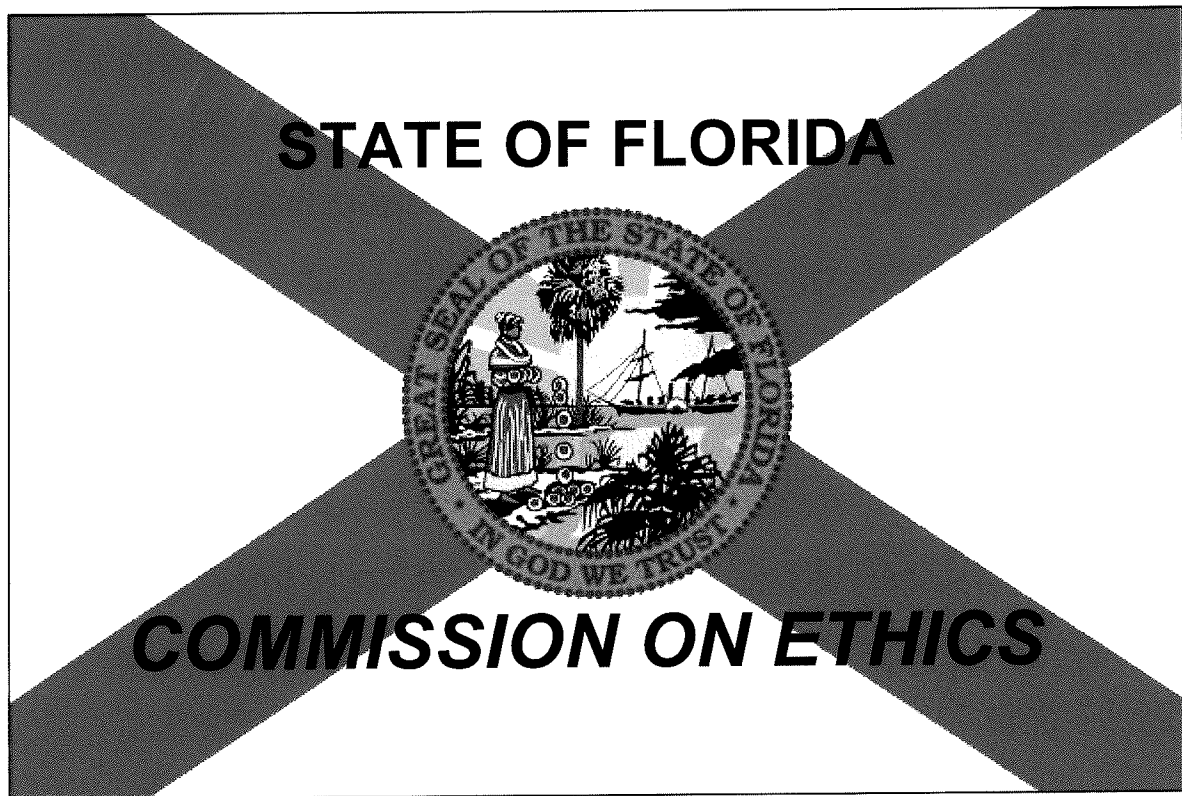


REPORT OF INVESTIGATION



Complaint Number 23-231

NOTICE CONCERNING CONFIDENTIALITY

This report of investigation concerns an alleged violation of Chapter 112, Part III, Florida Statutes, or other breach of public trust under provisions of Article II, Section 8, Florida Constitution. The Report and any exhibits may be confidential (exempt from the public records law) pursuant to Section 112.324, Florida Statutes, and Chapter 34-5, F.A.C., the rules of the Commission on Ethics. Unless the Respondent has waived the confidentiality in writing, this report will remain confidential until one of the following occurs: (1) the complaint is dismissed by the Commission; (2) the Commission finds sufficient evidence to order a public hearing; or (3) the Commission orders a public report as a final disposition of the matter. *See Section 112.3215, Florida Statutes, regarding executive branch lobbying matters and confidentiality.

STATE OF FLORIDA
COMMISSION ON ETHICS
Post Office Drawer 15709
Tallahassee, Florida 32317-5709

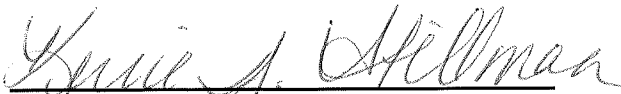
REPORT OF INVESTIGATION

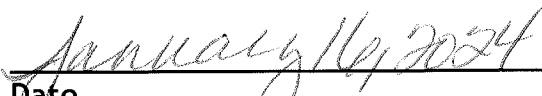
TITLE: JONATHAN OWENS
Former Legislative Aide
Escambia County
Pensacola, Florida

COMPLAINT NO.: 23-231
Exhibits A through D

INVESTIGATED BY: 
Robert G. Malone

Distribution: Commission on Ethics
Respondent
Advocate
File

Releasing Authority: 
Kerrie J. Stillman
Executive Director


Date

* * * *

**REPORT OF INVESTIGATION
COMPLAINT NO. 23-231**

(1) Jeffrey W. Bergosh, the Escambia County Commissioner for District 1, alleges Mr. Jonathan L. Owens formerly served as the Legislative Aide to then-Escambia County Commissioner Douglas Underhill, and, after leaving public employment, disclosed information not available to members of the public that he obtained during his public employment.

(2) The Executive Director of the Commission on Ethics noted that based upon the information provided in the complaint, the above-referenced allegation was sufficient to warrant a preliminary investigation to determine whether the Respondent's actions violated Section 112.313(8), Florida Statutes (Disclosure or Use of Certain Information).

(3) The Complainant advised that he has served as an Escambia County Commissioner since November 2016. He related the Respondent served as the Legislative Aide to former County Commissioner Underhill from November 2014 through November 2022, at which time Commissioner Underhill left public office. The Complainant maintains he and former Commissioner Underhill had a contentious relationship throughout his (Complainant's) tenure as a County Commissioner. He added the Respondent ran against him and failed to win his (Complainant's) seat on the County Commission during the 2020 election.

(4) Escambia County Attorney Alison Rogers advised she has served as the County Attorney since February 2008. She verified the Respondent was a full-time County employee from November 2014 through November 2022, serving as then-County Commissioner Underhill's Confidential Aide. She explained that each County Commissioner has one full-time aide who serves at the pleasure of the County Commissioner who hired them.

(5) The Complainant noted that, in February 2022, he requested the County's Information Technology (IT) Department to preserve the contents of his personal cell phone which contained both personal and County Commission-related data. He explained he uses his personal cell phone for both personal and County business and was having technical issues with the phone. The Complainant said he was planning to travel to Mexico and was concerned that the issue with his cell phone could delete County-related public records (primarily texts) that he was required to preserve pursuant to Chapter 119, Florida Statutes, if he attempted to preserve the data on the phone himself. The Respondent recalled asking the County's IT staff if they could help, and Mr. Bart Siders, the then-IT Director for the County, assured him that his department could preserve the data on the cell phone. The Complainant maintains he directed the IT staff not to make or retain any copies of his private cell phone data, other than one copy for himself, because, in addition to County-related data, his phone also contained private, personal, and privileged information, including confidential medical information, family medical information, personal financial information, including social security numbers, attorney-client privileged information, and personal texts between himself and his family members, friends, and business associates. He related he provided a "stick drive" to the IT staff, and all of the data from his cell phone was copied to the drive. The Complainant said he believed, based upon the instructions he had given the IT staff to delete any additional

copies, that the stick drive was the only existing copy of the data retrieved from his cell phone. He estimated one-third of the data on his cell phone was public records, and the remainder was private and/or privileged information.

(6) The Complainant stated that, in June 2023, he was notified by the Escambia County Attorney's Office that the entire contents of his personal cell phone data had been disseminated by the Respondent in an unredacted state, to a law firm involved in litigation with Escambia County. He explained the County has been involved in litigation with Dr. Rayme M. Edler, the former Medical Director for Escambia County, since 2020,¹ and that attorneys for Dr. Edler informed the County Attorney's Office that the Respondent had provided them with a significant amount of data taken from his (the Complainant's) personal cell phone. The Complainant added he did not give permission to the Respondent to retain or disseminate any of the data from his personal cell phone. He said data from his personal cell phone included texts between himself and the County Attorney's Office relative to the litigation between the County and Dr. Edler. The Complainant maintains Dr. Edler and her attorneys benefitted from having access to attorney-client privileged text messages between himself and County Attorney Rogers pertaining to the Edler lawsuit.

(7) County Attorney Rogers stated Dr. Edler filed a Federal False Claims Act against Escambia County during her former tenure as the County's Medical Director. According to Ms. Rogers, Dr. Edler claimed in the lawsuit that the County had falsely billed the Federal government through Medicare billings, had EMS employees who were not properly credentialed, and had mistreated her during her public employment. The lawsuit, according to Ms. Rogers, is still pending and the County's insurance company lawyers are litigating the case on behalf of the County. She recalled being advised by the insurance company's counsel in March 2023 that, through discovery requests, Dr. Edler's attorneys had advised they had texts from the Complainant's cell phone. She explained she initially assumed the Complainant had provided this information to Dr. Edler's attorneys. Ms. Rogers said when she later mentioned this to the Complainant, he informed her that he had not given any cell phone data to Dr. Edler's attorneys. Ms. Rogers said she then inquired with the insurance company's attorneys on how Dr. Edler's attorneys had obtained information from the Complainant's personal cell phone, and Attorney Stephanie Piderman informed her on May 23, 2023, that Dr. Edler's attorneys had claimed the Respondent voluntarily provided them with the data. Ms. Rogers noted she subsequently was provided a spreadsheet that listed the data provided to Dr. Edler's attorneys by the Respondent, and learned it included approximately 60,000 lines of texts from the Complainant's personal cell phone.

