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**BEFORE THE
STATE OF FLORIDA
COMMISSION ON ETHICS**

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In re: Jonathan L. Owens,

Respondent.

Complaint No.: 23-231

ADVOCATE'S RECOMMENDATION

The undersigned Advocate, after reviewing the Complaint and Report of Investigation filed in this matter, submits this Recommendation in accordance with Rule 34-5.006(3), F.A.C.

RESPONDENT/COMPLAINANT

Respondent, Jonathan L. Owens, served as the Legislative Aide to Escambia County Commissioner Douglas Underhill. Complainant is Jeffrey W. Bergosh of Pensacola, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaint was legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Section 112.313(8), Florida Statutes. The Commission on Ethics has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on January 16, 2024.

ALLEGATION

Respondent is alleged to have violated Section 112.313(8), Florida Statutes, by disclosing or using information not available to members of the general public and gained by reason of his official position for his personal benefit or for the benefit of any other person.

APPLICABLE LAW

Section 112.313(8), Florida Statutes, provides as follows:

DISCLOSURE OR USE OF CERTAIN INFORMATION. A current or former public officer, employee of an agency, or local government attorney may not disclose or use information not available to members of the general public and gained by reason of his or her official position, except for information relating exclusively to governmental practices, for his or her personal gain or benefit or for the personal gain or benefit of any other person or business entity.

In order to establish a violation of Section 112.313(8), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.
2. Respondent must have disclosed or used information which was:
 - a) not available to members of the general public
and
 - b) gained by reason of Respondent's official position.
3. Such information must have been disclosed or used with an intent to secure personal gain or benefit for Respondent or another person or business entity.

ANALYSIS

Respondent served as the full-time Legislative Aide to then-Escambia County Commissioner Douglas Underhill from November 2014 through November 2022. (ROI 1, 3, 4) Respondent and Complainant, Escambia County Commissioner Jeffrey W. Bergosh, had a contentious relationship throughout Commissioner Bergosh's tenure as a County Commissioner.

(ROI 3) Respondent unsuccessfully ran against Commissioner Bergosh during the 2020 election for the seat occupied by Commissioner Bergosh. (ROI 3)

Dr. Rayme M. Edler, former Medical Director for Escambia County, and the County have been involved in litigation since 2020. (ROI 6) Dr. Elder 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. (ROI 7) Respondent sided with Dr. Elder in the lawsuit. (ROI 14, Exhibit B) The lawsuit is pending. (ROI 7)

Commissioner Bergosh uses his personal cell phone for personal and County business. (ROI 5) He was having technical issues with his cell phone which caused him concern that County-related public records (primarily texts) that he was required to preserve pursuant to the "Public Records Law" could be deleted if he attempted to preserve the data himself. Ch. 119, Fla. Stat. (ROI 5) Thus, he asked the County's IT staff if they could help and Bart Siders, the then-IT Director, assured Commissioner Bergosh that the data could be preserved. (ROI 5)

Commissioner Bergosh provided a "stick drive" (aka "thumb drive") to the IT staff and directed them to make one copy for him and not to make or retain any copies of his private cell phone data. (ROI 5) His phone 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. (ROI 5, 17) Commissioner Bergosh believed that he had the only existing copy of the data retrieved from his cell phone. (ROI 5)

In June 2023, Commissioner Bergosh was notified by the Escambia County Attorney's Office that the entire unredacted contents of his personal cell phone data had been disseminated by Respondent to the law firm representing Dr. Edler. (ROI 6) On August 7, 2023, Respondent stated during an interview on a radio talk show that, while he was employed with Escambia County, an anonymous source had left a "thumb drive" in his County office. (ROI 8, Exhibit A) Respondent said, "he assumed another county employee put it on his desk because they wanted him to have it." (Pensacola News Journal, August 8, 2023, attached as page 12 of the Complaint) Respondent acknowledged that the information contained hundreds, or thousands, of text messages pertaining to County business and private text messages and records. (ROI 8) Rather than contacting the County's IT Department or law enforcement, Respondent voluntarily turned the data over to Dr. Edler's attorneys and otherwise "just held on to it." (ROI 7, 8) Commissioner Bergosh has learned that Alexander Arduini, a purported friend of Respondent; and Gannett MHC Media, Inc., the corporate owner of the Pensacola News Journal; each have copies of the data from his personal cell phone. (ROI 17) The Pensacola News Journal has already printed text messages between Commissioner Bergosh and his wife that were included in his cell phone data. (ROI 17)

