IN THE CIRCUIT COURT OF THE FOURTH JUDICIAL CIRCUIT, IN AND FOR NASSAU COUNTY, FLORIDA

CASE NO. 2019-CA-000054

RAYDIENT LLC (d/b/a RAYDIENT PLACES + PROPERTIES LLC), and RAYONIER INC.,

Plaintiffs,

vs.

NASSAU COUNTY, FLORIDA, a political subdivision of the State of Florida,

Defendant.
_____/

PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs, Raydient LLC (d/b/a Raydient Places + Properties LLC) ("Raydient") and Rayonier Inc. ("Rayonier") (collectively, "Plaintiffs"), pursuant to Rule 1.510 of the Florida Rules of Civil Procedure, file their Motion for Summary Judgment against Defendant, Nassau County, Florida ("County"), and in support thereof, state as follows:

Summary of Argument

This case focuses on the County's flagrant and repeated violations of Florida's Public Records Act and Florida's Government in the Sunshine Law. As set forth below, various County Commissioners and County staff, along with County Attorney, Michael Mullin ("Mullin"), have routinely used text messages as a covert way of communicating with each other regarding County business, and as it pertains to this case, to coordinate the County's efforts to try to pressure Plaintiffs to provide additional public funding for parks and recreation facilities.

On October 12, 2018, Plaintiffs made a public records request regarding a variety of topics relating to Plaintiffs' development efforts in connection with approximately 24,000 acres located within Nassau County. Plaintiffs, who were previously aware that County officials routinely engaged in text communications regarding County business, sought communications (including, specifically, text messages) from Mullin, County Commissioners, and County staff relating to a variety of topics as set forth in detail in Plaintiffs' request. The County failed to produce any text messages, and then, when Plaintiffs pressed the County further about the missing documents, Mullin directed his staff to falsely respond that the County was ***"not aware of any text messages."*** When Plaintiffs challenged the veracity of that assertion and squarely asked the County if it had searched for the requested text messages, Mullin directed his staff to state that the County stood by its initial response – without answering the Plaintiffs' question.

The depositions and subpoenas of current and former County Commissioners and other County employees have uncovered that hundreds of text messages responsive to Plaintiffs' public records request in fact existed, but that the County simply did not produce them. Instead, the County Attorney and County Commissioners deleted the text messages or lied about their existence in direct violation of Florida law. The County's former Office of Management and Budget Director, Justin Stankiewicz ("Stankiewicz"), provided sworn testimony that Mullin told him he should delete text messages responsive to Plaintiffs' public records request, and shortly after Stankiewicz refused to do so, Mullin fired him. Stankiewicz further testified that Mullin told him that he had already deleted text messages on his own phone and planned to tell other County Commissioners and employees who were included on the group texts to delete their text messages as well.

County Attorney Mullin, Commissioner Edwards, Commissioner Leeper, and Commissioner Taylor engaged in extensive group text discussions about Raydient and the Stewardship District Act that were responsive to Plaintiffs' public records request, but all of these individuals admitted that ***all responsive text messages had been deleted from their phones.*** The only way Plaintiffs were able to recover a portion of such text messages were through productions by former County employees who were included on the group text exchanges with the County Attorney and the County Commissioners. The former County employees preserved the text messages on their cell phones in accordance with Florida law, and then produced the documents to Plaintiffs in response to subpoenas after this lawsuit was filed. The County and its officials, on the other hand, deleted everything.

Curiously, County Attorney Mullin, Commissioner Edwards, and Commissioner Leeper all admitted they included a setting on their cell phones in which all text messages would be automatically deleted after 30 days – even though they used their cell phones to discuss County business. Commissioner Taylor testified he manually deleted all responsive text messages from his phone because he was "freeing up space." The County Commissioners and County Attorney Mullin all knew that text messages regarding County business needed to be preserved because all County Commissioners admitted to regularly attending extensive public records training where the issue was repeatedly stressed, and the practice of exchanging text message communications about County business was strongly discouraged. Nevertheless, the County Commissioners and County Attorney Mullin engaged in a pattern and practice to evade these laws by secretly texting each other about County business and then deleting such communications so they could operate in the shadows outside of public view.

Notably, Commissioner Edwards admitted in his deposition that many of the deleted text messages exchanged between the County Commissioners and Mullin related to County business and were, in fact, public records that should have been preserved and produced. Commissioner Leeper, Commissioner Taylor, and County Attorney Mullin equivocated in their testimony and tried to suggest that the messages were "personal" or otherwise did not need to be produced. The Court will make the ultimate determination.

In addition to the blatant violations of the Florida Public Records Act and the intentional deletion of text messages, the County also engaged in numerous violations of Florida's Government in the Sunshine Law. In February 2018, all five sitting County Commissioners made multiple trips together to Tallahassee (along with Mullin and other County employees) in order to defeat an amendment to a state sector plan statute that the County believed would be helpful to landowners and developers like Plaintiffs. The County also believed, albeit incorrectly, that if the sector plan statute amendment passed, that it would eliminate the alleged obligations of Raydient to fund parks and recreation facilities under the Stewardship District Act.

The County Commissioners stayed together at the same hotel in Tallahassee for multiple days, having meals together and meeting after hours for drinks. While in Tallahassee, the County Commissioners met privately outside of the Sunshine and discussed (both in person and through group text messages) how they could exact revenge on Plaintiffs for having supported the legislative amendment that allegedly could have potentially impacted the Stewardship District Act, including plans to launch negative media campaigns that spread false statements about Plaintiffs' alleged obligations, suspending Plaintiffs' development approvals, and specifically targeting Plaintiffs' property for increased taxes. Mullin and the County Commissioners then intentionally concealed these communications from public view and

attempted to delete any traces of their existence. The County, at Mullin's direction, also hired a public relations firm using taxpayer dollars to assist in the smear campaign efforts through local and social media, and secretly coordinated those efforts by using text messages and private email accounts.

Finally, it was revealed through depositions that multiple County Commissioners and County Attorney Mullin regularly met together for dinner and drinks after nightly BCC meetings at the home of Commissioner Edwards. Commissioner Taylor admitted that the Commissioners made remarks during these gatherings about their level of frustration with Raydient. Former County Manager, Shanea Jones, provided more detail and testified that when she attended the post-BCC meeting gatherings at Commissioner Edwards' house, she observed multiple Commissioners discussing *"how they were going to get Raydient to fund parks and recreation and what options they have."*

Based on the record evidence before the Court, the Court should enter summary judgment in favor of Plaintiffs, declare that the County violated Florida's Public Records Act and Government in the Sunshine Law, and grant the appropriate relief requested below to prevent the County's future violations of Florida's open government laws.

STATEMENT OF UNDISPUTED FACTS

Plaintiffs' Public Records Request and the County's Failure to Produce Any of the Responsive Text Messages

1. On October 12, 2018, Plaintiffs, through their undersigned counsel, submitted a public records request to Nassau County. (**Exhibit 1)**.[1]

[1] Plaintiffs are filing a Notice of Filing Summary Judgment Evidence in conjunction with this Motion which contains all exhibits referenced herein.

2. The public records request called for a variety of "documents" and correspondence" relating to, among other topics, the East Nassau Community Planning Area ("ENCPA"), the Stewardship District Legislation, House Bill 1075, House Bill 697, and various correspondence sent or received by County officials and other County employees relating to the matters outlined in the public records request. (Exhibit 1).

3. These topics are directly related to Plaintiffs' development and approval efforts concerning approximately 24,000 acres of land that are largely owned by Rayonier-related entities in Nassau County. (Exhibit 1).

4. The County officials and County employees specifically named in the public records request that were believed to have sent or received correspondence relating to the topics identified in the public records request included County Attorney Mike Mullin,[2] County Commissioner Pat Edwards, County Commissioner Justin Taylor, County Commissioner Daniel Leeper, County Commissioner Stephen Kelley, County Commissioner George Spicer, Shanea Jones, Justin Stankiewicz, Taco Pope, Doug McDowell, Peter King, Scott Herring, and Becky Bray. (Exhibit 1).