(8) The Complainant reported that the Respondent was interviewed on a radio talk show (NewsRadio 92.3, Pensacola Morning News with Andrew McKay) on August 7, 2023, during which he (Respondent) acknowledged that, during his employment with Escambia County, an anonymous source had left a "thumb drive" in his County office.² During the interview, the Respondent stated that when he opened the files on the thumb drive, he saw they contained the data from the Complainant's personal cell phone. The Respondent said during the radio

¹ United States of America, ex rel. Rayme M. Edler, M.D., v. Escambia County, Case Number 3:20cv5503-MCR-HTC, United States District Court, Northern District of Florida.

² A transcript of the radio interview is appended as Exhibit A.

interview that when he reviewed the data, he learned it contained hundreds, or thousands, of text messages pertaining to County business. The phone data, he continued, also included the Complainant's private text messages and records. When asked by the radio station host what he did with the thumb drive after realizing what information was on it, and whether he contacted the County's IT Department or law enforcement, the Respondent said, "I just held on to it." He acknowledged during the radio interview that Dr. Edler's attorneys asked him at a later date to provide a statement or affidavit regarding Dr. Edler's lawsuit against the County.³ The Respondent noted he informed Dr. Edler's attorneys about the thumb drive and sent them the data that he had kept from the Complainant's personal cell phone. He stated during the radio interview that he believed all of the records on the cell phone became public record when the Complainant used the County's resources to have the IT Department staff make a copy of the data on the cell phone.

(9) The Respondent advised by telephone that he retained Attorney Dennis Green, Jr., to represent him in this matter. Telephone contact was made with Mr. Green during which he stated the Respondent did not wish to provide a sworn statement in this matter.

(10) County Attorney Rogers said Dr. Edler's attorneys sent a copy of the spreadsheet of cell phone data they had received from the Respondent to her office requesting them to identify the information they (Dr. Edler's attorneys) were not allowed to see because of its personal nature, and to redact it from the data. Ms. Rogers advised that the County subsequently filed a Protective Order with Federal Magistrate Judge Hope T. Cannon, requesting that all of the cell phone data be barred from Dr. Edler's attorneys reviewing it and that her (Dr. Edler's) attorneys destroy all copies of the data. Ms. Rogers stated Judge Cannon granted the motion, ordering that the data on the spreadsheet be considered confidential and should not be shared outside of this litigation.

(11) Attorney Darth M. Newman, one of the attorneys representing Dr. Edler in the lawsuit against the County, provided a sworn statement (appended as Exhibit C) on June 21, 2023, in response to the County's Motion for Protective Order concerning the cell phone data. In the statement Newman indicates he obtained a single unsolicited Excel file from the Respondent on March 15, 2023, that contained text messages from the Complainant's personal cell phone. He noted in the statement that, shortly after coming into possession of the file, he notified the County's defense counsel and sent them a copy of the Excel file. He added he did not share this file with his co-counsel and no one on Dr. Edler's co-counsel team has "substantively" reviewed the file.

(12) Mr. Newman stated by telephone that he learned during a telephone conversation with the Respondent that he (Respondent) had telephone data from the Complainant's cell phone which might be helpful in Dr. Edler's litigation against the County. The Respondent, according to Mr. Newman, on March 15, 2023, emailed him the data copied from the Complainant's personal cell phone. Mr. Newman confirmed that the Respondent provided him with a written declaration (Exhibit B) relative to the Edler case on April 3, 2023. He

³ Records reflect that on April 3, 2023, the Respondent signed a sworn statement that was submitted by Dr. Edler's attorneys to the Court in the lawsuit against the County. A copy of the sworn statement is appended as Exhibit B.

maintains that the cell phone data provided by the Respondent involved information that he would have eventually obtained from the County's counsel through the discovery process and/or the filing of subpoenas.

(13) A review of Judge Cannon's response to the Protective Order (appended as Exhibit D) reflects that the Judge further ordered the County to redact all privileged and personal identification information from the spreadsheet forwarded to them from Dr. Edler's counsel, and provide Edler's attorneys with a "privilege log" identifying what was redacted from the spreadsheet. Judge Cannon further ordered that both parties confer regarding which data on the spreadsheet was relevant to the litigation and directed the County to redact any data concerning the litigation which both parties could jointly agree should be redacted. The redacted spreadsheet was then to be used by Dr. Edler's counsel in discovery going forward. Judge Cannon noted if the parties could not agree on what data should be redacted, they would jointly submit the list of disputed data to her and she would determine the status of the data.

(14) Attorney Newman confirmed that, in November 2023, the parties involved in the Edler lawsuit arrived at an agreement of what data in the cell phone records could be used in the litigation.

(15) County Attorney Rogers verified that some of the information that Dr. Edler's attorneys were provided by the Respondent included attorney-client privileged text messages between her and the Complainant relative to the Edler lawsuit. She explained that following Judge Cannon's Order Exhibit D), County legal counsel classified all of the information on the Complainant's copied cell phone data into three distinct categories: information that was personal in nature; information that pertained to the Edler litigation and was discoverable; and attorney/client privileged information that pertained to the Edler litigation and other legal issues before the County. Ms. Rogers recalled that the information determined to be attorney/client privileged information consisted of approximately 12 pages of texts with an average of three texts per page. She verified that within these 12 pages, there were three texts between her and the Complainant that directly addressed the Edler litigation and primarily dealt with her (Edler's) employment issues with the County. Ms. Rogers said these texts have been redacted from the cell phone data that is available to Dr. Edler's attorneys through the discovery process. She noted that the Respondent sided with Dr. Edler in the lawsuit and he provided an affidavit (Exhibit B) to Dr. Edler's attorneys that was beneficial to Dr. Edler. Ms. Rogers opined, based on this, that the Respondent provided the cell phone data to Dr. Edler's counsel because he believed it would benefit Dr. Edler in her lawsuit against the County.

(16) County Attorney Rogers advised that, on June 5, 2023, she sent a letter to First Judicial Circuit State Attorney Ginger Bowden Madden (page nine of the complaint) requesting a criminal investigation involving the unlawful taking of the Complainant's personal cell phone data. She said it is her understanding that the State Attorney's Office contacted the Florida Department of Law Enforcement (FDLE) to conduct the investigation, and FDLE requested the FBI to conduct a forensic investigation of the County computers used to make a copy of the cell phone data. Ms. Rogers stated that the FBI's investigation is ongoing. She added that the County's Office of Compliance and Ethics conducted its own

investigation into how the Respondent obtained the Complainant's cell phone data. A review of the June 23, 2023, Report of Investigation (Case Number OCE 23-010) completed by the Office of Compliance and Ethics reflects that a number of County staff were interviewed. Ultimately the investigation was unable to provide any conclusive findings. Additionally, Ms. Rogers stated that the County has filed a lawsuit for Replevin and Conversion against the Respondent in the County Court of the First Judicial Circuit (filed November 16, 2023), requesting the Circuit Court to direct the Respondent to relinquish possession of all of the Complainant's cell phone data. She noted that this matter remains pending.

(17) The Complainant stated that he has learned that Mr. Alexander Arduini, a purported friend of the Respondent; and Gannett MHC Media, Inc., the corporate owner of the Pensacola News Journal; each have obtained copies of the data from his personal cell phone. He assumes the Respondent gave the data to these entities, but acknowledged he has no evidence to support this assumption. The Complainant added he is concerned the Respondent will use the personal data from his cell phone against him politically in the upcoming 2024 election, when he (Complainant) plans to run for reelection. He noted the Pensacola News Journal has already printed text messages between him and his wife that were taken from the cell phone data. The Complainant added that, although the Respondent has information that includes his (Complainant's) and his family members' social security numbers, credit card numbers, and bank account information, he has no evidence of any identity theft attempts at this time.

END OF REPORT OF PRELIMINARY INVESTIGATION

EXHIBIT A

EXHIBIT A

Exhibit A

IN RE: Jonathan Owens responds to Jim Little in PNJ
flash drive

News Talk Radio Conversation

Recorded News Talk Radio transcribed by Elaine
Richbourg, a Court Reporter and Notary Public, State
of Florida at Large, taken via talk radio,
Pensacola, Florida, on Monday, August 7th, 2023.

