IN THE CIRCUIT COURT OF THE EIGHTEENTH JUDICIAL CIRCUIT
IN AND FOR BREVARD COUNTY, FLORIDA

JENNIFER JENKINS,

Plaintiff,

v. CASE NO. 05-2023-CA-018437-XXX-XX

BREVARD COUNTY SCHOOL BOARD; and MATTHEW SUSIN, in his official and individual capacity,

Defendants.
_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PRESERVING PHONE RECORDS

COMES NOW Plaintiff JENNIFER JENKINS, by and through counsel Jessica J. Travis, and moves this Court to deny Defendants' Dispositive Motion To Dismiss Plaintiff's First Amended Complaint For Declaratory Relief And Opposition To Plaintiff's Motion For Order Requiring Defendants to Obtain And Preserve Susin's Phone Records (Dkt. 14) and to grant Plaintiff's Motion For Order Requiring Defendants To Obtain And Preserve Susin's Phone Records (Dkt 12). In support thereof, Plaintiff states and asserts as follows:

PROCEDURAL POSTURE

1. JENNIFER JENKINS (Ms. JENKINS or Plaintiff) has filed a First Amended Complaint (FAC) suing Defendants, the BREVARD COUNTY SCHOOL BOARD (BOARD) and MATTHEW SUSIN (SUSIN), following the denial of

four public records requests that are set out with specificity in the FAC and Defendants' motion to dismiss (Motion).

2. In their Motion, the Defendants concede that:
    a. Ms. JENKINS's public records requests followed public statements made by SUSIN and others stating or indicating that SUSIN used his personal cell phone for official business. *Motion*, p. 3, ¶8.
    b. Ms. JENKINS's public records requests were narrowly tailored in that they requested records pertaining to particular people and date ranges referenced or indicated by the public statements. *Motion*, p. 2, ¶6, p. 8.
    c. SUSIN has previously provided Ms. JENKINS text messages from his personal cell phone in response to her public records requests. *Motion*, p. 3, ¶10.
    d. Though not binding on this Court and not attached to the FAC, the BOARD received a legal opinion that the phone logs from SUSINS's personal cell phone should be produced in response to JENKINS's public records requests. *Motion*, p. 3, ¶11.
    e. Brevard County Sheriff's Office (BCSO) has previously provided phone logs in response to a public records request by Ms. JENKINS.
3. Defendants' motion to dismiss waives certain claims and defenses:
    a. Defendants do not contend that they did not receive the pre-suit notice required by the Act before attorney's fees can be awarded.

b. Defendants do not assert that the phone logs do not exist or that they are not obtainable. *Motion*, p. 20.

c. Defendants do not claim that any privilege or exception exists that would bar production of the cell phone logs upon this Court finding that they are "public records."

4. Defendants' motion to dismiss incorrectly implies that Ms. JENKINS has only alleged that "one of the calls may have been "related" to Board business." *Motion*, p. 17. Rather, the public comments referenced in the FAC do not specify how many official calls were made on SUSIN's personal cell phone.

5. It remains uncertain whether SUSIN's assertion that there are no responsive records is truthful. As set forth in paragraph 2(e), BCSO provided JENKINS phone logs after SUSIN had previously claimed they did not exist. It is for this reason that Ms. JENKINS has filed Plaintiff's Motion For Order Requiring Defendants To Obtain And Preserve Susin's Phone Records (Dkt 12).

6. In sum, Defendants do not contest the bulk of the facts set forth in the FAC, rather they argue that the BOARD and SUSIN are able to circumvent Florida's Public Record Act because SUSIN caused records documenting his official calls to be made by a third-party, SUSIN's personal cell phone carrier, and because Defendants have not taken any steps to obtain the records.

SUMMARY OF DEFENDANTS' ARGUMENT AND PLAINTIFF'S RESPONSE

7. The BOARD and SUSIN have filed a motion to dismiss arguing that SUSIN's personal cell phone call logs are not public records as a matter of law, despite the fact that SUSIN used his personal cell phone for official business. Defendants make the following argument, in sum, and the Plaintiff sets forth a short summary of her reply for the Court's convenience.

    a. Defendants argue that the call logs are not public records because they are not generated in the normal course of operations and are not intended to perpetuate, communicate, or formalize knowledge of some type. *Motion*, p. 12.

        i. Ms. JENKINS replies that Defendants' definition of "public record," as set forth above, **is not consistent with the statutory definition** which encompasses all documents, including those that are electronically generated ***regardless of the physical form***, "***made*** or received pursuant to law or ordinance or ***in connection with the transaction of official business by any agency.***" § 119.011(12), Fla. Stat. Even should the Defendants' definition apply, the cell phone logs were **prepared as a result of SUSIN's official calls, and they formalize the knowledge of with whom he communicated**. There is no requirement that they be generated in the normal course of operations. Defendants are not excused from

providing access because they **meet the statutory definition of "agency" and "records custodian" and cannot escape their responsibility by failing to take the simple step of printing the cell phone logs.**

b. Defendants argue that the call logs are not probative because they do not tell the nature or contents of conversations. *Motion*, p. 17-18.

   i. Ms. JENKINS replies that it is well-established **that an individual's reason for requesting a public record is irrelevant**.

c. Defendants argue that the records are not related to Board business just because one call may have been related. *Motion*, p. 17

   i. Ms. JENKINS replies that Defendant's incorrectly state that she only asserted one call (see ¶4 above) and the FAC sets forth sufficient facts – including the public statements made by SUSIN and others - demonstrating that calls were made regarding official business.

d. Defendants argue that if the call logs are found to be public records, it would result in overly broad application of an already liberally construed statute. *Motion*, p. 18.

   i. Ms. JENKINS replies that because she has **narrowly tailored** her public records request by person and time frame to correspond with the public statements, allowing her to obtain

the records will not result in an overly broad application. Conversely, ***not* requiring Defendants to provide public records would undermine Florida's Public Records Act.**

e. Defendants argue that the suit against SUSIN in his individual private capacity should be dismissed because the complaint fails to allege private conduct by SUSIN. *Motion*, p. 20.

i. Ms. JENKINS asserts that the FAC articulates SUSIN's use of his personal cell phone in several paragraphs rendering it sufficient to warrant suit against SUSIN in both his official and personal capacity.

ARGUMENT & AUTHORITY

I. THE RECORDS REQUESTED ARE PUBLIC RECORDS

8. The Defendant's argument that the call logs are not "public records" is contrary to policy, statutory definitions, and case law.

a. Policy Behind Florida's Public Records Act

9. The Defendants' argument is contrary to the policy behind Florida's Public Records Act, chapter 119, Florida Statues:

a. "Every person has the right to inspect or copy any public record **made** or received in **connection with the official business** of any public body, officer, or employee of the state, or persons acting on their behalf, except with respect to records exempted pursuant to this section or specifically made confidential by this Constitution." *Art I, § 24(a), Fla. Const.*

b. "It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. **Providing access to public records is a duty of each agency**." § 119.01(1), Fla. Stat.

c. "**The purpose** of both Art I, § 24(a), Fla. Const., and the Public Records Act, § 119.01, Fla. Stat. (2017) et. seq., **is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device."** *O'Boyle v. Town of Golf Stream*, 257 So. 3d 1036 (Fla. 4th DCA 2018) (reversing and remanding for in camera inspection of text messages on mayor's personal cell phone) (attached).

d. "The right of access to public records is a cornerstone of our political culture, therefore, the Public Records Act, § 119.01, Fla. Stat. (2017) et seq., **must be liberally construed in favor of access**, and all **exceptions must be limited to their stated purpose**." *O'Boyle*, 257 So. 3d at 1040; *Seminole County v. Wood*, 512 So. 2d 10000, 1002 (Fla. 5th DCA 1987), *review denied*, 520 So. 2d 586 (Fla. 1988).

e. **All materials <u>made</u>** or received in connection with official business which are used to perpetuate, communicate, or formalize knowledge 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).

10. Therefore, any record made through the use of a personal cell phone can be compelled under Florida's Public Record Act if it meets the definition of a "public record."

b. Statutory Definition of "Public Record"

11. While Defendants acknowledge the statutory definition of "public records" in their motion, they then rely on another definition in argument.

12. Florida's public records statutes are clear:

> "'Public records' means 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.***" § 119.011(12), Fla. Stat. (emphasis added).

> "'Data processing software' means the programs and routines used to employ and control the capabilities of data processing hardware, including, but not limited to, operating systems, compilers, assemblers, *utilities*, library routines, maintenance routines, *applications*, and *computer networking programs.*" § 119.011 (6), Fla. Stat. (emphasis added).

13. Though the statutes use common terms, the Merriam-Webster dictionary provides clarification, if needed:

> "Data processing" is "the converting of raw data to machine-readable form and its subsequent processing (such as storing, updating, rearranging, or **printing out**) by a computer." https://www.merriam-webster.com/dictionary/data%20processing

> **"Make" or "made" means "to cause to exist, occur, or create."** https://www.merriam-webster.com/dictionary/make

14. When SUSIN placed official business calls on his personal cell phone, he knowingly took affirmative steps and "made" the records by causing them to be created. Upon engaging his personal phone provider,

SUSIN became aware, by virtue of that engagement and the act of paying his bills, that call logs would be created. Therefore, at the time he made the official calls, SUSIN knew call logs would be made and yet caused them to be made anyway. Further, the fact that SUSIN would be required to produce them in civil discovery and has access to them, for billing, defense in a civil lawsuit, or otherwise, lends to the conclusion that SUSIN has an interest in the records because he 'made' them. To interpret otherwise would allow officials to utilize third parties for official functions and conduct business in the dark, rather in the sunshine.

c. Case Law Defining "Public Record"

15. **The definition of "public record" promoted by Defendants** – "any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type" – **is based on case law that interpreted a prior version of the public records statute.** In *Shevin v. Byron, Harless, Schaffer, Reid & Assocs., Inc.,* 379 So. 2d 633, 640 (Fla. 1980), cited by Defendants in their motion to dismiss, the Florida Supreme Court was interpreting the 1975 statute which contained a narrower definition of "public record."

§ 119.011(1), Fla. Stat. (1975)	§ 119.011(12), Fla. Stat. (2023)
"Public records" mean all documents, papers, letters, maps, books, tapes, photographs, films,	(12) "Public records" means all documents, papers, letters, maps, books, tapes, photographs, films,

sound recordings or other material, regardless of physical form or characteristics, made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.	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.***

16. In the subsequent amendment, it is clear that the **legislature intended to expand the scope of public records**, arguably in light of technological advancements since the current definition includes records transmitted or generated electronically. The legislature did not distinguish between actively made records and those that are passively made and to make this distinction would read past the legislature's plainly stated intent to broadly conceptualize "public records."

17. Defendants' assertion that phone logs are merely a "by product," as mentioned in *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003), is misplaced. In *City of Clearwater*, the Court was asked to resolve **a limited issue:** "This case involves the narrow legal issue of whether personal e-mails are considered public records by virtue of their placement on a

government-owned computer." *City of Clearwater*, 863 So. 2d at 151. Two petitioners argued that an employee's personal emails should be produced under the Act. Petitioner Times Publishing Company argued that the personal emails were public records because they were located on public computers. Petitioner State of Florida, through the Attorney General, argued that "the creation of an e-mail "header" made all emails, regardless of their content or intended purpose, public records." *Id* at 155. The court found that "there was no evidence in the record that the City maintains or generates, in its normal course of operations, a list of email headers created by its employees' use of the computer network." *Id.* It then speculated that if a list did exist, it did not meet the definition of a "public record," as defined by *Shevin, supra,* because was not prepared with the intent to perpetuate, communicate, or formalize knowledge of some type," and because "the emails were personal emails and "not made or received pursuant to law or ordinance in connection with the transaction of public business" and, therefore, do not fall within the definition of public records in section 119.001(1) by virtue of their placement on a government-owned computer system." *Id.* ***City of Clearwater* did not hold that records of official communications made using personal devices can never amount to public records.**

18. Nor did it establish a "by product" doctrine as Defendants argue. **Shepardizing *City of Clearwater* finds no other cases extending the "byproduct" argument** to computer generated reports**. Instead, it leads**

to *Media Gen.* *Operation, Inc. v. Feeny,* 849 So. 2d 3 (Fla. 1st DCA 2003), which, instead of considering private cell phone logs as "by products," **specifically found that they amounted to public records when used for official business.** (See further discussion herein.)

19. Given the particular facts and limited issue, *City of Clearwater* does not apply here and should not be used as a shield to protect an official who uses a personal cell phone for official business. Here, we know that call logs were made as a result of SUSINS's calls. Between 1975 and 2023, the definition of "public record" has been expanded by the legislature. The records *Shevin* referred to were front-end documents such as "rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation," not logs created as a result of official conduct. *See Shevin,* 379 So. 2d at 640. That said, even if this Court is inclined to apply the *Shevin* definition, the call logs here meet its definition because they were made or prepared with the intent of formalizing with whom SUSIN was communicating.

20. Defendants' argument could be taken to the point of absurdity to argue that any computer record generated by an official act is a "by product" and therefore not subject to the Act. Such a conclusion would be contrary to the legislature's intent to require broad disclosure. Even *City of Clearwater, supra,* acknowledges that whether something is a public record is determined on a case-by-case basis, that "(e)lectronic documents stored in a computer can be public records provided they are

made or received pursuant to law or ordinance or in connection with the transaction of official business," that "the determining factor is the *nature* of the record, not its physical location," and that "**an agency cannot circumvent the Public Records Act by allowing a private entity to maintain custody of documents that fall within the definition of 'public records.'**" *City of Clearwater*, 863 So. 2d at 152-53, 154.

21. Defendants' reliance on *Nissen v. Pierce Cnty*, 183 Wash. 2d 863 (Wa. 2015), to define "public records" is not persuasive because **Washington's statutory definition is not as broad as Florida's**. *Nissen* denied access to phone logs because, as required by the definition of public records in *Wash. Rev. Code § 42.56.010(3)*, they were not "prepared, owned, used, or retained" by the agency or employee.

> "Public record" includes any writing containing information relating to the conduct of government or the performance of any governmental or proprietary function prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics. Wash. Rev. Code Ann § 42.56.010(3).

While the Washington statute has some similarities, it does not include Florida's broad language that "public records" include documents "***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."***

22. Further, Defendants appear to argue that the call logs are not "public records" because they are not probative. Defendants seemingly try to bolster their arguments by prematurely citing case law that a Plaintiff

may not receive attorney's fees when records are requested for an improper or frivolous purpose. *Motion,* p. 11. However, "[t]he governmental agency claiming the benefit of an exemption from disclosure bears the burden of proving its entitlement to the exemption. **An individual's reason for requesting a public record is irrelevant."** *Barfield v. Sch. Bd.,* 135 So. 3d 560, 562 (Fla. 2d DCA 2014) (citations omitted). There is no requirement under chapter 119 that a Plaintiff prove that requested records have "substantive insight into the deliberative process or official actions." *Motion,* p. 20. Further, though she is not obliged to do so, Ms. JENKINS has set forth the reasons for her requests in the FAC and her requests do not amount to an improper or frivolous purpose such as to prohibit production or attorney's fees.