5. The terms "documents" and "correspondence" were specifically defined on the first and second pages of the public records request under the heading "Definitions and Scope." Specifically, the term "**correspondence**" was defined as follows:

> For purposes of this request, the term "**correspondence**" means any writing of any kind, including but not limited to, letters, electronic mail, text messages, facsimiles, memoranda, or records of any telephone conversation or other communications. To the extent any County employee or County Commissioner uses or has used any personal

[2] At the time the County was processing Plaintiffs' public records request, Mullin was operating in the dual role as County Attorney *and* County Manager, where he was being paid an annual salary of $271,000 plus benefits. This was the first time anyone in the history of Nassau County has held such a dual role. (Mullin, 15/21-17/4).

> telecommunications device (cell phone, smart phone, laptop, personal computer, I-pad, etc.) to communicate regarding any County-related business, regardless of whether such device is owned by that individual, his or her family member, his or her business, the County, or by some other third party, all such communications are included within the aforementioned definition of "correspondence."

(emphasis in original). (Exhibit 1).

6. Plaintiffs explicitly sought, in both the individual categories of documents requested and the "Definitions and Scope" section, all text messages and other documents that may have been communicated from any personal or County-issued telecommunications device regarding any County-related business. (Exhibit 1).

7. On October 25, 2018, the County advised that the public records request had been completed "*with the exception of emails*," which were being reviewed by Mullin for privilege. The County advised that the revised costs for the responsive documents, including the emails, would be $391.03. On October 26, 2018 the County produced its documents responsive to the public records request. Notably, the County produced no text messages in its document production. **(Exhibit 2).**

Multiple Witnesses Testified that During Discussions About Plaintiffs' Public Records Request, Mullin Stated that Certain Types of Text Messages Did Not Need to be Retained and that Mullin Already Deleted Text Messages from His Phone

8. On November 6, 2018, Mullin, Stankiewicz, former Planning and Economic Opportunity Director and current County Manager, Taco Pope ("Pope"), and Mullin's legal assistant, Susan Gilbert ("Gilbert"), all attended a meeting where they were scheduled to discuss an unrelated issue regarding The Enclave at Summer Beach trail walkover. However, Pope, Stankiewicz, and Gilbert all testified that Mullin immediately shifted the focus of the meeting to

discuss Plaintiffs' public records request. (Pope, 49/9-24; Gilbert, 36/10-37/2, Stankiewicz, 34/24- 36/1).[3]

9. Stankiewicz and Gilbert testified that during the November 6 meeting, Stankiewicz told Mullin that he had text messages on his phone that could be responsive to Plaintiffs' public records request. (Stankiewicz, 35/9-36/24; Gilbert, 37/16-38/14).

10. Stankiewicz testified that these messages included many group text messages between Mullin and several County Commissioners regarding Raydient and the ENCPA. (Stankiewicz, 13/13-14/3; 34/24-37/18).

11. Pope, Stankiewicz, and Gilbert all testified that Mullin then went into a very long explanation trying to draw a distinction between "transient" text messages and "public records." (Pope, 46/4-11, 52/9-53/13; Stankiewicz, 34/24-38/20; Gilbert, 38/9-40/5).[4]

12. Pope testified that Mullin and Stankiewicz went back and forth for about *an hour* discussing the difference between text messages and public records, and whether some text messages did not need to be retained. (Pope, 56/17-57/7). Pope testified that Mullin repeatedly stated that certain text messages that Mullin characterized as "transient" text messages did not need to be kept:

> Q. Did he – during these meetings, did he tell people that it was okay for them to delete text messages on their phones that were of this transient nature?

[3] References to deposition transcripts previously filed in this case shall be referenced by (Last name of deponent, Page/Line–Page/Line).

[4] Irrespective of any distinction Mullin was trying to draw, Florida law provides that it is not the *method* of the communication but the *content* of the communication that determines whether a document constitutes a public record. The same rules that apply to the preservation and retention of e-mail apply similarly to text messages. *See Inf. Op. to Browning*, March 17, 2010, discussed *infra*.

A. I don't recall him ever saying it's okay for you to delete them, but ***he articulated that you didn't need to keep them. They were not required to be kept.***

Q. So he may not use the word "delete" but he says you don't need to keep them?

A. Correct, yes sir.

(Pope, 88/21-89/4, 53/11-13) (emphasis added).

13. During the discussion about Plaintiffs' public records request, Pope corroborated Stankiewicz's testimony that he told Mullin that he had group text messages and that other people would have them in their possession. Pope, who had a vivid memory of the November 6 meeting, including remembering where each of the various attendees were sitting around the conference table, testified that he specifically recalls Stankiewicz telling Mullin that "*there are other people on these messages. Even if I get rid of them, other people have them*." Mullin responded by saying, "*That's fine. I would tell them the same thing*." (Pope, 46/4-17, 50/14-51/3), 53/24-54/18; 64/4-19).

14. Gilbert, who retained her own counsel for her deposition, requested to be excused early during the November 6 meeting. Gilbert testified that she was "frustrated" because she "*felt all text messages needed to be turned over so that the County Attorney's office could review them and determine which texts – which were public record and which were not. I did not feel that was the path that was being taken by anyone and so that frustrated me*." (Gilbert, 39/8-40/5).

15. After Gilbert excused herself from the meeting on November 6, Stankiewicz testified that Mullin told him he could delete text messages on his phone. Mullin confirmed he

had already deleted such text messages on his phone, and would encourage other County employees to do the same:

> Q. And when you told him that you had these responsive text messages, what did he say?
>
> A. He told me that I needed to delete them because they weren't something I needed to be keeping and he felt the email responses were sufficient to give Gunster what they were looking for in their request.
>
> Q. What did you say to him in response to that?
>
> A. I said, even if I deleted these, you know, that there's other people such as commissioners, and I named three commissioners that would have them, Shanea Jones, who was a previous county manager. I also mentioned Kristi Dosh, who was a public relations consultant that the county [hired] during an issue with a House bill and Senate bill that was being discussed in Tallahassee in February of 2018.
>
> And so I told him that even if I deleted these, these records still exist elsewhere. And he said, that's okay. We'll just tell everybody to – who has them just not to – he said that, ***We'll tell those people that have them just to delete them, because I already deleted mine, and so we don't need to keep them anymore.***

(Stankiewicz, 13/13-14/25; 34/24-40/16).

16. Pope testified similarly on this issue and recalls Mullin stating that he had already deleted text messages off his phone:

> A. . . . I remember Justin – I mean, I specifically remember , because I can visualize Justin holding his phone and saying, "So I can get rid of them?" And I remember him saying, "So I can get rid of them?" And then Mullin would give the long explanation about transitory nature and that ***you don't have to keep transient messages***. I don't recall Mr. Mullin saying "you need to delete those." ***I recall him saying that you don't have to keep – that you don't need to keep transient text messages, and I do recall him saying that he didn't have any text messages, that his had already been deleted off his phone.***

(Pope, 66/18-67/5).

17. Mullin admitted to multiple employees that he maintains a setting on his iPhone where *all* text messages he sends and receives are automatically deleted after 30 days. (Pope. 62/17-63/2; Gilbert, 46/2-14).

18. As it turned out, Mullin did not produce a single text message from his phone in response to Plaintiffs' public records request. (Mullin, 151/8-16).

19. Stankiewicz testified he adamantly refused to delete any text messages and told Mullin that, as his boss, Mullin could do what he wanted to do, but that he was not going to do anything illegal. (Stankiewicz, 13/13-14/25; 34/24-40/16).

20. Pope testified that after this lawsuit was filed, a new policy was implemented at the County that would take away an individual's discretion whether to retain or delete text messages. Pope further stated that "*as the current County Manager, we're never going to be in this situation again*." (Pope, 59/12-60/25).

Stankiewicz Immediately Told Other County Employees and Family Members That Mullin Told Him He Should Delete Text Messages

21. Immediately after the meeting ended on November 6, Stankiewicz walked over and told his fellow County employees, Megan Sawyer ("Sawyer") and Sabrina Robertson ("Robertson"), what had just happened in Mullin's office and that, according to Stankiewicz, Mullin had told him he needed to delete text messages. Sawyer testified in her deposition:

> A. Well, Justin came back to the office one day and told me that he had told Mr. Mullin that he had some text messages that he thought would've been responsive to the request, and that he had read some of them off of his phone, and that Mr. Mullin told him, "*Well, those wouldn't be considered a public record and I've already deleted mine, so you can – you need to delete those*."
>
> Q. That's what Mr. Stankiewicz told you?