ELAINE RICHBOURG

COURT REPORTER
2320 Brightview Place
Cantonment, Florida 32533
(850) 712-0984
elainerichbourg@cox.net

A/

1

APPEARANCES

2

For the News Talk Radio:

3

ANDREW MCKAY

4

5

For the Caller:

6

JONATHAN OWENS

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A2

1 INDEX OF TRANSCRIPT

2 WITNESS:

3 News Talk Radio

4 News Talk Radio 04

5 Reporter's Certificate..... 20

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A3

P R O C E E D I N G S

1
2 ANDREW MCKAY: Good morning. 640 here on
3 News Radio 92.3, informative, local,
4 dependable. I know over the last couple of
5 months we've have had a disproportionate
6 emphasis on Santa Rosa County and the City of
7 Milton, in particular, because they've been
8 having meetings. I mean, Escambia County has
9 barely had any meetings. They cancel all their
10 committees of the whole. They're going to have
11 to have one coming up to deal with apartment
12 complex issues and parking regulations and
13 things like that, if they have. They just
14 canceled another one. So it's been a year
15 since we've had a committee of the whole. All
16 that is may way of saying, this is why I
17 haven't talked as much about Escambia County
18 politics in the last month or two. Oh, but
19 that is about to change. That is about to
20 change. Jim Little, at the PNJ, has an article
21 out this morning detailing a records requests
22 for all of the texts off of Jeff Bergosh's
23 personal phone on which he's apparently doing
24 county business a lot, in conjunction with
25 lawsuits being brought by the former Medical

A4

1 Director, Rayme Edler, and Jonathan Owens, who
2 has gotten basically dragged into all of this
3 stuff. He joins us by phone now. Jonathan,
4 who used to be the Chief of Staff for Doug
5 Underhill, when he was a County Commissioner.
6 Jonathan also ran against Jeff Bergosh,
7 unsuccessfully, for the District 1 County
8 Commission seat three years ago, and he is with
9 us now. Jonathan, welcome back to the
10 Pensacola Morning News.

11 JONATHAN OWENS: Good morning Andrew. How
12 are you?

13 ANDREW MCKAY: I'm -- I'm good. You know,
14 just when you think it's, you know, all the
15 problems are over here, Escambia is like, hold
16 my beer. So, tell me, you tell me, what --
17 what is the back drop to this story, how did we
18 get to where we are now, where there's an
19 investigation and all kinds of other stuff
20 going, tell me what you know, and tell me how
21 we got here.

22 JONATHAN OWENS: Well, gosh, it's so much
23 to put in this short -- a short show for you.

24 ANDREW MCKAY: I know.

25 JONATHAN OWENS: Yeah. So, like you said,

AV

1 hold my beer, Escambia County will come through
2 again for you. The -- the Medical Director,
3 obviously, as you referenced the article, has a
4 lawsuit going, and I was asked for a statement
5 or an affidavit to provide to Dr. Edler's
6 attorneys, and I did, and in that statement,
7 and after that statement, there was a
8 conversation about any other information
9 related to the case at all. I said, well, you
10 know, I have a thumb drive that showed up in my
11 office that has lots of public records on them,
12 and they seem to be from Commissioner Bergosh's
13 personal cell phone.

14 So, I sent them over to Dr. Edler's
15 attorneys, and that was sometime last year. I
16 don't remember the exact date. And then that
17 was pretty much it. I didn't really think much
18 more about it.

19 Well, fast forward, and here we are, Jim
20 Little is writing an article about that, and
21 all kinds of motions and things have been filed
22 in the case to try to block Dr. Edler's
23 attorneys from using those public records, and
24 that's -- that's pretty much how we got to
25 where we are today. This thumb drive showed up

AG

1 in my office sometime last year, when I was
2 still an employee at the County. I assumed it
3 showed up in several people's offices, as
4 things showed up over the years, the 8 years
5 that I worked with the Board of County
6 Commissioners. I mean, we've had file folders
7 show up, you know, negative things against
8 political activists. We've had, as you
9 probably famously remember, a box showed up for
10 Commissioner Bergosh of -- as a prank.

11 ANDREW MCKAY: Yeah.

12 JONATHAN OWENS: We had all kind of things
13 that showed up in the office. I don't know if
14 we can have that conversation on your morning
15 show, if we want to keep it PG, but anyway,
16 things showed up over the years. So, I assumed
17 this showed up in my office, just like it
18 showed up in other people's offices. So, to
19 me, if something showed up in the office, it
20 was a public record, and that was it. So,
21 that's how we got to where we are today. So,
22 you know, hundreds, if not thousands of text
23 messages on there, after me going through them,
24 in relationship -- in relation to, you know,
25 County business, things that, conversations

A7

1 during meetings between individuals. So --

2 ANDREW MCKAY: Well, yeah, that's what --
3 that's what I'm curious -- so, you have, this
4 thumb drive shows up, with what appear to be --
5 what would be public records, anything that
6 would be on Jeff Bergosh's personal cell phone,
7 that would be talking about County business;
8 right, anything that's dealing with any
9 personal matter, that's unrelated to County
10 business is a private record, but anything that
11 would be dealing with, for example, Rayme
12 Edler's employment, or OLF-8, or you know,
13 hiring and firing decisions, anything along
14 those lines that would be from, you know,
15 anybody that would deal with County business,
16 that would be a public record. So, I assume,
17 you tell me if I'm wrong, it's a mixture of
18 public records and private records on his
19 phone; is that right, or at least that's what
20 you thought it was?

21 JONATHAN OWENS: One hundred percent,
22 correct. Yes, one hundred percent. That is --
23 it's a mixture of public and private records.

24 ANDREW MCKAY: So, how, I mean, how did it
25 come to exist, in the first place, because I'm

AP

1 pretty --

2 JONATHAN OWENS: I have no --

3 ANDREW MCKAY: -- I'm confident Jeff
4 Bergosh didn't just come to your office and
5 give you a copy of his phone, so --

6 JONATHAN OWENS: Right. I have no idea.
7 A thumb drive showed up in my office, and
8 that's what I know. That's how it came into
9 existence.

10 ANDREW MCKAY: Okay. So, I guess --

11 JONATHAN OWENS: And at least in my
12 possession. I mean, like I said, it could be
13 in -- it could have shown up in everyone's
14 office.

15 ANDREW MCKAY: Right.

16 JONATHAN OWENS: Because, like I said,
17 we've had folders show up in our offices over
18 the years of, you know, people, you know,
19 wanting to get information out to the public,
20 and I guess it's up to each individual
21 Commissioner's office whether to disregard it,
22 or do something with it.

23 ANDREW MCKAY: Yeah. And so what did you
24 do with it? I mean, when you got it, you
25 apparently opened it and read it. I'm very

A9

1 curious to know what you saw, but what did you
2 do, at that point? I mean, did you, you know,
3 did you contact IT, did you contact law
4 enforcement, did you just hang on it it, did
5 you, you know, what did you do, at that point?

6 JONATHAN OWENS: I just -- I just held on
7 to it.

8 ANDREW MCKAY: Okay. I'm dying to know
9 what's on it --

10 JONATHAN OWENS: There's no policy --

11 ANDREW MCKAY: I mean, I'm going to
12 definitely make a public records request to get
13 a copy, because anything that's done on --

14 JONATHAN OWENS: I'm sure.

15 ANDREW MCKAY: -- anything that's done on
16 the phone is a public record. Commissioner
17 Bergosh says, I guess in this article, he said
18 that he brought his phone -- it was his
19 personal phone in -- he brought the phone in
20 for work by a County IT before he was going on
21 a vacation, because the phone had been acting
22 up, and he wanted to make sure -- this is his
23 account -- from Jim Little -- is that he wanted
24 to make sure those public records were
25 preserved, you know, and not just at the whim

A10

1 of him having them on his phone when he's
2 overseas or whatever. So, he recognizes that
3 they're public records. You know, to the
4 extent that you believe that particular account
5 of it, that would at least validate the fact
6 that they are public records. Why does the
7 County want to prohibit them? I mean, if
8 they're public records, what's the issue?

9 JONATHAN OWENS: I have no idea.

10 ANDREW MCKAY: Okay.

11 JONATHAN OWENS: I have no idea why they
12 would want to prohibit them, other than, you
13 know, there may be some things in there that
14 are detrimental to other things that are County
15 related.

16 ANDREW MCKAY: Okay.

17 JONATHAN OWENS: I don't know. It will be
18 interesting to see how the judge rules in this,
19 because it's really similar to a previous case
20 of County records against the guy I used to
21 work with, a former Commissioner.

22 ANDREW MCKAY: Yeah.

23 JONATHAN OWENS: And it will be
24 interesting to see it.

25 ANDREW MCKAY: Yeah. We're talking

All

1 about --

2 JONATHAN OWENS: And if you know, we can
3 go back --

4 ANDREW MCKAY: Just a second, Jonathan,
5 we'll come back to you in a second because I
6 want to get a quick traffic on the 5 before we
7 continue, Candy.

8 (Advertisement)

9 UNIDENTIFIED SPEAKER: Come on, man, come
10 on Jonathan. Disabled vehicle, I-10 westbound
11 at exit 22, there's a safety truck on scene
12 with cones. And then almost right on the other
13 side of I-10, it's east, a disabled vehicle
14 I-10 east at mile marker 23. So, the right
15 shoulder is blocked. Other than that, good to
16 go. If you have traffic tips you can text
17 437-1620. It was brought to you by FDOT, and
18 make sure you're prepared. It's hurricane
19 season. Keep FL-511.com your emergency tool
20 kit to see helpful traffic info, before and
21 after the storm, message from FDOT. 6:48.

22 (End of advertisement.)

