

FLORIDA
COMMISSION ON ETHICS
JUN 23 2021
RECEIVED

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

CONFIDENTIAL

In re: Douglas Underhill,

Respondent.

**Complaint Nos. 20-060, 20-073, & 20-103
(consolidated)**

ADVOCATE'S AMENDED RECOMMENDATION

The undersigned Advocate, after reviewing the Complaints and Report of Investigation filed in this matter, submits this Amended Recommendation in accordance with Rule 34-5.006(3), F.A.C. The Amended Recommendation incorporates the Amended Determination of Investigative Jurisdiction and Order to Investigate.

RESPONDENT/COMPLAINANTS

Respondent, Douglas Underhill, serves as County Commissioner for Escambia County. Complainants are David M. Bear, Joe Ward, and John F. Stenicka of Pensacola, Florida.

JURISDICTION

The Executive Director of the Commission on Ethics determined that the Complaints were legally sufficient and ordered a preliminary investigation for a probable cause determination as to whether Respondent violated Sections 112.313(6), 112.313(8), 112.313(7)(a), 112.3148(3), 112.3148(4), and 112.3148(8), Florida Statutes. On May 5, 2021, the Executive Director issued an Amended Determination of Investigative Jurisdiction and Order to Investigate. The Commission has jurisdiction over this matter pursuant to Section 112.322, Florida Statutes.

The Report of Investigation was released on April 19, 2021.

ALLEGATION ONE

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by publicly sharing and/or publishing confidential transcripts, including the minutes, of meetings of the Escambia County Board of County Commissioners.

APPLICABLE LAW

Section 112.313(6), Florida Statutes, provides as follows:

MISUSE OF PUBLIC POSITION. No public officer, employee of an agency, or local government attorney shall corruptly use or attempt to use his or her official position or any property or resource which may be within his or her trust, or perform his or her official duties, to secure a special privilege, benefit, or exemption for himself, herself, or others. This section shall not be construed to conflict with s. 104.31.

The term "corruptly" is defined by Section 112.312(9), Florida Statutes, as follows:

"Corruptly" means done with a wrongful intent and for the purpose of obtaining, or compensating or receiving compensation for, any benefit resulting from some act or omission of a public servant which is inconsistent with the proper performance of his or her public duties.

In order to establish a violation of Section 112.313(6), Florida Statutes, the following elements must be proved:

1. Respondent must have been a public officer or employee.
2. Respondent must have:
 - a) used or attempted to use his or her official position or any property or resources within his or her trust,
 - or
 - b) performed his or her official duties.
3. Respondent's actions must have been taken to secure a special privilege, benefit or exemption for him- or herself or others.
4. Respondent must have acted corruptly, that is, with wrongful intent and for the purpose of benefiting him- or herself or another

person from some act or omission which was inconsistent with the proper performance of public duties.

ANALYSIS

Respondent has served as an Escambia County Commissioner since November 2014. (ROI 1, 14) His current term of office began in November 2018 and ends in November 2022. (ROI 61, Note)

RELEASE OF CONFIDENTIAL TRANSCRIPTS:

In 2014, Escambia County (County) sued the Innerarity Island Development Corporation, the company responsible for the private sewer and water system for Innerarity Island, after the company notified the County of its intent to abandon the system. (ROI 58) The sewer and water systems are located in a private gated community in Respondent's District in Escambia County. (ROI 59) The County Commissioners held private "shade meetings" concerning the court case in the County Attorney's office on February 18, 2014, April 10, 2014, June 25, 2015, July 7, 2015, and August 4, 2016. (ROI 57, 59) Eventually, the County Commission agreed to bring the Emerald Coast Utilities Authority (ECUA), the local governmental body providing utility services to the majority of the County, into the litigation. (ROI 61)

During a regular County Commission meeting, the Commissioners asked County Attorney Alison Rogers if they could receive copies of the transcripts¹ of the confidential meetings so they could review what had occurred in the previous meetings. (ROI 60) County Attorney Rogers released the transcripts to the Commissioners via a May 11, 2020 email with the heading "CONFIDENTIAL RECORDS ATTACHED," and noted in the email that the transcripts are confidential because the litigation has not concluded, and that the transcripts should not be

¹ The meeting minutes and other business that transpired during the shade meetings would be included in the transcripts.

released, or shown to the public, or the media, until the litigation is concluded. (ROI 60, Exhibit H)

County Attorney Rogers said she may have told Respondent and the other Commissioners at some point that all legal aspects of the lawsuit had been "essentially resolved." (ROI 65) However, the case is still pending. (ROI 63, 66)

Thereafter, Respondent asked County Attorney Rogers if the transcripts could be released to the public and he provided her with an informal Attorney General's Opinion² (AGO) stating that this matter involved "waivable confidentiality." (ROI 61, Exhibit I) She told Respondent that her client was not just him, but all five County Commissioners and she believed that in order for the AG opinion to apply, the majority of the Commissioners would have to agree to release the transcripts. (ROI 60, 61, Exhibit I)

