



100 S. Harrington Street
Raleigh, NC 27603

phone: 919.834.2099

fax: 919.834.2350

email: clf@nccivitas.org

web: nccivitas.org

May 13, 2016

Gaston County Clerk of Superior Court
325 Dr. Martin Luther King Jr. Way
Suite 1004
Gastonia, NC 28052-2331

Via Overnight Mail

Re: *Dan Deitz and Ellen Deitz Tucker v. City of Belmont, Adrian Miller in his Official Capacity as City Manager of the City of Belmont*
Docket No.: 15 CVS 3203
CLF File No.: 0016

Dear Clerk of Court:

Please find attached one original of Plaintiffs' reply memorandum in the above-captioned matter, as well as one copy of the caption page of the memorandum. Please file the original in the court file, and return the file-stamped caption page in the envelope provided.

Please call me with any questions or concerns. Thank you for your assistance in this matter.

Regards,

Elliot Engstrom
Lead Counsel
Center for Law and Freedom
Civitas Institute

Cc: Brad Kline, Esq. (via email and U.S. Mail)
Christian Ayers, Esq. (via email)

Enclosures

STATE OF NORTH CAROLINA
COUNTY OF GASTON

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
15 CVS 3203

DAN DEITZ, ELLEN DEITZ TUCKER,)
)
Plaintiffs,)
v.)
)
CITY OF BELMONT, ADRIAN MILLER)
in his official capacity as City Manager of)
the City of Belmont,)
)
Defendants.)

REPLY MEMORANDUM IN
OPPOSITION TO DEFENDANTS'
MOTION TO DISMISS AND
IN SUPPORT OF PLAINTIFFS'
MOTION FOR SUMMARY
JUDGMENT

NOW COME the Plaintiffs, Dan Deitz and Ellen Deitz Tucker, by and through the undersigned counsel, and file this memorandum in response to Defendants' motion to dismiss and in support of Plaintiffs' motion for summary judgment.

ARGUMENT

I. PLAINTIFFS' CLAIMS AGAINST THE CITY MANAGER IN HIS OFFICIAL CAPACITY SHOULD NOT BE DISMISSED AS A MATTER OF LAW WHERE THE CITY MANAGER IS A PUBLIC RECORDS CUSTODIAN AND PROPER DEFENDANT.

Defendants are correct that, in certain situations, "in a suit where the plaintiff asserts a claim against a governmental entity, a suit against...individuals working in their official capacity for this governmental entity is redundant." May v. City of Durham, 136 N.C. App. 578, 584 (2000), (citations omitted). However, the Plaintiffs' case is distinguishable from May.

May involved a Section 1983 claim for retaliatory discharge in violation of the First Amendment. The Plaintiffs' case, by contrast, involves a claim under North Carolina's Public Records Act. The Public Records Act requires a "custodian of public records" to "permit any record in the custodian's custody to be inspected and examined and...furnish copies thereof." N.C.G.S. § 132-6(a). Should the custodian deny such inspection or copies, this creates a cause of

action for the requestor of records to seek “an order compelling disclosure.” N.C.G.S. § 132-9(a). Our courts have confirmed that “[i]n order to compel an unresponsive custodian to fulfill his statutory duty, a party must sue the custodian of those records in the custodian’s official capacity.” Cline v. Hoke, 766 S.E.2d 861, 863 (N.C. Ct. App. 2014).

The custodian of public records is defined by statute as “[t]he public official in charge of an office having public records.” N.C.G.S. 132-2. Defendants have provided no argument to the effect that the City Manager is not the person in charge of or holding the disputed records. He has therefore properly been sued in his official capacity.¹

II. PLAINTIFFS PROPERLY STATED A CLAIM FOR RELIEF UNDER THE PUBLIC RECORDS ACT AND UNIFORM DECLARATORY JUDGMENT ACT.

Plaintiffs did not fail to state a claim for relief under the Public Records Act and Uniform Declaratory Judgment Act. Plaintiffs’ cause of action is clearly stated and is only valid because Defendants denied disclosure of the ISS Report. Absent a denial, there would be no cause of action available for Plaintiffs. Under the Public Records Act: “[a]ny person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E.” N.C.G.S. § 132-9(a). Here, Plaintiffs: (1) were denied

