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

DAVID BEAR,

Plaintiff,

Case No. 3:19-CV-04424-MCR/HTC

v.

ESCAMBIA COUNTY BOARD OF COUNTY COMMISSIONERS AND DOUGLAS UNDERHILL,

Defendants.

SUPPLEMENTAL BRIEF OF DEFENDANT DOUGLAS UNDERHILL (IN HIS INDIVIDUAL CAPACITY) RELATING TO PLAINTIFF'S MOTION TO COMPEL [DOC. 74]

Defendant Douglas Underhill, in his individual capacity, submits this Supplemental Brief pursuant to the Court's invitation at the February 2, 2021 hearing on Plaintiff's Motion to Compel [Doc. 74]. For brevity, Mr. Underhill, in his individual capacity, will be referenced herein simply as "Mr. Underhill."

Definition of What Constitutes a "Public Record" Is a Matter of Law Governed by the Rules of Statutory Construction

The central issue before this Court is whether Mr. Underhill failed to produce "public records." All of the documents the Plaintiff claims to be public

records are before the Court.[1] Determining whether they are public records is solely within the province of this Court.

This is not a "common law" or "case law" issue. It is one of statutory construction. The analysis starts with the plain language of the statute, Fla. Stat. § 119.01 *et. seq.*

The term "public records" is defined, by statute, as follows:

> "Public records" means all **[1]** documents, papers, letters, maps, books, tapes, photographs, films, sound recordings, data processing software, or other material, regardless of the physical form, characteristics, or means of transmission, **[2]** *made or received **[a]** pursuant to law or ordinance or **[b]** in connection with the transaction of official business by any agency*.

Fla. Stat. § 119.011(12) (bracketed numbers and letters and italicized emphasis added).

Prong 1: Medium doesn't matter, it's the content that matters

The parties agree that a "public record" can be in any form—electronic or otherwise—and that a record maintained on a social media page by an agency, or on its behalf, could be a public record. *See, e.g., O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036 (Fla. 4th DCA 2018) (finding that text messages on a Mayor's

[1] This includes more than 10,000 pages from Facebook that Mr. Underhill produced, despite his position that none of those records met the statutory definition of "public records" and that he did not meet the definition of "agency" when making Facebook posts, as well as more than 24,000 other pages of Facebook posts not produced to Plaintiff, but produced to this Court for an *in-camera* review.

private phone might be a "public record" if the statutory definition is otherwise met).

Here, there is no dispute that the Facebook documents at issue were not maintained by the agency in its files or on its computers, but rather by an individual Commissioner without direction, or authorization, of the agency. In fact, the agency's rule forbade Commissioners from communicating with constituents on Facebook, an agency rule Mr. Underhill believed to be unconstitutional. The only relevance of the County's rule is the rule demonstrates that the Facebook account at issue was neither maintained by the agency, nor at its direction.

Prong 2: Made or received [a] pursuant to law or ordinance or [b] in connection with the transaction of official business by any agency.

While the first prong of the statutory requirement makes the medium of the record irrelevant, the second prong defines what must be recorded, by whom, and in connection with what, to make it a "public record."

The second prong can be met by showing that either the record was:

> [a] made or received pursuant to law or ordinance, or
>
> [b] made or received in connection with the transaction of official business by any agency.

Prong 2[a]: "Made or received pursuant to law or ordinance."

Under this first portion of Prong 2, the record must be "made or received pursuant to law or ordinance." Here, there was no law or ordinance that required, directed, or even permitted Commissioner Underhill to create and maintain a Facebook account.

Prong 2[b]: "Made or received[2]… in connection with the transaction of official business by any agency."