A. Yes.

Q. And did Mr. Stankiewicz tell you that the same day as his meeting with Mr. Mullin?

A. Yes. I mean, he came from over there and straight into my office and told me.

(Sawyer, 28/23-29/10).

22. In addition to fellow employees, Sawyer and Robertson, Shanea Jones (former County Manager) also confirmed in her deposition that Stankiewicz told her the same day on November 6 that Mullin had told him to delete text messages and that Mullin had told Stankiewicz he had already deleted similar text messages from his cell phone. (Jones, 72/12-73/12).

23. Stankiewicz also testified in deposition that while he was still employed at the County, he told other County employees, Tina Keiter and Chris LaCambra, that Mullin had told him to delete text messages. Stankiewicz also relayed the same series of events involving Mullin to numerous family members. (Stankiewicz, 51/16-53/21).

Despite the Testimony of Stankiewicz, Pope, and Gilbert, Mullin Largely Denied or Otherwise Could Not Recall Key Details from the November 6 Meeting

24. When Mullin was questioned during his deposition as to whether he had ever told any County employee that it would be okay to delete text messages from their cell phone, Mullin stated that he could not recall such an instance:

Q. ... I'm just asking you, in general, has anyone at the County whether it's a Commissioner or a County employee, ever said to you, is it okay if I delete text messages off my cell phone?

A. I don't remember anybody phrasing a question like that, no, sir.

Q. Well, not so much phrasing it, but has anyone ever asked you if they can delete text messages off their cell phone?

A. I mean, I don't recall, as I sit here. There may have been. I don't recall.

Q. You don't recall?

A. I don't recall.

Q. Okay. Have you ever told anyone at the County, it's okay for you to delete text messages off your cell phone?

A. I would never tell anybody to delete what's a public record off any device.

Q. That's not my question. My question is, have you ever told anyone at the County it's okay to delete text messages off their cell phones?

A. I don't ever recall telling anybody to delete text messages. I don't ever recall being asked that.

Q. You're 100 percent sure of your answer, sir? I remind you that you're under oath.

A. As I sit here, to the best of my knowledge, I don't ever recall being asked that.

(Mullin, 67/11-68/13).

25. Contrary to Stankiewicz and Pope's testimony that Stankiewicz told Mullin during the November 6 meeting that Stankiewicz had *group* text messages and that other people would have them in their possession, Mullin claimed that Stankiewicz only told him about two text messages and that those two messages were only between Mullin and Stankiewicz – and no one else. (Mullin, 69/15-70/4).

26. As discussed above, Pope and Stankiewicz testified that Mullin had stated that he had already deleted text messages from his cell phone. Gilbert likewise testified that Mullin had a setting on his phone that deleted all text messages every 30 days. Despite the testimony of

these three witnesses, Mullin denied ever telling Stankiewicz that he deleted text messages from his cell phone:

> Q. Did you ever at any time tell Mr. Stankiewicz that you have deleted text messages from your cell phone?
>
> A. I never had a conversation with Mr. Stankiewicz about deleting messages of any kind, so whether they're text messages – he never asked me, you know, are we going to lunch, have you ever deleted something like that. I don't ever recall that conversation.
>
> A. Did he ever at any time tell you – or did you ever at any time tell him that you had some text messages on your cell phone with him, but they have been deleted off your phone –
>
> A. I don't –
>
> Q. – they have not been retained?
>
> A. I don't recall any conversation with Mr. Stankiewicz in that regard.
>
> * * *
>
> Q. Let me just ask you. Did you ever tell Mr. Stankiewicz that you deleted text messages?
>
> A. No, sir.

(Mullin, 73/17-74/8, 76/24-77/1).

Despite Mullin Having Personally Sent and Received Text Messages Regarding Raydient and the ENCPA, and Despite Stankiewicz Meeting with Mullin for an Hour on November 6 to Discuss Text Messages Relating to Plaintiffs' Public Records Request, Mullin Directed His Staff – Nine Days Later – to Advise Plaintiffs that the County was "*Not Aware of any Text Messages*"

27. On November 8, 2018 – two days after the Stankiewicz/Mullin meeting – the County produced supplemental documents, including emails that the County had reviewed for privilege and personal information. Again, the County produced ***no text messages*** in its supplemental production. **(Exhibit 3).**

28. On November 15, 2018, after reviewing the limited documents the County produced, Plaintiffs' counsel sent a letter to the County and stated:

> We have reviewed the documents the County produced to our office in response to our October 12, 2018 public records request. ***However, it appears that none of the requested text messages were produced by the County. We know that such text messages exist and request they be produced to us as soon as possible.*** A copy of our prior public records request is attached for your convenience. Please advise when we can expect these responsive documents to be made available for pickup.

(emphasis added). (**Exhibit 4)**.

29. Later that same afternoon on November 15, 2018 – just nine (9) days after his meeting with Stankiewicz – Mullin directed his staff to respond with a short, one-sentence e-mail stating, "***We are not aware of any text messages***." **(Exhibit 5)**.

30. Sawyer, who was the County's public records coordinator at the time, and the County employee who sent the response, confirmed that Mullin is the one who directed how the County would respond to the letter from Plaintiffs' counsel:

> Q. So you sent [the November 15 letter] to Mr. Mullin, and what did you hear next about what to do in response to this letter?
>
> A. I received a phone call from Susan Gilbert in his office, who told me she was directed to let me know – to respond to the following [letter] that you see right there on November 15th, that we're not aware of any text messages.
>
> * * *
>
> Q. Susan Gilbert told you that Mr. Mullin had directed her to tell you to respond and say, "***We are not aware of any text messages***."
>
> A. That's correct.

(Sawyer, 44/20-45/10).

31. Gilbert, who is Mullin's assistant, also confirmed in her deposition that Mullin directed the County's response, "*We are not aware of any text messages*," and that he was responsible for directing all other County responses to Plaintiffs' inquiries regarding its public records request. (Gilbert, 90/23-91/22).

32. Mullin testified he did not "recall" directing Gilbert or Sawyer to provide that response, but "that could have happened." (Mullin, 94/8-25).

33. The following day, November 16, 2018, Plaintiffs' counsel sent a follow-up email to Mullin and Sawyer inquiring further about the County's failure to produce *any* text messages and questioned the County's assertion that it was "*not aware of any text messages*." As Plaintiffs knew County officials routinely used their cell phones to send text messages regarding County business, Plaintiffs' counsel inquired whether the County had adequately searched for the requested text messages. A copy of Plaintiffs' November 16 email is included within the email exchange in Exhibit 5 and is reproduced below:

> Dear Megan and Mike:
>
> In response to our inquiry yesterday about the failure of the County to produce any text messages in response to our public records request, the County responded that it is "*not aware of any text messages*." We find that difficult to believe given that County officials have routinely used their cell phones to send text messages regarding the very subject matter that is the scope of our public records request. **Has the County conducted any searches of any personal telecommunications device belonging to any County employee or County Commissioner?**
>
> Regardless, if County employees and commissioners were using a personal, business, or government cell phone, any communications regarding County-related business are squarely within the scope of our public records request. We tried to make that clear in our request by underlining those types of communications in our definition of "correspondence" in Paragraph 2 of the "Definition and Scope" section, and we expect those communications to be produced. Please let us

> know when we can expect to receive those responsive documents. Thank you.

(emphasis in original).

34. Four days later on November 20, 2018, the County, once again at Mullin's direction, provided an evasive response in which it refused to acknowledge whether it had conducted a search for the requested text messages, and simply stated, "*The County has responded to the public records dated October 12, 2018 as set forth in our responses previously sent*." (Exhibit 5).

35. Rather than respond directly to the email himself, Mullin provided his staff with the specific language he wanted them to include in the response to Plaintiffs' counsel. Mullin did so in a peculiar way to avoid appearing he was the one directing the response. Sawyer testified:

> A. I can tell you that I remember at some point Susan [Gilbert, Mullin's assistant] walking over to me, what looked like, an email that she was drafting to me, where she had this response "*The County has responded to the public records request*," my response to Gunster on November 20th. Susan walked over to me this on an email format like she was drafting an email to me. But she didn't send it, she just printed it out and brought it to me and said, "*This is how Mr. Mullin said to respond*."
>
> Q. Okay. And you did that? That's how you responded on November 20th, 2018 at 2:27 p.m.
>
> A. Yes, sir.
>
> * * *
>
> Q. And Susan told you Mr. Mullin wanted it sent that way?
>
> A. Yes, sir.