¹ There is case law suggesting that either the City Manager or the City itself could be the proper custodian, and therefore the proper defendant. The statutory description of “the person in charge of an office holding public records” as the custodian fits the City Manager, and indeed some case law suggests that a plaintiff must name as custodian a physical person in their official capacity. *See, e.g., Cline v. Hoke*, 766 S.E.2d 861, 865 (N.C. Ct. App. 2014). However, other case law from the same court in the same year suggests that a custodian need not be a natural person, but can instead be a state entity. *See Lexisnexis Risk Data Mgmt. Inc. v. N. Carolina Admin. Office of Courts*, 754 S.E.2d 223, 228 (N.C. Ct. App. 2014), *rev’d on other grounds*, 368 N.C. 180 (2015). The North Carolina Supreme Court has declined to provide clarification. *LexisNexis Risk Data Mgmt. v. N. Carolina Admin. Office of Courts*, 368 N.C. 180, 186 (2015). As it is the Plaintiffs’ duty to name the proper custodian as a defendant, Plaintiffs have no choice but to name both the City Manager and the City in order to meet their burden of establishing standing.

access to public records, (2) have filed suit in the appropriate General Court of Justice for an order compelling disclosure of the ISS Report, and (3) have complied with G.S. 7A-38.3E.

Defendants further assert that “speculation that the ISS Report *might* contain other matters is insufficient as a matter of [law] to sustain their claim for disclosure of the ISS report under the Public Records Act, and their Complaint should be dismissed.” Defs.’ Mem. Opp. Summ. J. 8. Defendants’ assertion is contradicted by statements of the ISS Agency, obtained through discovery, summarizing its understanding of the nature of the ISS Report as including an examination of “issues that are critical to the Town and the police department” and “rules for consideration by the Town Manager.” Pls.’ Mem. Supp. Summ J. Ex. D.

The North Carolina Court of Appeals has found that “whether information may be withheld [as exempt from the Public Records Act]...is not a determination that can be made unilaterally by the public body.” Times News Pub. Co. v. Alamance-Burlington Bd. of Educ., 774 S.E.2d 922, 926 (N.C. Ct. App. 2015). In Times News Pub. Co., the Court of Appeals cited to the North Carolina Supreme Court’s treatment of “an exception to the Public Records Act.” Times News Pub. Co., 774 S.E.2d at 926, *citing* News & Observer Pub. Co. v. Poole, 330 N.C. 465, 480 (1992). The Court of Appeals found that “where the withholding of information is challenged in court, the court must review [the challenged information] *in camera* – meaning in private, without revealing the contents in open court.” Id.

While Times News Pub. Co. dealt with an open meetings exception to the Public Records Act rather than a personnel exception, the same policy rationale still applies — the Defendants must not be allowed to withhold information under the auspices that it is protected by the privacy protections of the personnel statute merely by claiming that these privacy protections apply. Whether these protections apply is a matter of law, as only a judge can decide how to properly

apply a statute. *See, e.g. Purcell v. Friday Staffing*, 761 S.E.2d 694, 698 (N.C. Ct. App. 2014).

The Plaintiffs have therefore properly stated a claim upon which relief can be granted.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE GRANTED WHERE DISCOVERY MATERIALS SHOW THAT THE DISPUTED RECORDS CONTAIN INFORMATION THAT IS NOT "WITH RESPECT TO" INDIVIDUAL EMPLOYEES AS A MATTER OF LAW.

A. Plaintiffs have provided this Court with evidence that the ISS Report contains materials that are not "with respect to" individual employees as a matter of law.

The Plaintiffs have provided this Court with the U.S. ISS Agency's investigation proposal, obtained through discovery from Defendants. That proposal provides:

The investigation will consist of the following tasks: ...Prepare a written report to the Town Manager that documents all relevant facts and circumstances found by the investigation and addresses the issues that are critical to the Town and the police department. The report will summarize the investigative findings including any violations of Town or police policies and rules for consideration by the Town Manager...ISS investigators will be available as needed for consultation regarding any future actions based upon investigative results. *See* Pls.' Mem. Supp. Summ J. Ex. D.

Evidence such as this, obtained through discovery, is the best evidence that Plaintiffs could possibly gather in support their motion for summary judgment. Defendants attempt to characterize Plaintiffs' use of such evidence to indicate the ISS Report's contents as "merely conclusory, unwarranted deductions of fact, or unreasonable inferences." Defs.' Mem. Opp. Summ. J. 4 (citations omitted). Yet, the use of reasonable deductions and inferences is the only way that Plaintiffs could possibly have any idea what is in the disputed ISS Report, as *Defendants will not let Plaintiffs see it*. If the use of reasonable deductions and inferences based on ISS and the City's written understanding of what would be contained in the ISS Report is insufficient to support at least the need for an *in camera* review, then Plaintiffs are left with no

choice but to simply trust Defendants. This Court could alleviate such uncertainty by conducting a private, *in camera* review of the disputed records to determine which portions are and are not confidential.