> "For the purposes of this subsection, the term "improper purpose" means a request to inspect or copy a public record or to participate in the civil litigation primarily to cause a violation of this chapter or for a frivolous purpose." § 119.12(3), Fla. Stat.

23. Admittedly, *City of Clearwater, supra,* is a 2013 case that relied on the 1980 *Shevin* interpretation of the 1975 statute. However, *City of Clearwater* did not engage in an in-depth analysis as to why the 1975 definition would still apply under the expanded statute and counsel's research has found no other cases that have investigated this matter. That said, the current definition should always be based on the plain meaning of the present statute.

> "Our statutory analysis begins with the plain meaning of the actual language of the statute, as we discern legislative intent primarily from

> the text of the statute. If statutory language is clear and unambiguous and conveys a clear and definite meaning, there is no occasion for resorting to the rules of statutory construction. In instances of ambiguity in statutory language, we may resort to the rules of statutory construction which permit us to examine the legislative history to aid in our determination regarding legislative intent." *Diamond Aircraft Indus., Inc., v. Horowitch*, 107 So. 3d 362, 367 (Fla. 2013) (citations and quotations omitted).

24. Here, the statute is clear or, if ambiguous, the legislative history and policy clearly favors an inclusive definition of "public record." The public **records laws are "to be construed liberally in favor of openness, and all exemptions from disclosure are to be construed narrowly** and limited in their designated purpose." *Barfield,* 135 So. 3d at 562. The Defendants' reliance on the 1975 statute and out-of-state case law does not trump the current statute and are insufficient to warrant dismissal.

d. <u>Private Phone Logs Become Public Records When An Official Uses His Private Phone For Official Business</u>

25. Defendants claim that "Plaintiff cannot and will not present any legal authority holding that phone logs that are generated and maintained by a public official's private cell phone provider are public records." *Motion*, p. 12. However, Ms. JENKINS presents the following cases establishing the Defendants are incorrect:

a. In *Media Gen. Operation, Inc. v. Feeny,* 849 So. 2d 3 (Fla. 1st DCA 2003) (attached),[1] **call logs from personal-use cell phones were**

[1] On page 12 of the motion to dismiss, the same page that Defendants claim no case law exists, they briefly acknowledge *Media Gen.* without discussion.

ordered to be produced. The plaintiffs in *Media Gen.* were media companies that sought cell phone use/ billing logs from five staff employees of the Florida House of Representatives. **The phones were used for personal and official business and paid for by the Republican party, not the government.** The Republican party provided redacted records. The media companies sued for unredacted copies and "sought a bright-line ruling that all phone calls in the billing records were 'public records.'" *Id* at 4. The appellate court held that the media companies were **entitled to the receipt of unredacted call logs for official calls,** but not for private calls. Clearly, call logs are more than a mere "by product" and can become public records subject to the Act when used for official business regardless whether the bill is paid by the government, a third party, or the official.

b. Additionally, ***Media Gen.* has been relied upon to resolve the exact issue currently before this Court.** Though admittedly a persuasive authority, the Circuit Court judge in *Barton v. City of Cape Coral*, 2014 Fla. Cir. LEXIS 23355, Twentieth Judicial Circuit of Florida, Lee County, Case No. 13-CA-1342, (Jan. 24, 2014)(attached), found that even though the **City had made no effort to request the billing records from the cell phone provider, the city employee was a records custodian for his personal cell phone call logs which were readily accessible to**

him from his provider. The city employee was **ordered to produce the billing records showing, at a minimum, the date(s), phone number(s), duration of "official public business" communications,** but he was allowed to redact any personal non-official calls as they were not public records. Again, **who pays the bills is irrelevant - the use of personal cell phones for official business renders personal cell phone call logs "public records" and requires the relevant portions to be produced.**

c. In the current public records lawsuit against the Governor's office for records related to the transportation of migrants to Martha's Vineyard, the plaintiff requested that the governor provide "phone log of any telecommunication devices used by James Uthmeier (DeSantis' chief of staff)" during a specific time frame. *Florida Center for Government Accountability (Center) v. Executive Office of the Governor (EOG) and Governor Ron Desantis*, Second Judicial Circuit of Florida, Leon County, Case No. 2022 CA 001785; *appeal pending* First District Court of Appeals Case No. 1D22-3507; *see* Complaint - Center v Governor. The public records request was more general than those submitted by Ms. JENKINS because they did not include statements indicating that phone was used for official business.

d. In its final order, the circuit court found that despite acknowledging *O'Boyle, supra,* the EOG and Governor "has not made any production of text or phone log of James Uthmeier as requested."

Notice of Appeal with Order of lower court – Governor v Center.

Further:

> "7. The EOG acknowledges the decision in ***O'Boyle v. Town of Gulft Stream*, 257 So. 3d 1036 (Fla. 4th DCA 2018), which requires an agency to make inquiries of individual employees who may possess public records on private accounts or devices.** The EOG has **presented no evidence to the Court of what direct steps it took to identify or produce records responsive to the public records** request dated September 20, 2022, some of which have yet to be produced to Plaintiff. The court finds that the EOG **is not in compliance with Chapter 119,** Florida Statute 119 [sic]. EOG's partial production and response to the record requests were unreasonable."

The Circuit Court ordered the records to be produced within twenty days.

e. On appeal, the Governor's office has not argued that the circuit court erred by concluding that the phone logs were public records. Rather, the only assertion raised on appeal is that the records that *were* provided were done so in a timely manner; arguably, in an effort to reduce attorneys' fees. *See* Governor's Amended Initial Brief.[2] [3]

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[2] A review of the Center's Answer Brief indicates that contempt proceedings are ongoing in the circuit court due to a continued failure by the EOG to provide the phone logs. Center's Answer Brief, p. 8

[3] A related public records case is on appeal following the lower court's denial to require production of text messages from entities that transported the migrants to Martha's Vineyard in *Florida Center for Government Accountability v. Florida Department of Transportation, et. al,* First District Court of Appeals Case No. 1D2023-0692, Leon County Circuit Court Case No. 2022 CA 1823. In that case, a different circuit judge found that the Center failed to show that text messages pertaining to official business existed in the first place. Here, Defendants do not contest that SUSIN used his personal cell phone for official business and Ms. JENKINS' FAC sets forth the public statements that caused her to believe the records exist and are "public records."

26. In a persuasive informal advisory opinion on the applicability of the public records laws to elected official's personal social media pages, the Office of the Attorney General of Florida stated,

> "A determination of whether the list of blocked accounts is a public record requires resolution of whether the 'tweets" which resulted in the blocked accounts, were public records. If the "tweets" the public official is sending are public records, then a list of blocked accounts, prepared in connection with those public records 'tweets," could well be determined by a court to be a public record." *Fla. Att'y Gen. Inf. Op. to Nicolle Shalley* (June 1, 2016).

The same reasoning applies here. **If the calls were public record, the logs made or prepared in connection with the calls are public records.** Here, the calls, if recorded, would have been public records and, therefore, the related call logs are public records.

27. Defendants' motion cites several unpersuasive authorities in what appears to be an attempt to counter-act *Media Gen.*

a. Defendants cite Fla. Atty Gen Op. 99-74 which opined that a list of telephone numbers was a public record because the calls were made on district phones. *Motion*, p. 13. However, this opinion does not conclude that *only* call logs related to official phones can amount to public records. It does not preclude the possibility that logs made from use of personal phones can result in public records if used for official business.

b. Defendants cite § 257.36(1), Fla. Stat., which sets forth the record retention duties of the Division of Library and Information Services of the Department of State. *Motion*, p. 13. However, nothing about

these records retention policies alleviates an agency or records custodian from their responsibilities under chapter 119.

c. Defendants cite the concurring justice in *Taylor v. Sch. Bd. Of Brevard County*, 888 So. 2d 1, 15 (Fla. 2004), to extrapolate when public records are "related" to official business. *Motion*, p. 17. However, the justice in *Taylor* was analyzing the unrelated works exception in a workers compensation case, not Florida public records laws.

d. Defendants cite *Cendan v. Sch. Bd. Of Broward County*, 2022 WL 4131105, 2022 U.S. Dist. LEXIS 164043 (S.D. Fla. Sept. 12, 2022), in what appears to be an effort to argue that the records Ms. JENKINS has requested have little probative value. *Motion*, p. 17-18. However, *Cenden* was a whistle-blower retaliation case in which the court found that un-provided call logs would not have supported the plaintiff's attempt to establish coercion. *Cendan* is not a public records case.

28. Ms. JENKINS asserts that **the phone logs in this case meet the current definition of "public records" because the statutory definition is broad and because she narrowly tailored her request** by date and person so that only records pertaining to official business are to be produced. While the call logs here may have also been made for the purpose of paying a bill, common sense tells us that they may also be made or prepared so that it can be determined with whom the owner

communicated. If an official made, or caused staff to make, a written or computer call log for the purpose of tracking his communications, certainly that log would be subject to Florida's Public Records Act. The call log made as a result of SUSIN's official calls on his personal cell is no different.

II. BOARD AND SUSIN ARE RESPONSIBLE FOR MAKING PUBLIC RECORDS AVAILABLE

29. Even though the BOARD and SUSIN have not taken any steps to obtain the records from SUSIN's personal cell phone carrier, they must provide access because they have the responsibility to do so under Florida's Public Records Act. It is the responsibility of both the "agency" and "custodian of public records" to provide public records.

a. "**Providing access to public records is a duty of each agency**." § 119.01(1), Fla. Stat.

b. "**'Agency' means** any state, county, district, authority, or *municipal* ***officer,*** district, division, ***board,*** ..." § 119.011(2), Fla. Stat.

c. Defendants' motion to dismiss **omits the entire statutory definition of "custodian of public records":**

> "'Custodian of public records" means the elected or appointed state, county, or municipal officer ***charged with the responsibility*** *of maintaining the office having public records, or his or her designee."* § 119.011(5), Fla. Stat.

Therefore, an agency or records custodian is one with the *responsibility* and does not require the official or entity to actually possess the public records. An agency does, however, have the

responsibility to inquire and obtain responsive public records. *O'Boyle, supra.*

30. The fact that it is the *responsibility,* and not the possession, is further emphasized by other statutes:

a. The responsibility to maintain records begins once a candidate becomes an officer-elect. Officers-elect are required to comply with public records obligations including preserving any online or electronic communication or recordkeeping system so as to not impair the ability of the public to inspect or copy such public records. § 119.035, Fla. Stat.

b. Agencies are obligated to properly contract with and collect public records from third parties. In contracting with third-parties, officials and agencies must require that the contractor comply with public records laws including producing public records upon request from the official or agency. § 119.0701(2)(b), Fla. Stat.

c. A person requesting public records held by third party contractors is required to request the records from official or agency with the *responsibility* to contract, not the third-party:

> "A **request to inspect or copy public records relating to a public agency's contract for services must be made directly to the public agency**. If the public **agency does not possess the requested records, the public agency shall immediately notify the contractor of the request,** and the contractor must provide the records to the public agency or allow the records to be inspected or copied within a reasonable time." § 119.0701(3)(a), Fla. Stat.

31. Case law reinforces that the agency or official has the responsibility to obtain public records.

> "When specified communications to or from individual state employees or officials are requested from a governmental entity – **regardless of whether the records are located on private or state accounts or devices – the entities obligation is to a reasonable search that includes asking those individual employees to provide any public records stored in their private accounts that are responsive to a proper request.** *O'Boyle*, 257 So. 3d at 1041-42.

32. Defendants conflate the language of § 119.01(f), Fla. Stat. – "[a]n agency must provide a copy of the record in the medium requested if the agency maintains the record in that medium" – with the responsibility of records custodians to provide "public records" within their control. Ms. JENKINS' has not requested a different medium and is not asking the Defendants to create a document..[4] The language does not allow an agency or records custodian to circumvent public records laws by using third-parties and personal accounts.

33. Defendants' motion cites *In re Report of the Supreme Court Workgroup on Public* Records, 825 So. 2d 889 (Fla. 2002), an opinion that was subsequently substituted. *Motion*, p. 9. Contrary to how the report is used by Defendants, it does not alleviate an agency or custodian of his responsibility:

> "Records custodians must not place form over substance, and as long as the custodian can identify the records requested, the custodian

[4] Defendants allege that Ms. JENKINS is attempting to require them to generate documents but simultaneously does not contest that phone call logs exists, are accessible, and contain date, time, duration, initiating phone number and receiving phone number. *Motion*, p. 11, 17.

must produce the records. ... Further, records custodians should take any other reasonable steps to ensure that the individual obtain access to the judicial records they seek." *Id*, at 890.

34. The responsibility is demonstrated when officials are obligated to produce social media from personal accounts when it meets the definition of "public record." **There is no practical distinction between social media made using a third party (Facebook, Twitter, etc.) and records that are made through other third parties.** "[P]ublic records law is not limited to paper documents but it applies, as well, to documents that exist only in digital form." *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. 1st DCA 2009). "[A]utomation of public records must not erode the right of access to those records." *Rhea v. Dist. Bd. Of Trustees of Santa Fe Coll.*, 109 So. 3d 851, 855 (Fla. 1st DCA 2013). "The determining factor of whether a document is a public record subject to disclosure is the nature of the record, not its physical location." *State v. City of Clearwater*, 863 So. 2d 149 (Fla. 2003).[5]

35. Despite the fact that posts were held by a third-party, Facebook, social media posts were ordered to be produced and attorney's fees were

[5] *See also* Maggie D. Mooney-Portale and Kevin S. Hennessy, The Government In Your Facebook: An Examination of Social Networking Sites and Florida's Public Records Law, The Florida Bar, Vol. 85, No. 5, Pg. 41, May 2022; Ralph D. DeMeo and Lauren M. DeWeil, The Florida Public Records Act In The Era of Modern Technology, Florida Bar, Vol. 92, No. 9, Pg. 33, November 2018, (electronic communications should be interpreted broadly to include social media; agencies should adopt policies for retention and termination of non-compliant employees); Patricia R. Gleason, Public Records Act: Social Media Retention Issues, Florida Supervisor of Elections Conference, May 22, 2018.

personally imposed against a defendant county commissioner in *Bear v. Escambia Cnty. Bd.*, 2023 U. S. Dist. LEXIS 50924, 2023 WL 2632103, No. 3:19cf4424-MCR/HTC (N.D. Fla. March 25, 2023) (attached).[6] The facts in *Bear* are similar to those in the case at hand:

a. County Commissioner Underhill used his personal Facebook page for official business. Plaintiff Bear was blocked from the page and submitted public records requests for the conversations he could not view. Commissioner Underhill did not respond, and Bear sued both Underhill and the commission board in in federal court under the First Amendment and Florida's public records laws.

b. The magistrate judge ordered production of the social media posts - despite the fact that they were made with and held by Facebook - because "Florida's Public Records Act 'is to be construed liberally in favor of the state's policy of open government'" and **"doubts as to whether a matter is a public records are to be 'resolved in favor of disclosure.'"** *Bear, supra* at 10-11, *citing Morris Pub. Group, LLC v. Fla. Dep't of Educ.*, 133 So. 3d 957, 960 (Fla. 1st DCA 2013), *quoting NCAA v. AP*, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009); § 119.01, Fla. Stat.

