

NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
18 CVS 0867

FILED

2018 MAY 23 A 9:37

CRAIG MERRILL,

Plaintiff,

v.

WAKE CO., C.S.C.

BY 

BEVERLY BOSWELL, in her official
capacity as North Carolina State
Representative for North Carolina House
District 6,

Defendant.

**PLAINTIFF'S BRIEF IN
SUPPORT OF MOTION FOR
SUMMARY JUDGMENT**

Seeking to more fully engage in governance by becoming better educated about the actions undertaken by one of his elected representatives, the Plaintiff Craig Merrill made a public records request of the Defendant Representative Beverly Boswell and her office in April 2017. Instead of welcoming the efforts of this civic-minded constituent, the Defendant has thwarted the Plaintiff's efforts to obtain public records for more than a year. The Defendant first categorically refused to produce the public records asked for by the Plaintiff for more than nine months, necessitating this litigation. After litigation commenced, the Defendant then produced the requested records but has sought to categorically obscure who she and her office were corresponding with on matters of public import. The Plaintiff is statutorily entitled to the records he has requested free of such redactions; in fact, North Carolina's Public Records Act proudly trumpets that such records "are the property of the people[.]" N.C. Gen. Stat. § 132-1(b) (2017). The Defendant's longstanding and ongoing intransigence has no basis in law and is an affront to North Carolina's system of representative democracy.

PROCEDURAL HISTORY

On January 25, 2018, the Plaintiff Craig Merrill filed this declaratory judgment action against Beverly Boswell, in her official capacity as North Carolina State Representative for North Carolina House District 6. Counsel for the Defendant accepted service on her behalf on February 6, 2018. The Defendant subsequently filed an Answer and Defenses on March 5, 2018.

Pursuant to N.C. Gen. Stat. § 7A-38.3E (2017), on February 8, 2018, the Plaintiff filed a Request for Pre-Litigation Mediation of Public Records Dispute. The mediation reached an impasse on May 10, 2018, as the parties could not resolve their dispute. The Court now has jurisdiction to adjudicate this suit. *See Tillet v. Town of Kill Devil Hills*, — N.C. App. —, —, 809 S.E.2d 145, 148 (N.C. Ct. App. 2017).

STATEMENT OF FACTS

On April 8, 2017, the Plaintiff made a public record request of the Defendant via an email sent to her official North Carolina General Assembly (hereinafter “NCGA”) email account. Compl. ¶ 18; Answer ¶ 18. In pertinent part, the Plaintiff “request[ed] an opportunity to inspect or obtain copies of public records of official correspondence between your office and the residents and businesses of North Carolina House District 6, which you represent.” Compl. ¶ 18; Answer ¶ 18. The Plaintiff further “ask[ed] that the email records” provided by the Defendant in response to his request “include the recipients[]” of said correspondence. Compl. ¶ 18; Answer ¶ 18.

Over the course of nine months, the Plaintiff reiterated his request for these public records in writing to the Defendant, the Defendant’s staff, and the staff of the NCGA on

fifteen occasions. Compl. ¶ 45; Answer ¶ 45. In addition, on June 16, 2017, the undersigned counsel wrote to the Defendant asking that she fulfill the Plaintiff's public record request. Compl. ¶ 36; Answer ¶ 36. The undersigned counsel reiterated his request on two subsequent occasions. Compl. ¶ 46; Answer ¶ 46. As of the January 25, 2018 filing of this litigation, the Defendant had not made available to the Plaintiff for inspection or examination any correspondence between herself or her office and the residents and businesses of North Carolina House District 6. Compl. ¶¶ 49-50; Answer ¶¶ 49-50.

Subsequent to discussion with the Defendant's counsel and in an effort to guide and expedite the Defendant's search of the public records requested, the Plaintiff substantively and temporally limited his request in three ways.¹ First, the Plaintiff temporally limited his request to seek only those responsive records created, sent or received from January 1, 2017 through January 1, 2018. Brook Aff. ¶ 6 (hereinafter "Ex. A"). Second, the Plaintiff provided a list of keywords to guide the Defendant's public records review on February 8, 2018. *Id.* at ¶ 7. Finally, to further guide the public records review, the Plaintiff provided a list of entities for which he was seeking any correspondence between their employees and representatives and the Defendant and the Defendant's office.

