OFFICE OF THE STATE ATTORNEY
FOURTH JUDICIAL CIRCUIT
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CLOSING MEMORANDUM

Access to public records has been described as a "cornerstone of our political culture." In re Report & Recommendations of Judicial Mgmt. Council of Fla. on Privacy & Elec. Access to Court Records, 832 So. 2d 712, 713 (Fla. 2002). The right to access the records of state and local governments is a right guaranteed by the Florida State Constitution. Chapter 119, Florida Statutes enforces the right of access to public records. In the absence of a statutory exemption, this right of access applies to all materials made or received by an agency in connection with the transaction of official business used to perpetuate, communicate, or formalize knowledge. The purpose behind the right and enforcement "is to allow Florida's citizens to discover the actions of their government."[1]

The State Attorney's Office began an investigation of Nassau County Attorney Michael Mullin (Mullin) after allegations arose during civil litigation, strongly suggesting Mullin committed criminal acts by knowingly violating Florida's public records and open government laws[2]. The State's investigation found evidence that Mullin committed criminal acts by permitting Nassau County's systemic failure to preserve public records, failing to truthfully and timely respond to Raydient's public records request, and allowing the deletion of text messages constituting public records. Mullin committed these violations as a public appointee of the Nassau County Board of County Commissioners (BOCC), who was charged with giving legal advice to the BOCC. Further, the evidence supports that Mullin committed these violations of the public records law to give the County what he must have believed was an advantage in the ENCPA dispute, and to hinder Raydient's efforts to discover the truth associated with his actions as a public official.

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[1] Bent v. State, 46, So.3d 1047, 1049 (Fla. 2016) (quoting *Christy v. Palm Beach Cnty. Sheriffs Office*, 698 So.2d 1365, 1366 (Fla. 4th DCA 1997))

[2] The applicable laws for this investigation are set forth in "Addendum A", attached hereto.

I. Michael Mullin

In his most recent term as County Attorney, Mullin has served in his role since 2015. Mullin previously served as County Attorney for twenty-five years, leaving in 2007 for private practice. He was admitted to the Florida Bar in 1980 after graduating from the Stetson School of Law. He does not have any prior criminal history.

II. Background and Timeline

Raydient began developing approximately 24,000 acres of land in Nassau County. This development includes the Wildlight community. Master planning for the ENCPA has been ongoing since 2007. In 2017, a dispute arose between Nassau County and Raydient over the terms of the ENCPA. Specifically, the parties disagreed over who was responsible for constructing and maintaining specific infrastructure inside the ENCPA.

In February of 2018, a delegation of public employees and officials from Nassau County went to Tallahassee to oppose legislation they asserted would impact the ENCPA.[3] Members of the delegation exchanged numerous text messages before, during, and after the trip.[4] The messages concerned the dispute between Raydient and Nassau County and potential courses of action the County might take in challenging Raydient.

In October 2018, Raydient submitted a four-page public records request to Nassau County. Raydient requested twenty-one different types of records, from June 1, 2016, onward, related to the ENCPA and proposed state legislation that Nassau County asserted would impact the ENCPA. On October 25, 2018, Nassau County subsequently produced a response that did not include email or text message communications.

The public records which Raydient sought ultimately surfaced after Mullin terminated the County's Budget Director, Justin Stankiewicz ("Stankiewicz") in December 2018. Shortly after his termination, Stankiewicz filed a grievance against the County, claiming he was fired because he refused to delete text messages responsive to Raydient's public records request.[5] Stankiewicz attached pages of text messages (hereafter "the Stankiewicz Text Messages") to his grievance.

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[3] The Board of County Commissioners voted, in an open meeting, to go to Tallahassee. The delegation went to address House Bill 1075 and Senate Bill 324.

[4] Text messages obtained from Justin Stankiewicz included the following individuals: (1) County Commissioner Pat Edwards, (2) County Commissioner Danny Leeper, (3) County Commissioner Justin Taylor, (4) County Attorney Mike Mullin, (5) County Manager Shanae Jones, (6) Justin Stankiewicz, and (7) Taco Pope.

[5] Stankiewicz's grievance was 3 pages long and contained 62 pages of attachments.