In spite of having "CONFIDENTIAL" noted in the email, and despite the County Attorney personally explaining to Respondent that the transcripts should remain confidential, Respondent posted them on his Facebook page. (ROI 61) Respondent cites various reasons why he believed it was appropriate to release the transcripts to the public. In Respondent's opinion:

1) All matters involved in the litigation had been settled and concluded by inter-local agreements between the parties;³

2) The only court actions in the litigation since the agreements were made have been motions by the County Attorney to extend the time for discovery, the County Attorney has not made any attempt(s) to produce discovery, and the only purpose of these motions was to keep what was discussed during the shade meetings from being released to the public;

² Florida Attorney General Advisory Legal Opinion to Robert D. Pritt; Informal; Date: November 26, 2014; Subject: Sunshine Law – Shade Meetings. (Exhibit I)

³ Inter-local agreements are discussed later.

3) When he received the transcripts on May 11, 2020, he became the "custodian of public records under Florida Law" and he is "responsible to the higher ethical calling of my duty as a custodian of public record . . . I cannot deny that information to a citizen";⁴

4) He did not agree with the County Attorney's legal opinion regarding the records but came to his own legal conclusion based on the Attorney General's Opinion that he was allowed to release the transcripts;

5) He disagreed that just because the County Attorney labeled the transcripts as confidential that makes the records confidential;

6) He believed the County Attorney had reasons for keeping the transcripts confidential because they showed "dirty operations on the part of the County" and "petty politics" engaged in by a former Commissioner;

7) The County Attorney told him privately that all legal matters that were in dispute in the litigation had been settled but she did not believe the transcripts should be released until the project was completed because "you never know when something can go sideways";

8) The release of the transcripts benefitted every citizen in the County by providing them with the knowledge of what the County was doing relative to the utility litigation issue; and

9) The release of the transcripts did not damage the outcome of the project, nor expose the County or citizens to the potential loss of revenue or legal action. (ROI 62, 64, 65)

According to County Attorney Rogers, the lawsuit was technically ongoing at the time Respondent released the transcripts to the public and the case still, as of today, is not closed. (ROI 66) Therefore, she believes the transcripts should have remained confidential until the case is closed. (ROI 66)

The Attorney General's Office has consistently read the "Government in the Sunshine Law" to assure the public's right of access to meetings of public boards or commissions. However, in

⁴ Respondent maintains he received a citizen's verbal public records request and citizens have demanded the information for several years. (ROI 64)

order to place local governments and state agencies on equal footing with the other parties in a lawsuit, the Legislature has provided a specific exemption from the open meetings requirements by adopting Section 286.011(8), Florida Statutes. The purpose of this exemption is to allow governmental agencies to protect their theories of litigation strategy or settlement negotiations from the opposing party during the pendency of a lawsuit, but there is no requirement of confidentiality expressed in section 286.011(8), Florida Statutes. In this regard, Section 286.011(8)(e) is a tool which governmental boards or commissions, *as a collegial body*, may employ in their discretion to release the records prior to the conclusion of such litigation.

Thus, the Escambia County Board of Commissioners, as the collegial body to which it applies, *could have* waived the exemption provided in Section 286.011(8), Florida Statutes, and released the transcripts of the shade meetings. The Commissioners chose not to.

The County Attorney advised Respondent that the waiver must be agreed upon by the body as a whole. (ROI 61) Nonetheless, Respondent released the shade meeting transcripts without the consent of the other Commissioners.

Contrary to County Attorney Rogers' instruction to Respondent, he claimed that the transcripts were no longer confidential insomuch as the legal disputes had been resolved with inter-local agreements. (ROI 64) The Attorney General previously addressed whether an agreement or stipulation for settlement would constitute the conclusion of litigation as claimed by Respondent. The Attorney General stated that "a stipulation does not, *except by its express terms*, operate to bring litigation to a conclusion." (Emphasis added.) *See* Op. Att'y Gen. Fla. 94-64 (1994); *Cf.* Op. Att'y Gen. Fla. 94-33 (1994)(Concluding that, although a voluntary dismissal of an action usually operates to end the action and to divest a trial court of jurisdiction, to avoid a subversion of the rules of procedure that would deprive an agency of its rights to a fair trial, a public agency could

maintain the confidentiality of a record of a strategy or settlement meeting until the suit is dismissed with prejudice or the applicable statute of limitation has run.) The terms of any agreement(s) entered herein, apparently did not provide for release of the transcripts prior to the conclusion of the litigation and the case was still "technically ongoing" at the time Respondent released the transcripts. (ROI 66)

All the elements for a violation of misuse of public position have been met. Respondent was a public employee at all relevant times. Thus, element one for a violation has been met. The basis for Respondent's misuse of public office is his release of the shade meeting transcripts. It is solely because of his public position that Respondent had been entrusted with access to these documents. Thus, element two for a violation has been met.