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[6] To preliminary bolster their argument that attorney's fees are inappropriate, Defendants cite the magistrate's recommendation in *Bear, supra,* dated October 8, 2021. *Motion,* p. 11. However, the federal district court subsequently rejected the magistrate's recommendation and ordered that the county commissioner personally pay attorney's fees on March 25, 2023, two days prior to Defendants' motion to dismiss.

c. However, the magistrate recommended *not* awarding the plaintiff statutory attorney's fees under the Public Records Act finding that the commission board did not unlawfully withhold the public records because they did not have access to Underhill's Facebook page. Further, the magistrate reasoned that Underhill had a good faith basis to question whether he was an "agency" with obligations to provide public records and, therefore, attorneys fees should not be awarded against him.

d. The district court rejected the magistrate's recommendation and awarded attorney's fees noting, **"[t]he Florida Supreme Court has explained that the attorney's fees statute contains no good faith or reasonableness exception"** and "**the only challenge permitted by the Act at the time a request for records is made is the assertion of a statutory exemption."** *Bear, supra* at 12-13, *citing Bd. Of Trustees, Jacksonville Police & Fire Pension Fund v. Lee*, 189 So. 3d 120, 128 (Fla. 2016); *Tribune Co. v. Cannella*, 458 So. 2d 1075, 1078-79 (Fla. 1984). Further,

> "[T]he Court respectfully rejects the Magistrate Judge's conclusion that Underhill's withholding of the public records was not unlawful and that his status as an "agency" was reasonably uncertain. To the contrary, **no reasonable uncertainty existed as to Underhill's status. As a Commissioner, he was a public official,** a county authority, a member of the [commission] Board, and, as already determined, 'a person **acting on behalf of an agency' when he created public records on his social media pages, whether he was authorized by the Board to do so or not**. Underhill **acknowledged that his communications were in furtherance of his duties as a Commissioner. No statutory**

> **exemptions were claimed**, and **Underhill's delay, which lasted well after Bear had filed suit, cannot be attributable to a reasonable or good faith attempt to locate the records. Bear was forced to file suit to obtain them, and the Court compelled their disclosure. Period. End of story**." *Bear, supra* at 14-15.

e. Further, despite the fact that the county settled with the plaintiff, resulting in dismissal of all official capacity claims, the district court **imposed attorney's fees against Underhill personally** because he clearly met the definition of an "agency," knew his Facebook was used for official business, and **still took no steps to provide the Plaintiff or the board with the records until after suit was filed**. *Bear, supra* at 15.

36. The BOARD and SUSIN cannot escape their responsibility by failing to take the simple steps necessary to obtain the records. The BOARD, knowing its responsibility, should have implemented policies and procedures requiring SUSIN to produce or give access to public records made using his personal cell phone as a condition of his position. SUSIN could print the call logs with little effort. To allow the BOARD and SUSIN to avoid their obligation by simply failing to request or print out the records circumvents the entire transparency policy behind Florida's Public Records Act.

III. REQUIRING DEFENDANTS TO PROVIDE RECORDS THAT MEET THE DEFINITION OF "PUBLIC RECORDS" WILL NOT LEAD TO AN OVERLY BROAD OR BURDENSOME RESULT; CONVERSELY, *NOT* REQUIRING DEFENDANTS TO PROVIDE PUBLIC RECORDS WOULD UNDERMINE FLORIDA'S PUBLIC RECORDS ACT

37. Complying with narrowly drawn public records requests such as Ms. JENKINS' will not lead to an overly broad or burdensome result or, if it does, Ms. JENKINS cannot be denied her request because the BOARD and SUSIN have failed to implement policies and procedures that facilitate production. *O'Boyle* recognized that a requestor must ask for records that meet the statutory definition of "public records" and, therefore, not every text message on a personal cell phone or records kept for purely private use would not fall under the Act. *O'Boyle v. Town of Golf Stream*, 257 So. 3d at 1041.

38. The procedure for responding and resolving conflicts is no different or burdensome than with written records.

> "To comply with the dictates of the Act, the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession – such as e-mails - by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester. Where specified communications to or from individual state employees or officials are requested from a governmental entity – regardless of whether the records are located on private or state accounts or devices – **the entity's obligation is to conduct a reasonable search that includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to a proper request.**
>
> ***
>
> When judicial intervention is requested to test the adequacy of the entity's response, the court can make the required determination of

relevance and privilege as to any contested record." *O'Boyle*, 257 So. 3d at 1041-42.

***

"Deciding which ones may remain private was the very purpose of the protocol ratified by the Supreme Court's *City of Clearwater* decision – review these communications **in-camera** and afford an opportunity to raise objections to protect against disclosure of irrelevant, privileged, or otherwise non-discoverable materials. **To avoid that process altogether**, assuming the scope of the request was reasonable, it would have been **incumbent on** the appellees **(government entity) to show some controlling authority that the Public Records Act did not apply,** or otherwise prohibited, the submission of the text messages to the court for an in-camera review. No such showing was made here." *O'Boyle*, 257 So. 3d at 1042, *citing City of Clearwater, supra.*

39. Defendants appear to cite *Lightbourne v. McCollum,* 969 So. 2d 326, 332-33 (Fla. 2007), to support their contention the Act "has not been interpreted to mean that every iota of incidentally created data is rendered a public record by virtue of its mere existence in relationship to a public entity." *Motion*, p. 18. However, *Lightbourne* does not make this statement. In fact, the words "iota" or "incidentally" are nowhere in the opinion. *Lighbourne* does state that the act should be liberally construed, and it then discusses whether the statutory exemption that protects an attorney's mental impressions and litigation strategy prevents the records requestor, a defendant inmate, from obtaining a prosecutor's records. *Lightbourne* does not discuss the ramifications of obtaining cell phone logs or deem similar requests as overbroad. Simply put, the reach of the Act is not hard to decipher – it pertains to every record made as a result of an official's exercise of his public responsibilities.

40. Defendants invite this Court to speculate on every possible type of device and record that can be imagined. Plaintiff urges the Court to focus only on the facts before it since what amounts to a public record is to be determined on a case-by-case basis. *City of Clearwater, supra.* A ruling in this case will not "create boundless legal duties and exposure to liability for public agencies" as Defendants allege. *Motion*, p. 20. A Plaintiff will still be required to show that the record meets the definition of a "public record" and that the person or entity compelled is a "custodian of records." Ms. JENKINS has done exactly that.

41. If officials can avoid Florida's Public Records Act by using personal devices or just because the records have both a both personal and official purpose, an official would be allowed to cause a third-party to generate the records, store them at home or with the third-party, prevent disclosure by simply asserting the records are not "public records," and retain the right to use those records in his official capacity if they have exculpatory value. **This would effectively encourage public officials to avoid using official devices and to comingle records for the purpose of avoiding release to the public which could not be more plainly contrary to the legislature's intent.** Therefore, 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); *see also* Op. Att'y Gen. Fla. 02-73 (2002).

> **"The ability of public officials and employees to use cell phones** to conduct public business by creating and exchanging public records – text messages, e-mails, or anything else – **is why a process must be available to offer the public a way to obtain those records and resolve disputes about the extent of compliance. Without such a process the Act cannot fulfill the people's mandate to have full access to information concerning the conduct of government on every level."** *O'Boyle*, 257 So. 3d at 1041-42.

IV. THE AMENDED COMPLAINT ALLEGES SUFFICIENT FACTS TO BRING SUIT AGAINST SUSIN IN HIS INDIVIDUAL CAPACITY

42. Defendants concede that SUSIN used his personal cell phone but allege the facts in the FAC are insufficient and conclusory. Defendants overlook statements of fact establishing SUSIN's use of his personal cell phone in paragraphs 3, 10, 10(b), 11, 11(b), 12, 12(a), 13, 13(b), 13(c), 14(b), 14(c), and 14(d). At this stage, the Court must consider all facts and any reasonable inferences must be drawn in favor of the pleader. *See Aguilera v. Inservices, Inc.*, 905 So. 2d 84 (Fla. 2005). SUSIN is sued in both his official and individual capacities because he is both officially and personally responsible to produce the records and, just as the county commissioner was in *Bear, supra,* is officially and personally liable for attorney's fees incurred as a result of his failure to do so. Should the Board be unable to comply because SUSIN continues to refuse to cooperate, Ms. JENKINS should not be prohibited from obtaining the records and recovering attorney's fees from SUSIN personally since he meets the definition of "agency" and is required to produce public records under the Act.

V. DEFENDANTS' MOTION DOES NOT MEET MOTION TO DISMISS STANDARDS

43. At the motion to dismiss phase, factual disputes are not before the court, rather the inquiry is simply whether the allegations, if true, sufficiently allege that the phone bills at issue are *likely* public records. A complaint is not required to be perfect so long as it sets out sufficient allegations of ultimate fact to withstand a motion to dismiss for failure to state a cause of action. *Mt. Olive Primitive Baptist Church v. Harris*, 860 So. 2d 520, (Fla. 1st DCA 2003). To state a cause of action, a complaint must only allege sufficient ultimate facts to show that the pleader is entitled to relief. The complaint is viewed in the most favorable light to the pleader and the court must consider all facts and any reasonable inferences must be drawn in favor of the pleader. *See Aguilera v. Inservices, Inc., supra*; *Demase v. State Farm Fla. Ins. Co.,* 239 So. 3d 218 (Fla. 5th DCA 2018). The fact the BOARD and SUSIN have failed to obtain the records, or that phone logs could be used for the personal purpose of paying a bill, does not negate that they can be made by official business and is wholly irrelevant to the issue of whether the amended complaint alleges facts sufficient to conclude that the logs are likely public records. Because the FAC sets forth the public statements establishing that SUSIN used his personal cell phone for official business, a fact that is uncontested, it more sets forth that the phone logs more than likely meet the definition of "public record" and Defendants have failed to establish that Ms. JENKINS's cause of action should be dismissed.

CONCLUSION

WHEREFORE, because phone logs made by official business are "public records," and for all other reasons cited herein, Plaintiff JENNIFER JENKINS prays this Court will deny Defendants' Dispositive Motion To Dismiss Plaintiff's First Amended Complaint For Declaratory Relief And Opposition To Plaintiff's Motion For Order Requiring Defendants to Obtain And Preserve Susin's Phone Records and order that the records be preserved and produced as requested in Plaintiff's Motion For Order Requiring Defendants To Obtain And Preserve Susin's Phone Records pending the outcome of this matter, along with any other remedy as justice requires thereby preserving her rights under Article I, Section 24 of the Constitution of the State of Florida and The Florida Public Records Act, chapter 119 of the Florida Statutes.

Respectfully submitted this 31st day of May 2023.

By: _____

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing document was served on counsel for the BREVARD COUNTY SCHOOL BOARD and MATTHEW SUSIN by eservice on the 31st day of May 2023 at the below eservice emails:

Randy D. Mora, Esquire, Trask Daigneault, LLP	Attorney for Defendants Brevard County School Board and Matthew Susin	randy@cityattorneys.legal jay@cityattorneys.legal jennifer@cityattorneys.legal
Jay Daigneault, Esquire, Trask Daigneault, LLP	Attorney for Defendants Brevard County School Board and Matthew Susin	jay@cityattorneys.legal randy@cityattorneys.legal jennifer@cityattorneys.legal

/s/ Jessica J. Travis
Attorney for Plaintiff

ATTACHMENTS TO

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PRESERVING PHONE RECORDS

JENNIFER JENKINS,

Plaintiff,

v.

BREVARD COUNTY SCHOOL BOARD; and MATTHEW SUSIN, in his official and individual capacity,

Defendants.

CASE NO. 05-2023-CA-018437-XXX-XX

Barton v. City of Cape Coral, 2014 Fla. Cir. LEXIS 23355, Twentieth Judicial Circuit of Florida, Lee County, Case No. 13-CA-1342, (Jan. 24, 2014)

Bear v. Escambia Cnty. Bd., 2023 U. S. Dist. LEXIS 50924, 2023 WL 2632103, No. 3:19cf4424-MCR/HTC (N.D. Fla. March 25, 2023)

Media Gen. Operation, Inc. v. Feeny, 849 So. 2d 3 (Fla. 1st DCA 2003)

O'Boyle v. Town of Golf Stream, 257 So. 3d 1036 (Fla. 4th DCA 2018)

Barton v. City of Cape Coral

Circuit Court of the Twentieth Judicial Circuit of Florida, Lee County, Civil Division

January 23, 2014, Decided; January 24, 2014, Filed

CASE NO. 13-CA-1342

Reporter
2014 Fla. Cir. LEXIS 23355 *

LARRY BARTON, Petitioner, vs. CITY OF CAPE CORAL, a Florida Municipality, STEPHEN POHLMAN as Interim City Manager, Respondent(s).

Core Terms

billing, records, public business, public record, cell phone, provider, online, cell phone records, city employee, cellphone, phone, print

Judges: **[*1]** Keith R. Kyle, Circuit Court Judge.

Opinion by: Keith R. Kyle

Opinion

ORDER GRANTING PETITION FOR MANDAMUS

THIS CAUSE having come before the Court for an evidentiary on January 21, 2014, on a Petition for Writ of Mandamus filed May 14, 2013, and pursuant to *section 119.07(1)(c), Florida Statutes* states "...a good faith response includes making reasonable efforts to determine from other officers or employees within the agency whether such a record exists and, if so, the location at which the record can be accessed," and the Court having heard oral argument thereon does hereby find as follows:

1. That Interim City Manager Stephen Pohlman, a city employee is a record custodian [1] of cellphone records regarding official business made on his personal cellphone concerning the "official public business" records including information requested by Plaintiff. *Media General Operation, Inc. v. Feeney, 849 So.2d 3 (Fla. 1st DCA, 2003)*; *Wisner v. City of Tampa Police Department, 601 So. 2d 296,298 (Fla. 2d DCA 1992).*

2. The City concedes no effort/request was made to request the (billing) records from the cell phone provider. These public records are readily accessible online by Interim City Manager Stephen Pohlman from his cell phone provider. Instructions for printing the detailed billing statement can be obtained from Stephen Pohlman's cell phone provider either online or by calling customer service. See Plaintiffs' **[*2]** Petition, Exhibit - Sprint Detailed Billing Statement Online Instructions (requiring username and password to access detailed billing statement).