Regardless of Mullin's motive for terminating Stankiewicz or Stankiewicz's belief as to why he was terminated, it is evident the text messages Stankiewicz attached to his grievance constitute public records. Even though these text messages were directly responsive to public records requests made by Raydient to the County, their existence – known to Mullin – was denied by the County at Mullin's direction.

In August 2021, Circuit Court Judge James Daniel issued an order granting summary judgment in favor of Raydient and Rayonier in the public records lawsuit. Judge Daniel specifically stated in his order, "The undisputed facts show that the county represented to Plaintiffs on multiple occasions that these text messages did not exist." The Court found there was no genuine issue of material fact over whether: (1) the plaintiffs made a public records request, (2) the County received the request, and (3) the requested records were public records that did exist. In his order, Judge Daniel stated:

> Based upon this record, no reasonable trier of fact could conclude that the County properly responded to Plaintiffs' public records request by producing the requested text messages in a reasonable and timely manner

Judge Daniel found that Nassau County violated Chapter 119 regarding Raydient's public records request as a matter of law.

III. <u>Florida Law on Chapter 119 Violations</u>

Florida law provides that Chapter 119 violations can be based on "strict liability" or "knowing conduct." Offenses committed by way of strict liability or without an intent to commit the act are noncriminal infractions or civil violations in Florida. To prove a strict liability infraction, the State need only prove that the public officer violated any of the provisions of Chapter 119. A strict liability violation is punishable by a fine not exceeding $500. A criminal violation of Chapter 119 occurs when the public officer knowingly violates the public records laws and is punishable as a first-degree misdemeanor.

IV. <u>Evidence</u>

The ongoing civil litigation between Raydient, Rayonier, Nassau County, and Mullin has yielded considerable sworn testimony under oath. The testimony establishes that text messages existed between the commissioners and Mullin regarding the subject matter of the Raydient dispute and that these messages constitute public records. The evidence is clear that Mullin knew that commissioners were not retaining texts and implicitly condoned the practice by advising them they had no obligation to retain "transitory" [or in his words "transient"] messages; without further explaining that their communications – regardless of the medium

used -- about Raydient were indeed public records and required to be retained. Mullin was ambiguous and contradictory in his sworn testimony regarding his interpretation of the status of many of the records in question.

As County Attorney, it is unreasonable to conclude that Mullin was not familiar with the public records law. On the contrary, based on his experience and position within the County, he surely appreciated that these text message communications constituted public records. Similarly, Mullin also appreciated the potential adverse public relations and legal ramifications of these text messages becoming public.

V. Mullin's Conduct

The evidence supports that Mullin's acts rise above simple strict liability. Mullin not only committed public records violations as a public officer, but did so knowingly by (1) overseeing the County's systemic failure to preserve text messages, (2) failing to truthfully and timely respond to Raydient's public records request, and (3) allowing the deletion of text messages constituting public records. As noted previously, a public officer who commits a knowing violation of Chapter 119 is a criminal offense.

A. Failing to Produce the Stankiewicz Text Messages

Instead of ensuring retention and compliance with the law, Mullin allowed the routine deletion and destruction of records. Mullin advised commissioners they were at liberty to delete "transitory" messages without clearly cautioning them of their obligations to retain their communications regarding county business.

Despite being included on the relevant text threads, Mullin additionally learned that Stankiewicz had possession of texts responsive to Raydient's public records request during a meeting on November 6, 2018. These texts, the "Stankiewicz Text Messages," were public records. The messages: (1) were sent between County employees; (2) were sent while the employees were on official County business; and (3) involved an ongoing dispute between the County and Raydient. Florida public records laws required the text messages to be preserved as outlined in Florida's Records Retention Schedule.

When Mullin dictated responses to Raydient's public records requests, he specifically denied the existence of responsive records that he knew existed. Undoubtedly, Mullin appreciated the damaging nature and content of these communications – both to the commissioners' reputations and the lawsuit the county was defending. These actions, and the motive for concealing these messages, indicate a knowing and willful violation of the law.