23 ANDREW MCKAY: All right. Thanks so much.
24 Back to Jonathan Owens, talking to about this
25 case that the PNJ has a good story on this

A12

1 morning of the public records on Jeff Bergosh's
2 personal cell phone that were somehow or other
3 delivered to Jonathan Owens, when he worked for
4 Commissioner Underhill at the County, and now
5 have been brought up in the Rayme Edler lawsuit
6 against the County and the County is trying to
7 squash those records, for reasons that we're
8 still not sure about. Jonathan, I kind of
9 interrupted you. You were about to say
10 something though. Go ahead.

11 JONATHAN OWENS: I was just going to say,
12 Commissioner Bergosh, at the time, thanked
13 County staff in a meeting publicly, on
14 February 10th, for recovering his personal
15 phone, and he claimed responsibility for it,
16 you know. Thanks to County staff, so he used
17 County resources, County employees to recover
18 his personal phone, and all of those records on
19 it, in my opinion, of course, it's not enough
20 for me to have an opinion, you know, that's
21 legal, they all became public record when you
22 use County resources. I mean, this would be
23 the equivalent of saying I got my oil changed
24 on my car because I was using County business.
25 Now, you and I and anybody else in the public

A13

1 would say, well, that's not right, but do you
2 know when I first started at the County, the
3 County Attorney, Allison Rogers told me, she
4 said, it's not the vehicle of which you receive
5 a public record, but the content of that record
6 is whether it's a public record or not.

7 ANDREW MCKAY: Right. Right.

8 JONATHAN OWENS: Whether it was on his
9 personal phone or County phone or on a piece of
10 paper, on a bar napkin, on whatever, it become
11 -- it became a public record. I mean, the
12 whole drive, in my opinion, became a public
13 record, when it showed up in my office. I
14 mean, how could it not be? I was -- it was in
15 my office.

16 ANDREW MCKAY: Right.

17 JONATHAN OWENS: So --

18 ANDREW MCKAY: So, how did -- so, the
19 story mentions the FBI and Jeff Bergosh says he
20 doesn't want to comment because there's an
21 active investigation. I mean, has the FBI
22 contacted you?

23 JONATHAN OWENS: No. The only person who
24 has contacted me, is the IT Director, current
25 IT Director, Scott McDonald, asking me about

A14

1 this thumb drive, and I said, you know, he
2 said, how did I get it? And I'm telling you
3 the same story I would tell him or anyone else,
4 it showed up in my office and that's it.
5 That's how I ended up with this. So --

6 ANDREW MCKAY: So, why is the -- why is
7 the FBI involved?

8 JONATHAN OWENS: As far as the FBI, no one
9 has contacted me --

10 ANDREW MCKAY: I mean, this doesn't
11 sound -- this doesn't sound like an FBI issue
12 to me, but I don't know. Maybe there's
13 something that I'm missing.

14 JONATHAN OWENS: Well, you know -- well,
15 many people have many different opinions on the
16 FBI.

17 ANDREW MCKAY: That's fair.

18 JONATHAN OWENS: If you watch national
19 news, and that's no -- a slight against them,
20 in any way, but why the FBI would be involved
21 in something as miniscule as this, based on the
22 filings by Commissioner Bergosh, and what the
23 article says, is that I obtained these things
24 illegally. So, I'm assuming, and this is an
25 assumption, that a complaint was filed with the

A15

1 FBI or law enforcement or FDLE or someone, that
2 these files were illegally removed from a
3 county servant. That's a guess.

4 ANDREW MCKAY: Okay.

5 JONATHAN OWENS: That, in my opinion, that
6 would be the only way that law enforcement
7 would be involved in this, that something was
8 illegally removed. Well, I mean, I had nothing
9 do with anything illegal.

10 ANDREW MCKAY: You just received --

11 JONATHAN OWENS: A thumb drive showed up
12 in my office.

13 ANDREW MCKAY: -- you received the
14 thumb -- yeah. All right. So, the question
15 I've been delayed asking: What's on them?
16 What does it say about what kind of County
17 business is being done on Jeff Bergosh's phone,
18 which by the way, I think -- I think most every
19 elected official, it may not be all, but most
20 every elected official does some degree of
21 business, official business, on their personal
22 cell phone. Just these days, it seems
23 impossible to avoid, but the point is, you're
24 supposed to turn that over. That's supposed to
25 become a public record, and at the very least,

A/B

1 if anybody asks, you're supposed to provide
2 that; right? That's sort of the basis of what
3 where we are.

4 JONATHAN OWENS: Right. And I went
5 through that while working with Commissioner
6 Bergosh, at the time. I mean, there was --
7 there's an active lawsuit right now over
8 Facebook messages that -- that someone, David
9 Bear, has filed against Commissioner Underhill,
10 former Commissioner Underhill --

11 ANDREW MCKAY: Right.

12 JONATHAN OWENS: -- in regards to the
13 contents of his text, I'm sorry, the contents
14 of his Facebook messages.

15 ANDREW MCKAY: Right.

16 JONATHAN OWENS: So, if those are
17 considered public records, public business on
18 Commissioner Bergosh's personal cell phone are
19 definitely considered public records. And to
20 your point, what all is on there, I would say
21 do a public records request --

22 ANDREW MCKAY: Yeah, I'm going to.

23 JONATHAN OWENS: -- and ask the County for
24 -- for any of the communications on
25 Commissioner Bergosh's cell phone having to do

A 17

1 with county business. I mean, that's --

2 ANDREW MCKAY: All right.

3 JONATHAN OWENS: I'm not the one that
4 should determine what public records are;
5 right?

6 ANDREW MCKAY: No, and that's fair.

7 JONATHAN OWENS: -- that should --

8 ANDREW MCKAY: Right. There might be
9 privilege, there might be, it's certainly
10 personal, you would expect. There might be
11 things that, you know, are legally protected.
12 There's all kind of categories of information
13 and that would, I assume, be up to the County
14 Attorney, to make that decision, but yeah, I
15 mean, I'll definitely call Allison later today,
16 and you know, make the request and then she'll
17 give me what we get, and we'll find out from
18 there. Okay. All right.

19 JONATHAN OWENS: I will tell you this --

20 ANDREW MCKAY: Go ahead, yeah, yeah.

21 JONATHAN OWENS: I will tell you this:
22 There are communications between Commissioner
23 Bergosh and a former County employee on there
24 that ended up getting a lawsuit and a
25 settlement that is also currently in the news

A18

1 right now in regards to Pam Childers.

2 ANDREW MCKAY: Okay.

3 JONATHAN OWENS: The payment for --

4 ANDREW MCKAY: -- the ECMO (phonetic)
5 thing?

6 JONATHAN OWENS: -- the payment for the
7 settlement for Selover --

8 ANDREW MCKAY: Oh, the Selover case, okay.
9 All right.

10 JONATHAN OWENS: Yeah. So, there is
11 communication, lots of communication between
12 Commissioner Bergosh and Selover, the former
13 County employee, in those text messages.

14 ANDREW MCKAY: All right. Well, without
15 being able to get more at the moment, we'll get
16 more when we get the records request fulfilled,
17 assuming that we can get it. Jonathan Owens,
18 interesting stuff, the FBI, all right.
19 Jonathan, thanks --

20 JONATHAN OWENS: Yeah.

21 ANDREW MCKAY: -- thanks so much for the
22 time this morning, man. I appreciate it.

23 JONATHAN OWENS: No problem. Have a good
24 one.

25 (WHEREUPON: The recorded talk radio conversation was

A19

1 concluded.)

2
3 CERTIFICATE OF TRANSCRIPTION

4
5
6 I, ELAINE RICHBourg, do hereby acknowledge that
7 the foregoing pages are a transcription of the
8 electronically-recorded talk radio conversation, taken on
9 August 7th, 2023, and transcribed to the best of my ability.

10
11
12
13 /s/Elaine Richbourg

14 _____
15 ELAINE RICHBourg
16 Court Reporter
17 Notary Public, State of Florida
18 Commission No. GG929588
19 Commission Expires: 3/6/2024
20
21
22
23
24
25

EXHIBIT B

EXHIBIT B

UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION

UNITED STATES OF AMERICA *ex rel.*
Rayme M. Edler, M.D.

Civil Action No 3:20-CV-05503

Plaintiff,

v.

Escambia County,

Defendant.

DECLARATION OF JONATHAN OWENS

1. My name is Jonathan Owens and I offer this declaration to recite the facts as I know them with respect to my former employer Escambia County.

2. I have personal knowledge of the facts stated herein and if called upon to testify to them I would do so.

I. My Professional Background

3. Prior to my government service, I owned various local businesses in the technology and commercial realty industries.

4. In 2014, I worked on Doug Underhill's campaign for District 2 County Commissioner.

5. Between 2014 and 2022, I served as a legislative aid for Commissioner Underhill.

II. My Role at Escambia County

6. As a legislative aid to a County Commissioner, I participated in various meetings and other communications with the County Commissioners, County administration, County staff, and citizens.

7. From time to time, County staff would bring their concerns and problems to my attention.

8. I also became aware of issues brought to the attention of the County Commissioners generally and Commissioner Underhill specifically.

9. Commissioner Underhill held weekly meetings with the County Administrator.

10. However, during the term in office of Interim County Administrator Matthew Coughlin, fewer meetings were held than the more regular meetings with County Administrators Brown and later Gilley.