Respondent informed the Commission on Ethics' Investigator that every citizen in the County benefitted by his release of the transcripts. Respondent also may have received a political benefit for himself by releasing the transcripts. He breached the duty to maintain confidentiality for his own benefit and/or that of his constituents, thus, element three for a violation has been met.

The fourth and final element for a violation has been met. Respondent stated he was, at the time, "absolutely aware" of the confidential restriction noted by County Attorney Rogers; nonetheless, he ignored her admonition. (ROI 64) The unilateral decision made by one member of the body – Respondent – to release transcripts of shade meetings held pursuant to Section 286.011(8), Florida Statutes, rather than by the decision of the collegial body was inappropriate and inconsistent with the proper performance of his public duties. *See, e.g.,* Ops. Att'y Gen. Fla. 03-09 (2003) and 91-75 (1991). Respondent's release of confidential litigation strategy, etc. discussed in the shade meetings, without collegial body consent, is egregious conduct as evidenced by a potential sanction constituting a noncriminal infraction punishable by a fine up to \$500.

§286.011(3)(a), Fla. Stat. Respondent's intentional defiance in releasing the confidential transcripts over the advice of counsel shows his utter disregard for the law, the County Attorney, and the County Commissioners, and indicates a corrupt intent.

Therefore, based on the evidence before the Commission, I recommend that the Commission find probable cause to believe that Respondent violated Section 112.313(6), Florida Statutes.

ALLEGATION TWO

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 (i.e., shade meeting transcripts, including the minutes) and gained by reason of his official position for his personal gain or benefit or the personal gain or benefit of another person or business entity.

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

The facts are set forth above under Allegation One. Respondent had access and/or possession of transcripts⁵ from private shade meetings he attended in this official capacity as a County Commissioner. Despite their confidential designation, Respondent released the transcripts to the general public prior to their classification as public records. According to Respondent, his intent was to benefit every citizen in the County by providing them with the knowledge of what the County was doing relative to the utility litigation issue.

Additional benefits may have included: alerting the opposing parties of attorney-client communications, litigation strategy, legal theory, mental impressions, etc.; and potentially benefitting Respondent politically. These facts support all the elements of a violation.

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.

ALLEGATION THREE

Respondent is alleged to have violated Section 112.313(6), Florida Statutes, by publicizing his legal defense fund on a social media page affiliated with the County.

APPLICABLE LAW

Section 112.313(6), Florida Statutes, is set forth under Allegation One.

⁵ The minutes of the five County Board shade meetings would be included in the transcripts of the meetings which Respondent released to the general public prior to their designation as public records.

ANALYSIS

GoFundMe:

Respondent was sued for defamation in several lawsuits prior to, and soon after, becoming a Commissioner. (ROI 10, 14) He prevailed in each of the lawsuits, but accumulated approximately \$20,000 in legal fees in each lawsuit. (ROI 11, 14) After County Attorney Rogers informed Respondent that the County would not pay his legal fees, she advised Respondent that he could create a "GoFundMe"⁶ account to receive contributions for his legal defense; however, he could not accept contributions from lobbyists or vendors doing business with the County. (ROI 11) Based on Respondent's desire to solicit money for his legal defense, County Attorney Rogers sent an email to Respondent, dated September 22, 2017, detailing Respondent's responsibility and obligation to comply with Chapter 112, Florida Statutes, "Gifts Disclosure and Prohibited Gifts," and she stressed the importance of filing a gift report with respect to donations over \$100 to his legal defense fund. (ROI 11, 14, Exhibit C)

On November 26, 2019, Respondent created a GoFundMe page and raised \$4,829 from 44 contributors, ranging from \$5 to \$500, in his GoFundMe account. (ROI 12, 13, 15, 20) Respondent withheld the identity of some contributors/donors by indicating that their contribution was from an anonymous contributor. (ROI 12, 16) Eleven (11) individuals donated over \$100, with five shown as "anonymous" on Respondent's GoFundMe page. (ROI 13, 20, Exhibit E)

In the case of contributors he did not know personally, Respondent stated that he was "very, very, careful" to follow-up with additional questions and checked the County's vendor registry to verify that he was not receiving gifts from prohibited donors. (ROI 17) In contradiction, County

⁶ "GoFundMe provides an easy way to raise money from your friends, family, and online community. Our platform makes it simple to share your campaign in a variety of ways to bring in donations, track your progress, and post updates to engage your community. Check out our fundraising tips and fundraising ideas for advice on how to raise more donations." <https://www.gofundme.com/c/questions>