MEMORANDUM

To: Paul Gibbs, Esq.

From: John J. Quick, Esq.

Date: October 28, 2022

RE: Florida Public Records Law – call logs from a personal cell phone record

We have been asked to provide an opinion as to the potential application of Florida's Public Records Act to certain cell phone logs in connection with a pending public records request.[1]

1. OVERVIEW

Florida's Public Records Act, Ch. 119, Fla. Stat., provides a right of access to records of the state and local governments as well as access to records of private entities acting on their behalf. In the absence of a statutory exemption, this right of access applies to all materials made or received by an agency in connection with the transaction of official business.

Not all materials will fall under the definition of a public record. For example, an individual's notes prepared for their own personal use and not intended or used to perpetuate, communicate, or formalize knowledge would not be considered a public record and would not be subject to disclosure.

Materials that fall within the definition of a public record must be disclosed unless there is a statutory exemption. These exemptions are limited and strictly construed, particularly as applied to litigation and work product materials. Moreover, these exemptions apply in limited circumstances and are subject to specific criteria.

Generally, cell phone records (including call logs) of calls made in connection with official business are considered public records under Florida law and will need to be

[1] / This memorandum is based upon facts and documents provided by the District as well as a review of existing law and Florida Attorney General Opinions. To the extent additional or different facts or documents become available, the analysis set forth herein may be revised.

produced. This is true even where the records are from a personal cell phone, to the extent that any calls were made in the course of a person's official business.

Included below is a more detailed outline of the Florida Public Records Law, including its application to cell phone records.

2. FLORIDA'S PUBLIC RECORDS LAW

The right of access under Florida's Public Records Law is a broad one. This right of access includes records of the state and local governments as well as those of private entities acting on their behalf. Moreover, unless a statutory exemption applies, Florida's right of access includes access to all materials made or received by an agency in connection with the transaction of official business.

Section 119.011(12), Fla. Stat., defines "public records" to include:

> all 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.

The Florida Supreme Court has interpreted this definition to encompass all materials made or received by an agency in connection with official business which are used to perpetuate, communicate or formalize knowledge. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.,* 379 So. 2d 633, 640 (Fla. 1980). All such materials, regardless of whether they are in final form, are open for public inspection unless the Legislature has exempted them from disclosure. *Wait v. Florida Power & Light Co.,* 372 So. 2d 420 (Fla. 1979).

The general purpose of Ch. 119, Fla. Stat., "is to open public records to allow Florida's citizens to discover the actions of their government." *Christy v. Palm Beach County Sheriff's Office*, 698 So. 2d 1365, 1366 (Fla. 4th DCA 1997). The Public Records Act is to be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose. *See National Collegiate Athletic Association v. Associated Press*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009), *review denied,* 37 So. 3d 848 (Fla. 2010); *Krischer v. D'Amato*, 674 So. 2d 909, 911 (Fla. 4th DCA 1996); *Seminole County v. Wood,* 512 So. 2d 1000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988); *Tribune Co. v. Public Records*, 493 So. 2d 480, 483 (Fla. 2d DCA 1986), *review denied sub nom.*, *Gillum v. Tribune Co.*, 503 So. 2d 327 (Fla. 1987).

In light of this liberal construction of Florida's Public Records Law, any exemptions from disclosure shall be narrowly construed and limited to the allowable purpose.

3. CELL PHONE RECORDS

Florida law holds that cell phone records from private phones may be deemed public nature. *See Media Gen. Operation, Inc. v. Feeney*, 849 So. 2d 3, 6-7 (Fla. 1st DCA 2003) (Polston, J.). As set forth by the Florida Supreme Court, "[t]he determining factor is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So. 2d 149, 154 (Fla. 2003) (an agency cannot circumvent the Public Records Act by allowing a private entity to maintain physical custody of documents that fall within the definition of 'public records'").