11. It is my understanding and observation that County Administrator Gilley briefed all of the Commissioners equally.

III. EMS and Fire Department Dysfunction

12. During my time at Escambia County, it became clear that major problems existed in the EMS and Fire Departments.

A. Training Problems

13. In particular, no later than 2018 it was clear that EMS and Fire had a serious training deficiency.

14. I know County Administration was also aware of these problems because they came up during Commissioner Underhill's weekly meetings with the County Administrator.

15. In addition, Dr. Rayme Edler, then the Medical Director for EMS, personally raised training deficiencies with me, Commissioner Underhill, and the County Administrator as early as 2018 and then continuously thereafter.

16. At no time did I witness any steps taken to remedy, solve, or address these training problems.

17. In fact, I do not recall solutions even being discussed by County administration.

B. Billing Problems

18. In addition to the training deficiencies, I became aware of problems in the EMS Billing department as well.

19. Like the training problems, the billing issues were also a topic of conversation at Commissioner Underhill's weekly meetings with County Administration.

20. At least one EMS billing staffer, Lindsay Ritter, was concerned with the County's billing non-compliance.

21. For example, EMS charges were being coded improperly and there were ongoing software problems that resulted in inaccurate bills.

22. Ms. Ritter would often report to me that she was finding billing non-compliance and, more troublingly, she was being prevented from investigating and fixing the compliance issues.

23. For example, Leon Salter, who was then the Deputy Chief of EMS, would constantly assign Ms. Ritter tasks that would keep her busy and prevent her from investigating or fixing the billing errors and compliance issues she was finding and reporting and generally prevent her from fully identifying or remedying billing fraud.

24. At no time did I witness any steps taken to remedy, solve, or address these billing problems.

25. I believe the County changed billing software vendors at least in part to obfuscate and hide problems with billing.

26. I am aware that the County had to issue refunds for EMS services and am also aware that no leaders were held accountable for that event or the events that gave rise to the need to issue substantial refunds.

IV. Failed Internal Investigations

27. County Administrator Gilley was reluctant to fully investigate the issues in EMS and Fire Department out of concern about a simultaneous State of Florida investigation that appeared to be focused on the same or similar issues.

28. However, she did hire Jerry Maygarden to assist her in fact finding with respect to the EMS and Fire Departments.

29. In April 2019, and at the direction of the Board of County Commissioners, an "Ombudsman" Janice Kilgore, was hired to investigate issues in the EMS and Fire Departments.

30. At various times, Mr. Maygarden and Ms. Kilgore appeared to be in conflict with each reporting different facts and conclusions.

31. I found Mr. Maygarden substantially more credible than Ms. Kilgore.

32. Mr. Maygarden was an outsider that did not have any preexisting connections or loyalties to the people he was investigating.

33. Ms. Kilgore, on the other hand, was a prior leader of the EMS department and had personally hired or supervised many of the people she was tasked with investigating including the personnel who were arrested and charged with crimes by FDLE.

34. I believe her impartiality and credibility were negatively impacted by bias.

35. In fact, I believe that is why a majority of the Board of County Commissioners directed that she be engaged to add an official imprimatur to their desired outcome: not finding any wrongdoing.

36. Ms. Kilgore did appear to conduct a perfunctory and cursory investigation with the goal of reporting no serious issues. She appeared very reluctant to give any remarks disparaging the people or departments she was tasked with investigating.

37. My impression of these facts is based on my observations of her investigation and presentations which both appeared to be lacking in quality and depth.

V. Retaliation

38. I witnessed the County retaliate against Dr. Edler.

39. This retaliation took many forms including a general refusal of other County staff and leaders to adequately communicate with her even when otherwise required for the orderly operation of County business.

40. Dr. Edler was isolated and denigrated in private and in public including by the County Commissioners in public meetings.

41. The County Commissioners castigated Dr. Edler in plenary session and asked her questions that should have been directed to County Administration, not Dr. Edler and similarly suggested she have solutions, answers, or information that should have come from County Administration, not Dr. Edler.

42. County staff that attempted to do their jobs and help Dr. Edler in the normal course of County business or particularly with respect to uncovering the full scope of the training and billing problems within the EMS and Fire Departments were similarly retaliated against and sidetracked by their superiors with other and additional work tasks designed to leave them without the time or bandwidth to address the serious issues Dr. Edler and others had identified.

A. County Commissioner Coordination with Citizen Agitator

43. At least Commissioner Bergosh appeared to coordinate his attacks on Dr. Edler with Melissa Pino.

44. That observation is based on the fact that their public comments at Board of Commissioners meetings appeared well coordinated and synchronized.

45. In addition, Ms. Pino would communicate to County staff exactly the same topics and viewpoints that Commissioner Bergosh espoused from the dais and in less public settings.

46. I also know that Commissioner Bergosh frequently used his personal cell phone for County business to the near exclusion of his County provided phone.

47. Beginning in April or May 2019, Commissioner Underhill and I met with Dr. Edler more than once to discuss the ongoing harassment she was suffering from Ms. Pino.

48. In connection with these meetings, Commissioner Underhill reported the harassment to Matthew Coughlin who was then the acting County Administrator.

49. Based on the information provided by Dr. Edler and my own observations of what Ms. Pino posted online and spoke about in public forums, I easily drew the conclusion that Ms. Pino's harassment campaign directed against Dr. Edler was undertaken on behalf of and in coordination with County leaders and employees.

50. In May 2019, I referred Dr. Edler to attorney Greg Whibbs who I knew had previously sent a cease-and-desist letter to Ms. Pino after Ms. Pino directed a similar campaign of harassment and lies at another member of the community.

51. I continued to receive communications from Dr. Edler on an essentially continuous basis through which Dr. Edler reported and complained to me about the continuing harassment she was suffering from Ms. Pino and the County generally.

52. My observation was that the ongoing harassment was creating continuing and deepening distress for Dr. Edler.

B. Undue Pressure

53. Commissioner Bergosh, and others, applied undue and unwarranted pressure on Dr. Edler and on County Administrator Gilley.

54. The purpose of that pressure was an attempt to make Dr. Edler stop raising the alarm on the EMS and Fire Department issues she was rightly bringing to the attention of her superiors.

55. Based on my observations of them at public meetings, it appeared to me that a majority of the County Commissioners also attempted to run Dr. Edler out of money through lawsuits for which they refused to reimburse her legal fees.

56. With respect to Ms. Gilley, that pressure was an attempt to make Ms. Gilley fire, discipline, or otherwise cause Dr. Edler to cease reporting the problems that were facing the EMS and Fire Departments.

C. Impact of Retaliation

57. Dr. Edler contemporaneously communicated to me the toll the County's campaign of retaliation was having on her and I could see it for myself.

58. Dr. Edler complained to me about the retaliation approximately once or twice a week.

59. Before the retaliation began, I would have described Dr. Edler as full of energy and excitement. She appeared energized by the opportunity to serve the public as the County's EMS Medical Director.

60. I know from my conversations with her and my observations of her work that Dr. Edler took her obligations and commitments to the County and our citizens, especially people who might find themselves in need of emergency medical services, exceptionally seriously.

61. After the retaliation began, Dr. Edler's mood and physical health declined.

62. She was angsty, miserable, and ground down.

63. She lost substantial weight – so much so that it was easy to observe in her face.

64. She looked sickly.

65. I communicated these observations about the impact the County's retaliation was having on Dr. Edler directly to County Administrator Gilley and to Commissioner Underhill.

66. I believe, though I am not sure, that Commissioner Underhill also discussed the retaliation against Dr. Edler with Ms. Gilley.

67. Despite all of this, the County failed to take appropriate remedial actions with respect to the dysfunction in EMS, the criminal prosecution of EMS staffers, and the retaliation against Dr. Edler.

Conclusion

68. If called upon to provide testimony about the above topics I would and could competently testify consistent with this declaration as to the facts set out herein.

I declare under penalty of perjury, that the foregoing is true and correct.

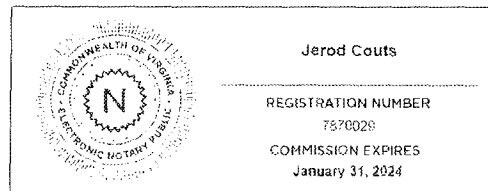
Executed on 3rd April, 2023

Jonathan Lee Owens
Jonathan Owens

STATE OF ~~FLORIDA~~ Virginia
COUNTY OF Arlington

Sworn to (or affirmed) and subscribed before me by means of ☐ physical presence or ☒ online notarization, this _____ this 3rd day of April, 2023, by Jonathan Owens.

(NOTARY SEAL)



Jerod Coutts
(Signature of Notary Public-State of ~~Florida~~ Virginia)
Notarized online using audio-video communication

(Name of Notary Typed, Printed, or Stamped)

Personally Known _____ OR Produced Identification ☒ _____
Type of Identification Produced Drivers License

EXHIBIT C

EXHIBIT C

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF FLORIDA
PENSACOLA DIVISION**

UNITED STATES OF AMERICA
ex rel. RAYME M. EDLER, M.D.

Plaintiffs,

v.

Case 3:20-cv-05503 MCR-HTC

ESCAMBIA COUNTY,

Defendant.