Unquestionably, the phrase "in connection with," taken by itself, is broad. This phrase is modified, however, both by the foundational phrase of "made or received" at the start of this statutory definition, as well as by the phrase "the transaction of *official business* by any *agency*" contained in the only potentially applicable portion of the definition. Application of this part of the definition frames the issue before this Court:

> ***Were any of the Facebook posts at issue "made or received" as part of the "transaction of official business by any agency"?***

To answer that question, we must look to the definition of "agency," as "Chapter 119 applies only to 'agency' records." *State v. City of Clearwater*, 863 So.2d 149, 153 n.3 (Fla. 2003). Agency is defined by the statute as follows:

> "Agency" means any state, county, district, authority, or municipal officer, department, division, board, bureau, commission, or other separate unit of government created or established by law

[2] The language "made or received" applies to all that follows, as the statute uses the word "or."

> including, for the purposes of this chapter, the Commission on Ethics, the Public Service Commission, and the Office of Public Counsel, and any other public or private agency, person, partnership, corporation, or business entity *acting on behalf of any public agency*.

Fla. Stat. § 119.011(2) (emphasis added).

It is the "agency" that has the duty to maintain and provide access to "public records." *See* Fla. Stat. § 119.01(1). The word "agency," in fact, appears *no less than 285 times* in Chapter 119. "State" is expressly included in that definition, and Escambia County is a political subdivision of the State of Florida. "Commission" is also defined as an agency, which—of course—includes the Escambia County Commission. But the term "commissioner" or "legislator" (the role of a commissioner) appears nowhere in the definition of "agency."

This does not mean that a commissioner might not be found to be a "person" "*acting on behalf of any public agency*"… "*in connection with*" the "*official business*" of that "*agency*."[3] But that is the only route under which Plaintiff could demonstrate that the records he seeks are "public records"; i.e., Plaintiff must show that the content of Mr. Underhill's Facebook page was "made or received" by Mr.

[3] For example, the County Commission might designate a commissioner to gather records to be used by the Commission in enacting a land use ordinance. In that case, the information gathered and in the Commissioner's possession might be a public record that is to be turned over to the County as a records custodian. But that was not the case here.

Underhill, "acting on behalf of" the agency (the County Commission), "in connection with" the "official business" of that "agency."

Uncontroverted Evidence Shows the Facebook Pages At Issue Do Not Meet the Statutory Definitions Of "Public Record" and "Agency."

The uncontroverted evidence established that, in posting on Facebook, Mr. Underhill never acted on behalf of the Escambia County Commission, or any other agency, in "connection with" the "official business" of that agency. This evidence included the testimony of the County Attorney (Alison Rogers), along with the testimony of Mr. Underhill, that Mr. Underhill was not authorized to speak or act on behalf of the agency.

The agency did not want Mr. Underhill to make Facebook posts that had anything to do with county political issues. The agency, in fact, forbade him from doing so by ordinance. Mr. Underhill's political opinions did not become "public records" by their posting on social media. Nor would those opinions, or the public comments they generated, have become "public records" if they had been broadcast on the nightly news, plastered on billboards, or published in every major newspaper in this nation. His opinions—regardless of the medium used to express

them—are not actions by the agency. Mr. Underhill is but one legislative vote on a five-commissioner Commission that acts only by majority vote of its members.[4]

Under these facts, the content on the Facebook page was not "made or received" in connection with the "official business" of the agency by Mr. Underhill as a person "acting on behalf of" the agency (the Commission). Thus, the content is not a "public record."

O'Boyle v. Town of Gulf Stream

Plaintiff relies heavily on *O'Boyle v. Town of Gulf Stream*, 257 So. 3d 1036 (Fla. 4th DCA 2018). The Court invited further briefing on this case.

In *O'Boyle*, the issue at the trial court involved two categories of records: (1) bills and payments sent to the Town for services rendered by the Town's attorney, and (2) text messages sent or received by the Town's Mayor relating to Town business since the time of his appointment. The appellate court's focus was on the second category of documents, the only category of documents relevant here.[5]

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[4] See the detailed treatment of this topic on pages 4 through 7 of Mr. Underhill's Motion to Dismiss [Doc. 29].