(Sawyer, 46/4-16; 47/14-16).

36. Gilbert testified similarly to Sawyer that this additional response by the County was also made at Mullin's direction. (Gilbert, 94/3-11).

Shortly After the November 6 Meeting, Mullin Fired Stankiewicz

37. The following month after the November 6 meeting where Stankiewicz testified Mullin directed him to delete text messages off his phone (and which Stankiewicz testified he adamantly refused to do), Mullin fired him. On January 7, 2019, Stankiewicz filed an employee grievance relating to the events surrounding Plaintiffs' public records request and his meeting with Mullin on November 6. Stankiewicz wrote to Mullin and stated:

> [O]n November 6, 2018, Taco Pope, Susan Gilbert and I met at 2:00 pm with you for the intent to discuss the Enclave and Summer Beach trail walkover issue; ***however, the discussion was solely about the public records request that was submitted by Gunster Law Firm, Raydient/Rayonier's legal firm, which in addition to other things, specifically asked for text messages relating to county business that had been sent on personal phones***. During this meeting is when I disclosed that I had messages related to this request on my personal phone and stated that you, Taco, at least 3 of the Commissioners and Shanea Jones would also have messages as many of them were group messages. ***You directed me to delete these messages, which is a direct violation of Chapter 119, Florida Statutes. Furthermore, you stated that you have already deleted your text messages*** which in addition to a violation of law, is a violation of Section 2.01, Code of Conduct of the Employee Policy and Procedures Manual. After understanding the magnitude and unethical conduct of what you were directing, Susan Gilbert, asked to excuse herself from the meeting stating that she "did not want to be part of this meeting." With you and Taco still in the room, I asked multiple times for you to confirm that you were directing me to delete text messages that are public record to which you affirmed. Immediately following this meeting, I expressed verbally my concern of violating Chapter 119 of Florida law to Taco Pope, Megan Sawyer and Sabrina Robertson. Additionally, I later express[ed] this same concern to Tina Keiter and Chris Lacambra.
>
> After this November 6, 2018 meeting, your behavior and attitude towards me changed. I was not included in any other meetings or conversations regarding the response to Gunster's public records request, you did not obtain the messages that I told you that I had in response to Gunster's request and I was not copied on the county's response to Gunster. ***I was told by staff that you reported to Gunster that no text messages exist and that Gunster asked you again for the messages.***

...

> To conclude, I feel that I was singled out in retaliation of expressing and refusing to delete public records at your direction. ***I have identified over 150 individual and group text messages between a combination of you, Commissioner Edwards, Commissioner Taylor, Commissioner Leeper, Shanea Jones, Kristi Dosh, Taco Pope, and myself that should have been turned over in response to Raydient/Rayonier's public record request.***

(emphasis added). In support of his claim, Stankiewicz attached to his grievance more than thirty (30) pages of individual and group text messages between himself, Mullin, County Commissioners, and other County employees that were responsive to Plaintiffs' public records request, but which the County never produced. (**Exhibit 6)**.

38. Although numerous County employees, Commissioners, and Mullin had regularly sent and received text messages responsive to Plaintiffs' request, **not one text message was produced by the County**. Instead, Mullin asserted that the County was "*not aware of any text messages*." Even after Stankiewicz filed his employee grievance on January 7, 2019 attaching more than 30 pages of text messages (which the County should have already had in their possession), the County still did not produce any of these text messages to Plaintiffs.

39. On February 6, 2019, Plaintiffs filed their Complaint in this action and attached a copy of the text messages which had been made available through recent media reports regarding Stankiewicz's employee grievance.

40. In an attempt to try to give the appearance the County was belatedly complying with Plaintiffs' public records request, the County sent an email to Plaintiff on February 7, 2019 – the day *after* Plaintiffs filed their Complaint and stated the County was now producing copies of text messages responsive to Plaintiffs' request that the County had received from "an outside

source." The supplemental documents produced by the County on February 7 were the exact same documents already attached to Plaintiffs' Complaint a day earlier and were simply a copy of the same documents Stankiewicz filed with the County a month earlier as part of his grievance. **(Exhibit 7).**

41. When news of Plaintiffs' lawsuit ran in a local newspaper on February 13, 2019, Mullin made misleading public statements to the *Fernandina Beach News Leader* as to the timing of when the County forwarded the text messages received from Stankiewicz. Mullin stated, "*When we got those documents he sent us, we sent those to (Gunster*)." Mullin conveniently left out the fact that the County sat on the text messages from Stankiewicz for a full month until a public scandal eventually broke out, and then only produced the text messages *after* Plaintiffs had already filed this lawsuit. Mullin also inaccurately told the *News Leader*, "*Text messages and public records are two different things*," and tried to suggest that text messages he or the Commissioners exchanged in Tallahassee were about lunch plans or personal greetings and had nothing to do with Raydient. **(Exhibit 8).**

Plaintiffs Uncover Additional Responsive and Previously Unproduced Text Messages Through a Subpoena to Former County Manager, Shanea Jones

42. After Plaintiffs filed their lawsuit, and still concerned that many responsive text messages involving County Commissioners, Mullin, and other County officials had still not been produced, Plaintiffs served a subpoena to former County Manager, Shanea Jones ("Jones"). In response to the subpoena, Jones produced approximately **150 pages** of text messages responsive to Plaintiffs' records request. Multiple County Commissioners and Mullin were included on a majority of these text messages, further demonstrating that there was no legal justification as to why the County did not produce the responsive text messages in the first place. **(Exhibit 9).**

43. Jones confirmed that, despite the fact she was specifically identified as one of the individuals on Plaintiffs' public records request whose communications (including text messages) were being sought, the County never contacted her while it was responding to Plaintiffs' public records request to see if she may have any responsive information. (Jones, 75/19-77/11).

44. In fact, according to Gilbert's testimony (Mullin's assistant), during one of the five (5) to eight (8) meetings the County held to discuss how to respond to Plaintiffs' public records request, there was a suggestion that the County *should* send an email to Jones providing her with a copy of Plaintiffs' public records request and asking if she had any responsive documents. However, Gilbert testified that Mr. Mullin specifically told her to "hold off" on contacting Jones. (Gilbert, 32/23-33/21).

45. It was not until after Stankiewicz had been fired and filed his employee grievance with the County in January 2019 that the County eventually contacted Jones. (Jones, 75/19-77/11).

46. Similarly, Gilbert testified that she was originally instructed to schedule each commissioner to come in individually and meet with Mullin to discuss Plaintiffs' public record request; however, she did not end up doing so because "*Mr. Mullin indicated that he would get with them on his own*" and "*that it wasn't anything that I needed to handle.*" (Gilbert, 68/5-17).

The County Commissioners and Mullin Met Privately in Tallahassee "Outside of the Sunshine" and Discussed (Both in Person and Through Text Messages) How the County Could Try to Pressure and Negatively Impact Raydient

47. Starting in February 2018, all five then-sitting County Commissioners made trips together to Tallahassee (along with Mullin, Jones, and other County employees) in an attempt to

defeat a proposed amendment to a state sector plan statute which the County believed would benefit Plaintiffs.[5] The County Commissioners stayed together at the same hotel in Tallahassee for multiple days, having breakfast, lunch, and dinner together, and then reconvening for drinks later in the evening. (Edwards, 123/2-19; 127/19-130/15).

48. Commissioner Edwards testified that in his eight years as a County Commissioner, the February 2018 trip was the *only* time when the Board had attended meetings together in Tallahassee. (Edwards, 126/10-16).

49. Commissioner Taylor confirmed that while they were together in Tallahassee, there were discussions between commissioners about Raydient. Taylor admitted the issues discussed amongst the commissioners included the parks and recreation funding dispute with Raydient. (Taylor, 115/6-116/15; 125/2-25).