**DECLARATION OF DARTH M. NEWMAN IN SUPPORT OF PLAINTIFF-
RELATOR'S RESPONSE TO DEFENDANT'S MOTION FOR
PROTECTIVE ORDER**

1. I am the founder and sole practitioner at the Law Offices of Darth M. Newman, LLC in Coraopolis, PA. I am one of the attorneys representing Plaintiff-Relator, Dr. Edler, in the above-captioned matter. I am an attorney in good standing with the State Bars of New Jersey and New York, and the Commonwealth of Pennsylvania. I have personal knowledge of the facts set forth in this Declaration, and if called as a witness for this purpose, I could and would testify competently under oath to them. I submit this Declaration in support of Plaintiff-Relator's Response to Defendant's Motion for Protective Order.

2. On March 15, 2023, Jonathan Owens, a non-party to this litigation and

former County employee, emailed me a single Excel file he represented contained text messages from County Commissioner Jeff Bergosh's personal cell phone. Counsel did not request this file from Mr. Owens, and we did not know in advance that he would be sending it.

3. Mr. Owens represented to me that he came by the Excel file innocently.

4. Dr. Edler's attorneys have sequestered the file and proceeded carefully. Shortly after coming into possession of the file, they notified defense counsel. Dr. Edler herself has never had access to and has not reviewed the file in any way. I was the only one of her Counsel to receive the file, and have not forwarded it to the co-counsel firms in an accessible format.

5. When I sent the Excel file to the County, I password protected it and have not shared the password with co-counsel. Nobody on Dr. Edler's co-counsel team has substantively reviewed the file.

6. Mr. Owens told me that he saw Dr. Edler referenced in the Excel spreadsheet.

Under 28 U.S.C. § 1746, I declare under penalty of perjury that the foregoing is true and correct.

Executed on this 21st day of June, 2023

s/Darth Newman

Law Offices of Darth M. Newman LLC

Darth M. Newman

LAW OFFICES OF DARTH M. NEWMAN LLC

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Coraopolis, PA 15108

412.436.3443

darth@dnewmanlaw.com

(admitted pro hac vice)

EXHIBIT D

EXHIBIT D

UNITED STATES OF AMERICA, ex rel. RAYME M. EDLER,
M.D., Plaintiffs,
v.
ESCAMBIA COUNTY, Defendant

Case No. 3:20cv5503-MCR-HTC
United States District Court, N.D. Florida

Filed August 25, 2023

Counsel

Jonathan Evan Kroner, Jonathan Kroner Law Office, Hollywood, FL, Kathryn Wilburn Drey, US Attorney, Pensacola, FL, Mary Ann Lane Couch, DOJ-USAO, Pensacola, FL, Marie Armstrong Moyle, DOJ-USAO, Tallahassee, FL, for Plaintiff United States of America.

Darth M. Newman, Pro Hac Vice, Law Offices of Darth M. Newman, Coraopolis, PA, Gerald Charles Pierre Robinson, Grace Irene Chanin, Matthew H. Morgan, Rebekah L. Bailey, Nichols Kaster PLLP, Minneapolis, MN, Jonathan Evan Kroner, Jonathan Kroner Law Office, Hollywood, FL, for Plaintiff Rayme Edler.
Katherine Laura Gudaitis, Margaret Hood Mevers, Stephanie Pidermann, Lydecker LLP, Miami, FL, for Defendant.

Cannon, Hope T., United States Magistrate Judge

ORDER

*1 Plaintiff-Relator Dr. Rayme M. Edler ("Dr. Edler") has filed this False Claims Act Qui Tam ("FCA") action against Escambia County alleging, among other things: (1) the County falsely billed various government healthcare programs for Emergency Medical Services ("EMS") that were carried out by unlicensed personnel, in contravention of applicable law and regulation ("Count I") and (2) the County submitted false claims to the federal government, namely, by miscoding the level of service provided ("Count II").^[1] Count II was added in the Second Amended Complaint, ECF Doc. 59, and is subject to a pending motion to dismiss, ECF Doc. 91.

This matter is before the Court on two discovery motions, one filed by Dr. Edler and one filed by the County. The first motion is Dr. Edler's motion to compel and for sanctions against the County arising from a discovery dispute that is more than a year old. ECF Doc. 106. The second is the County's motion for protective order relating to an excel spreadsheet containing text messages belonging to Commissioner Bergosh that the County alleges was improperly provided to Dr. Edler's counsel by a former County employee.^[2] ECF Doc. 112. All motions have been fully briefed and are addressed below. See Responses, ECF Docs. 113, 115, 121, 126, 128.^[3]

I. MOTION TO COMPEL

The motion to compel relates to three discovery requests: (1) Request Number 1, of Dr. Edler's Third Requests for Production ("RFPD III-1") (which is also the subject of Dr. Edler's motion for sanctions, *infra* Section II); (2) Request Number 6 of Dr. Edler's Fourth Requests for Production ("RFPD IV-6"); and (3) Request Numbers 1, 2 and 3 of Dr. Edler's Fifth Requests for Production ("RFPD V1-3"). For the reasons discussed below, the Court finds the motion to compel should be GRANTED IN PART.

A. RFPD III-1 and IV-6

*2 In November 2021, Dr. Edler served a third set of requests for documents on the County, seeking, among other things, claims data, work hour reports, dispatch records, and patient records from 2016 to present, which Dr. Edler

subsequently agreed to limit to 12 employees. See RFPD III-1. The 12 employees had been identified by law enforcement as having provided ambulance services without the mandated minimal training and certifications. The County initially objected to providing this information, primarily on the ground that it was overly burdensome. Specifically, the County argued that just 8 employees alone resulted in over 24,180 calls and that it would take over 4,000 hours of personnel time for the County to go through each record for the information sought.

Although Dr. Edler initially filed a motion to compel, ECF Doc. 49, the matter was never addressed by the Court because the parties jointly requested the Court cancel the hearing on the motion and submitted a consent proposed order overruling the County's objections and requiring the production within 14 days or, alternatively, in lieu of a production, the parties could enter into certain stipulations.^[4] ECF Docs. 60, 60-1. Although the Court did not adopt the proposed order verbatim, it did overrule the County's objections and ordered the County to produce documents in 14 days (by October 4, 2022). Nonetheless, now almost a year later, this same discovery dispute is back before the Court.

When the County agreed to the consent order, the County believed that it could work with its prior database provider, Zoll, to run queries on the existing database for the information being requested by Dr. Edler. It appears, however, that the Zoll reports did not provide all the information expected. Namely, claims data that had been stored by the County's prior database provider, ESO, which relate to about a 6-month period, was not included. Additionally, Dr. Edler believes the work reports and dispatch records are incomplete, including that the information did not include all government payors. Thus, Dr. Edler moves to compel responses to RFPD III-1, as promised by the County, and also moves for sanctions for the County's failure to comply with the Court's September 30, 2022 Order.

On May 30, 2022, Dr. Edler served a Fourth Request for Production, seeking the same information as in Request III-1, for 5 additional employees. See Request IV-6. Although these requests were not a part of the Court's September Order, they are at issue here and the alleged deficiencies are the same as with RFPD III-1.

Under Federal Rule of Civil Procedure 37, "a party may move for an order compelling disclosure or discovery." Fed. R. Civ. P. 37(a)(1). Under Federal Rule of Civil Procedure 26(b)(1), "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case." Fed. R. Civ. P. 26(b)(1). As an initial matter, the County does not dispute the relevance of the information sought in RFPD III-1 or RFPD IV-6. And as discussed above, although the County initially argued the discovery was not proportional to the needs of the case, the Court overruled that objection (with the County's agreement). Thus, what remains in dispute is not whether the motion to compel as to these requests should be granted (because it should), but simply when and what the County must do to comply with its discovery obligations.

*3 At the hearing, counsel for the parties represented that they believe they have reached some solutions with regard to the information requested in RFPD III-1 and VI-6. Based on the representations of the parties at the hearing, and to ensure the Court does not see this issue again months down the road, the parties shall strictly comply with the following directives as to the categories of documents requested in RFPD III-1 and IV-6:

1. Work hour reports

The County shall have fourteen (14) days of the date of this Order to produce any work hour reports which may be missing or are incomplete. The Court understands the County believes the Zoll reports it has already produced include the work hour reports for all relevant time periods for the 17 requested employees and that there is nothing else to produce. Certainly, if that is the case, the Court cannot compel the County to produce records or information that do not exist. However, the County should be aware that if Dr. Edler proves otherwise after taking a Rule 30(b)(6) deposition of a Zoll representative,^[5] then the Court may reconsider the imposition of sanctions. Thus, Dr. Edler shall have fourteen (14) days after conducting the 30(b)(6) Zoll deposition to file a renewed motion to compel as to any work reports that it believes remain missing or are incomplete. If no such motion is filed, the Court will consider this issue RESOLVED.

2. Dispatch records (CAD)

The County shall have fourteen (14) days of the date of this Order to produce to Dr. Edler the long-form Zoll summary reports, which the County's counsel represented is currently in counsel's possession, and the short summary reports, which have yet to be generated. Dr. Edler shall have fourteen (14) days after conducting the 30(b)(6) Zoll deposition to file a renewed motion to compel as to any missing or incomplete dispatch records. If no such motion is filed, the Court will consider this issue RESOLVED.