On April 13, 2018, the Defendant provided the Plaintiff with documents responsive to his request. *Id.* at ¶ 9. The documents provided, however, were redacted to obscure who the Defendant or her office was corresponding with. *Id.* at Ex. A-2 (hereinafter "Doc. Prod.>"). In instances where the Defendant was one of multiple recipients of the

¹ The Plaintiff communicated these limitations via an email sent by his counsel to the Defendant's counsel on February 8, 2018. Brook Aff. ¶ 5.

correspondence, the identity of all other recipients was also redacted. *See, e.g.*, Doc. Prod. at 69-70, 101, 1054-55.² These redactions were made despite the fact that many of the documents provided by the Defendant contain the following admonition from state actors to the individuals with whom they were corresponding: “Email correspondence to and from this address is subject to North Carolina Public Records Law and may be disclosed to third parties[.]” *id.* at 22, 23, 85, 89-90, 95-6, 131, 276, 320, 325, 331, 334, 344, 346, 350, 353, 356, 900, 902, 906, 907, 913, 915, or some variant thereof. *Id.* at 274, 403-04, 410, 415.

STANDARD OF REVIEW

Summary judgment is appropriate when “the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law.” N.C. Gen. Stat. § 1A-1, Rule 56(c) (2017). In considering a motion for summary judgment, the Court is to consider the evidence “in a light most favorable to the non-moving party.” *McCutchen v. McCutchen*, 360 N.C. 280, 286, 624 S.E.2d 620, 625 (2006) (citation and internal quotation marks omitted).

ARGUMENT

North Carolina law liberally defines public records and allows the public broad access to them. Access to materials falling within the definition of a public record is limited

² On occasion, and apparently inadvertently, the documents provided make plain the identities of those receiving the correspondence beyond the Defendant. For example, though one email provided fully redacts the “To” line such that the names and email addresses of the recipients are obscured, the names of the recipients are visible in the email’s body. Doc. Prod. at 1054-55. In addition to the Defendant, the email in question was sent to the following members of the North Carolina House of Representatives: Larry Pittman, Michael Speciale, and Jay Adams. *Id.*

only by clearly enumerated statutory exemptions and exceptions. The applicable law and relevant facts, even viewed in the light most favorable to the Defendant, conclusively demonstrate that the materials sought by the Plaintiff are public records. No statutory exemption or exception permits the Defendant to redact names and email addresses and categorically prevent the public from seeing who she is corresponding with as she conducts her constituents' business. In fact, the Public Records Act explicitly states that "electronic mail names or addresses" do not constitute "identifying information" beyond the law's scope. N.C. Gen. Stat. § 132-1.10(b)(5) (2017). As such, the Plaintiff is entitled to summary judgment and the disclosure of the requested documents free of such redactions.

I. North Carolina law provides broad access to public records.

"[P]ublic records . . . are the property of the people[.]" N.C. Gen. Stat. § 132-1(b). North Carolina law defines public records as "all documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government." § 132-1(a). "Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed)[.]" *Id.* Furthermore, it is "the policy of this State that the people may obtain copies of their public records and public information." § 132-1(b). Specifically, the law requires that "[e]very custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof." § 132-6(a). And, when litigation is necessary to vindicate these rights, such actions "shall be set down for immediate hearing[.]" § 132-9(a).

Courts have rejected narrow interpretations of the Public Records Act, holding that “the legislature intended to provide that, as a general rule, the public would have liberal access to public records.” *News & Observer Publ’g Co. v. State ex rel. Starling*, 312 N.C. 276, 281, 322 S.E.2d 133, 137 (1984); *see also News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992) (quoting *Advance Publications, Inc. v. Elizabeth City*, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70–71 (1981)) (“[T]he general rule in the American political system must be that the affairs of government be subject to public scrutiny.”); *Times-News Publ’g Co. v. State*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451–52 (1996), *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997) (“The Public Records Act . . . affords the public a broad right of access to records in the possession of public agencies and their officials.”). Judicial interpretation of the statutory requirement that documents be “made or received pursuant to law or ordinance in connection with the transaction of public business” to qualify as public records provides a case in point. N.C. Gen. Stat. § 132-1(a). The North Carolina Court of Appeals definitively interpreted this language to “include, in addition to those records required by law, those records that are kept in carrying out lawful duties.” *News & Observer Publ’g Co. v. Wake Cty. Hosp. Sys.*, 55 N.C. App. 1, 13, 284 S.E.2d 542, 549 (1981), *disc. review denied*, 305 N.C. 302, 291 S.E.2d 151, *and appeal dismissed and cert. denied*, 459 U.S. 803 (1982).

II. The statutory default of broad access to public records is limited only where a clear statutory exception or exemption applies.