50. Jones provided more detail and testified that the discussions amongst the commissioners in Tallahassee included "the ongoing dispute over recreation and funding of public facilities, revoking a tax increment financing agreement, and establishing a targeted Municipal Services Taxing Unit (MSTU) over Raydient's property," which is consistent with the types of text messages that the commissioners sent and received around the same time they were together in Tallahassee. (Jones, 215/7-216/17).

[5] Mullin and certain County Commissioners alleged that the amendment to the sector plan statute would somehow undo certain "obligations" contained in the Stewardship District Act requiring Raydient and the Stewardship District to allegedly construct and maintain all recreation facilities within the ENCPA. (Edwards, 130/11-15). In a separate case pending as *Raydient LLC (d/b/a Raydient Places + Properties LLC), et al. v. Nassau County*, Case No. 2018 CA-000467, this Court rejected a similar position taken by the County and concluded that the "County's Comprehensive Plan requires the County, and no other entity, to ensure adequate levels of parks and recreational facilities." (Order Granting Partial Summary Judgment as to Count VI in Favor of Plaintiffs and Intervenor-Plaintiff, p. 14).

Commissioner Edwards Admitted that Text Messages Regarding the County's Dispute with Raydient Were, In Fact, Public Records that Had Been Deleted

51. In one group text message exchange on February 15, 2018, between County Attorney Mullin, Commissioner Edwards, Stankiewicz, Pope, and Jones, Commissioner Edwards wrote: "***Whatever roadblocks, we can legally legislate which will bring about the original agreed-upon outcome, and anything to slow them down and increase their overhead is needed … "We should use our Facebook and other social media to get our spin on this up and running.*"** Mullin responded to Commissioner Edwards' text with an emoji to express his approval. **(Exhibit 10).**

52. When questioned about this group text message exchange, Commissioner Edwards admitted it related to County business and was a public record:

Q. Okay. And who did you send this to?

A. I think I sent this to Shanea.

Q. Is that Mike Mullin on there as well?

A. Yeah, I think it's Mike Mullin, Justin Stankiewicz, Taco Pope.

Q. Okay. This is a text message that you sent, correct?

A. Uh-huh, yes, sir.

Q. ***And this is a text message relating to County business?***

A. ***Yes, sir.***

Q. ***And this is a public record?***

A. ***Yes, sir***, I would think. Shanea has it.

(Edwards, 85/25-86/22).

53. Commissioner Edwards testified that he believed, based on language in the Stewardship District Act, that Raydient had committed to funding all the parks and recreational

components in the ENCPA, and that Raydient had reneged on that alleged obligation. Commissioner Edwards testified that he wanted to see what "roadblocks" he could put up that would "slow down their development" and force Raydient to spend more money so that it would be forced to come back to the County to negotiate. (Edwards, 86/23-88/23).

54. When Commissioner Edwards' text was shown to Commissioner Spicer during his deposition, he said it was the first time he had seen it and testified, *"I can't believe he did that. It surprises me."* He further testified that based on the ethics training they received, you *"ain't supposed to be doing that."* (Spicer, 43/4-44/5; 45/17-46/6).

55. On March 6, 2018, while the Commissioners were still privately plotting how they could pressure and punish Raydient, Commissioner Edwards texted Jones, and stated: "***Good afternoon, please, when possible, send me all the ways we can affect Raydient negatively such as remove the TIF, MSTU for recreation. Hold up any and all permits. Anything! Thanks***." **(Exhibit 11).**

56. In response to questions about that text message, Commissioner Edwards admitted it was a public record that should have been produced:

> Q. Is that a text message you sent to Shanea Jones?
>
> A. Yes, sir.
>
> Q. Okay. ***Is that a personal text message or a text message relating to County business?***
>
> A. ***I would say that's County business.***
>
> Q. Okay.
>
> A. There's a previous one that said legally and this was another one.
>
> Q. ***Is this a public record?***
>
> A. ***Yes, sir.***

Q. Okay. ***Is the only reason you didn't produce this text message is that you had already deleted it off your phone?***

A. I hadn't seen it. ***It was gone, yes sir.*** There was no messages on my phone.

Q. Okay. Why did you want to affect Raydient negatively?

A. ***Because I wanted to get them back to the table to negotiate***.

(Edwards, 72/15-73/15).

57. Jones provided further background on the text exchange and explained, "*that was just coming off the few weeks in Tallahassee, and they were angry with Raydient. And it just goes along with all the other texts and other conversations that had been going on at the time*." Ms. Jones testified that while in Tallahassee, the Commissioners had private discussions concerning the ongoing dispute with Raydient regarding recreation and funding of public facilities, including revoking a tax increment financing (TIF) agreement, opposing a bond issue, and establishing a targeted municipal services taxing unit (MSTU) over Raydient's property. (Jones, 192/12-193/1).

58. During her deposition, Jones explained that Commissioner Edwards' texts were consistent with the types of private conversations the commissioners were having with each other in Tallahassee where they discussed various ways the County could try to pressure and harm Raydient. When asked to provide more context, Jones stated: "*this is part of the same conversations down in Tallahassee when they were directing us to get staff to make the fliers and to create the stories, and then – that's when, at some point, around -- a little shortly after that is when Mr. Mullin sent the email that he was hiring Kristi Dosh as a PR person, stuff like that*." (Jones, 150/7-21).

59. Around the same time, other Commissioners sent texts discussing plans to negatively affect Raydient. On February 26, 2018, Commissioner Danny Leeper sent a group text to Mullin, Stankiewicz and Jones, stating "*We need a full-page ad with three photographs, a big X across the ball field, another X across the park, and another one saying,* ***what is the next broken promise from Raydient***?" **(Exhibit 12)**.

60. When asked if this text message related to County business or a personal matter, Commissioner Leeper initially said it was a "personal" matter and that he was just venting. However, when pressed further about the fact that his text was about a County business matter that was part of an ongoing parks and recreation funding dispute between the County and Raydient, Commissioner Leeper testified as follows:

> Q. So at the time this text message was sent, there had been discussions between the County and Raydient about the future needs of recreation in Nassau County?
>
> A. Correct.
>
> Q. And was there a dispute going on around this time about what, if any, obligations Raydient had with respect to public recreation facilities?
>
> A. There have been.
>
> Q. Okay. And when you said you were venting here, was it venting about that dispute?
>
> A. Correct.
>
> Q. Okay. Was the dispute about recreation facilities a County matter, a County business matter?
>
> A. Yes.
>
> . . .
>
> Q. Are you aware of any distinction under Florida Public Records law that *venting* text messages are excluded from being subject to Florida Public Records Laws?

(Objection to the form)

A. I'm not aware.

(Leeper, 64/7-65/18; 66/17-68/5).

61. In another deleted group text message also dated February 26, 2018 between Commissioner Leeper, Commissioner Edwards, Commissioner Taylor, Mullin, and others, Commissioner Leeper commented on a recent article discussing conflict of interest issues raised by Raydient against Mullin (given that Mullin formerly represented Raydient on ENCPA matters). Commissioner Leeper wrote, "*What would happen if we denied a conflict? I say let them spend their money*." Mullin then responded, "*We may do that. I guess I am off the Easter dinner list*." Despite these communications, Commissioner Leeper did not produce a single text message in response to Raydient's public records request. (**Exhibit 13)**.

62. In a February 23, 2018 group text exchange between multiple County Commissioners and Mullin, Commissioner Justin Taylor responded to an article published by Raydient and asked the group, "*Should we post a screenshot of the language from [House Bill] 1075 next to the proposed language from the bill we're fighting with a statement that* ***we just want developers to honor their promises to the tax payers***? (**Exhibit 14).**

63. When questioned about this group text exchange, Commissioner Edwards admitted that the text messages discussed County business and were public records. (Edwards, 101/13-102/24).

64. Commissioner Edwards testified that he has had other text messages with other County Commissioners, County Attorney Mullin, and other County officials regarding Raydient and the ENCPA that would be responsive to Raydient's public records request, but that those text messages had already been deleted off his phone. (Edwards, 54/1-24; 69/24-71/7).