B. Failing to Prevent the Destruction of Text Messages

In addition to knowingly failing to produce records responsive to Raydient's public records request, Mullin permitted a systemic failure to preserve public records. When Stankiewicz met Mullin to discuss the text messages, Mullin was aware of the County's obligations under Florida public records laws. As County Attorney, he knew the County's obligation to comply with Florida's public records law. Instead of ensuring retention and compliance with the law, he allowed the records' routine deletion and destruction.

VI. Mullin's Defense

Mullin claims that neither he nor the other county commissioners intentionally deleted the text messages at issue and that a good faith effort was made to comply with Raydient's public records request. Mullin points to the steps taken by the county in an effort to comply with the public records request which included providing over 20,000 responsive emails and over 1,000 pages of other documents. Concerning the text messages at issue, Mullin claims that once he became aware of the existence of the text messages, the county took proactive steps to determine whether any of the text messages were in their possession so they could be provided to Raydient.

During the effort to locate the text messages at issue, Mullin claims that he discovered he had unknowingly set his phone to automatically delete his text messages after 30 days. Mullin further points to an outdated County public records policy in existence at the time, which did not account for the advances in technology to address the retention of text messages constituting public records. Mullin claims that although he admittedly did not retain the text messages as required under the law, his failure was not an intentional violation, and thus not criminal.

While Mullin could attempt to rely on this defense at trial, it is unreasonable to conclude that Mullin was not familiar with the requirements of the public records laws. Mullin has been a practicing attorney for over 40 years and has now served in the role of County Attorney for over 30 years. As the County Attorney, Mullin was not only responsible for ensuring that the County lawfully comply with public records requests, but was also responsible for ensuring that both he and the members of the BOCC take appropriate action to retain public records as required by law. Perhaps the most compelling reason why this defense fails is that Mullin was himself a party to these text message communications. Based on his experience and position within the County, it is unreasonable to believe that he did not recognize that these text message communications constituted public records that needed to be preserved.

VII. The Other Commissioners and Nassau County's Remedial Actions

As noted in footnote 4, the text message communications at issue occurred between Mullin and other elected commissioners on the BOCC. Today, none of these individuals remain as elected commissioners on the BOCC. While these commissioners were obligated to preserve the text messages at issue, based on the state of the evidence, a reasonable probability of conviction does not exist to support the institution of criminal charges against the commissioners. This is based on each commissioner being able to credibly claim that because Mullin, as the County Attorney, was included in the text message communications, they either believed that if the text messages were public records, Mullin would have preserved them, or that Mullin would have specifically advised them that these text communications were public records and directed each of them to preserve their text messages. Mullin did neither.

It should also be noted that on October 16, 2019, through resolution 2019-153, the BOCC took remedial measures to address the retention of text messages and other electronic communications that are public records. This revised public records policy was specifically designed to prevent an event like this from occurring in the future. BOCC officers and employees are now prohibited from "using private, non-County owned or leased mobile devices to send or receive SMS messages, text messages, instant messages, or MMS (including multimedia and picture messages) to conduct County business." By limiting communications involving County business to only County-issued mobile devices, the BOCC can now automatically ensure that a record of all electronic communications is preserved.

The revised policy further requires that if any officer or employee receives on their **private/personal mobile** device **any unsolicited** SMS messages, text messages, instant messages, or MMS (including multimedia and picture messages) that are public records, they are required to preserve and retain all communications regarding County business and to promptly transfer those communications to the custody of the County, either by forwarding the communication to the individual's County e-mail account, a County-issued mobile device, or to provide the communication directly to the custodian with instructions that the communication is preserved.

The entire revised public records policy can be found here.

VIII. Disposition

The evidence supports that Mullin committed criminal violations of Florida's public records law. Mullin has also subjected the taxpayers of Nassau County to potential attorneys' fees that may very well be awarded to Raydient at a later date in the civil lawsuit.

While Mullin may contend that his conduct amounts to only a civil violation of the public records laws, what is indisputable is that through his actions, Mullin has disqualified himself from continuing to serve as County Attorney.