As I understand the issue, a public records request has been made for a log of cell phone calls between School Board Member Matthew Susin and Representative Randall "Randy" Fine, including calls made from both a personal or District issued cell phone. Records related to School Board Member Susin's District cell phone have already been produced, but there is a question concerning whether records from his personal cell phone are public records which are required to be produced. Florida law treats public and private communications differently.

A. Calls Made in the Course of Official Business.

If any of the phone calls depicted in the cell phone logs involved School Board or District business or were otherwise made in the course of official business, then the record of those calls would be a public record under Florida law. *See, e.g., O'Boyle v. Town of Gulfstream*, 257 So. 3d 1036, 1040-41 (Fla. 4th DCA 2018). Specifically, the *O'Boyle* court held that "an elected official's use of a private cell phone to conduct public business via text messaging can create an electronic written public record subject to disclosure" if the official or employee "prepared, owned, used, or retained it within the scope of his or her employment or agency." *Id*. The *O'Boyle* court further explained that an official or employee's communication falls "within the scope of employment or agency" when the "job requires it, the employer or principal directs it, or it furthers the employer or principal's interests." *Id*.

The *Media Gen*. court considered a substantially similar scenario wherein a public records request was made for the cell phone records of five elected officials on non-government issued phones. Rather than produce the records, the agency in that case redacted the logs of all calls, whether public or private in nature. When faced with this, the *Media Gen.* court held that the agency was required to produce the records of all calls made in connection with official business, but that any private calls depicted in the same call logs would not be deemed public records. In doing so, the *Media Gen.* court held that the requesting party was "entitled to receipt of the redacted phone numbers for those designated as public calls, but [were] not entitled to receipt of the redacted private calls." *Id*. at 7.

B. Private Calls.

On the contrary, Florida law holds that private phone calls and other communications are not public records. As the Second District Court of Appeal stated in *Times Publishing Co. v. City of Clearwater*:

> "[P]rivate" or "personal" e-mail simply falls outside the current definition of public records. Such e-mail is not "made or received pursuant to law or ordinance." Likewise, such e-mail by definition is not created or received "in connection with the official business" of the City or "in connection with the transaction of official business" by the City. Although digital in nature, there is little to distinguish such e-mail from personal letters delivered to government workers via a government post office box and stored in a government-owned desk.

830 So. 2d 844, 846-47 (Fla. 2d DCA 2002). Similarly, "private" or "personal" phone calls, texts, e-mails and other communications in the personal phones of School Board Member Susin or any other School Board Members, which "were not created or received in connection with the official business" of the Board or District, are not public records. *Media Gen.*, 849 So. 2d at 6. (citing *Clearwater*, 830 So. 2d at 846-47).

Accordingly, to the extent that any calls listed in the phone log were private in nature, those portions of the call log would not be public records and may be properly redacted from any records produced.

C. Additional Considerations.

During the course of my analysis, my attention was directed to a handful of cases, two of which I will address in further detail here: (1) *Nissen v. Pierce County*, 357 P.3d 45 (Wash. 2015); and (2) *Shevin*, 379 So. 2d 633.

i. *Nissen*

First, consideration was given to a case from the State of Washington which held that call and text logs prepared and retained by a third party cellular provider were not public records under Washington's public records laws. *See Nissen*, 357 P.3d at 55. While the issue considered is substantially similar to the issue here, the public records laws of Washington are significantly different than that of Florida. As explained by the *Nissen* court, Washington's public records law sets forth three requirements for a record to be considered public and subject to disclosure. *Id.* at 54. Specifically, "[t]o be a public record under RCW § 4256.010(3), information must be (1) a writing (2) related to the conduct of government or the performance of government functions that is (3) prepared, owned, used, or retained by a state or local agency." *Id.* These standards, however, are not requirements under Florida's Public Records Act. *See* Ch. 119, Fla. Stat.; *see also Shevin*, 379 So. 2d at 640.