IT IS HEREBY ORDERED AND ADJUDGED as follows:

1. Defendant STEPHEN POHLMAN as a city employee and record custodian of his personal cell phone records containing, at least in part, "official public business" records is hereby ordered to obtain and print a detailed billing statement for all cell phone records concerning "official public business" requested by Plaintiff within five (5) days from the date of the Tuesday January 21, 2014 hearing and that these records be promptly provided on or before Monday January 27, 2014.

2. The public records to be provided should include at a minimum, the date(s), phone number(s), duration of "official public business" communications as provided in the ceil phone detailed billing statement. *Media General Operation, Inc. v. Feeney, 849 So.2d 3 (Fla. 1st DCA, 2003)*.

3. Any personal non-official billing records are not public records and may be redacted (if desired) from the requested detailed billing statement. **[*3]** *Media General Operation, Inc. v. Feeney, 849 So.2d 3 (Fla. 1st DCA, 2003)*: *State v. City of Clearwater, 863 So. 2d 149, 154* (Fla.

DONE AND ORDERED in Chambers at Fort Myers, Lee County, Florida, on this 23rd day of January, 2014.

[1] Supervision and control over the public records created by a city employee creates a duty on the public official to be custodian of the records within their control. ***Mintus v. City of West Palm Beach, 711 So. 2d 1359 (Fla. 4th DCA 1998)*** (citing *Williams v. City of Minneola, 575 So. 2d 683, 687 (Fla. 5th DCA 1991)*); *Puls v. City of Port St. Lucie, 678 So. 2d 514 (Fla. 4th DCA 1996)*.

/s/ Keith R. Kyle

Keith R. Kyle, Circuit Court Judge

End of Document

Bear v. Escambia Cnty. Bd.

United States District Court for the Northern District of Florida, Pensacola Division

March 25, 2023, Decided; March 25, 2023, Filed

Case No. 3:19cv4424-MCR/HTC

Reporter
2023 U.S. Dist. LEXIS 50924 *; 2023 WL 2632103

DAVID BEAR, Plaintiff, v. ESCAMBIA COUNTY BOARD OF COUNTY COMMISSIONERS, and DOUGLAS B UNDERHILL, Defendants.

Core Terms

public record, filter, public forum, pages, summary judgment, attorney's fees, media, comments, message, state action, blocked, profanity, records, words, color of state law, constituents, designated, viewpoint, argues, hidden, users, public records request, good faith, banned, individual capacity, bulletin board, private entity, no evidence, state actor, Recommendation

Counsel: **[*1]** For DAVID BEAR, Plaintiff: ALEXANDRA E AKRE, ERIK MATTHEW FIGLIO, AUSLEY MCMULLEN - TALLAHASSEE FL, TALLAHASSEE, FL; JEREMIAH JOSEPH TALBOTT, TRAVIS PHILLIP LAMPERT, LAW OFFICES OF JEREMIAH J TALBOTT PA - PENSACOLA FL, PENSACOLA, FL.

For DOUGLAS B UNDERHILL, Defendant: JOSEPH L HAMMONS, LEAD ATTORNEY, HAMMONS LAW FIRM - PENSACOLA FL, PENSACOLA, FL; EDWARD P FLEMING, MATTHEW ADAM BUSH, MCDONALD FLEMING LLP - PENSACOLA FL, PENSACOLA, FL.

Judges: M. CASEY RODGERS, UNITED STATES DISTRICT JUDGE.

Opinion by: M. CASEY RODGERS

Opinion

ORDER

This case arises out of Escambia County Commissioner Douglas Underhill's use of social media to discuss County business with constituents. In the First Amended Complaint, Plaintiff David Bear sued Underhill and the Escambia County Board of County Commissioners ("Board"), seeking to compel the disclosure of public records from Underhill's social media pages under *Florida's Public Records Act*, *see Fla. Stat. § 119.01, et seq.* (Counts I—IV) and also claiming that Underhill blocked him or denied him full access to the social media accounts in violation of his *First Amendment* free speech rights, *see 42 U.S.C. § 1983* (Counts V—VII).[1] Through prior orders, Bear's settlement with the County, and stipulations on file, most of the claims have been resolved. **[*2]** [2] What remains is Bear's request for an

[1] The case was originally filed in state court and removed to federal court on federal question jurisdiction. *See 28 U.S.C. § 1331*.

[2] As to the Public Records Act claims against Underhill and the Board, the Magistrate Judge held a hearing and compelled them to provide public records from Underhill's social media pages on Counts I and III (against Underhill) and IV (against the Board). The Court found that the request in Count II against Underhill was not a request for public records, rendering it subject to dismissal as a nullity; and the Court deferred ruling on the claim for attorney's fees as to the Public Records Act claims. *See* ECF No. 93 (Order on Motion to Compel), ECF No. 128 (Report and Recommendation, recommending compelling production of documents but not awarding a statutory attorney's fee), ECF No. 140 (Order adopting Magistrate Judge's recommendation to compel documents under Counts I and III and deferring on the request for an attorney's fee award).

Subsequently, Bear settled all claims against the Board—the Public Records Act claim (Count IV) and the *First Amendment* claims against the Board and in Underhill's official capacity (Counts V and VI). Bear also expressly abandoned all claims for compensatory and punitive damages and attorney's fees and costs on the *First Amendment* claim, including the individual capacity claim against Underhill (Count VII). *See* ECF No. 95 (Notice of Abandonment of Plaintiff's Claims for Compensatory and Punitive Damages in Counts V, VI, VII), ECF No. 108 (Notice of Abandonment of Plaintiff's Claims for Attorney's Fees Against Douglas Underhill in his Individual Capacity in Count VII), ECF No. 123 (Order memorializing abandonment of damages, attorney's fees and costs),

attorney's fee award on the Public Records Act claims against Underhill (Counts I and III), for which he seeks partial summary judgment, ECF No. 145; and the individual capacity *First Amendment* claim for declaratory and injunctive relief against Underhill (Count VII), on which Underhill moves for summary judgment, ECF No. 144.[3] Having fully reviewed the matter, the Court concludes that Bear is statutorily entitled to an award of attorney's fees, and Underhill is entitled to summary judgment on the *First Amendment* claim.

I. Background

The record reflects that in 2019, while Underhill was a County Commissioner, he used social media Facebook pages on his personally owned Facebook account to converse with constituents and provide them information on matters involving the Board and County business. Underhill explained by deposition that he has one overall Facebook account titled "Douglas Underhill," which includes pages titled "Douglas Underhill" ("Underhill page") and "Commissioner Doug Underhill" ("Commissioner page").[4] As one of five County Commissioners, Underhill had no authority to make County policy on his own, he had no County sponsored or supported social media platform, **[*3]** [5] and he has never been expressly authorized to make Facebook posts on behalf of the Board. Nonetheless, Underhill acknowledged in testimony, both in a prior hearing and in his deposition, that social media is one of the ways he carried out his duties as a Commissioner. Underhill further testified that he understood he had an obligation to preserve public records and provide them when requested, even if those records were on a personal computer or personal cell phone.

The Commissioner page, according to Underhill, was intended to serve as an electronic bulletin board on which he could post information about County business that might be of interest to his constituents, and he included a statement to that effect on the Commissioner page. Underhill explained that the Commissioner page is publicly visible to anyone on Facebook but maintained he did not intend to create a public forum open for comments. He used settings on the administrator's page, namely a profanity filter and also a filter using a list of common words he selected that would hide from public view any comment using a filtered word; however, the comments would not be hidden from the commenter or the commenter's Facebook "friends." **[*4]** [6] Underhill thought this list of common words would cause all messages to be hidden from view on the Commissioner page so it could function as a bulletin board. There were posts from Underhill informing users that he would not read their comments because the page was "not a discussion board." ECF No. 144-2 at 177.

Bear testified by deposition that he was denied full access to the Commissioner page because although he could comment, he could not see the comments of others unless he was their Facebook "friend." Bear said he was excluded "from being able to engage in dialogue on that page" because he could not see all comments and therefore could not "fully engage in that entire conversation" without being Facebook "friends" with the commenters. ECF No. 151-1 at 11-12, 29. Underhill participated in dialogue on the Commissioner page starting in October 2018 when the page was created, and he has commented on other pages using this Commissioner page identity. *Id.* at 20-21.

Underhill acknowledged that he may not have set up the page as a bulletin board immediately, and posts on the Commissioner page dating from 2018 clearly used filter

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ECF No. 138 (Motion to Dismiss/Settlement with Board), ECF No. 139 (Order granting dismissal of Board, Counts IV and VI, not impacting claims against Underhill); ECF No. 148 (*Rule 41(a)(1)(A)(ii)* stipulation of dismissal as to all remaining official capacity claims against Underhill (Count VI) with each party to bear their own fees and costs).

[3] Underhill also filed a Motion for Summary Judgment on the official capacity claim in Count V, ECF No. 143. Bear's settlement with the Board had initially preserved this official capacity claim, but in response to Underhill's summary judgment motion, Bear filed a stipulation of dismissal, signed by all parties, as to all remaining claims against Underhill in his official capacity, ECF No. 148. Thus, Underhill's motion for summary judgment on Count V, ECF No. 143, is moot.

[4] Underhill also used a separate Facebook page related to his campaign, which is not at issue in this suit.

[5] County policy from 2009 through May 16, 2019, prohibited commissioners from discussing county business on social networking sites but allowed commissioners to post a story or comment on social media under the commissioner's actual name as long as no other commissioner had also posted a comment or response to the same article or issue. The policy also required the County to retain a copy of the post. ECF No. 128 at 2 n.2. A separate policy adopted in 2012 prohibited County employees, including commissioners, from conducting County business on personal social media accounts but allowed an official page to be established by approval of the County administrator, ECF No. 35-1.

[6] The page setting shows that posts containing the following words were blocked: "and, the, you, your, it, good, congradulations, congratulations, will, should, won't, wont, commissioner, commission, board, county, this, that, those, they, them." ECF No. 150-5.

words and were not hidden from view. Underhill initially **[*5]** encouraged discussion and acknowledged to users that the Commissioner page was a public record, stating in a post on November 9, 2018:

> The same rules apply here as in public forum. No attacks. No profanity. Stay on topic One topic per thread . . . Everything here is public record and there is no privacy. Violations will simply be deleted, just like having your time terminated and being asked to sit down if you violate the rules in public forum.

ECF No. 150-2 at 1. By email to the County Attorney dated January 19, 2019, Underhill stated that he "continue[d] to run [the] Commissioner Doug Underhill page in accordance with the same rules as public forum, and in fact my detractors use it to sh[ut] down my message on a routine basis, so there is a good body of evidence that I am preserving their *1st amendment* rights." *Id.* at 3.

By May 2019, it appears the rules regarding the bulletin board format had changed. Underhill wrote on the Commissioner page: "I have a couple of lunatics that are losing their minds over the fact that they can't see their comments on my page. All comments, pro and con, are blocked on this page. This page exits for me to tell my constituents what is going on."[7] *Id.* at 217. Again, **[*6]** one month later in June of 2019, Underhill specifically cautioned users that "[a]ll comments are hidden on this page. I encourage you to share the comment on your page if you want to run commentary on it. If you want to communicate with me on it, please use [my official email]." ECF No. 150-4 at 1. Records show that Bear's comments were hidden from public view on the Commissioner page when he used filter words, as were others. *See e.g.*, ECF No. 150-7 at 10 (August 2020); ECF No. 150-7 at 17 (July 2020); 150-9 at 19 (November 2019); ECF No. 150-8 at 25 (May 2020). However, some comments of others were occasionally visible on the page despite the filters, which Underhill was unable to explain but attributed to either a Facebook glitch or his own mistake in thinking a conversation was occurring on a different site. *See e.g.*, ECF No. 144-2 at 174, 213-14. Underhill testified that the hidden comments were a function of the Commissioner page general rules, and he denied blocking anyone from the Commissioner page.

Regarding the Underhill page, it was set up as limited for viewing by Underhill's Facebook "friends" but also included a setting allowing public "followers."[8] Underhill characterized **[*7]** this as a personal page, mostly consisting of family pictures and personal conversations, and he said he posts about all kinds of issues on this page, including political and societal issues, and whatever is happening in his life. He acknowledged that Bear was on a list of persons he had blocked from this page at one time. There are instances in the Underhill page where Underhill directed the discussion to his Commissioner page or to his official email, informing the users that this was a personal page and that discussions related to matters that may come before the Board would be reserved for his Commissioner page.[9]

Bear made three public records requests of the County and Underhill, seeking the production or inspection of messages and posts on Underhill's social media pages. Underhill did not respond. The County replied to the requests, but because the social media pages were in Underhill's ownership and under his control, the response was incomplete. Bear then filed suit.[10] Ten months later, Underhill produced 12,000 pages out of approximately 36,000 pages of Facebook records, but continued to maintain that none of his Facebook pages constituted public records because they were personally **[*8]** owned and maintained. Plaintiff filed a motion to compel public records as to the 24,000 pages that were withheld.

The Magistrate Judge held a hearing on Bear's public records request and concluded that for purposes of Counts I, III, and IV, Underhill was acting on behalf of the Board by communicating with constituents on County matters involving the Board, or on matters that would be subject to a vote by the Board, and that those posts or messages were therefore public records that Underhill must disclose, despite being located on social media pages that he considered personal. The Magistrate Judge found that Count II was not a request for public records. After inspecting the disputed documents *in camera*, the Magistrate Judge recommended compelling the production of 129 pages from Underhill's Facebook account as public records and another group was identified as a mix of

[7] Underhill later again told people to "stop wasting your time fussing about whether you can see comments. All comments are blocked on this page which means only you and your friends can see each other's comments. The page exists to tell you what your representative is doing. Think of it as a press release using modern media." ECF No. 150-4 at 3.

[8] "Followers" can follow the page holder's public posts while "friends" view the page by default. ECF No. 144-2 at 229.

[9] *See* ECF No. 133-1 at 1, 7, 9, 10, 12, 13, 33, 38, 39, 48, 54 (pages showing a comment by Underhill directing the discussion to his Commissioner page).

[10] As noted previously, Bear asserted Public Records Act claims against Underhill in Counts I, II, and III and against the Board in Count IV, and *First Amendment* claims.

public records and personal messages that Underhill was required to redact. Underhill complied with the redaction and made no objection to the Magistrate Judge's determination that the unredacted portions were public records. The Court adopted the Report and Recommendation as to these issues. *See* ECF Nos. 128, 140. **[*9]**

In the same Report and Recommendation, the Magistrate Judge also recommended not awarding Bear statutory attorney's fees under the Public Records Act, finding that the Board, which did not have access to Underhill's Facebook pages, did not *unlawfully* withhold public records and that Underhill's refusal to disclose records was not unlawful because he questioned his "agency" status in good faith.[11] The Magistrate Judge determined that Underhill's position, while ultimately unavailing, was not unreasonable, citing *New York Times Co. v. PHH Mental Servs., Inc. 616 So. 2d 27 (Fla. 1993)* (finding a private entity's good faith refusal to disclose was not unlawful because its "agency" status was unclear). Bear objected to this portion of the Report and Recommendation, and the undersigned deferred ruling on the issue.