3. Claims information

As the Court understands this issue, the Zoll reports the County produced contain incomplete claims information because it did not include the ESO data and, also, did not include all government payors. Dr. Edler believes the issue can be resolved by having Zoll remove the employee filters when running claims information and by adding additional payors identified by Dr. Edler. The County believes this issue can be resolved by providing a statistical sampling of the ESO data and comparing it to the Zoll data.

Within fourteen (14) days of the date of this Order the County shall provide the statical sampling of ESO data, referenced at the hearing, to Dr. Edler and within seven (7) days of receipt of that information, Dr. Edler shall advise the County whether such information is sufficient and, if not sufficient, shall meet and confer regarding alternative means. If the information is not sufficient and the parties are unable to agree as to a different approach for production, the County shall run the queries as suggested by Dr. Edler to omit the employee filter and to add the missing government payors and shall produce the reports fourteen (14) days after the meet and confer.

B. RFPD V1-3

*4 On December 22, 2022, Dr. Edler served a Fifth Request for Production seeking the same type of information i.e., patient care records, dispatch records, and billing records, but this time not limited to specific employees, and going back a 13-year period. See Request V-1 to 3. These requests pertain to Count II of the Second Amended Complaint, which charges the County with miscoding services provided. According to Dr. Edler, this broader request is necessary for two reasons: (1) the limitation to 17 employees may have altered the data that was produced and (2) broader information is needed for Count Two.

The County argues these requests amount to nothing more than a fishing expedition as Dr. Edler has no personal knowledge on which to base Count II. This argument, however, goes to the merits of the claim but, "as a general rule, a party may not resist discovery relating to a particular claim by arguing the claim lacks merit." See *Suever v. Connell*, 2008 WL 906423 at *12 (N.D. Cal. Apr. 1, 2008). As discussed during the hearing, until the Court dismisses Count II, it remains a claim in this litigation and Dr. Edler is entitled to discovery on the claim. See Fed. R. Civ. P. 26(a).

The County also argues the production of responsive information is unduly burdensome. When a party raises an unduly burdensome objection to the production of documents, the objecting party must submit evidence that reveals the nature of the burden. See *Trinos v. Quality Staffing Servs. Corp.*, 250 F.R.D. 696, 698 (S.D. Fla. 2008) ("Additionally, courts should only limit discovery 'based on evidence of the burden involved, not on a mere recitation that the discovery request is unduly burdensome.'"). The County, however, was unable to provide any specifics to support its burden argument. Although the County provided an affidavit from Shandra Jenkins, the County's EMS Billing Manager, in support of its opposition, the information in that affidavit is based on having individual employees review each record in the database for the requested information and does not consider whether a query can be run for the information. ECF Doc. 115-1.

Indeed, the County was not able to provide the Court with information about how much time or expense it took to run the Zoll reports limited to the 17 employees or evidence to rebut Dr. Edler's position that, while the results may be more voluminous, the same (if not less) effort is required to run a Zoll report for all employees (limited only by government payee) as to limit the query to certain employees. In other words, while the volume of information

produced may be much greater when not limited to a specific employee, it is not clear that the time spent running queries is greater.

While the Court agrees with Dr. Edler that the County has not shown that the requests are unduly burdensome, Dr. Edler's counsel also recognized that Dr. Edler might be able to narrow the requests or better understand what compromises might be possible with regard to the production after she has had an opportunity to depose a 30(b)(6) representative regarding the Zoll reports. Thus, given the proportionality standards^[6] which the Court must consider in deciding discovery issues, the Court finds it will be more judicially efficient to have the parties further vet this issue.

*5 Therefore, with regard to RFPD V1-3, the parties shall comply with the following directives:

- Within thirty (30) days of the date of this Order, Dr. Edler shall depose a 30(b)(6) representative regarding the Zoll reports and data.
- Within seven (7) days of the date of the deposition, the parties shall meet and confer regarding ways to narrow RFPD V1-3 or ways in which the information can be timely produced. Any agreement as to the production of information responsive to these requests must include a requirement that the production be made within thirty (30) days of the deposition.
- If the parties do not reach an agreement during their meet and confer, then within fourteen (14) days of the date of the deposition, Dr. Edler shall file a renewed motion to compel.
- If the parties reach an agreement in the meet and confer, but upon review Dr. Edler determines the production remains insufficient or the County did not comply with the agreement, then Dr. Edler shall have fourteen (14) days after production is made to file a renewed motion to compel.
- The Court will consider the issues as to RFPD V1-3 fully RESOLVED if no motion is filed within the times set forth above.

II. Request for Sanctions

Dr. Edler asks the Court to sanction the County for failing to comply with the Court's September 30 Order. Under Rule 37(b)(2)(C), whenever a party disobeys a court order, "the court must order the disobedient party, the attorney advising that party, or both to pay the reasonable expenses, including attorney's fees, caused by the failure, unless the failure was substantially justified or other circumstances make an award of expenses unjust." Fed. R. Civ. P. 37(b)(2)(C). District courts have broad discretion to fashion appropriate sanctions for violation of discovery orders. See e.g., *Malautea v. Suzuki Motor Co., Ltd.*, 987 F.2d 1536, 1542 (11th Cir. 1993).

Exercising that discretion here, the Court does not find sanctions to be appropriate at this time because the evidence presented by both parties suggests that the County tried, albeit unsuccessfully, to comply with the Court's Order. The County was in communications with Dr. Edler regarding the Zoll reports as well as whether the parties could agree to certain stipulations that would alleviate the need for the discovery sought. Moreover, although the Court required the production to be made within fourteen (14) days, Dr. Edler did not seek relief from the Court for the County's non-compliance until June 2023, more than eight months after the County's noncompliance.

The Court will add one caveat to its ruling – the County has had long enough to figure out how to respond to relevant discovery requests and it is time for these discovery issues to be laid to rest. While the County may not want to do it, it may very well be at the point where the County simply needs to transfer the data to Dr. Edler's counsel and let them figure out how to extract what they need. Thus, while the Court does not find sanctions to be appropriate now, that may not be the case if there continues to be delays.

III. Motion for Protective Order

*6 In addition to the parties' dispute over Dr. Edler's discovery requests, another issue has arisen involving text messages belonging to County Commissioner Jeff Bergosh. As alleged in the County's motion for protective order, Jonathan Owens, a former County employee, improperly (and possibly illegally) obtained an excel spreadsheet containing text messages that were downloaded from Commissioner Bergosh's cell phone to the County's server and provided that excel spreadsheet to Dr. Edler's counsel.[7] The County seeks to prevent Dr. Edler from reviewing the information or using it in discovery and asks that Dr. Edler be ordered to destroy any and all copies of the "potentially illegally acquired text messages."

Dr. Edler, on the hand, argues she should be allowed to retain and use the excel spreadsheet because neither she nor her counsel engaged in any improper conduct to obtain the spreadsheet; it is disputed as to how Owens came into possession of the spreadsheet; and it is a document that counsel obtained outside of discovery. Recognizing, however, that there may be privileged information or personal identification information as defined in Fla. Stat. § 817.5685, Dr. Edler's counsel immediately notified the County's counsel of the existence of the spreadsheet and asked counsel to redact such information.[8] Dr. Edler's counsel also has not reviewed the spreadsheet.

The County filed a motion for protective order under Federal Rule 26 seeking to have the spreadsheet destroyed. Under Rule 26, upon motion by a party or by a person from whom discovery is sought, and for good cause shown, [9] the Court may enter a protective order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense. Fed. R. Civ. P. 26(c)(1)(G).

As an initial matter, Rule 26 does not apply because the spreadsheet was not obtained during discovery. See e.g., *Lahr v. Fulbright & Jaworski, LLP*, 1995 WL 17816334 (N.D. Tex. Oct. 25, 1995) ("A court may not issue a Rule 26 protective order to control documents obtained outside the court's formal discovery process."), *aff'd Lahr v. Fulbright & Jaworski*, 1996 WL 34393321 (N.D. Tex. July 10, 1996). In *Lahr*, the district court reversed the magistrate judge's entry of a protective order precluding the use of handwritten notes that a third party stole and provided to a party in an employment discrimination case. *Id.* Similarly, in *In re Rafferty*, 864 F.2d 151, 155 (D.C. Cir. 1988), the district court reversed a magistrate judge's entry of a protective order limiting the disclosure of a document which had been improperly obtained, finding that the employers could not "use the happenstance of a discovery proceeding to place under a protective order materials not obtained through discovery." *Id.* at 155.

*7 That, however, does not mean the County is without recourse. As the Texas court held in *Lahr*, a district court may nonetheless impose restrictions on the use of such information under its inherent power to control the litigation. See *Lahr*, 1996 WL 34393321, at *3 ("The court's power to remedy unfair litigation practices and preserve the judicial integrity is broader in scope). Thus, the Court may preclude or place other limitations on the use of a document under its inherent powers even if the document was not obtained through discovery. *Smith v. Armour Pharm. Co.*, 838 F. Supp. 1573, 1578 (S.D. Fla. 1993) ("A bright-line rule prohibiting a court from regulating the use of information or documents obtained through means other than discovery in the pending proceeding would result in inequitable consequences and could undermine the integrity of a court's judicial proceedings."); see also *In re Shell Oil Refinery v. Shell Oil Co.*, 143 F.R.D. 105 (E.D. La. 1992) (granting protective order where the PLC communicated with a current Shell employee and "surreptitiously obtained from this employee propriety documents belonging to Shell").