[5] The first category of records in *O'Boyle* clearly constituted public records. At the trial level, they were first produced in redacted form, and were later produced in unredacted form after a motion for *in-camera* inspection had been filed but apparently before the *in-camera* inspection took place. Regarding this category of documents, the appellate court dealt only with the issue of the appropriateness of the initial redactions and whether attorneys' fees, costs, and

In *O'Boyle*, an action was brought against a municipality to obtain records that, while potentially related to the Town's public business, were in the exclusive control of one of their elected officials. *Id.* at 1040. The Fourth DCA did *not* find that the text messages on the Mayor's phone that had not been produced were, in fact, "public records." Rather, the Fourth DCA remanded to the trial court for consideration by the trial court to determine, in an *in-camera* inspection, whether the text messages sent to and from the Town's Mayor qualify as "public records." *Id.* at 1042-43. That determination was to be made by reference to the plain language of the statute and controlling Florida Supreme Court precedent. *O'Boyle* did not purport to change the statutory definition.

O'Boyle is readily distinguishable from the case now before this Court based on one simple fact: a "mayor" of a municipality is part of the executive branch of government, and is—in fact—the highest ranking executive in that municipality. A "municipal officer" is expressly defined as an "agency." Fla. Stat. § 119.011(2). A mayor is, without a doubt, authorized to act on behalf of the agency, as he or she *is* an agency under the statutory definition.

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expenses should be awarded, and the court remanded that issue to the trial court for that determination. Neither party seems to have disputed whether an auditable "accounts payable" record on which the expenditure of public funds was to be made was a "public record."

In addition to being an "agency" by being a "municipal officer," the Mayor was—as the top-ranking executive—authorized to speak and act on behalf of the agency in the conduct of official agency business. Because the Mayor fits squarely within the definition of an "agency," text messages on the Mayor's phone could potentially fall within the definition of an action by an "agency." That was the only relevant ruling by the *O'Boyle* court.

Those facts are contrasted with the Facebook account of a single county commissioner, who—by uncontroverted testimony at the hearing—had no authority to post his opinions, or respond to the opinions of others, *as a representative of the agency* on which he served only in a legislative role.[6]

The *O'Boyle* court is correct insofar as it holds that "[a]n elected official's use of a private cell phone to conduct public business via text messaging *can* [not does] create an electronic written public record subject to disclosure." *Id.* (emphasis and bracketed language added).

[6] The County Attorney testified that when he was a chairman, Commissioner Underhill had certain authority to sign checks approved by the Commission, and to conduct, as chair, commission meetings. But she expressly testified that he has never had the authority to speak on behalf of or in any manner bind the Escambia County Commission. He is not a "county officer" with executive authority, nor a "person" with any authority to speak for or bind the agency—the Escambia County Commission.

Even in the context of a clearly defined agency, the *O'Boyle* court acknowledged an important limitation to the above proposition:

> "*However*, for that information to *indeed* be a public record, an official or employee must have prepared, owned, used, or retained it *within the scope of his or her employment or agency*.[7] An official or employee's communication falls 'within the scope of employment or agency' *only* when *their job* <u>*requires*</u> *it*, the employer or principal <u>*directs*</u> it, or it *furthers the employer or principal's interests*.'"

O'Boyle, 257 So.3d at 1040-1041 (emphasis added).