Subsequently, Bear settled with the Board, and summary judgment motions were filed on the remaining claims, which are now ripe and before the Court.

II. Standard of Review

Summary judgment is appropriate if "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." *Fed. R. Civ. P. 56(a)*; *see Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-248, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986)* ("The mere existence of some alleged factual dispute between the parties will not defeat an otherwise properly supported motion for **[*10]** summary judgment."). The moving party bears the burden of establishing that there is no genuine dispute of fact and that the plaintiff has failed to establish an essential element of the claim. *See Allen v. Bd. of Pub. Educ., 495 F.3d 1306, 1313 (11th Cir. 2007)*; *see also Celotex Corp. v. Catrett, 477 U.S. 317, 325, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1986)*. The Court views "the evidence and all reasonable inferences drawn from it in the light most favorable to the nonmoving party." *Martin v. Brevard Cnty. Pub. Sch., 543 F.3d 1261, 1265 (11th Cir. 2008)* (internal marks omitted). To avoid summary judgment, the nonmoving party must then go beyond the pleadings and "designate specific facts showing that there is a genuine issue for trial." *Celotex, 477 U.S. at 324* (internal marks omitted). The mere existence of some factual dispute will not defeat an otherwise properly supported summary judgment motion—there must be a "genuine issue of material fact." *Scott v. Harris, 550 U.S. 372, 380, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007)* (quoting *Anderson, 477 U.S. at 247-47*). At this stage, the court's role is not to weigh the evidence or determine the truth but to determine whether there is a genuine issue of fact for trial. *Anderson, 477 U.S. at 249*.

III. Discussion

A. Attorney's Fee Request---Florida Public Records Act

Bear moves for partial summary judgment on his claim for attorney's fees under the Public Records Act (Counts I and III). Florida's Public Records Act "is to be construed 'liberally in favor of the state's policy of open government.'" *Morris Pub. Group, LLC v. Fla. Dep't of Educ., 133 So. 3d 957, 960 (Fla. 1st DCA 2013)* (quoting *NCAA v. AP, 18 So. 3d 1201, 1206 (Fla. 1st DCA 2009)* **[*11]**); *see also Fla. Stat. § 119.01*. Doubts as to whether a matter is a public record are to be "resolved in favor of disclosure." *Morris Pub. Group, 133 So. 3d at 960*. Consistent with this policy, the Act provides a reasonable attorney's fee to a prevailing plaintiff, *see Fla. Stat. § 119.12*. The attorney's fee award "is designed to encourage public agencies to voluntarily comply with the requirements of chapter 119, thereby ensuring that the state's general policy is followed" and making agencies less likely to wrongfully deny proper requests for documents. *State Attorney's Off. of Seventeenth Jud. Cir. v. Cable News Network, Inc., 254 So. 3d 461, 463 (Fla. 4th DCA 2018)* (quoting *New York Times Co. v. PHH Mental Health Servs., Inc., 616 So. 2d 27, 29 (Fla. 1993)*).

Specifically, Florida law provides: "[I]f a civil action is filed against an agency to enforce" the Public Records Act, the Court:

> . . . shall assess and award the reasonable costs of enforcement, including reasonable attorney fees, against the responsible agency if the court determines that:
> (a) The agency unlawfully refused to permit a public record to be inspected or copied; and
> (b) The complainant provided written notice identifying the public record request to the agency's custodian of public records at least 5 business days before filing the

[11] In response to the Magistrate Judge's Report and Recommendation, Underhill objected to the judge's definition of "agency" and of "public records."

civil action.[12]]

Fla. Stat. § 119.12. At issue is whether Underhill acted "unlawfully" and can be assessed fees as "the responsible agency." Bear argues the Court previously determined that Underhill met the definition of "agency" by compelling him to produce public records from his social media pages, and therefore his conduct was unlawful. Underhill argues that because only "individual capacity" claims remain at issue he cannot be assessed fees as an "agency."

The Public Records Act defines "agency" as "any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government **[*12]** created or established by law . . . and any other public or private agency, person, partnership, corporation, or business entity acting on behalf of any public agency." Fla. Stat. § 119.011(2). The Act requires a person who has custody of public records to acknowledge requests for inspection and respond in good faith to determine whether such a record exists and its location. Fla. Stat. § 119.07(1)(c). A delay in making public records available is only permissible "under very limited circumstances," such as the time necessary to make "a reasonable effort to determine" whether the records exist, Fla. Stat. § 119.07(1)(c), or are exempt, Fla. Stat. §§ 119.07(1)(d)-(e). Promenade D'Iberville, LLC v. Sundy, 145 So. 3d 980, 983 (1st DCA 2014). And the "only challenge permitted by the Act at the time a request for records is made is the assertion of a statutory exemption."[13] Tribune Co. v. Cannella, 458 So. 2d 1075, 1078-79 (Fla. 1984). "[W]hen a court determines that the reason proffered as a basis to deny a public records request is improper," the refusal is "unlawful." B&L Serv., Inc. v. Broward Cnty., 300 So. 3d 1205, 1208 (Fla. 4th DCA 2020) (internal quotations omitted). In sum, an attorney's fee award is required "for unlawful refusal to provide public records under two circumstances: first, when a court determines that the reason proffered as a basis to deny a public records request is improper, and second, when the agency unjustifiably fails to respond to a public records request by delaying **[*13]** until after the enforcement action has been commenced." Off. of State Att'y for Thirteenth Jud. Cir. of Fla. v. Gonzalez, 953 So. 2d 759, 764 (Fla. 2nd DCA 2007).

The Florida Supreme Court has explained that the attorney's fee statute contains no good faith or reasonableness exception. *See* Bd. of Trustees, Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 128 (Fla. 2016). Instead, a prevailing party is entitled to a statutory attorney's fee award "under the Public Records Act when the trial court finds that the public agency violated a provision of the Public Records Act in failing to permit a public record to be inspected or copied."[14] *Id.* In so ruling, the court in *Lee* distinguished an earlier case, New York Times Co. v. PHH Mental Health Servs., Inc., 616 So. 2d 27, 29 (Fla. 1993), as not based on a "good faith" standard but rather on a private entity's uncertainty of its agency status. Because the private entity "was not denominated a public agency by law," a judicial determination was required to decide "whether it was acting on behalf of a public agency." *Id.* The *PHH* court explained:

> If it is unclear whether an entity is an agency within the meaning of chapter 119, it is not unlawful for that entity to refuse access to its records. Conversely, refusal by an entity that is clearly an agency within the meaning of chapter 119 will always constitute unlawful refusal.

Id.; *see also* Lee, 189 So. 3d at 128 (explaining that "[w]hile there are statements in *PHH* that may **[*14]** have inadvertently resulted in confusion for the district courts of appeal," grafting a good faith or honest mistake exception into the "unlawfully refused" term when a unit of government unquestionably meets the agency definition and refuses to disclose the record would cause the statute to be "seriously diluted").

On *de novo* review of Bear's objections to the Report and Recommendation and the summary judgment arguments, the Court respectfully rejects the Magistrate Judge's conclusion that Underhill's withholding of these public records was not

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[12] It is undisputed that Bear provided the requisite notice for purposes of subsection (b). Fla. Stat. § 119.12(b).

[13] If any person who has custody of a public record contends that all or part of the record is exempt under one of the enumerated statutory exemptions from disclosure, the basis for the exemption must be stated; the failure to disclose based on a statutory exemption is not unlawful. See Fla. Stat. § 119.07(1)(d)-(e); *see also* State Attorney's Off. of Seventeenth Jud. Cir. v. Cable News Network, Inc., 254 So. 3d 461, 463 (4th DCA 2018) (school district's refusal to disclose certain video footage taken by security cameras at Marjory Stoneman Douglas High School was based on the "security plan" exemption from disclosure contained in ***§ 119.071(3)(a)***, so even though the court ultimately required the records to be disclosed, the nondisclosure based on an exemption was not "unlawful"). It is undisputed that no statutory exemption was claimed in this case.

[14] The Florida Supreme Court explained in *Lee* that while a failure to respond in good faith to a public records request in violation of Fla. Stat. § 119.07(1)(c) may itself constitute a violation of the Public Records Act requiring an attorney's fee award, that does not import a good faith or reasonableness *requirement* into Fla. Stat. § 119.12, "which does not contain any such language." 189 So. 3d at 128.

unlawful and that his status as an "agency" was reasonably uncertain. To the contrary, no reasonable uncertainty existed as to Underhill's status. As a Commissioner, he was a public official, a county authority, a member of the Board, and, as already determined, "a person acting on behalf of an agency" when he created public records on his social media pages, whether he was authorized by the Board to do so or not. Underhill acknowledged that his communications were in furtherance of his duties as a Commissioner. No statutory exemptions were claimed, and Underhill's delay, which lasted well after Bear had filed suit, cannot be attributable **[*15]** to a reasonable or good faith attempt to locate the records.[15] Bear was forced to file suit to obtain them, and the Court compelled their disclosure. Period. End of story.

In response to Bear's motion for fees, Underhill argues only that the issue is moot because Bear has settled and dismissed all official capacity claims.[16] Effectively, Underhill is arguing that an attorney's fee award is not proper in this case because as an individual, he cannot be the "responsible agency." The undersigned disagrees because clearly he was an elected commissioner and thus could wear two different hats depending on his task and his speech at the time. He received a public records request for these records, which have been found to be "public," and therefore, he was acting as an agent of the County in making these statements on social media, regardless of any good faith belief otherwise; there is no good faith exception that applies to an elected public official. *See Lee, 189 So. 3d at 128*. And as noted, the definition of "agency" includes a person acting on behalf of an agency. Underhill was sued in Counts I and III--without any express reference to capacity--as the person who had custody of the public records requested and **[*16]** who refused to respond to the public records request. *See Fla. Stat. § 119.07(1)(a)* (stating it is the obligation of "[e]very *person* who has custody of a public record" to permit inspection and copying (emphasis added)). Because the records were withheld unlawfully, the Act mandates an assessment of reasonable attorney's fees against the "responsible agency," and "agency" is broadly defined to include a county authority, board, commission, or private entity or person acting on behalf of the agency. Because Underhill meets the definition and therefore is "the responsible agency," an award against him is mandated by statute. *See generally, Wood v. Marston, 442 So. 2d 934, 938 (Fla. 1983)* (finding the president of the University of Florida was an "agency," even though higher education institutions are not specifically identified in the definition of agency; also noting in that case, the defendant had been relieved of any personal liability for attorney's fees pursuant to a stipulation); *Miami Herald Media Co. v. Sarnoff, 971 So. 2d 915, 917 (Fla. 3d DCA 2007)* (finding it undisputed that city "Commissioner Sarnoff is an 'agency' for purposes of Chapter 119," citing *Fla. Stat. § 119.011(2)*).

B. Individual Capacity Free Speech Claim—*First Amendment*

Underhill moves for summary judgment on the individual capacity *First Amendment* claim in Count VII. In this claim, Bear alleged that Underhill, **[*17]** in his individual capacity, acted under color of state law by operating social media pages as public fora using the apparent authority of his office and blocked or restricted Bear's access to the pages in violation of his *First Amendment* free speech rights. Bear seeks declaratory and injunctive relief.[17] Underhill moves for

[15] Even assuming Underhill was subjectively concerned about not disclosing personal messages, he made no timely response and the statute includes no reasonableness inquiry that would preclude a finding that the conduct was unlawful. Underhill does not even argue that the nondisclosure was not "unlawful."

[16] The "individual capacity" versus "official capacity" terminology is discussed commonly in the ***§ 1983*** context, where the law provides that an "individual capacity" suit holds an individual liable for his or her unconstitutional conduct committed under color of state law, whereas "[a] suit 'against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office.'" *Attwood v. Clemons, 818 F. App'x 863, 871 (11th Cir. 2020)* (Grant, J., concurring) (quoting *Will v. Michigan Dep't of State Police, 491 U.S. 58, 71, 109 S. Ct. 2304, 105 L. Ed. 2d 45 (1989)*). To determine the capacity in which a person is sued, courts consider whether the complaint requests relief against the office held or against the individual himself. *Id.* Here, the complaint clearly requested relief under the Public Records Act against Underhill, who was the individual in custody of the public records, which were created through his duties—not relief against the office he holds.

[17] As noted, Bear has abandoned his claims for compensatory and punitive damages as well as attorney's fees on this claim. The Court takes judicial notice of the fact that Underhill is no longer an Escambia County Commissioner. Therefore, his claim for injunctive relief is moot. *See Dow Jones & Co. v. Kaye, 256 F.3d 1251, 1254 (11th Cir. 2001)* ("A claim for injunctive relief may become moot if: (1) it can be said with assurance that there is no reasonable expectation that the alleged violation will recur and (2) interim relief or events have completely and irrevocably eradicated the effects of the alleged violations.") (internal marks omitted). However, the Supreme Court has recently held that declaratory relief and nominal damages (even if not requested) are available to remedy a past constitutional violation; therefore, the declaratory relief claim is not moot. *See Uzuegbunam v. Preczewski, 141 S. Ct. 792, 209 L. Ed. 2d 94 (2021)* (holding nominal damages award by itself can redress a past injury such that *First Amendment* claim was not moot).

summary judgment, asserting there is no state action because as one individual member of a five-member County Commissioner Board, he had no authority to act for the Board, and he argues there is no state action and no evidence of content-based restrictions or that Bear's speech was excluded or censored based on content.[18]

Section § 1983 allows a suit for the intentional deprivation of a constitutional right under color of state law. *42 U.S.C. § 1983*. "A successful *section 1983* action requires that the plaintiff show []he was deprived of a federal right by a person acting under color of state law." *Almand v. DeKalb Cty., Ga., 103 F.3d 1510, 1513 (11th Cir. 1997)*. The *First Amendment*, in relevant part, guarantees that "Congress shall make no law . . . abridging the freedom of speech," *U.S. Const. amend. I*, and this right is protected against state action through the *Fourteenth Amendment*, *U.S. Const. amend. XIV*. It is well-established that "the Free Speech Clause prohibits only governmental abridgment of speech," not "private abridgment of speech," and therefore, as in **[*18]** every *§ 1983* claim, state action is essential to the claim. *Manhattan Cmty. Access Corp. v. Halleck, 139 S. Ct. 1921, 1928, 204 L. Ed. 2d 405 (2019)*. The "color of state law" and "state actor" "requirements are treated as the functional equivalent of one another and can be analyzed under the same framework. *Attwood v. Clemons, 526 F. Supp. 3d 1152, 1164 (N.D. Fla. 2021)* (citing *United States v. Price, 383 U.S. 787, 794 n.7, 86 S. Ct. 1152, 16 L. Ed. 2d 267 (1966)*). "[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law," but he also can be said to have acted under color of state law when abusing or misusing the position given to him by the state or local government. *West v. Atkins, 487 U.S. 42, 49, 108 S. Ct. 2250, 101 L. Ed. 2d 40 (1988)*. State action also can be found by "if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." *Brentwood Acad. v. Tennessee Secondary Sch. Athletic Ass'n, 531 U.S. 288, 295, 121 S. Ct. 924, 148 L. Ed. 2d 807 (2001)* (internal quotations omitted).