65. Records produced by AT&T in response to a subpoena served in this case reveal a history of extensive text messages that were exchanged between County Commissioners and Mullin. While AT&T was unable to recover the actual text messages that were deleted, it produced the texting history of some of the Commissioners. For example, during the time period requested in the public records request, Commissioner Edwards exchanged 441 text messages with County Attorney Mullin, 107 text messages with Commissioner Leeper, and 95 text messages with Commissioner Taylor. During the specific period between February 14, 2018 and March 10, 2018 (which was the approximate time the County Commissioners traveled together to Tallahassee), Commissioner Edwards exchanged 78 text messages with County Attorney Mullin, 52 text messages with Commissioner Taylor, and 42 text messages with Commissioner Leeper. In light of the widespread destruction of evidence revealed by discovery taken in this case, it could reasonably be inferred that these text communications were regarding County business.[6]

Despite Attending Extensive Public Records and Government in the Sunshine Law Training, Neither County Attorney Mullin Nor Any County Commissioner Produced a Single Text Message from their Cell Phones Because All Text Messages Had Been Deleted

66. Commissioner Edwards testified he has attended an annual four-hour course on Florida's Public Records and Sunshine Laws every year for the past eight years. (Edwards, 40/16-41/7; 49/20-50/21). Commissioner Edwards further admitted that the annual course advised that text messages are public records, and if you text regarding County business, then you need to capture and preserve your text messages. (Edwards, 48/ 5-22; 49/10-18; **Exhibit 15**).

[6] In accordance with the Court's January 8, 2020 Order, the documents evidencing these text histories will not be filed with the Clerk absent leave of Court or filing under seal, however the documents are available to be produced to Defendant's counsel.

67. Commissioner Leeper testified that he's received Florida Public Records and Sunshine Law training every year for the past 12 years. (Leeper, 21/1-9).

68. Commissioner Taylor admitted to attending seminar training on Florida's Public Records Act and Government in the Sunshine laws every year that he has been in office. (Taylor, 55/17-56/6). Commissioner Taylor admitted that the training courses covered the use of text messages and advised that County employees and officials should *not* communicate about County business via text messages from a personal device. Commissioner Taylor further testified he understood that text messages sent from a personal device regarding County business could be considered a public record. (Taylor, 60/8-61/11).

69. One slide from the course materials that Commissioner Taylor admitted he attended read, *"KEEP CALM AND STOP TEXTING. Private discussions via email and text messaging between board members about board business are prohibited under the Sunshine Law. See AGO 89-39."* (Taylor 65/5-23; Exhibit 15, p. 627).

70. Another page of the course materials reads, *"The Attorney General's Office has also determined that private discussions via email between board members about board business are prohibited under the Sunshine Law. The same would be true of board members texting each other about board business."* (Taylor 66/7-20; Exhibit 15, p. 652).

71. Commissioner Kelley attended the ethics training courses about public records and remembers that the presenters "*used to stress over and over and over again, be careful what you text, because once you text, it's a public record*." (Kelley, 23/9-23)

72. Commissioner Spicer also attended the ethics courses on public records and remembers the classes advising the attendees that they can't use text messages for County

business and that "*anything, from my understanding that involves government is a public record*." (Spicer, 21/5-22/2).

Mullin and the County Commissioners Admitted to Deleting Text Messages

73. Commissioner Edwards testified that he did not produce any text messages in response to Plaintiffs' public records request because he maintains a setting on his iPhone that automatically deletes text messages every 30 days.[7] (Edwards, 17, 20-23).

74. Commissioner Leeper similarly admitted to adjusting the setting on his iPhone so that text messages would be automatically deleted after 30 days. (Leeper, 44/9-17). He further testified that he did not produce a single text message in response to Plaintiffs' public records request despite having sent and received responsive text messages. (Leeper, 52/18-21).

75. County Attorney Mullin also admitted that he has a setting adjusted on his iPhone that automatically deletes all text messages after 30 days. Despite participating and being included on numerous text messages that are public records, Mullin did not produce a single text message from his phone responsive to the request. (Mullin, 87/24-88/8; 151/8-16).

76. Commissioner Taylor also admitted to manually deleting responsive text messages. When asked why he deleted text messages involving Raydient, Taylor stated "**they were just deleted out because I was freeing up space on my phone**." (Taylor, 27/5-28/6). Around the same time local media reports began to surface regarding Stankiewicz's allegations about Mullin's directive to delete text messages, a concerned local citizen, Blanche Smith, contacted Commissioner Taylor and asked him why he did not produce any text messages responsive to Raydient's public records request. When presented with a sworn affidavit from

[7] The factory setting "Keep Messages" on all iPhones is by default set to "Forever." A user must manually alter the factory settings from "Forever" to "30 Days" in order to have text messages automatically deleted after 30 days. **(Exhibit 16)**.

Ms. Smith, Commissioner Taylor admitted that he had already deleted those text messages from his cell phone:

> Q. And then, on February 9th, 2019, she writes that, "I spoke with Commissioner Taylor over the phone for about 25 minutes regarding the issues raised in my email. During the call, I asked Commissioner Taylor why he did not produce any text messages responsive to Raydient's public records request when he was clearly having group text messages – text message exchanges with other commissioners and Mr. Mullin regarding Raydient. In response to my question, ***Commissioner Taylor told me that he had already deleted those text messages from his cell phone***." Is that correct?
>
> A. That is correct.

(Taylor, 98/13-99/15). Like the other County officials, Commissioner Taylor did not produce a single text message in response to Plaintiffs' public records request.

Multiple County Commissioners and Employees Testified that the County Never Had a Policy or Procedure in Place for Retaining and Preserving Text Messages

77. Commissioner Taylor admitted there has never been a protocol in place at the County for preserving text messages relating to County business. According to Commissioner Taylor, it would just be up to the individual county employee or commissioner to preserve and produce it. (Taylor, 73/12-74/14).

78. Commissioner Edwards similarly testified that during his time as a County Commissioner from 2012 to 2020, there has never been a policy or procedure at the County for either retaining and preserving text messages or searching for text messages requested in a public records request. (Edwards, 52/4-22).

79. Despite the fact that County Attorney Mullin was included on many group text messages between multiple commissioners regarding County business, Commissioner Edwards

testified that Mullin never advised him against texting with other County Commissioners. (Edwards, 104/25-105/6).

Mullin Hired a Public Relations Firm to Plant Negative Stories about Raydient

80. Around the same time the Commissioners were holding private meetings together in Tallahassee, Mullin made the decision to hire Kristi Dosh ("Dosh"), a public relations consultant, to help mount a public relations smear campaign against Raydient. Mullin was responsible for hiring Dosh, negotiated her compensation, and used taxpayer dollars to pay her fees. (Jones, 136/7-138/7).

81. Jones testified that when the Commissioners met privately together in Tallahassee, Mullin would spend a significant amount of time on the phone with various media outlets in the hopes of publicly pressuring Raydient to exact more funding for public recreation facilities. (Jones, 110/8-111/17).

82. Jones, who was Mullin's predecessor as County Manager and worked for the Board of County Commissioners for more than 12 years, testified that this was the only time she could ever recall where the County hired a public relations firm for a County matter. (Jones, 139/21-25).

83. As to communications with Dosh and others involved in the public relations efforts, Mullin was very careful in how he conveyed information, preferring to communicate either by text messages or through *private* email. On February 25, 2018, the same time the Commissioners and Mullin were meeting privately in Tallahassee, Mullin sent the following text message to Jones: *"Afternoon. If u have a chance, can you ck ur private e mail from christy?"* Jones confirmed in deposition that Mullin had specifically directed Dosh to send emails to Jones'

private email account. Mullin would then send text notifications to Jones to alert her to check her private email account. (Jones, 189/13-190/11). **(Exhibit 17).**

84. To further advance the public relations efforts, Mullin also used the services of Theresa Prince ("Prince"), a local attorney with whom Mullin is closely acquainted. Jones testified that Prince and Dosh worked together on the public relations issues, all at Mullin's direction. (Jones, 131/22-133/25).

85. In one group text exchange between Commissioner Taylor, Commissioner Edwards, Commissioner Leeper, and Mullin, the group responded to an article that was published regarding the County's dispute with Raydient. Mullin sent a text stating, "*I will crank up [our] p r person*." All three commissioners replied to Mullin's text expressing their support and approval. **(Exhibit 18).**

Multiple Commissioners and Mullin Regularly Met at Commissioner Edwards' House after BCC Meetings and Discussed Parks and Recreation Issues Involving Raydient

86. Various witnesses in this case also testified that it was customary for Commissioner Edwards, Commissioner Taylor, Commissioner Leeper, and County Attorney Mullin to routinely meet in the evening together after County Commission meetings at the home of Commissioner Edwards, who was Chairman of the BCC at the time. Commissioner Taylor admitted that the Commissioners would have drinks together and that all attending Commissioners made remarks during these gatherings about their level of frustration with Raydient. (Taylor, 153/24-154/22; 161/9-163/14).