Accordingly, the holding in *Nissen* has limited, if any, application in the Florida. In fact, the sole reason cited in the *Nissen* case for declaring the call logs at issue there to not be public records was that the complaint failed to allege that the "County used[2] the call and text message logs." Since this is not a requirement under Florida law – and given Florida's requirement that the Public Records Act be liberally construed in favor of open government, and exemptions from disclosure are to be narrowly construed so they are limited to their stated purpose – the holding in *Nissen* should not influence the analysis here.

ii. *Shevin*

Second, consideration was given to the portion of the holding in *Shevin* which exclude records from production where they are not "intended to perpetuate, communicate, or formalize knowledge of some type." *Shevin*, 379 So. 2d at 640. It is important to note that this language relates to items such as "rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation." *Id*. This holding has not been applied to telephone records (cell phone or otherwise) and, in fact, the *Media Gen.* court has specifically required the production of cell phone records for calls designated as public calls. Accordingly, the reasoning in *Shevin* has not been extended to cell phone records.[3]

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[2] / "The call and text message logs were prepared and retained by Verizon, and Nissen does not contend that the County evaluated, reviewed, or took any other action with the logs necessary to 'use' them." *Id*.

[3] / Although not necessarily pertinent here, personal notes are not always deemed exempt from public records. Examples of instances where an individual's notes were determined to be a public record include the following:

- Portions of a police officer's notes containing research that were referred to during a city commission meeting presentation in response to questions was held to be public record. *Barfield v. City of Sarasota*, 21 F.L.W. Supp. 874 (Fla. 12th Cir. Ct. May 5, 2014).
- Handwritten notes prepared by an assistant city labor attorney during her interviews with city personnel were determined to be public records when those notes were used to communicate information to the labor attorney regarding possible future personnel actions. Op. Att'y Gen. Fla. 05-23 (2005).
- Written comments and performance memoranda of school board members that were discussed with the superintendent were public records. Op. Att'y Gen. Fla. 97-23 (1973).
- Handwritten notes taken by a negotiator for a fire control district during collective bargaining sessions were public records however, they fell within an exemption for impressions, strategies and opinions of district labor negotiators. Inf. Op. Att'y Gen. Fla. to Richard B. Fulwider, dated June 14, 1993.

4. OTHER MATTERS OF NOTE

There are numerous factors that must be considered to ensure compliance with public records requests. Pertinent matters of note here include, but are not limited to:

- A person denied the right to inspect and/or copy public records under the Public Records Act may bring a civil action against the agency to enforce the terms of Ch. 119, Fla. Stat., which also provides authority for an award of attorney fees and reasonable costs in civil actions provided that certain conditions are met. *See* § 119.12, Fla. Stat.

- A violation of the Florida Public Records Law may be assessed against an agency or an individual and has significant consequences, even if the violation is unintentional. Penalties range from a fine of up to $500, criminal charges, suspension or removal of office, and the prevailing party may be awarded attorney's fees. *See* § 119.10, Fla. Stat. (establishing penalties for violations of Chapter 119); § 119.12, Fla. Stat. (providing for attorney's fees in civil actions).

- Regardless of how burdensome it may be, exempt and confidential information shall be redacted and the remainder of the record shall be produced for inspection and copying. § 119.07(1)(d), Fla. Stat.; *see also* Op. Att'y Gen. Fla. 02-73 (2002).

5. CONCLUSION

To the extent that any phone records might reflect calls including conversations which took place in connection with the School Board Member's official business, the record of those calls should be produced in response to this public records request. However, if no phone calls took place in connection with the School Board Member's official business, then those records would not be public records and, as a result, do not need to be produced.

Should the phone records contain a mix of both public and private calls, all private calls should be redacted from the record and produced accordingly. Insofar as the School Board Member is unable to determine whether a call is either public or private in nature, then, in abundance of caution, the calls of undetermined nature should not be redacted from the records produced.