When the government creates a public forum for speech, the *First Amendment* ordinarily prohibits the government from excluding "speech or speakers from the forum on the basis of viewpoint, or sometimes even on the basis of content."[19] *Halleck, 139 S. Ct. at 1930*. Conversely, "when a private entity provides a forum for speech, the private entity is not ordinarily constrained by the *First Amendment* because the private entity is not a state actor." *Id.* In the social media context, to determine **[*19]** whether a government official's social media conduct constitutes state action, "courts have focused on two main factors: namely, 1) whether the official uses the account in furtherance of their official duties, and 2) whether the presentation of the account is connected with the official's position." *Attwood, 526 F. Supp. 3d at 1166* (citing *Charudattan v. Darnell, 834 F. App'x 477, 481 (11th Cir. 2020)*).

Underhill contends that because he had no authority to act according to state law except as part of the collective legislative body of the Board, he could not be said to be a state actor or to have acted under color of state law in establishing or maintaining his Facebook pages. The Court disagrees. Courts have rejected the contention that a single legislator can never be considered as acting under color of state law. *See Attwood, 526 F. Supp. 3d at 1164-65* (stating, "[c]ontrary to Defendant's assertion, Defendant's status as a state legislator is not a magic pill that immunizes him from state action analysis"); *see also Davison v. Randall, 912 F.3d 666, 680 (4th Cir. 2019)*, as amended (Jan. 9, 2019) (the chair of a county board of supervisors was found to be a state actor when establishing the "Chair" Facebook page and banning a citizen's access). The Fourth Circuit explained that where "a defendant's status as a public official" allows him "to execute a challenged **[*20]** action in a manner that private citizens never could have, then the action also is more likely to be treated as attributable to the state." *Davison, 912 F.3d at 680* (noting "Chair" Facebook page was state action because it was used as a "tool of governance" and was intentionally

[18] Bear argues the motion should be rejected out of hand for its technical deficiencies, but the Court does not find it so deficient as to be denied on technical grounds. The motion includes some citations to the record and Underhill incorporated the facts and arguments from his motion for summary judgment on the official capacity claims, ECF No. 143, as well as his motion to dismiss and the Magistrate Judge's original report and recommendation on his motion to dismiss, which the undersigned rejected. The Court has considered the other summary judgment motion and the case record but the vague incorporation of "facts" and arguments made in a motion to dismiss or a rejected report and recommendation are not persuasive in the summary judgment context and have therefore not been considered. It remains the Plaintiff's burden to establish a genuine dispute of material fact as to each element of the claim. *See Celotex Corp., 477 U.S. at 322-23*.

[19] Underhill is sued in his individual capacity, but the Court has found that he was carrying out his duties as a Commissioner using his personally owned Facebook pages, and he therefore made public records using his public office and title as Commissioner. Thus, the undisputed record shows that in administering at least portions of his Facebook pages, Underhill was acting as a state actor/under color of law, despite the fact that he did not have explicit authority to make policy or decisions on behalf of the Board.

opened for public discourse).

Here, two distinct Facebook pages are at issue, and both are privately owned by Underhill. As to the Commissioner page, the record shows that Underhill unquestionably used his public office and title to create it, and the Court has found--following an evidentiary hearing--that Underhill was carrying out his duties as a Commissioner by using his personally owned Facebook pages to conduct County business, which resulted in the creation of public records. Underhill invited discussions on the page in which he participated with his constituents using his title and office, and he informed users that the Commissioner page was not private and would create public records. He also represented to the County Attorney that the page was being operated under the rules of "public forum" to protect constituents' constitutional rights, ECF No. 150-2 at 3. The Commissioner page was not used for personal matters, and although **[*21]** it transformed into more of a bulletin board format, there is at least a question of fact as to whether Underhill was a state actor and acted under color of state law in creating the Commissioner page.

Assuming state action with respect to the Commissioner page, Bear must prove that a public forum was opened and he was excluded or his speech infringed under the applicable forum analysis.[20] Social media accounts can serve as a designated or limited public forum as "government property that has not traditionally been regarded as a public forum but that has been intentionally opened up for that purpose." *Attwood, 526 F. Supp. 3d at 1170* (quoting *Bloedorn v. Grube, 631 F.3d 1218, 1231 (11th Cir. 2011)*). While "[r]easonable time, place, and manner restrictions are allowed" in a designated public forum, "any restriction based on the content of the speech must satisfy strict scrutiny, that is, the restriction must be narrowly tailored to serve a compelling government interest, and restrictions based on viewpoint are prohibited." *Pleasant Grove City, Utah v. Summum, 555 U.S. 460, 469-470, 129 S. Ct. 1125, 172 L. Ed. 2d 853 (2009)* (internal citations omitted). A limited public forum is similar but grants selective access to the designated class, and restrictions imposed on speech in a limited forum need only be "reasonable and viewpoint neutral." *Id. at 470*; *Bloedorn, 631 F.3d at 1231*. As to this page, the record **[*22]** supports a finding of either a designated or limited public forum, open to the public (initially with no restrictions) and used by Underhill to discuss County business with constituents, despite Underhill's contention that subjectively, he did not intend to create a public forum for discussion on the Commissioner page, but rather a one-way electronic bulletin board.

The final inquiry is whether Underhill impermissibly restricted Bear's speech on the Commissioner page. Underhill argues that no one was banned or blocked based on their viewpoint or the content of their message. Bear argues there are questions of fact because at some point, Underhill added the word list filter and a profanity filter and that despite the filters, constituents continued to engage in expressive activities, but because of the filters, not all comments were visible to all users (unless the parties were Facebook "friends") and some of the comments inexplicably were visible on the Commissioner page despite the filters. Bear contends that the profanity filter and restricted word list "are unquestionably content based," contrary to *First Amendment* standards. ECF No. 150 at 27.

For purposes of strict scrutiny in a designated public **[*23]** forum, a government restriction on speech is based on content if the restriction is based on the "topic discussed or idea or message expressed;" and "[t]his commonsense meaning of the phrase 'content based' requires a court to consider whether a regulation of speech 'on its face' draws distinctions based on the message a speaker conveys." *See Reed v. Town of Gilbert Az, 576 US 155, 163, 135 S. Ct. 2218, 192 L. Ed. 2d 236 (2015)*. The Court agrees that excluding speech from a designated public forum under a profanity filter would arguably be unconstitutional, and its reasonableness for use in a limited public forum would present a jury question. *See Cohen v. California, 403 U.S. 15, 26, 91 S. Ct. 1780, 29 L. Ed. 2d 284 (1971)* (holding profanity cannot be banned or criminalized absent compelling reason); *Tanner v. Ziegenhorn, Case No. 4:17 cv780-DPM, 2021 U.S. Dist. LEXIS 187782, 2021 WL4502080 (2021)* (finding a profanity filter on Sheriff's Facebook page, including words such as "pig" or "copper" was not justified and that an individual could not be banned from a designated public forum based on a profane message sent to a private administrative page); *Attwood, 526 F. Supp. 3d at 1173 n.5* ("restricting speech in a designated public forum based solely on a propensity for profanity is arguably unconstitutional"). But there is no

[20] Courts use "'forum analysis' to evaluate government restrictions on purely private speech that occurs on government property." *Walker v. Tex. Div., Sons of Confederate Veterans, Inc., 576 U.S. 200, 215, 135 S. Ct. 2239, 192 L. Ed. 2d 274 (2015)* (citing *Cornelius v. NAACP Legal Def. & Educ. Fund, Inc., 473 U.S. 788, 800, 105 S. Ct. 3439, 87 L. Ed. 2d 567 (1985)*). The Supreme Court has "identified three types of fora: the traditional public forum, the public forum created by government designation, and the nonpublic forum." *Cornelius, 473 U.S. at 802*. Viewpoint discrimination--which occurs when a government official's decision to take a challenged action was "impermissibly motivated by a desire to suppress a particular point of view"--is prohibited in all forums. *Cornelius, 473 U.S. at 812-13*.

evidence that Bear's speech was banned, excluded or hidden under the profanity filter. **[*24]** None.

The other filter words used to hide comments from view were neutral in character and did not draw a distinction based on a speaker's topic, idea, or viewpoint. ECF No. 150-5 (filter words included "and, the, you, your, it, good, congradulations, congratulations, will, should, won't, wont, commissioner, commission, board, county, this, that, those, they, them"). All users of the Commissioner page alike were subject to the same neutral word list filter, and Underhill testified that he did not block individuals from the Commissioner page. Bear acknowledged he had access to the page, and there is no evidence to the contrary. Bear nonetheless suggests that because some messages inextricably could be viewed on the page regardless of the filters, there is a reasonable inference that Underhill might have blocked individuals, but this type of speculation is insufficient to create a material question of fact. Bear has no evidence that he was ever denied access to the Commissioner page, he was never blocked for the use of profanity, and after the common word filters were added, his messages using those words were hidden from public view but still available to him and his "friends," and the **[*25]** filter words were so common that they did not ban any particular topic, message or viewpoint. Moreover, the cases cited by Bear are factually distinguishable because in each instance, the plaintiff was banned or blocked based on the content or viewpoint of their message or filter words pertaining to a particular content or disparaging viewpoint. Underhill is therefore entitled to summary judgment with regard to the Commissioner page.

Regarding the Underhill page, Underhill argues he is entitled to summary judgment because this page was personal and not a public forum, and it contained no vestige or trappings of his office to suggest it was anything other than a personal page. Bear responds that Underhill's testimony creates material questions of fact because he acknowledged discussing County issues on the page, he was required to disclose public records from this page, and Bear was on a list of people Underhill blocked from the Underhill page. Bear also argues that Underhill attempted to control the public dialogue by sharing a comment from his Commissioner page to the Underhill page so he could engage only with his Facebook "friends."

The record does not support a finding of state action **[*26]** with regard to the Underhill page. While some public records were identified on the Underhill page because of their content, that alone is an insufficient basis to find state action for purposes of the entire page. *See* *Brentwood Acad., 531 U.S. at 295* ("[S]tate action may be found if, though only if, there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State itself." (internal quotations omitted)). There is no evidence that Underhill opened this page for public comment or invited public discussions in his capacity as a Commissioner. *See* *Halleck, 139 S. Ct. at 1930* ("merely hosting speech by others is not a traditional, exclusive public function and does not alone transform private entities into state actors subject to *First Amendment* constraints"). The page bears no insignia of Underhill's office—no official title, logo, or mark. Underhill acknowledged that he does occasionally post about issues, political and societal, as he has his entire life, but this is not a situation where the page could only exist by use of his title or office, and the discussions that resulted in the creation of public records were a small fraction of the content of this page.[21] Moreover, the record **[*27]** reflects that when discussions on the page veered into County issues, Underhill directed the discussion to his Commissioner page or to his official email while cautioning users that this was a personal page and discussions related to matters that may come before the Board were reserved for his Commissioner page.[22] *See* ECF No. 144-2 at 246-61. There is no question of fact as to state action on this record and no evidence that the Underhill page was a public forum, as opposed to a personal Facebook page. Therefore, the fact that Bear may have been blocked from the page does not rise to a *First Amendment* violation. Underhill is entitled to summary judgment.

Accordingly:

1. Plaintiff's Partial Motion for Summary Judgment on entitlement to attorney's fees under Counts I and III, ECF No. 145, is **GRANTED**. Plaintiff has **30 days** to file a motion to establish the amount, and the parties are directed to proceed in accordance with *N.D. Fla. Loc. R. 54.1(E)*, (F), and (G).

2. Defendant Douglas Underhill's Motion for Summary Judgment on Count VII, the individual capacity *First Amendment* claim, ECF No. 144, is **GRANTED**.

3. The Motion for Summary Judgment by Douglas Underhill in his Official Capacity, Count V, ECF No. 143, is **MOOT,**

[21] During the litigation, Underhill produced thousands of pages of documents, he withheld approximately 24,000 as personal, and the Court compelled the production of 129 as public records, less than 1%. *See* ECF No. 128 at 17-18. In addition, an unknown number estimated by Bear to be in the hundreds were redacted because they contained both personal messages and public records.

[22] These posts were dated November 2018, which was before Underhill had set the Commissioner page with filters attempting to create a one-way communication bulletin board.

see ECF No. 148.

4. Count II is **[*28] DISMISSED** pursuant to ECF Nos. 128, 140.

5. Final judgment will await entry of the attorney's fee award.

DONE AND ORDERED this 25th day of March 2023.

/s/ *M. Casey Rodgers*

M. CASEY RODGERS

UNITED STATES DISTRICT JUDGE

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Media Gen. Operation, Inc. v. Feeney

Court of Appeal of Florida, First District

February 21, 2003, Opinion Filed

CASE NO. 1D02-2849

Reporter
849 So. 2d 3 *; 2003 Fla. App. LEXIS 2023 **; 31 Media L. Rep. 1983; 28 Fla. L. Weekly D 547

MEDIA GENERAL OPERATION, INC., Publisher of THE TAMPA TRIBUNE; ORLANDO SENTINEL COMMUNICATION, Publisher of the ORLANDO SENTINEL, Appellants, v. TOM FEENEY, in his official capacity as SPEAKER OF THE STATE OF FLORIDA HOUSE OF REPRESENTATIVES; REPUBLICAN PARTY OF FLORIDA, Appellees.

Subsequent History: **[**1]** As Corrected April 22, 2003.

Review denied by *Media Gen. Operations, Inc. v. Feeney, 857 So. 2d 196, 2003 Fla. LEXIS 1640 (Fla., Sept. 12, 2003)*

Prior History: An appeal from the Circuit Court for Leon County. Honorable L. Ralph Smith, Judge.

Disposition: Affirmed in part; Reversed in part and Remanded.

Core Terms

public record, redacted, records, telephone number, official business, numbers, phone, cellular phone, disclosure, e-mail

Case Summary

Procedural Posture
Appellant media companies sought review of the judgment of the Circuit Court for Leon County (Florida). The media companies had sought information from the cellular phone records of five staff employees of appellee Florida House of Representatives pursuant to public record requests to the House and the Republican Party of Florida. The trial court held the personal calls fell outside the current definition of public records.

Overview

The cellular phones, used by the five individuals for personal calls and for official business calls, were paid for by the Republican party without any cost to the individuals or to the House. The Republican party delivered copies of the telephone records, redacted by the individuals as instructed, to outside counsel for the House and he forwarded them to the media companies. The media companies claimed they were entitled to receipt of the cellular phone records in their entirety without redaction. They sought a bright-line ruling that all phone calls in the billing records were "public record." The appellate court held the media companies were 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, pursuant to *Fla. Stat. ch. 11.0431* (2002). The "private" or "personal" phone calls by the five individuals were not created or received in connection with the official business of the House. Therefore, the personal calls fell outside the definition of public records and were properly redacted.