87. Former County Manager, Shanea Jones, provided more detail and testified that when she attended the post-BCC meeting gatherings at Commissioner Edwards' house, she observed multiple Commissioners discussing their frustrations with Raydient and *"how they were*

going to get Raydient to fund parks and recreation and what options they have." (Jones, 234/19-236/1).

88. Commissioner Edwards testified that this practice of multiple Commissioners meeting together after BCC meetings has continued for the past eight years and still continues today:

> Q. So you would either meet at your house or sometimes after BCC meetings, you and some other Commissioners would go out to dinner?
>
> A. Yes, sir.
>
> Q. Okay. Was that a regular practice after the BCC meetings?
>
> A. For years.
>
> Q. Yeah. Had that been the practice back when you started in 2012?
>
> A. Yes, sir.
>
> Q. And how long did that continue for?
>
> A. Still continues.

(Edwards, 138/13-139/21).

The County Subsequently Voted to Enact a MSTU Taxing Ordinance and to Amend the Stewardship District Act

89. Eventually, the same issues that the commissioners had been discussing amongst themselves in private came back before the BCC for a vote. This included the Commissioners voting to enact a targeted MSTU taxing unit that covered only Plaintiffs' property – a tactic that certain commissioners admitted was taken to try to force Raydient back to the negotiating table. (Edwards, 73/12-75/6; Leeper, 94/3-96/9; **Exhibit 19**).

90. Additionally, the Commissioners voted to amend the Stewardship District Act to try to manufacture "obligations" that did not previously exist. The County went to the lengths of

drafting a proposed *amended* Stewardship District Act that included brand new provisions such as requiring the Stewardship District to provide adequate public parks and public recreation facilities, and penalties such as a moratorium on development if the Stewardship District did not honor the new proposed requirements. **(Exhibit 20).**

91. On January 3, 2019, the County voted unanimously at a BCC meeting to present the proposed amendments to the Stewardship District Act to its Legislative Delegation so that the bill could be taken up at the 2019 Florida Legislative Session in Tallahassee. **(Exhibit 21)**. Later that same day, County Attorney Mullin presented the proposed amendments to the Legislative Delegation and requested their support to address the matter of amending the Stewardship District Act during the next legislative session. **(Exhibit 22).** Ultimately, however, the County's legislative efforts stalled out.

92. Commissioner Edwards admitted that the County wanted to use the MSTU as a bargaining chip to try to negotiate with Raydient. He testified, "*so they would not come to a meeting, they would not respond. So, I wanted us to find a way to get ourselves in a position that we had a bargaining chip, an MSTU, something that gave us the opportunity to get them to understand that we need the recreation*." (Edwards, 74/15-75/6).

ARGUMENT

I. The Court Should Declare that the County Violated the Public Records Act by Unlawfully Refusing to Produce Public Records to be Inspected or Copied

A. Legal Standard for Proving Violation of Florida's Public Records Act

Section 119.011(12), Fla. Stat., defines "public records" as "all documents, papers . . . books, tapes . . . or other material, regardless of the physical form, characteristics, or means of transmission, made or received pursuant to law or ordinance or in connection with the

transaction of official business by any agency." The Florida Supreme Court has interpreted this definition to encompass **all materials made or received by an agency in connection with official business** which are used to perpetuate, communicate, or formalize knowledge." *Shevin v. Byron, Harless, Schaffer, Reid and Associates, Inc.*, 379 So. 2d 633, 640 (Fla. 1980) (Government in Sunshine Manual, p. 56).

Section 119.07(1)(a), Fla. Stat., provides: "Every person who has custody of a public record shall permit the record to be inspected and copied by any person desiring to do so, at any reasonable time, under reasonable conditions, and under supervision by the custodian of the public records." Article I, Section 24(a) of the Florida Constitution also provides: "Every person has the right to inspect or copy any public record made or received in connection with the official business of any public body, officer or employee of the state, or persons acting on their behalf …"

As it pertains to "text messages," the Florida Attorney General's Government in the Sunshine Manual provides as follows:

> In Informal AG Opinion to Sec. of State Kurt Browning, (March 17, 2010), the Attorney General's Office advised the Department of State (which is statutorily charged with development of public records retention schedules) that ***the "same rules that apply to e-mail should be considered for electronic communications*** including Blackberry PINS, SMS communications (***text messaging***), MMS communications (multimedia content), and instant messaging conducted by government agencies."
>
> In response, the Department revised the records retention schedule to recognize that retention periods for text messages and other electronic messages or communications "are determined by the content, nature, and purpose of the records, and are set based on their legal, fiscal, administrative, and historical values, regardless of the format in which they reside or the method by which they are transmitted." ***Stated another way, it is the content of the electronic communication that determines how long it is retained, not the technology that issued to send the message.*** *See* General Records Schedule GS1-SL for State and Local Government Agencies, Electronic Communications, available online at http://dlis.dos.state.fl.us.

(*Id.* at p. 81) (emphasis added).

The use of text messages by government officials was discussed at length in the case of *O'Boyle v. Town of Gulf Stream,* 257 So. 3d 1036 (Fla. 4th DCA 2018). In determining the scope of text messages that are subject to the Public Records Act, the court noted, "To comply with the dictates of the Act, the governmental entity must proceed as it relates to text messaging no different than it would when responding to a request for written documents and other public records in the entity's possession – such a emails …." *Id.* at 1041. In discussing the importance that governments preserve all electronic messages, including text messages, the *O'Boyle* court stated:

> The ability of public officials and employees to conduct public business by creating and exchanging public records – ***text messages***, e-mails, or anything else – is why a process must be available to offer the public a way to obtain those records and resolve disputes about the extent of compliance. Without such a process, the Act cannot fulfill the people's mandate to have full access to information concerning the conduct of government on every level.
>
> …
>
> Strong public policy reasons also support the conclusion that electronic information stored on privately-owned devices may be subject to disclosure under the Public Records Act. ***The purpose of both Article I, Section 24 and Chapter 119 is to ensure that citizens may review (and criticize) government actions. That purpose would be defeated if a public official could shield the disclosure of public records by conducting business on a private device.***

Id. at 1041-42 (emphasis added). Unfortunately, that is precisely what happened in the present case. The County Commissioners and County Attorney Mullin conducted government in the shadows by covertly using text messages to communicate between each other about County business, and then deleted all text messages on their cell phones in violation of Florida law.

B. The County and its Officials Failed to Preserve Text Messages in Accordance with the Requirements of the Public Records Act.

The County's actions in routinely deleting all text messages after 30 days clearly violated the preservation requirements under the Public Records Act. Section 119.021, Florida Statutes, provides:

> (2)(a) The Division of Library and Information Services of the Department of State shall adopt rules to establish retention schedules and a disposal process for public records.
>
> (b) Each agency shall comply with the rules establishing retention schedules and disposal processes for public records which are adopted by the records and information management program of the division.

The Florida Division of Library and Information Services has promulgated a General Records Schedule specifying the manner in which public records must be kept. The General Records Schedule GS1-SL is intended for use by public records custodians of state and local governments. With respect to *electronic records*, the General Records Schedule provides:

> Records retention schedules apply to records regardless of the format in which they reside. Therefore, records created or maintained in electronic format must be retained in accordance with the minimum retention requirements presented in these schedules. Printouts of standard correspondence in text or word processing files are acceptable in place of the electronic files. Printouts of electronic communications (email, instant messaging, text messaging, multimedia messaging, chat messaging, social networking, or any other current or future electronic messaging technology or device) are acceptable in place of the electronic files, provided that the printed version contains all date/time stamps and routing information. However, in the event that an agency is involved in, or can reasonably anticipate litigation on, a particular issue, the agency must maintain in native format any and all related and legally discoverable electronic files.

Id. at viii. (emphasis added).