B. Defendants' proposed reading of the privacy protections provided to certain personnel information by N.C.G.S § 160A-168 is overly broad.

Defendants cite the example of communications “delivered to a city by the city’s private attorney with address personnel issues” as an example of an expansive reading of the personnel statute. Defs.’ Mem. Opp. Summ. J. 10. However, this example is far less indicative of an expansive reading than Defendants urge. A city attorney is not a private actor, but rather a state actor that a city council is *required by law* to appoint to serve at its pleasure. N.C.G.S. § 160A-173 (“The council shall appoint a city attorney...to be its legal advisor.”) City attorneys are “public officers.” Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel Kitty Hawk Town Council, 181 N.C. App. 1, 13 (2007). Providing the privacy protections of the personnel statute to such communications from public officers to a public agency is therefore no different than providing such protections to communications to or from any government official – hardly an expansive reading of the personnel statute.

Further, Defendants cite the case of Womack Newspaper, Inc. v. Town of Kitty Hawk for the proposition that “the fact that information was gathered by an independent contractor of the City is insufficient to prevent the records it creates for the City from becoming part of the City’s records.” Defs.’ Mem. Opp. Summ. J. 11. Defendants use this proposition to defend their expansive reading of the privacy protections of N.C.G.S. § 160A-168. In Kitty Hawk, the Defendants attempted to argue that “documents were kept by the [city attorney’s law] firm, and were never delivered to the Town, such that the Town never had the documents in its custody.” Womack Newspaper, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council, 181 N.C.

App. 1, 12 (2007). However, in the Kitty Hawk case, the “contractor” was again a city attorney — a public officer created by statute. Plaintiffs do not dispute that a city attorney is an officer and agent of a city. But Defendants have failed to show that a city attorney and a third-party private investigation firm should be treated the same for the purposes of personnel privacy protections and the Public Records Act.

For the purposes of determining whether all or portions of the ISS Report is “with respect to” individual employees, Plaintiffs would be satisfied with an *in camera* review of the report by this Court to determine which portions are and are not with respect to individual employees. Such a review is well within the powers of this Court. *See, e.g., News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 477 (1992) (“On remand the trial court must examine the documents *in camera* to decide if any part of them falls within the statutory “personnel file” definition so as to be protected.”) This approach will maintain the integrity of any specific language that is classified as personnel in nature, but will provide the rest of the report as required by N.C.G.S. § 132-6(c).

CONCLUSION

For the reasons stated above, Defendants’ motion to dismiss should be denied, and summary judgment should be awarded to the Plaintiffs. This Court should find that the ISS Report is a public record because it (1) was “gathered by” an entity other than the city, and/or (2) is a document that is not entirely “with respect to” individual city employees. The Court should compel production of public records in accordance with N.C.G.S. § 132-9(a) and award Plaintiffs’ attorneys fees in accordance with N.C.G.S. 132-9(c).

Respectfully submitted, this the 13th day of May, 2016.



Elliot Engstrom
Lead Counsel
Center for Law and Freedom
Civitas Institute
100 S. Harrington Street
Raleigh, NC 27603
N.C. Bar No. 46003
elliot.engstrom@nccivitas.org
Counsel for Plaintiffs

Korey D. Kiger
Certified Law Student

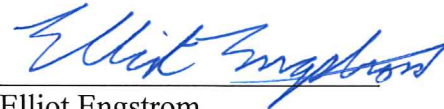
Christian Ayers
N.C. Bar # 47552
Brett Dressler
N.C. Bar # 34516
Sellers Ayers Dortch & Lyons
301 S. McDowell Street
Suite 410
Charlotte, NC 28204
cayers@sellersayers.com
Counsel for Plaintiffs

CERTIFICATE OF SERVICE

I certify that the attached REPLY MEMORANDUM IN OPPOSITION TO DEFENDANT'S MOTION TO DISMISS AND IN SUPPORT OF PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT has been served on the Defendants by emailing a copy to opposing counsel and by depositing a copy with the United States Postal Service with sufficient postage and overnight service, addressed to:

Brad P. Kline
Cranfill Sumner & Hartzog LLP
P.O. Box 30787
Charlotte, NC 28320

This the 13th day of May, 2016.



Elliot Engstrom
Lead Counsel
Center for Law and Freedom
Civitas Institute
100 S. Harrington Street
Raleigh, NC 27603
N.C. Bar No. 46003
elliott.engstrom@nccivitas.org
Counsel for Plaintiffs