Outcome
The appellate court reversed the trial court's ruling permitting the redaction of the numbers and remanded for the trial court to direct that the redacted public call telephone numbers be provided to the media companies.

LexisNexis® Headnotes

Administrative Law > Governmental Information > Freedom of Information > General Overview

Administrative Law > Governmental Information > Recordkeeping & Reporting

HN1[] **Governmental Information, Freedom of Information**

The public record statute defines "public record" and the Florida Constitution requires disclosure of documents made

or received pursuant to law or ordinance or in connection with the transaction of official business. *Fla. Stat. ch. 119.011(1)* (2000); *Fla. Const. art. I, § 24(a)*; and *Fla. Stat. ch. 11.0431(4)* (2002).

Counsel: David S. Bralow, Senior Counsel, Tribune Company, Orlando; Gregg D. Thomas, Esquire, Rachel E. Fugate, Esquire and Deanna K. Shullman, Esquire, of Holland & Knight LLP, Tampa, for Appellants.

Barry Richard, Esquire, Greenberg Traurig, P.A., Tallahassee; E. Thom Rumberger, Esquire, Daniel J. Gerber, Esquire, Kimberly D. Webb, Esquire, of Rumberger, Kirk & Caldwell, Tallahassee, for Appellees.

Judges: POLSTON, J. BARFIELD and BENTON, JJ., concur.

Opinion by: POLSTON

Opinion

[*4] POLSTON, J.

Appellants seek additional information from the cellular phone records of five staff employees of the Florida House of Representatives pursuant to public record requests to the House and the Republican Party of Florida. The cellular phones, used by the five individuals for personal calls and for official business calls, are paid for by the Republican Party without any cost to the individuals or to the House. [1]

[2]** In March, 2002, appellants demanded that the House provide copies of the cellular **[*5]** phone bills and the House responded that no such records existed. The appellants also demanded copies of the records from the Republican Party, which refused to provide them. Appellants filed suit to recover the requested documents. Shortly after appellants filed suit, outside counsel for the House instructed the five individuals to review the relevant cellular phone records at the Republican Party headquarters and to redact all information relating to calls they determined to be private. The employees were further instructed that any calls relating to the business of the House or to pending or potential legislation were considered public calls and were not to be redacted, except for the actual phone numbers called. In a failed attempt to facilitate a resolution of the matter without further litigation, the employees were instructed to write the name of the person or entity called for each of the public calls. The Republican Party delivered copies of the telephone records, redacted by the individuals as instructed, to outside counsel for the House and he forwarded them to counsel for appellants.

Appellants **[**3]** claim that they are entitled to receipt of the cellular phone records in their entirety without redaction. We hold that under the circumstances of this case, appellants are entitled to receipt of the redacted phone numbers for those designated as public calls, but are not entitled to receipt of the redacted private calls, pursuant to *section 11.0431, Florida Statutes* (2002). Accordingly, we affirm in part and reverse in part.

I.

The Republican Party argues that the cellular phone billing records at issue are its property and arise out of the business of the Republican Party, not on behalf of a public agency, and therefore are not governed by the disclosure provisions of *Art. I, § 24 of the Florida Constitution* or *section 11.0431, Florida Statutes.* However, because the Republican Party voluntarily produced the phone records, we do not reach the issue of whether the Republican Party was acting on behalf of a public agency and therefore required to disclose records pursuant to appellants' public record request. *See News and Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc., 596 So. 2d 1029 (Fla. 1992)* **[**4]** (holding that a "totality of factors" test should be utilized to determine whether a private entity is acting on behalf of a public agency and is therefore subject to the public records law).

The appellants seek a bright-line ruling that all phone calls in the billing records are "public record." As noted in *Times Publishing Co. v. City of Clearwater, 830 So. 2d 844 (Fla. 2d DCA 2002)*, *HN1*[] the public record statute defining "public record" and the Florida Constitution require disclosure of documents made or received pursuant to law or ordinance or in connection with the transaction of official business. *Id. at 846* (quoting *section 119.011(1), Fla. Stat.* (2000) and *Art. I, § 24(a), Fla. Const.*); *see § 11.0431(4), Fla. Stat.* (2002)(using the same language defining public records of the House). The court in *Times Publishing*, rejecting a similar argument for a bright-line ruling that all e-mail on the City's computer system was "public record," stated:

[1] In February, 2002, the House administration made the decision to discontinue paying for employee cellular phone service and the Republican Party began paying for the service. There is no dispute in this case over compliance with appellants' prior public record requests to the House for cellular phone records prior to February, 2002.

> In this case, however, "private" or "personal" e-mail simply falls outside the current definition of public records. Such e-mail is not "made or **[**5]** 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 **[*6]** 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.

Id. at 846-47.

Likewise, the "private" or "personal" phone calls by these five individuals were not created or received in connection with the official business of the House. Therefore, we agree with the trial court that the personal calls fall outside the current definition of public records and were properly redacted. [2] *Id.*; *see also* Fla. R. Jud. Admin. 2.051, Committee Commentary at 11 (West 2002 Second Cumulative Supplement)(commenting on the Florida Supreme Court's rules for public access to records of the judicial branch of government: "[e]-mail may also include transmissions that are clearly not official business and are, consequently, not required to be recorded as a public record.").

[6]** *II.*

The House agrees that calls made in connection with official business are responsive to appellants' public record request, but argues that the phone numbers were properly redacted, citing *Rea v. Sansbury, 504 So. 2d 1315 (Fla. 4th DCA 1987)* and arguing that the disclosure of these numbers will result in unreasonable consequences to the persons called.

We do not find *Rea* applicable to these circumstances. The court in *Rea* held that a telephone number providing access to the Palm Beach County Online Monitor System was not a public record. The Online Monitor System was established "to enable outlying county employees who are involved in matters pending before the commission or particular public board to monitor proceedings via telephone to determine when their presence at the proceeding was necessary so as to obviate their spending unnecessary time sitting through matters irrelevant to their function and purpose." *Id. at 1317*. The court noted that because the system will only tolerate so many calls, the county refused to allow its use by the general public. *Id.* The county argued that the telephone number acted as the access **[**7]** to the system in the same manner as a county computer with access codes and keys that are not public information subject to the public records law. *Id.* The court agreed with the county that the telephone number was not a public record, noting that the telephone number accessed public information otherwise available. *Id. at 1317-18*. Here, the redacted telephone numbers called during the transaction of official business do not act as access numbers to public information otherwise available. Therefore, *Rea* does not apply.

Although we agree with the House that the disclosure of these telephone numbers may result in unreasonable consequences to the persons called, this argument should be made to the Florida Legislature, which has specified various public record exemptions for disclosure of telephone numbers. *See, e.g.*, *§ 119.07(2)(a), Fla. Stat.* (2002)(exempting telephone numbers for law enforcement personnel, correctional officers, firefighters, judges, specified human resource directors); *Memorial Hospital-West Volusia, Inc. v. News-Journal Corp., 729 So. 2d 373, 380* & n.14 (Fla. 1999)(ruling that "an exemption **[**8]** from public records access is available only after the legislature has followed the express **[*7]** procedure provided in *article 1, section 24(c) of the Florida Constitution*"); *Wait v. Florida Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979)*(rejecting public policy considerations that support public record exemptions, the Court stated that such arguments should be addressed to the legislature; "Courts deal with the construction and constitutionality of legislative determinations, not with their wisdom."). Therefore, we reverse the trial court's ruling permitting the redaction of these numbers and remand for the trial court to direct appellees to provide these redacted public call telephone numbers to appellants.

Conclusion

We hold that under the circumstances of this case, appellants are entitled to receipt of the redacted phone numbers for those designated as public calls, but are not entitled to receipt of the redacted private calls.

Affirmed in part; Reversed in part and Remanded.

[2] There is no dispute over the individuals' designation of calls as private or public. It was the appellants' burden to request an in camera inspection of the calls designated as private if they intended to prove that the designations as private were incorrect. *See Times Publishing, 830 So. 2d at 846* & n.2.

BARFIELD and BENTON, JJ., concur.

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O'Boyle v. Town of Gulf Stream

Court of Appeal of Florida, Fourth District

October 24, 2018, Decided

No. 4D17-2725

Reporter
257 So. 3d 1036 *; 2018 Fla. App. LEXIS 15247 **; 43 Fla. L. Weekly D 2386; 2018 WL 5291287

MARTIN E. O'BOYLE and ASSET ENHANCEMENT, INC., Appellants, v. TOWN OF GULF STREAM, SCOTT MORGAN, JOHN C. RANDOLPH, ROBERT A. SWEETAPPLE, and JOANNE O'CONNOR, Appellees.

Prior History: [**1] Appeal from the Circuit Court for the Fifteenth Judicial Circuit, Palm Beach County; David E. French, Judge; L.T. Case No. 50-2015-CA-001737-XXXX-MB.

Martin E. O'Boyle & Asset Enhancement v. Town of Gulf Stream, 2017 Fla. Cir. LEXIS 18029 (Fla. Cir. Ct., Aug. 1, 2017)

Core Terms

public record, records, trial court, e-mails, bills, text message, employees, copies, moot, in-camera, texts, inspection, redacted, subject to disclosure, entity's, costs

Case Summary

Overview

HOLDINGS: [1]-The dismissal of appellants' claims under the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., was reversed and the case remanded to the trial court for it to conduct an in-camera inspection of the disputed text messages sent to and from the town's mayor to determine whether any qualify as public records; [2]-The court held to comply with the dictates of the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession-such as e-mails-by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester.

Outcome

Judgment affirmed in part; reversed in part; case remanded to trial court for further proceedings.

LexisNexis® Headnotes

Civil Procedure > Appeals > Standards of Review > De Novo Review

Civil Procedure > ... > Defenses, Demurrers & Objections > Motions to Dismiss > Failure to State Claim

Civil Procedure > ... > Pleadings > Complaints > Requirements for Complaint

Civil Procedure > Pleading & Practice > Pleadings > Rule Application & Interpretation

HN1[] **Standards of Review, De Novo Review**

A motion to dismiss tests whether the plaintiff has stated a cause of action. An appeal of a trial court's ruling on a motion to dismiss is an issue of law subject to de novo review. The trial court's decision regarding a motion to dismiss is limited to a consideration of the allegations within the four corners of the complaint, and such allegations must be viewed in the light most favorable to the non-moving party. Likewise, the determination of whether something is a public record is a question of law subject to de novo review and is determined on a case-by-case basis.

Administrative Law > Governmental Information > Freedom of Information > Methods of Disclosure

HN2[] **Freedom of Information, Methods of Disclosure**

The right of access to public records is a cornerstone of our political culture, therefore, the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., must be liberally construed in favor of access, and all exemptions must be limited to their stated purpose.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Public Inspection

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN3[] **Methods of Disclosure, Public Inspection**

Art. I, § 24(a), Fla. Const., grants every person the right to inspect or copy any public record made or received in connection with the official business of any public body, officer, or employee of the state, or persons acting on their behalf. The Act implements this important constitutional tenet, and declares: It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency. *§ 119.01(1), Fla. Stat. (2017)*. Public custodians must allow a requested record to be inspected and copied by 'any person desiring to do so, at any reasonable time, and under reasonable conditions. *§ 119.07(1)(a), Fla. Stat. (2016)*.

Administrative Law > Governmental Information > Freedom of Information > Enforcement

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

HN4[] **Freedom of Information, Enforcement**

To set forth a cause of action under the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., a party must prove they made a specific request for public records, the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner. Public records 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. *§ 119.011(12), Fla. Stat. (2017)*.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN5[] **Freedom of Information, Defenses & Exemptions From Public Disclosure**

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. However, for that information to indeed be a public record, an official or employee must have prepared, owned, used, or retained it within the scope of his or her employment or agency. An official or employee's communication falls within the scope of employment or agency only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests. Therefore, not all written communications sent or received by public officials or employees of a government agency are public records subject to disclosure upon request under the Act. The reach of the Act is to those records related to the employee or official's public responsibilities. For instance, employees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary. None of these examples would result in a public record in the usual case.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN6[] **Freedom of Information, Defenses & Exemptions From Public Disclosure**

The Florida Supreme Court has agreed with the Second District that based on the plain language of *§ 119.011(1), Fla. Stat.*, private or personal e-mails simply fall outside the current definition of public records. Not all e-mails

transmitted or received by public employees of a government agency are public records pursuant to the Act by virtue of their placement on a government-owned computer system.

Administrative Law > Governmental Information > Freedom of Information > Defenses & Exemptions From Public Disclosure

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

HN7[] **Freedom of Information, Defenses & Exemptions From Public Disclosure**

To comply with the dictates of the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., the governmental entity must proceed as it relates to text messaging no differently than it would when responding to a request for written documents and other public records in the entity's possession-such as e-mails-by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester. Where specified communications to or from individual state employees or officials are requested from a governmental entity-regardless of whether the records are located on private or state accounts or devices-the entity's obligation is to conduct a reasonable search that includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to a proper request. The ability of public officials and employees to use cell phones to conduct public business by creating and exchanging public records-text messages, e-mails, or anything else-is why a process must be available to offer the public a way to obtain those records and resolve disputes about the extent of compliance. Without such a process, the Act cannot fulfill the people's mandate to have full access to information concerning the conduct of government on every level.

Administrative Law > ... > Freedom of Information > Enforcement > Judicial Review

Administrative Law > ... > Freedom of Information > Compliance With Disclosure Requests > Notification Requirements

HN8[] **Enforcement, Judicial Review**

When judicial intervention is requested to test the adequacy of the entity's response under the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., the court can make the requisite determination of relevance and privilege as to any contested record. And like pre-trial discovery conducted in the context of litigation, the text messages or other records that may ultimately be produced will be narrowly confined to those found to be relevant and non-privileged.

Administrative Law > Governmental Information > Freedom of Information > Methods of Disclosure

HN9[] **Freedom of Information, Methods of Disclosure**

The purpose of both *Art. I, § 24(a), Fla. Const.*, and the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device.

Administrative Law > ... > Freedom of Information > Methods of Disclosure > Record Requests

Administrative Law > ... > Enforcement > Judicial Review > Standards of Review

HN10[] **Methods of Disclosure, Record Requests**

The Florida Court of Appeal acknowledges that the public's statutory right to public records does not extinguish an individual's constitutional and statutory rights in private information. But it does not read *Art. I, § 24(a), Fla. Const.*, or the Public Records Act, *§ 119.01, Fla. Stat. (2017)* et seq., as a zero-sum choice between personal liberty and government accountability.

Civil Procedure > Preliminary Considerations > Justiciability > Mootness

HN11[] **Justiciability, Mootness**

An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect. A moot case generally will be dismissed. But there are at least three instances where an otherwise moot case will not be dismissed: (1) when questions of great public importance are raised, (2) when issues are likely to recur, or (3) if collateral legal consequences that affect the rights of a party

flow from the issue to be determined.