The General Records Schedule GS1-SL also directs that administrative correspondence and memorandum must be retained for three (3) fiscal years and that program and policy development correspondence and memoranda shall be retained for five (5) fiscal years. *Id.* at 11. The County did not comply with the requirements of the Public Records Law when it concealed and destroyed text message public records as requested by Plaintiffs. As admitted by several County officials and employees, the County also did not have any procedures in place that are adequate to ensure that text messages were retained for the required periods.

The record before the Court now reflects that that County violated the Public Records Act by unlawfully refusing to permit public records to be inspected or copied because the records had been deleted or destroyed. It bears repeating that neither County Attorney Mullin nor any of the County Commissioners produced a single text message from their cell phones in response to Plaintiffs' public records request. As government officials who have attended extensive training on Florida public records laws, the County, the Commissioners, and County Attorney Mullin should have known of their obligations to preserve records on their phones when communicating about County business. Here, they simply failed to do so.

The only way Plaintiffs have been able to uncover what remains of any text message exchanges that were not already deleted by the County Attorney and the County Commissioners were through productions made by former County employees who fortunately retained such text messages in accordance with Florida law. Of course, these exchanges did not cover other text communications on which these former employees were not included. It is possible, if not highly likely, that County Commissioners and County Attorney Mullin engaged in numerous other text message exchanges with each other regarding Raydient and the Stewardship District

Act that have been deleted and are otherwise unrecoverable.[8] As such, Plaintiffs and the general public will never be able to uncover all responsive text message public records that Plaintiffs requested.

The County has demonstrated a pattern of non-compliance with public records laws by not only deleting responsive text message public records, but also not having an adequate system in place that will prevent these abuses of the law to continue. The ENCPA is a 24,000 acre project with a development horizon over the next few decades. As such, Plaintiffs have grave concerns that the County will continue to flout the public records laws in the years ahead. As one court noted, "the circumstances of this past violation give rise to a reasonable inference that the past course of conduct will continue in the future." *Daniels v. Bryson*, 548 So. 3d 679, 681 (Fla. 3d DCA 1989).

As such, Plaintiffs respectfully request that the Court enter an Order (a) declaring that the County unlawfully refused to permit public records to be inspected or copied, (b) directing the County to require all County officials and employees who use electronic devices to communicate regarding matters of official business to conduct those communications only on devices that record those communications on servers directly accessible by the County's public records custodians; and (c) directing the County to conduct a search for all responsive electronic communications at the time that a public records request is made.

[8] As discussed above, text message histories produced by AT&T during the 2-3 week period when the County Commissioners traveled together to Tallahassee revealed that Commissioner Edwards exchanged 52 text messages with Commissioner Taylor, 42 text messages with Commissioner Leeper, and 78 text messages with County Attorney Mullin. Unfortunately, AT&T could not produce the actual text messages because the users had deleted them.

II. The Court Should Declare that the County Violated Florida's Government in the Sunshine Laws

Section 286.011, Florida Statutes, commonly referred to as the Government in the Sunshine Law, provides a right of access to governmental proceedings of public boards or commissions at both the state and local levels. The law is equally applicable to elected and appointed boards and applies to any gathering of two or more members of the same board to discuss some matter which will foreseeably come before that board for action. (Government in Sunshine Manual, p. 1). "The Sunshine Law requires boards to meet in public; **boards may not take action on OR engage in private discussions of board business via written correspondence, e-mails, text messages, or other electronic communications**." (Government in Sunshine Manual, p. 22).

The intent of the Government in the Sunshine Law is to "cover any gathering of some or all of the members of a public board at which such members ***discuss any matters on which foreseeable action may be taken by the board***; and it is the entire decision-making process that the legislature intended to affect by the enactment of the statute." *Wolfson v. State*, 344 So.2d 611, 614 (Fla. 2d DCA 1977) (emphasis added). The Sunshine Law "aims to prevent the evil of closed-door operation of government without permitting public scrutiny and participation, and if any two or more public officials meet in secret to transact public business, they violate the Sunshine Law." *Transparency for Florida v. City of Port St. Lucie*, 240 So.3d 780, 784 (Fla. 4th DCA 2018).

The Nassau County Board of County Commissioners is the agency or authority of Nassau County, Florida. In February 2018, Commissioners Edwards, Taylor, Leeper, Kelley, and Spicer, along with Mullin and other County employees, traveled together to Tallahassee multiple

times outside commission chambers where almost all publicly noticed County Commission meetings are held. While in Tallahassee, the County Commissioners stayed in the same hotel, worked in close proximity with each other, and had meals and drinks together, providing the opportunity to discuss matters outside of the public's view. During their time in Tallahassee together (as well as thereafter), the County Commissioners and Mullin had private discussions (both in person and through text messages) regarding various ways the County could try to pressure and harm Raydient, including launching negative media campaigns regarding their unique and flawed interpretation of the Stewardship District Act, suspending development approvals, and enacting an MSTU ordinance to target Plaintiffs′ property for increased taxes. Additionally, the evidence in this case shows County Commissioners improperly met together after BCC meetings at Commissioner Edwards' house where issues involving Raydient were discussed, including ways the County could try to put pressure on Raydient regarding the funding of parks and recreation issues.

The matters that were privately discussed in person and through text messages between the County Commissioners and the County Attorney were issues that eventually came back before the Board and on which the County ultimately voted and acted. This includes the County's action in enacting a targeted MSTU ordinance over Raydient's property to increase taxes for parks and recreation funding. Commissioner Edwards and Commissioner Leeper admitted in deposition that the enactment of the MSTU was done to increase their leverage on Raydient in the hopes of forcing a negotiation on public parks and recreation funding – an area where the County had admitted budgetary deficiencies. The County's plan didn't work.

Subsequent to the text messages and private discussions referenced above, the County also voted to amend the Stewardship District Act to try to create obligations of Raydient that do

not presently exist. These issues all related to the same matters the Commissioners had been privately discussing among themselves (and with County employees) regarding the dispute over who bore the responsibility to fund parks and recreation facilities within the ENCPA, and what the County could do to put additional pressure on Raydient to provide additional funding. Under the Government in the Sunshine law, these were all issues that could "*foreseeably come before the board for action,*" and as demonstrated above, often did.

Based on the evidence and the law, the Court should enter a declaration that the County violated Florida's Government in the Sunshine Law pursuant to Section 286.011, Fla. Stat. Given Plaintiffs' long-term development plans for the ENCPA and their necessary interactions with the County for future development approvals, Plaintiffs are concerned that the extensive pattern and practice of County Commissioners regularly texting and meeting with each other to discuss County business in violation of Florida law may continue. As such, Plaintiffs also request that the Court enter a declaration enjoining the County's BCC and its Commissioners from meeting and discussing County business outside of the sunshine and without public notice.

CONCLUSION

WHEREFORE, Plaintiffs respectfully request that this Court grant summary judgment in Plaintiffs' favor and enter an Order:

A. Declaring that the County unlawfully refused to permit public records to be inspected or copied by:

1. Allowing text messages responsive to Plaintiffs' public records request to be destroyed or deleted prior to the applicable retention schedule;

2. Misrepresenting to Plaintiffs that all responsive records had been located and produced when, in fact, they knew that additional responsive records may not have been produced;

3. Failing to produce a portion of the public records responsive to the request until

after the County was sued by Plaintiffs; and

4. Failing to maintain adequate policies and procedures to preserve and maintain text messages responsive to public records requests that prevent their deletion or destruction by the County Attorney and individual County Commissioners.

B. Directing the County to require all County officials and employees who use electronic devices to communicate regarding matters of official business to conduct those communications only on devices that record those communications on servers directly accessible by the County's public records custodians;

C. Directing the County to conduct a search for all responsive electronic communications at the time that a public records request is made;

D. Declaring that the County violated Florida's Government in the Sunshine law pursuant to Section 286.011, Florida Statutes; and

E. Enjoining the County's Board of County Commissioners from meeting and discussing County business outside of the sunshine without public notice.

Dated this 23rd day of November 2020.

Respectfully submitted,

/s/ *Christopher P. Benvenuto*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished via electronic service through the E-Portal to all parties on the attached service list, this 23rd day of November, 2020.

/s/ *Christopher P. Benvenuto*
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