The *O'Boyle* court correctly assumed that a mayor, as the chief executive officer of the municipality, acted for the "agency" (in fact, a municipal officer *is* an agency by definition). With that assumption, the Mayor's text messages may have been the "official business" of that agency. This made the text messages potential "public records" requiring further inquiry. That was the sole ruling by the *O'Boyle* court in relation to the text messages. Any language that might be deemed an alteration of the statutory definition or an expansion of the Florida Supreme Court

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[7] This is an incomplete statement of the law. While it is true that to be a public record the record must have been prepared, owned, used, or retained while acting within the scope of the employment or agency, that does not end the analysis. This is the classic Venn diagram in which one is a subset of another. Qualifications to be a Judge in federal court include the requirement that one be a licensed attorney, but more is required more than *just* that qualification. It also requires (among other things) that the Judge be appointed to the bench by the President of the United States. It is not *wrong* to say that one must be an attorney to be a federal court Judge, but it is wrong to say that that is the only requirement. Similarly, it would be wrong to say that *mere* actions "furthering the employer's or principal's interests" resulting in the creation of a document would constitute a "public record."

decisions in *Shevin*, *City of Clearwater*, and *Braddy v. State* (see *infra*) would be dicta.

None of the activity on Mr. Underhill's Facebook page is "required" by his job; none was "directed" or even authorized by Mr. Underhill's employer or principal; and none of the activity "furthers the employer or principal's interests"—at least, not in connection with the "official business" of the agency.

The last part of the statement from *O'Boyle*, whether the action "furthers the employer or principal's interests," cannot be read in a vacuum—it must be read in light of the statutory language, including the definition of "public record" and "agency." And to the extent *O'Boyle* could be read so liberally that the definition of "public records" includes documents reflecting mere discussion of political issues, that reading would be in conflict with the Florida Supreme Court's holdings in *Shevin* and in *Clearwater* and must be rejected. Those courts would find such a definition to be unworkable, and contrary to the plain text of the controlling statute.

Shevin Is Still Good Law

The Court seemed to question the continuing validity of *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633 (Fla. 1980), in light of some of the arguably broad language from *O'Boyle*. *O'Boyle* was decided by the Florida Fourth DCA in 2018, and *Shevin* was decided by the Florida Supreme Court in 1980.

Shevin remains good law, and to the degree a later lower-court opinion is argued to state otherwise, that argument would be incorrect on its face, as lower-court opinions cannot overrule the Florida Supreme Court's express decisions.

Analysis of the case law since *Shevin* was decided further shows that *Shevin* remains good law. In *State v. City of Clearwater*, 863 So.2d 149 (Fla. 2003), the Florida Supreme Court expressly cited and discussed *Shevin*, stating: "[The] argument that the placement of e-mails on the City's computer network automatically makes them public records is contrary to this Court's decision in *Shevin*…." The Florida Supreme Court went on to quote and apply the *Shevin* test, holding that "the definition of the term 'public records' limited 'public information to those materials which constitute *records*—that is, materials that have been prepared *with the intent* of perpetuating and formalizing knowledge," and further holding that the documents "must have been prepared 'in connection with official agency business' and be 'intended to perpetuate, communicate, or formalize knowledge of some type.'" *Id.* (quoting and applying *Shevin*, 379 So.2d at 640) (emphasis in original).

In 2017, the Florida Supreme Court, in affirming that "not all materials are 'public records' within the meaning of chapter 119, Florida Statutes," again restated the *Shevin* test in *Braddy v. State*, 219 So. 3d 803, 820 (Fla. 2017).

Nothing in the Florida Supreme Court's precedent suggests the *Shevin*

analysis has been overruled or abrogated and, to the contrary, the Florida Supreme Court continues to cite it as good law.

Shevin

The Florida Supreme Court—the final say on Florida law—holds that the definition of "public records" within Florida's public-records laws "limits public information to those materials which constitute Records[,] that is, materials that have been prepared with the intent of perpetuating or formalizing knowledge.[] *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So.2d 633, 640 (Fla. 1980) (footnote omitted) (emphasis added).

The *Shevin* court, reviewing the district court of appeals' finding, held that broad language in the district court's opinion "expand[ed] the definition of 'public records' *beyond* that intended by the legislature." *Id.* (emphasis added). The Court further held that "[t]o give content to the public records law which is consistent with the most common understanding of the term 'record,' we hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business *which is intended to perpetuate, communicate, or formalize knowledge of some type*." *Id.* (emphasis added).