Here, the County seeks a protective order for two reasons. First, the County argues the spreadsheet has not been authenticated and could have been altered. Second, the County argues Owens obtained the spreadsheet illegally or through improper means. Whether the spreadsheet has been or can be authenticated does not determine whether it can be obtained during discovery or retained by Dr. Edler.[10] See, *supra*, fn. 2. Also, it is unclear how Owens came into possession of the spreadsheet and, as of this writing, Owens has not been charged with any illegal conduct. [11] And it is undisputed that neither Dr. Edler nor her counsel engaged in any improper conduct to obtain the spreadsheet. Those arguments, therefore, do not advance the ball. Notably, the County does not argue the spreadsheet does not contain relevant messages[12] and concedes it contains messages that would fall under the Florida Public Records Act, Fla. Stat. § 119, et seq.

Nonetheless, when determining whether the Court should intervene in these circumstances, the Court must "balance the scales" to ensure that it does not condone or encourage litigants or any person to use illegal or improper means to obtain information, whether during or outside of discovery, to gain an unfair advantage, while at the same time not

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unnecessarily preventing a party from accessing information to which it is entitled. See *In re Shell*, 143 F.R.D. at 108 (“What matters is balancing the scales.”). In “balancing the scales,” here, the Court finds some protection of the spreadsheet is required and imposes the following conditions on Dr. Edler’s use and retention of the spreadsheet in discovery.

First, as agreed to by Dr. Edler, the spreadsheet shall be marked CONFIDENTIAL and no information in the spreadsheet shall be shared with anyone outside this litigation or used outside this litigation.^[13] The Court will not hesitate to sanction any person or party who violates this Order.

Second, within seven (7) days of the date of this Order, the County shall redact all privileged information as well as personal identification information as defined in Fla. Stat. § 817.5685 from the spreadsheet that was provided to the County from Dr. Edler, and provide the redacted spreadsheet to Dr. Edler, along with a privilege log identifying what was redacted.

*8 Third, the parties shall then have seven (7) days after the redacted spreadsheet and privilege log are provided to meet and confer regarding which messages are (1) relevant to this litigation or (2) involve County business and thus would be subject to production under the Florida Public Records Act, Fla. Stat. § 119. The County shall redact any text messages which the parties jointly agree do not fall into either category. If the parties are able to agree on what should be redacted, then the County shall provide a second redacted spreadsheet to Dr. Edler redacted for (1) privileged information, (2) Fla. Stat. § 817.5685 information, and (3) mutually agreed upon clearly irrelevant and non-public information. That second redacted spreadsheet will be the spreadsheet Dr. Edler can use in discovery going forward and Dr. Edler’s counsel shall immediately destroy other copies of the spreadsheet in her possession, custody, or control.

If, however, the parties are unable to agree on all redactions i.e., the parties dispute whether a message is relevant or a public record, then the parties shall jointly submit the list of disputed text messages to the Court for in camera review, and identify the nature of the dispute i.e., “Relator contends the message is relevant to show retaliation; County disagrees.” The disputed list of text messages shall be submitted in camera, by no later than twenty-one (21) days from the date of this Order. Until the Court makes a determination on the disputed text messages, which it will promptly do, Dr. Edler cannot use any of the disputed text messages in discovery.

The Court understands Dr. Edler believes relevance redactions are not appropriate because the spreadsheet is a document her counsel obtained outside discovery. However, other than for purposes of annoyance, embarrassment, or harassment, the Court can find no basis for why Dr. Edler would need information that is not relevant to her claims. Also, while Dr. Edler’s counsel did nothing wrong in receiving the spreadsheet and took the exact steps this Court would have expected upon receipt of the spreadsheet, the Court also cannot ignore that the text messages at issue include personal text messages that were on a personal cell phone, many of which were intended to be private conversations.^[14] Indeed, in the line of FCA cases relied upon by Dr. Edler, the “misappropriated” document was relevant to, and used to support, the FCA claim. See e.g., *United States ex re. Gohil v. Sanoff U.S. Servc., Inc.*, 2016 WL 9185141, at *2 (E.D. Pa. Sept. 29, 2016) (recognizing strong public policy in favor of allowing relators to use documents, even if they have been misappropriated “in prosecution of FCA claims”) (emphasis added).

Here, even with this limited protective order, Dr. Edler will still be able to prosecute her whistleblower claims because she will have access to relevant information on the spreadsheet and by allowing Dr. Edler to review the spreadsheet, while keeping its contents confidential, Dr. Edler can be assured that the County is not redacting information that Dr. Edler contends is relevant. Thus, this limited protective order achieves a “balancing of the scales.”

Accordingly, it is ORDERED:

1. Dr. Edler’s Motion to Compel and for Sanctions, ECF Doc. 106, is GRANTED IN PART as set forth herein.
2. The County’s Motion for Protective Order, ECF Doc. 112, is GRANTED IN PART as set forth herein.



3. The County's Motion for Reconsideration, ECF Doc. 120, is DENIED.

DONE AND ORDERED this 25th day of August, 2023.

Footnotes

[1]

Each count also includes a claim of retaliation in contravention of the FCA.

[2]

After the motion for protective order was filed, the Court ordered the parties to submit the spreadsheet to the Court for in camera inspection. ECF Doc. 119. On the same day that the County sent the spreadsheet to the Court, the County also filed a motion for reconsideration asking for the Court not to review the spreadsheet because the spreadsheet had not been authenticated. ECF Doc. 120. Regardless of whether the spreadsheet has been authenticated, the Court cannot address the County's request for a protective order without seeing the spreadsheet. Moreover, discovery on the spreadsheet would be required before the Court can determine whether it is authentic. See *Brandnameswatches Int'l, LLC v. PNC Bank, N.A.*, 2018 WL 3089325, at *2 (S.D. Fla. Jan. 18, 2018). The motion shall, thus, be DENIED.

[3]

After the hearing, counsel for the County submitted a notice of supplemental authority (improperly docketed as a memorandum). ECF Doc. 128. As the Court was drafting this Order, Dr. Edler filed a response, ECF Doc. 129, and its own notice of supplemental authority, ECF Doc. 130. While the Court did not intend to, and does not recall, stating it was leaving the record open for further briefing, the Court has considered all late submissions in drafting this Order.

[4]

After the Zoll reports were produced, the parties discussed entering into certain stipulations to avoid having to produce additional documents. Dr. Edler requested the parties reach a stipulation as to the following: (1) an average claim amount for the government claims; (2) the percentage of calls that relate to government payors; and (3) the total number of calls per identified employee. The County agreed to the first two stipulations, but not the third. As to the third, the County argues it could not agree "at that time" because it did not have complete information and several of the employees at issue did not answer any calls. Although Dr. Edler asks that the Court go ahead and enter certain stipulations as to these matters as sanctions, for the reasons discussed in Section II, below, the Court finds sanctions to be unwarranted at this time. Moreover, as discussed at the hearing, Dr. Edler's requested stipulations would no longer streamline the discovery because Dr. Edler wants the stipulations and discovery. That does not mean, however, that the parties should not continue to see if they can streamline the disputed issues in this case prior to trial.

[5]

Dr. Edler sought, as a sanction, to be able to take the deposition of a representative regarding the Zoll reports. The County does not object to this deposition. And the Court finds that such a deposition is appropriate regardless of sanctions. As set forth in Section II.B., below, the parties shall conduct that deposition within thirty (30) days of this Order.

[6]

See Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.").

[7]

The spreadsheet was created when Commissioner Bergosh asked the County's IT personnel to download the contents of his personal cell phone prior to taking a trip out of the country. According to Commissioner Bergosh he did this because he knew there was some County business on the cell phone and wanted to preserve that information.

[8]

Despite being notified in March of the spreadsheet, the County did not talk to Dr. Edler about the spreadsheet until May.

[9]

"For good cause to exist, the party seeking protection bears the burden of showing specific prejudice or harm will result if no protective order is granted." *Huddleston v. Bowling Green Inn of Pensacola*, 333 F.R.D. 581, 584 (N.D. Fla. 2019) (citing *Phillips ex rel. Estates of Byrd v. Gen. Motors Corp.*, 307 F.3d 1206, 1210 (9th Cir. 2002)). "[B]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test." See *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992). Ultimately, the trial court has broad discretion to decide when a protective order is appropriate and what degree of protection is required. *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984); *Phillips*, 307 F.3d at 1211.

[10]

The County argued that only Commissioner Bergosh has the "true" spreadsheet, but admitted that it had not compared what Commissioner Bergosh has with what Dr. Edler was provided.

[11]

Owens told the Pensacola News Journal he did not do anything illegal and a thumb drive with the text messages was left on his desk at the county office. ECF Doc. 126-1 at 4.

[12]

The Court found 85 instances of the word "Edler" on the spreadsheet.

[13]

The Court understands the Pensacola News Journal has obtained a copy of the spreadsheet. Although the confidentiality of the spreadsheet may, thus, already be compromised, the parties and their counsel are nonetheless obligated by this Order to keep the information confidential.

[14]

Even if there was no improper or illegal conduct involved, Commissioner Bergosh did not authorize any individual other than the IT personnel who downloaded the phone's contents to "access, view, copy, or distribute" his text messages or the contents of his personal cell phone. ECF Doc. 120-1.

DP