Counsel: Robert Rivas of Sachs Sax Caplan, P.L., Boca Raton, (withdrawn as counsel after filing brief), and Jonathan R. O'Boyle of The O'Boyle Law Firm, P.C., Deerfield Beach, for appellants.

Hudson C. Gill and Jeffrey L. Hochman of Johnson, Anselmo, Murdoch, Burke, Piper & Hochman, P.A., Fort Lauderdale, for appellees Town of Gulf Stream, Scott Morgan, John C. Randolph, and Joanne O'Connor.

Therese A. Savona and Kathryn L. Ender of Cole, Scott & Kissane, P.A., Miami, for appellee Robert A. Sweetapple.

Judges: KLINGENSMITH, J. TAYLOR and KUNTZ, JJ., concur.

Opinion by: KLINGENSMITH

Opinion

[*1039] KLINGENSMITH, J.

Appellants Martin E. O'Boyle and Asset Enhancement, Inc., ("Asset") appeal the trial court's dismissal of their Complaint to Enforce Florida's Sunshine and Public Records Laws and for Declaratory and Injunctive Relief against the Town of Gulf Stream ("the Town") and other affiliated individuals (collectively, "appellees").[1] We find the trial court properly dismissed the Sunshine Law claims, as well as the claims arising from alleged public meeting violations under *Chapter 286, Florida Statutes*, and affirm **[**2]** on those issues without further comment. However, we reverse the dismissal of appellants' claims under the Public Records Act, and remand for further proceedings.

In their complaint, Asset and O'Boyle alleged separate Public Records Act violations regarding two public records requests: (1) for copies of bills and payments sent to the Town for services rendered by the Town's attorney; and (2) for copies of text messages sent or received by the Town's Mayor since the time of his appointment. Asset alleged that the Town produced illegitimately redacted copies of the bills and payments. In another claim, O'Boyle asserted that the Town produced "a cherry picked" selection of texts which painted O'Boyle "in a negative light." After another records request that produced additional, previously unseen texts, O'Boyle insisted that the initial release was incomplete and that the Town and Mayor deliberately concealed records from the public.

Appellants alleged that the Town violated *Article I, section 24 of the Florida Constitution* and *Chapter 119, Florida Statutes ("the Public Records Act" or "the Act")*. They requested the trial court order the Town and others to allow the inspection, copying, and photographing of the requested records after a hearing held pursuant to *section 119.11, Florida Statutes* (2017). **[**3]** They then filed a Motion for Mandatory In-Camera Inspection of Record asking that the court review the redacted legal bills to determine if they fell within the "work product" exception of the Public Records Act, as the Town claimed. A week later, the Town turned over the bills and payment records at issue without any redactions.

Appellees each filed a motion to dismiss, and the trial court held a hearing on the parties' motions. The court dismissed the complaint and granted ten days for amendment. Instead of amending, appellants requested **[*1040]** that a final judgment be entered, and the trial court obliged.

HN1[] "A motion to dismiss tests whether the plaintiff has stated a cause of action." *Bell v. Indian River Mem'l Hosp., 778 So. 2d 1030, 1032 (Fla. 4th DCA 2001)*. An appeal of a trial court's ruling on a motion to dismiss is an issue of law subject to *de novo* review. *See id.* The trial court's decision regarding a motion to dismiss is limited to a consideration of the allegations within the four corners of the complaint, and such allegations must be viewed in the light most favorable to the non-moving party. *See id.* Likewise, "[t]he determination of whether something is a public record is a question of law subject to *de novo* review and is determined on a case-by-case **[**4]** basis." *Bent v. State, 46 So. 3d 1047, 1049 (Fla. 4th DCA 2010)*; *accord State v. City of Clearwater, 863 So. 2d 149, 151 (Fla. 2003)*; *Media Gen. Convergence, Inc. v. Chief Judge of the Thirteenth Jud. Cir., 840 So. 2d 1008, 1013 (Fla. 2003)*.

HN2[] The right of access to public records is a "cornerstone of our political culture," *Bd. of Trs., Jacksonville Police & Fire Pension Fund v. Lee, 189 So. 3d 120, 124 (Fla. 2016)* (further citation omitted); therefore, the Public Records Act "must be liberally construed in favor of access, and all exemptions must be limited to their stated purpose." *Palm Beach Cty. Sheriff's Office v. Sun-Sentinel Co., LLC, 226 So. 3d 969, 972 (Fla. 4th DCA 2017)*.

HN3[] "*Article I, Section 24(a) of the Florida Constitution* grants '[e]very person . . . the right to inspect or copy any public record made or received in connection with the official

[1] Appellants filed their complaint against several other defendants, including the Town's mayor, and two of the Town's attorneys.

business of any public body, officer, or employee of the state, or persons acting on their behalf.'" *Id.* (alterations in original). The Act "implements this important constitutional tenet, and declares: 'It is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency.'" *Id.* (quoting § 119.01(1), Fla. Stat. (2017)); *accord* Rasier-DC, LLC v. B&L Serv., 237 So. 3d 374, 376 (Fla. 4th DCA 2018). "Public custodians must allow a requested record to be inspected and copied by 'any person desiring to do so, at any reasonable time, [and] under reasonable conditions.'" *Id.* (alterations in original) (quoting § 119.07(1)(a), Fla. Stat. (2016)).

HN4[↑] To set forth a cause of action under the Act, a party must "prove they made a specific request for public records, **[**5]** the City received it, the requested public records exist, and the City improperly refused to produce them in a timely manner." Grapski v. City of Alachua, 31 So. 3d 193, 196 (Fla. 1st DCA 2010). "Public records" 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." § 119.011(12), Fla. Stat. (2017); *accord* Braddy v. State, 219 So. 3d 803, 820 (Fla. 2017).

In line with these authorities, we consider the requests for the text messages and the attorney bills and payments separately.

Text Messages as Public Records

This is an action against a municipality to obtain records that, while potentially related to the Town's public business, are in the exclusive control of one of their elected officials. HN5[↑] 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. However, for that information to indeed be a public record, an official or employee must have prepared, **[*1041]** owned, used, or retained it within the scope of his or her employment or agency. An **[**6]** official or employee's communication falls "within the scope of employment or agency" only when their job requires it, the employer or principal directs it, or it furthers the employer or principal's interests.

Therefore, not all written communications sent or received by public officials or employees of a government agency are public records subject to disclosure upon request under the Act. *See* City of Clearwater, 863 So. 2d at 150. The reach of the Act is to those records related to the employee or official's public responsibilities. For instance, "employees do not generally act within the scope of employment when they text their spouse about working late or discuss their job on social media. Nor do they typically act within the scope of employment by creating or keeping records purely for private use, like a diary." *See* Nissen v. Pierce Cty., 183 Wn.2d 863, 357 P.3d 45, 54 (Wash. 2015). None of these examples would result in a public record in the usual case.

Illustratively, in *City of Clearwater*, a Times Publishing Company ("Times") reporter requested copies of all e-mails sent or received over the City's network by two City employees throughout the course of a year. 863 So. 2d at 150. The employees sorted their e-mails into private and public categories, and the City released the "public" emails **[**7]** to the reporter. *Id.* However, Times filed an action asserting it was entitled to *all* emails on the City's computers. Id. at 150-51. The trial court ordered all e-mails to be obtained, preserved, and secured from destruction. *Id.* After a final hearing, the trial court denied Times' requests for a writ of mandamus and permanent injunctive relief. *Id.* On appeal, the Second District affirmed the lower court's order, but did so without prejudice to Times seeking an in-camera review of all e-mails, while also ruling that "private" e-mails were outside the Act's scope. *Id.*

On review, HN6[↑] the Florida Supreme Court agreed with the Second District that "[b]ased on the plain language of section 119.011(1), . . . 'private' or 'personal' e-mails 'simply fall[] outside the current definition of public records.'" Id. at 153 (alteration in original) (quoting Times Publ'g Co. v. City of Clearwater, 830 So. 2d 844, 847 (Fla. 2d DCA 2002)). The Court concluded that not "all e-mails transmitted or received by public employees of a government agency are public records pursuant to [the Act] by virtue of their placement on a government-owned computer system." Id. at 150 (alteration in original); *accord Butler v. City of Hallandale Beach, 68 So. 3d 278, 280-81 (Fla. 4th DCA 2011).*

HN7[↑] To comply with the dictates of the Act, the governmental entity must proceed as it relates to text messaging no differently than it would **[**8]** when responding to a request for written documents and other public records in the entity's possession—such as e-mails—by reviewing each record, determining if some or all are exempted from production, and disclosing the unprotected records to the requester. Where specified communications to or from individual state employees or officials are requested from a governmental entity—regardless of whether the records are located on private or state accounts or devices—

the entity's obligation is to conduct a reasonable search that includes asking those individual employees or officials to provide any public records stored in their private accounts that are responsive to a proper request. The ability of public officials and employees to use cell phones to conduct public business by creating and exchanging public records—text messages, e-mails, or anything else—is why a process must be available to offer the public a way to obtain those records and resolve disputes **[*1042]** about the extent of compliance. Without such a process, the Act cannot fulfill the people's mandate to have full access to information concerning the conduct of government on every level.

HN8[] When judicial intervention is requested to **[**9]** test the adequacy of the entity's response, the court can make the requisite determination of relevance and privilege as to any contested record. And like pre-trial discovery conducted in the context of litigation, the text messages or other records that may ultimately be produced will be narrowly confined to those found to be "relevant" and "non-privileged."

Strong public policy reasons also support the conclusion that electronic information stored on privately-owned devices may be subject to disclosure under the Public Records Act. *HN9*[] The purpose of both *Article I, section 24* and Chapter 119 is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device.

HN10[] We acknowledge that the public's statutory right to public records does not extinguish an individual's constitutional and statutory rights in private information. But we do not read *Article I, section 24* or the Public Records Act as a zero-sum choice between personal liberty and government accountability. Accordingly, the Town's reasons for its lack of disclosure, whether for reasons related to relevancy, **[**10]** the application of possible privileges, or otherwise, necessitates a judicial review of the available communications to identify those which are subject to disclosure and any defenses to allegations of noncompliance. Such review would ensure that a meaningful determination of relevancy and privilege can be made, disputes can be expeditiously resolved, and all legitimate privacy concerns safeguarded.

Clearly, some of the text messages reviewed by the trial court during this process could include personal or private information, and some could be the subject of legitimate claims of privilege. Deciding which ones may remain private was the very purpose of the protocol ratified by the Supreme Court's *City of Clearwater* decision—review these communications in-camera and afford an opportunity to raise objections to protect against disclosure of irrelevant, privileged, or otherwise non-discoverable materials. To avoid that process altogether, assuming the scope of the request was reasonable, it would have been incumbent on appellees to show some controlling authority that the Public Records Act did not apply, or otherwise prohibited, the submission of the text messages to the court for an **[**11]** in-camera review. No such showing was made here.

Regardless of whether any of the texts are ultimately deemed subject to disclosure, each element of O'Boyle's public records claim as stated in the complaint regarding the text messages was sufficiently pled. *See Grapski, 31 So. 3d at 196*; *Brandon, 141 So. 2d at 279*. First, O'Boyle stated in the complaint that a *specific request* was made for all texts over a certain period of time. *See Grapski, 31 So. 3d at 196*. Second, the Town *received the request* because it responded with a release of certain texts deemed to be public records. *See id.* Third, the requested public records *texts existed*, as was evident by their release and inclusion as an exhibit with the complaint. *See id.* Fourth, O'Boyle complained that a later response by the Town revealed *several additional texts that were not released upon the first request*, leading to the belief that there may be more available. *See id.*

Whether O'Boyle's individual claim proceeds further may depend on the outcome **[*1043]** of that in-camera review. But for now, we reverse the dismissal on this count of appellants' complaint and remand for the trial court to conduct an in-camera inspection of the disputed text messages sent to and from the Town's Mayor to determine whether any qualify **[**12]** as public records.

Production of Redacted Attorney Bills

Following Asset's public records request for attorney billing records, the Town responded by citing work product privilege and only provided redacted copies of the requested records. After appellants filed a motion for in-camera review, but before the dismissal hearing began, the Town acquiesced and provided Asset with a complete set of unredacted billing records. As a result, the Town asserts this issue on appeal is now moot and should be dismissed. We disagree.

HN11[] "An issue is moot when the controversy has been so fully resolved that a judicial determination can have no actual effect." *Godwin v. State, 593 So. 2d 211, 212 (Fla. 1992)*. "A moot case generally will be dismissed." *Id.* But there are at least three instances where an otherwise moot case will not be dismissed: (1) when questions of great public

importance are raised, (2) when issues are likely to recur, or (3) "*if collateral legal consequences that affect the rights of a party flow from the issue to be determined.*" *Id.* (emphasis added)*; accord Paul Jacquin & Sons, Inc. v. City of Port St. Lucie, 69 So. 3d 306, 308 (Fla. 4th DCA 2011).*

We find the case of *Cookston v. Office of Pub. Def., 204 So. 3d 480 (Fla. 5th DCA 2016)*, to be analogous. There, Cookston filed a petition for writ of mandamus seeking the trial court to compel the production of correspondence from the Public **[**13]** Defender's Office ("PDO") and an assistant public defender pursuant to the Act. *Id. at 481.* He also petitioned for costs. *Id.* The trial court found the petition for writ of mandamus moot because the PDO provided the requested documents to Cookston in full shortly after it was filed. *Id.* On appeal, the Fifth District held, "Cookston's petition was not moot because the court did not determine whether he was entitled to reasonable costs of enforcement pursuant to *section 119.12*." *Id.* The matter was reversed and remanded for the trial court to determine whether the PDO's delay in providing the records entitled Cookston to an award of costs. *Id.; accord Mazer v. Orange Cty., 811 So. 2d 857, 858-60 (Fla. 5th DCA 2002).*

Similar to *Cookston* and *Mazer*, Asset requested records and, after filing a claim with the trial court, the records were provided in their requested form. *See Cookston, 204 So. 3d at 481*; *Mazer, 811 So. 2d at 858-60*. While it was argued in *Cookston* and *Mazer* that the issues were rendered moot, the appellate court held that collateral legal consequences affecting the rights of a party still existed—namely, the issuance of fees and costs based on improperly refused, completed, or delayed records requests. *See Cookston, 204 So. 3d at 481*; *Mazer, 811 So. 2d at 860*; *Godwin, 593 So. 2d at 212.*

Like those cases, we find this claim was not moot due to the presence of collateral issues yet to be decided **[**14]** by the trial court—specifically, a determination whether the Town's initial redactions of the bills were proper, and whether any reasonable attorney's fees, costs, and expenses, should be awarded. We therefore reverse and remand for a determination of those issues.

Affirm in part; reverse in part; and remand for further proceedings consistent with this opinion.

TAYLOR and KUNTZ, JJ., concur.

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