The Court noted examples of items that would *not* constitute a "public record": "To be *contrasted* with 'public records' are materials prepared as drafts or notes, which constitute mere precursors of governmental '*records*' and are not,

in themselves, intended as *final evidence of the knowledge to be recorded*. Matters which obviously would *not* be public records are rough drafts, notes to be used in preparing some other documentary material, and tapes or notes taken by a secretary as dictation." *Id.* (emphasis added).

Thus, according to the Florida Supreme Court, there are clearly large classes of documents that may be in the possession and control of an agency or officeholder that do *not* fall within the category of a "public record." The mere fact that a document, such as an email, is part of an agency's computer memory does not make it a "public record." Nor does posting a document on a commissioner's Facebook account.

Butler v. City of Hallandale Beach

While Plaintiff relies heavily on *O'Boyle*, the more analogous case is *Butler v. City of Hallandale Beach*, 68 So.3d 278 (Fla. 4th DCA 2011). In *Butler*, the plaintiff (Butler) sought, in a public records request, an email from the Mayor of the City of Hallandale Beach. *Id.* at 279. The email had been sent from the Mayor's personal email account, using her personal computer, and was blind copied to friends and supporters. *Id.*

Attached to the email were three articles that the Mayor had written as a contributor to the South Florida Sun Times (Times). *Id.* The three articles attached to the email were: (1) a transcript of the 2009 State of the City Address;

(2) a transcript of Part Two of the State of the City Address; and (3) an article about tax questions raised at prior commission meetings. *Id.*

The email itself that enclosed those three articles was brief, and included (as emails do) the names of the recipients of the email. *Id.*

The trial court found that the Mayor was under no obligation pursuant to the statute or ordinance to notify her friends and supporters that a column had been published, and found further that the City played no role in the Mayor's decision to send the email, with attachments, to friends. *Id.* Therefore, the email was not a "public record," and the public-records requester was not entitled to the email or the names and email addresses of the recipients of the email. *See id.* The appellate court agreed, and affirmed. *Id.*

The appellate court noted that "[t]he determination of what constitutes a public record is a question of law entitled to de novo review." *Id.* at 280. The appellate court, as does Mr. Underhill here, centered its analysis on the definitions of "public record" and "agency." *Id.* at 280. The court cited with approval the portions of *City of Clearwater* that quoted *Shevin*, including the test of "whether the e-mail is prepared in connection with the official business of an agency and is 'intended to perpetuate, communicate, or formalize knowledge of some type.'" *Id.*

The Court noted that the mere fact that the Mayor's email was sent from her private email on her own personal computer was not the determining factor as to

whether the email was a public record. *Id.* "Once again, it is whether the email was prepared in connection with official agency business and intended to perpetuate, communicate, and formalize knowledge of some kind." *Id.* (citing *City of Clearwater*).

The appellate court, in finding that the Mayor's email to friends and supports was *not* a public record, found it important that:

(1) the City (the "agency" in that case) played no role in the Mayor's decision to write articles for the newspaper, *id.* at 281;

(2) the City played no role in identifying the topics about which the Mayor chose to write and exercised no control over the content of the articles, *id.*;

(3) the City played no role in the Mayor's decision to distribute or not to distribute her articles, or the means by which she chose to do so, *id.*; and

(4) the City played no role in deciding to whom the Mayor chose to distribute the copies of her articles—rather, the Mayor herself decided to distribute the articles to select personal friends and supporters at her own discretion. *Id.*

The appellate court concluded that the email sent by the Mayor was not intended to perpetuate, communicate, or formalize the City's business, that it was

simply to provide a copy of the articles to the Mayor's friends and supporters, and that the email was not made pursuant to law or in connection with the transaction of official business by the City, or the Mayor in her capacity as Mayor. *Id.* That is precisely the analysis that should be applied to the content on Mr. Underhill's Facebook account. Application of that analysis demonstrates that none of Mr. Underhill's Facebook documents constitute "public records."