North Carolina’s highest court has held that “*in the absence of clear statutory exemption or exception*, documents falling within the definition of ‘public records’ in the Public Records Act must be made available for public inspection.” *Poole*, 330 N.C. at 486,

412 S.E.2d at 19 (emphasis added); *see also DTH Media Corp. v. Folt*, No. 17-871, 2018 WL 1801631, at *2 (N.C. Ct. App. Apr. 17, 2018) (permitting “public access to all public records . . . ‘unless . . . the record is specifically exempted from the statute’s mandate[.]’”) (citation omitted); *City of Burlington v. Boney Publishers, Inc.*, 166 N.C. App. 186, 191-92, 600 S.E.2d 872, 876 (2004) (“The Public Records Act permits public access to all public records in an agency’s possession ‘unless either the agency or the record is specifically exempted from the statute’s mandate.’”) (internal citation omitted). “Exceptions and exemptions to the Public Records Act” are also “construed narrowly.” *Carter-Hubbard Publ’g Co. v. WRMC Hosp. Operating Corp.*, 178 N.C. App. 621, 624, 633 S.E.2d 682, 684 (2006) (citation omitted), *aff’d*, 361 N.C. 233, 641 S.E.2d 301 (2007). Such an approach is eminently reasonable as the statute plainly enumerates instances where records are exempt from disclosure. For example, North Carolina General Statute 132-1.10(b)(5) states that “[i]dentifying information shall be confidential and not be a public record under this Chapter.” “Identifying information” includes, among other things, Social Security numbers. N.C. Gen. Stat. § 14-113.20(b) (2017).³

III. The documents sought are “public records” and there is no statutory exception or exemption allowing for categorical redaction of the identities of all parties to the Defendant’s official correspondence.

The documents sought in this case are public records, and the Plaintiff is entitled to their disclosure without redactions categorically obscuring who the Defendant corresponds

³ N.C. Gen. Stat. § 132-1.10(b)(5) states that “electronic mail names or addresses” are not considered pieces of “identifying information” such that they are exempt from the Public Records Act. And North Carolina statutes never suggest that an individual’s name is “identifying” or otherwise confidential information exempt from disclosure pursuant to the Public Records Act. *See generally* § 132-1.10.

with while conducting official business. For more than a year, the Plaintiff has simply sought correspondence between the Defendant and her office and the residents and businesses she represents in the NCGA.⁴ State legislators are considered agents of the state subject to the Public Records Act. N.C. Gen. Stat. § 132-1(a) (“Agency of North Carolina government or its subdivisions shall mean every public office, public officer or official (State or local, elected or appointed)[.]”). And these documents are public records as they were “made or received pursuant to law or ordinance in connection with the transaction of public business[.]” *Id.*; see also *Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*, 181 N.C. App. 1, 13, 639 S.E.2d 96, 104 (2007) (holding engineering and surveying records relating to “Town’s business” were “made or received pursuant to law or ordinance”). For example, though who the Defendant is corresponding with is obscured, documents pertaining to the Defendant’s sponsorship of a bill overturning an Outer Banks ban on plastic bags are among those that have been produced subsequent to the filing of this litigation. Doc. Prod. at 983. Such correspondence regarding her signature legislative achievement, as well as the identity of who she is corresponding with, exemplifies the sort of “records that are kept in carrying out [her] lawful duties” as a legislator. *Wake Cty. Hosp. Sys.*, 55 N.C. App. at 13, 284 S.E.2d at 549.

Further, there is no statutory exemption or exception that allows the withholding of such documents in general or the identity of the person with whom an elected

⁴ More recently, as noted above and in an effort to simplify and expedite production, the Plaintiff limited his request by 1) seeking only documents a) containing particular keywords or b) associated with particular entities; and 2) time-limiting the request. Ex. A ¶¶ 6-8.

representative is corresponding in particular. Correspondence between members of the NCGA and constituents is not exempt from coverage by the Public Records Act. *See* N.C. Gen. Stat. § 132-1(a). And, while the Act exempts certain sensitive “identifying information” from its ambit, § 132-1.10(b)(5), it treats the email addresses and names of individuals corresponding with agents of the state differently. The applicable statute notes “electronic mail names or addresses” are not considered “identifying information” exempt from public record disclosure. *Id.* And the Public Records Act never states or even implies that the identity of a person corresponding with a state agent is exempt from its coverage.⁵ The contrast in statutory treatment between the exclusion of discrete, sensitive “identifying information” and the names of parties corresponding with the Defendant is instructive; the inclusion of such minor limitations strongly suggests that the legislature did not intend to place additional, unstated limitations on the right to inspect or examine public records. *See In re Hudson*, 165 N.C. App. 894, 897, 600 S.E.2d 25, 28 (2004) (“[W]hen a law expressly describes a particular situation in which something should apply, an inference must be drawn that what is not included by specific reference was intended to be omitted or excluded.”) (quoting 73 Am. Jur. 2d *Statutes* § 129 (2004)). “[I]n the absence of clear statutory exemption or exception,” the remedy here is clear: the records in question “must be made available for public inspection[.]” without redactions obscuring who the Defendant