The disseminated information contained approximately 60,000 lines of texts, and approximately 12 pages of texts with three pages of texts between County Attorney Alison Rogers that directly addressed the Edler litigation and primarily dealt with Dr. Edler's employment issues with the County. (ROI 7, 15)

The County's Office of Compliance and Ethics' investigation was unable to provide any conclusive findings as to how Respondent obtained the cell phone data, the FBI currently is investigating the matter, and the County has sued Respondent for Replevin and Conversion. (ROI 16)

With respect to public records pursuant to Chapter 119, Florida Statutes, "[i]t is the policy of this state that all state, county, and municipal records are open for personal inspection and copying by any person. Providing access to public records is a duty of each agency." §119.01(1), Fla. Stat. If Respondent considered himself to be the "records custodian" of the data, the court has recognized a records custodian's duty to redact exempted portions of public records before they are released. *Morris Publ'g Grp., LLC v. State of Fla.*, 154 So.3d 528, 533 (Fla. 1st DCA 2015).

A public official or employee's use of a private cell phone to conduct public business via text messaging "can create an electronic written public record subject to disclosure" if the text message is "prepared, owned, used, or retained . . . within the scope of his or her employment or agency." *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036, 1040-1041 (Fla. 4th DCA 2018). (Accord *City of Sunny Isles Beach v. Gatto*, 338 So. 3d 1045 (Fla. 3d DCA 2022), noting that a "city commissioner's text messages may be a public record," although a private communication by a municipal official "falls outside the definition of public record.") However, in order for the communication to constitute a public record, "an official or employee must have prepared, owned, used, or retained it within the scope of his or her employment or agency." *Id.* at 1040-1041. According to the *O'Boyle* Court, an official or employee's communication "falls 'within the scope of employment or agency' only when their job requires it, the employer or principal directs it, or it furthers the employer's or principal's interests." *Id.* at 1041.

There are numerous categories of records that are exempt from disclosure in a public records request. §119.071(5)(a) 5., Fla. Stat. ("Social security numbers held by an agency are confidential and exempt from s. 119.07(1)."); §119.071(5)(b), Fla. Stat. ("Bank account numbers and debit, charge, and credit card numbers held by an agency are exempt from s. 119.07(1)."); §

394.4615(1), Fla. Stat. ("A clinical record is confidential and exempt from the provisions of s. 119.07(1).").

A current or former public employee may not disclose or use confidential information acquired in the course of his official duties for his personal gain or the benefit of others. §112.313(8), Fla. Stat. Dissemination of the information conferred a benefit to Dr. Edler and her attorneys in the pending lawsuit. Respondent admitted as much when he "said he's read the text messages. He said Edler is mentioned hundreds of times between Bergosh and several other people, as well as other issues related to Escambia County EMS," and he provided Dr. Edler's attorneys with the information "because he thought it would be helpful." (Pensacola News Journal, August 8, 2023, Complaint, p. 12)

Because the "text messages involve personal, private, privileged, and/or confidential communications between [Commissioner Bergosh] and [his] family members, attorneys, personal confidants, and business associates," Respondent may find that information useful if he runs against Commissioner Bergosh again or if he otherwise seeks to defeat the Commissioner in the 2024 election. (ROI 17, Complaint)

Commissioner Bergosh advised that Respondent was unauthorized to possess, and in turn disseminate, the information which consisted of personal information on at least five individuals, confidential medical record information on 18 different Escambia County citizens, as well as more than 30 attorney-client privileged conversations including some conversations between Commissioner Bergosh and the County Attorney on active cases. (Complaint, pp. 2-4) This information clearly did not perpetuate, communicate, or formalize knowledge consisting of public business.

Based on the characterization of the information and the case law discussed above, all the personal information contained on the thumb drive is not a public record, was unavailable to the general public, and would not be produced by a public agency in response to a public records request.

In sum, Respondent was a public employee when he gained information by reason of his official position, the information was not available to members of the general public, and such information was disclosed or used with an intent to secure a personal gain or benefit for Respondent and/or Dr. Edler and her attorneys. All the elements to prove a violation have been met.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.313(8) Florida Statutes.

RECOMMENDATION

It is my recommendation that:

There is probable cause to believe that Respondent violated Section 112.313(8), Florida Statutes, by disclosing or using information not available to members of the general public and gained by reason of his official position for his benefit or any other person.

Respectfully submitted this 31st day of January, 2024.


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