NCAA v. Associated Press

The case of *NCAA v. Associated Press*, 18 So.3d 1201 (Fla. 1st DCA 2009), is also not helpful to Plaintiff. That case establishes the proposition that "[i]n limited but well defined circumstances, a record created and maintained by a private organization can be subject to disclosure as a public record on an agency theory. For example, if a private entity is acting on behalf of the state or local government and creates a document that reflects the business of the governmental entity, the document *can* become a public record." *Id.* at 1209 (emphasis added).

The First DCA cited *News & Sun-Sentinel Co. v. Schwab, Twitty & Hanser Architectural Group, Inc.*, 596 So. 2d 1029, 1031 (Fla. 1992), which set forth a nine-factor test to determine whether records held by a private party must be disclosed under the public record act on the theory that the private party is acting on behalf of the government. *Id.* at 1209.

The nine (non-exhaustive) factors set forth in *News & Sun-Sentinel*, drawing from a line of cases, including: (1) the level of public funding; (2) commingling of funds; (3) whether the activity was conducted on publicly owned property; (4) whether services contracted for are an integral part of the public agency's chosen decision-making process; (5) whether the private entity is performing a governmental function or a function which the public agency otherwise would perform; (6) the extent of the public agency's involvement with, regulation of, or control over the private entity; (7) whether the private entity was created by the public agency; (8) whether the public agency has a substantial financial interest in the private entity; and (9) for [whose] benefit the private entity is functioning." *News & Sun-Sentinel*, 596 So. 2d at 1031.

Those nine factors are used in answering *the* "critical question": "The critical question in this line of cases is whether the private party is a *'private agency, person, partnership, corporation or business entity acting on behalf of [a] public agency'* that has therefore become an 'agency,' as defined in section 119.011(2) Florida Statutes. *NCAA*, 18 So.3d at 1209 (italicized emphasis in original in *NCAA*; underlined emphasis added). "The *common feature* of all of the cases in this line of authority … is that they all involve efforts to determine whether a private entity [or person] has *assumed the role of government*." *Id.* (emphasis added). It simply cannot be credibly argued that Mr. Underhill

"assumed the role of government" by maintaining and occasionally posting to a Facebook account.

In *NCAA*, the answer to that "critical question" was clearly "yes": The documents were "received" by the agency (Florida State University) and were "used in the transaction of official business," i.e., a disciplinary proceeding relating to the public university, *id.* at 1207, showing that the NCAA had "assumed the role of government" in the actions in question.

Under the analysis in *NCAA*, the answer to the "critical question" of whether Mr. Underhill "assumed the role of government" (including application of the nine-factor test in *News & Sun-Sentinal*) would clearly be "no," for the reasons previously stated.

CONCLUSION

Mr. Underhill would respectfully submit that the evidence at the all-day hearing demonstrated that none of the Facebook posts were "public records." They were, at the very *most, precursors* to *potential* action by the agency by a Commissioner who clearly had no authority to act on behalf of the agency, or to speak on behalf of the agency, for a single view expressed on Facebook

Defendants respectfully request that the Court DENY Plaintiff's Motion to Compel [Doc. 74], and requests such other and further relief as this Court deems just and proper.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief was prepared in Times New Roman 14-point font, in compliance Local Rule 5.1(C) and Local Rule 7.1(F) of the Northern District of Florida, and that it contains approximately 4,448 words, exclusive of case style, signature blocks, and certificates. Counsel relies on the word count of the computer program used to prepare this brief.

/s/Matthew A. Bush
MATTHEW A. BUSH

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the foregoing has been electronically filed with the Clerk of Court by using the CM/ECF system on this 8th day of February, 2021, which will send an electronic notice to the following counsel of record:

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