⁵ In fact, many of the documents provided by the Defendant after this litigation commenced point in the opposite direction, noting, without qualification, that “[e]mail correspondence to and from this [state email] address is subject to NC Public Records Law and may be disclosed to third parties[.]” Doc. Prod. at 22, 23, 85, 89, 90, 95, 96, 131, 276, 320, 325, 331, 334, 344, 346, 350, 353, 356, 900, 902, 906, 907, 913, 915, or some variant thereof. *Id.* at 274, 403-04, 410, 415.

is corresponding with. *Poole*, 330 N.C. at 486, 412 S.E.2d at 19; *see also City of Burlington*, 166 N.C. App. at 191-92, 600 S.E.2d at 876 (“The Public Records Act permits public access to *all* public records in an agency’s possession ‘unless either the agency or record is specifically exempted from the statute’s mandate.’”) (emphasis added) (internal citation omitted).

IV. Categorically redacting the identities of parties to official correspondence with state agents on matters within the purview of the Public Records Act undermines the purpose of the Act.

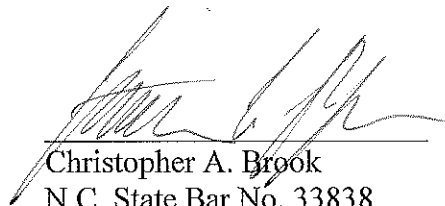
Though it is not necessary to go any further given that the law on point is clear, *see Folt*, 2018 WL 1801631, at *10, it is worth noting the threat posed by the Defendant’s position in this litigation. First, the value in liberal access to public records is knowing not only *what* the State is saying but also to *whom* it is saying it. The Plaintiff, for example, is entitled to understand who the Defendant spoke to and received input from in putting forward legislation overturning the Outer Banks ban on plastic bags. *See, e.g.*, Doc. Prod. at 983. The Defendant’s categorical redaction of who she has corresponded with on this matter of great import to the Plaintiff and her other constituents obscures information important to the public interest. Second, giving state actors extra-statutory powers in regards to what information they produce in response to public records requests invites mischief. *See Womack Newspapers*, 181 N.C. App. at 14, 639 S.E.2d at 105 (expressing concern that expansive, judicially-created exceptions to the Act would allow the State to “shield [public records] from public scrutiny” via gamesmanship). Unfortunately, this is a concern underlined by the documents that the Defendant provided after this litigation was filed. Reviewing instances where the Defendant’s categorical redaction scheme has failed

reveals it has been employed to protect the identities of other state legislators included on correspondence she received. Doc. Prod. at 1054-55 (body of email indicates correspondence sent to the Defendant as well as Representatives Pittman, Speciale, and Adams even as its "To" line obscured names and email addresses of other recipients). No valid basis exists for such redactions as those other legislators are also subject to the North Carolina Public Records Act. N.C. Gen. Stat. § 132-1(a). Though not necessary to grant summary judgment for the Plaintiff, these considerations underline the dangerous nature of the Defendant's deviation from the law.

CONCLUSION

For the foregoing reasons, an immediate hearing should be set, the Plaintiff's Motion for Summary Judgment should be granted, and the Court should declare that, pursuant to N.C. Gen. Stat. § 132-1(a), the records requested by the Plaintiff are public records, and order their disclosure for inspection and examination without undue redactions of who the Defendant is corresponding with.

This is the 23rd of May, 2018.



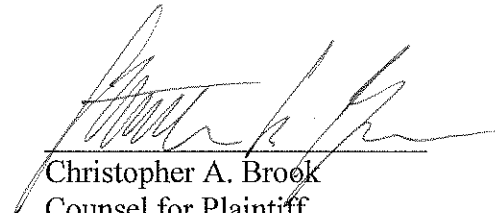
Christopher A. Brook
N.C. State Bar No. 33838
Emily E. Seawell
N.C. State Bar No. 50207
ACLU of North Carolina Legal Foundation
P.O. Box 28004
Raleigh, NC 27611-8004
919-834-3466
cbrook@acluofnc.org
Counsel for Plaintiff

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the foregoing Brief was served on all parties by email and by depositing a true copy thereof with the United States Postal Service, first class postage prepaid, addressed to the following:

Amar Majmundar
Olga Vysotskaya
North Carolina Department of Justice
P.O. Box 629
Raleigh, N.C. 27602
amajmundar@ncdoj.gov
ovysotskaya@ncdoj.gov

This is the 23rd of May, 2018.


Christopher A. Broek
Counsel for Plaintiff