Thus, in order to achieve the necessary result of separating Mullin from his position as the County Attorney; by agreement and to avoid protracted litigation in criminal courts, and in acknowledgment of Mullin's lack of any prior criminal record, the State of Florida has agreed to forego the initiation of formal prosecution and resolve the matter as follows:

1. Mullin will resign as County Attorney effective March 31, 2022.

This disposition provides finality and certainty in its resolution and allows Nassau County the opportunity to move forward with retaining new counsel.

Addendum A

Applicable Florida Law and Definitions

A. Sunshine Laws (F.S. 286.011)

Florida's Government in the Sunshine Law provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels.[6] The law is equally applicable to elected and appointed boards. It applies to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. All governmental entities in Florida are subject to the requirements of the Sunshine Law unless specifically exempted." Sarasota Citizens for Responsible Government v. City of Sarasota, 48 So. 3d 755, 762 (Fla. 2010).

There are three basic requirements of section 286.011 of the Florida Statutes:

1) Meetings of public boards or commissions must be open to the public;
2) Reasonable notice of such meetings must be given; and
3) Minutes of the meetings must be taken and promptly recorded.

Accordingly, private meetings between board members about board business would violate the Sunshine Law. The Attorney General's Office has also determined that private discussions via email between board members about board business are prohibited under the Sunshine Law.[7]

B. Public Records Laws (F.S. 119)

These laws provide a right of access to the records of state and local governments and private entities acting on their behalf. The right of access applies to all materials made or received by an agency in connection with the transaction of official business, which are used to perpetuate, communicate, or formalize knowledge unless statutorily excluded.

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[6] Government-in-the-Sunshine Manual, 2021 Edition.

[7] This analysis would likely also apply to text message communication. See *Linares v. District School Board of Pasco County*, No. 17-00230 (Fla. 6th Cir. Ct. January 10, 2018) (Holding that members of an advisory committee created to make recommendations to the superintendent on school attendance boundaries violated the Sunshine Law when they exchanged private electronic communications (emails and Facebook messages) relating to committee business). Also, the Attorney General's Office has advised members of a city board or commission not to engage on the city's Facebook page in an exchange or discussion of matters that foreseeably will come before the board or commission for official action because such conduct would violate the Sunshine Law. Fla. Atty Gen. Op. 09-19

The Florida Supreme Court has interpreted "public records" very broadly. *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980). The content, nature, and purpose of the electronic communication determines whether an item is a public record not the technology used to send the message.[8] Florida Courts have held that:

> 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. 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.

O'Boyle v. Town of Gulf Stream, 257 So. 3d 1036, 1042 (Fla. 4th DCA 2018). Therefore, it is clear that private text messages between elected officials are public records involving public business.

Florida Statute 119.10(1)(b) sets forth the criminal penalties associated with violations of Chapter 119.

> (1) Any public officer who:
>
> (a) Violates any provision of this chapter commits a noncriminal infraction, punishable by fine not exceeding $500.
>
> (b) Knowingly violates the provisions of s. 119.07(1) is subject to suspension and removal or impeachment and, in addition, commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (2) Any person who willfully and knowingly violates:
>
> (a) Any of the provisions of this chapter commits a misdemeanor of the first degree, punishable as provided in s. 775.082 or s. 775.083.
>
> (b) Section 119.105 commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

C. <u>Informal Attorney General Opinion Regarding Text Messages</u>

In March of 2010 the Attorney General's Office issued an informal advisory opinion to the Department of State that text messages, and other electronic communications, should be treated

[8] Government-in-the-Sunshine Manual, 2021 Edition. P. 81.

as public records when government agencies conduct business through them.[9] Attorney General McCollum advised the Florida Department of State as follows:

> The Department of State currently maintains administrative rules defining the retention schedule for government agency email. There are no required retention guidelines, however, for other types of electronic communication because the administrative rules describe them as **transitory**. This is no longer accurate in today's world where business is conducted on a variety of communication platforms. The same rules that apply to email should be considered for electronic communication including Blackberry PINs, SMS communications (text messaging), MMS communications (multimedia content), and instant messaging conducted by government agencies.[10]

- Resolution 2019-153 new public records revision.

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[9] Fla. Atty Gen. Op. March 17, 2010.
[10] *Id*. (Emphasis added).