

STATE OF NORTH CAROLINA
COUNTY OF WAKE

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
10 CVS 10416

NORTH CAROLINA INSTITUTE FOR
CONSTITUTIONAL LAW,

Plaintiff,

v.

STATE OF NORTH CAROLINA; NORTH
CAROLINA DEPARTMENT OF THE
SECRETARY OF STATE; and ELAINE F.
MARSHALL, North Carolina Secretary of
State, in her official capacity,

Defendants.

DEFENDANTS'
RESPONSE TO PLAINTIFF'S
MOTION FOR JUDGMENT ON
THE PLEADINGS

NOW COME the Defendants State of North Carolina, North Carolina Department of the Secretary of State, and Elaine F. Marshall in her official capacity as North Carolina Secretary of State (hereinafter referred to collectively as "Defendants") by and through the undersigned attorneys, and file the following Brief in Response to Plaintiff's Motion for Judgment on the Pleadings. (hereinafter "motion"):

1. On June 21, 2010, Plaintiff filed a Petition for a Declaratory Judgment challenging "Defendants' use of Article 6, Chapter 120C-600(c) of the North Carolina General Statutes to deny Plaintiff's request for records and information pursuant to the North Carolina Public Records Statute at N.C. Gen. Stat. §132, *et seq.*, and seeking an order compelling Defendants to comply with Plaintiff's request of public information and public records."
2. Plaintiff stated in its Petition that it requested records of the Lobbying Compliance Division pursuant to the Public Records Law. Plaintiff contended that the Lobbying Compliance Division maintained that N.C. Gen. Stat. §120C-600(c) precluded the release of the requested documents and information on the grounds that the same are considered "confidential records and may be released only by order of a court of competent jurisdiction."
3. On August 23, 2010, Defendants filed an Answer and Response to Plaintiff's Petition.

4. On September 14, 2010, Plaintiff filed a Motion for Judgment on the Pleadings. Plaintiff contended that "the State has admitted the material allegations of fact in NCICL's Complaint and only questions of law remain."
5. Plaintiff stated that "the interpretation of N.C. Gen. Stat. §120C-600(c) is a question of law for the Court." Defendants agree that the interpretation of N.C. Gen. Stat. §120C-600(c) is a question of law for the Court.
6. Plaintiff stated that "as a matter of law, NCICL is entitled to a declaration that N.C. Gen. Stat. §120C-600(c) does not prohibit Defendants from satisfying NCICL's public records requests." Defendants disagree and contend that NCICL is not entitled to a declaration that N.C. Gen. Stat. §120C-600(c) does not prohibit Defendants from satisfying NCICL's public records requests.
7. Defendants contend that N.C. Gen. Stat. §120C-600(c) prohibits them from satisfying NCICL's request for records.
8. N.C. Gen. Stat. §120C-600(c) states:

Complaints of violations of Articles 2, 4, and 8 of this Chapter, all other records accumulated in conjunction with the investigation of these complaints, and any records accumulated in the performance of a systematic review shall be considered confidential records and may be released only by order of a court of competent jurisdiction. Any information obtained by the Secretary of State from any law enforcement agency, administrative agency, or regulatory organization on a confidential or otherwise restricted basis in the course of an investigation or systematic review shall be confidential and exempt from G.S. 132-6 to the same extent that it is confidential in the possession of the providing agency or organization.

9. 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." *Times-News Publishing Co. v. State*, 124 N.C. App. 175, 176, 474 S.E.2d 450, 451-52 (1996), *disc. review denied*, 345 N.C. 645, 483 S.E.2d 717 (1997); N.C. Gen. Stat. 132-1 *et seq.*
10. In the same way N.C. Gen. Stat. §§126-22 and 24 provide that a state employee's personnel records are exempt from the Public Records Act unless released by a proper court order, N.C. Gen. Stat. §120C-600(c) provides a specific exemption to the Public Records Act for "[c]omplaints of violations of Articles 2, 4, and 8 of this Chapter, all other records accumulated in conjunction with the investigation of these complaints, and any records accumulated in the performance of a systematic review." Therefore, the only way records of complaints and systematic reviews can be released is by "an order of a court of competent jurisdiction" pursuant to N.C. Gen. Stat. §120C-600(c).

11. The Lobbying Compliance Division's records of complaint investigations and systematic reviews are also exempt from the Public Records Act much like records of criminal investigations. North Carolina courts have routinely refused to order the disclosure of records of criminal investigations and criminal intelligence. *See, e.g. Gannett Pacific Corp. v. North Carolina State Bureau of Investigation*, 164 N.C. App 154, 595 S.E.2d 162 (2004). In *Gannett*, the Court explains the policy considerations underlying this position:

[C]ourts have given almost universal recognition to certain reasons for excluding police and investigative records from the operation of statutory rights of public access Such reasons include, but are not limited to the following: (1) protection of confidentiality of government informants; (2) protection of investigative techniques used by law enforcement agencies; (3) criminal investigation reports contain the opinions and conclusions of the investigators and may be based on hearsay. These justifications do not dissipate upon conclusion of an investigation or where no actual prosecution takes place. (citations omitted.)

164 N.C. App. at 166 (holding that "the Plaintiffs are not entitled to release of the [State Bureau of Investigation's] records of its criminal investigation or criminal intelligence information.").

12. The North Carolina Supreme Court echoed this reasoning in support of its holding in *News and Observer Pub. Co. v. State ex rel. Starling* that State Bureau of Investigation records of criminal investigations and intelligence were confidential:

Reports based on criminal investigations are often exempt from disclosure because they are based on hearsay and consist largely of the opinions and conclusions of the investigators. The need for protection of confidentiality of government informants and the protection of investigative techniques used by law enforcement agencies also have been generally accepted as justifying prohibitions on disclosure of police and investigative records.

It is clear that if investigatory files were made public subsequent to the termination of enforcement proceedings, the ability of any investigatory body to conduct future investigations would be seriously impaired. Few persons would respond candidly to investigators if they feared that their remarks would become public record after the proceedings. Further, the investigative techniques of the investigating body would be disclosed to the general public.

An equally important reason for prohibiting access to police and investigative reports arises from recognition of the rights of privacy of individuals mentioned or accused of wrongdoing in

unverified or unverifiable hearsay statements of others included in such reports. (citations omitted)

312 N.C. 276, 283, 322 S.E.2d 133, 138 (1984).

13. The Defendants' investigations of complaints and systematic reviews have similar investigatory and privacy issues as stated in the above-cited cases. Currently, many records obtained from third parties during investigations of complaints and systematic reviews are provided based on the confidentiality language of N.C. Gen. Stat. §120C-600(c). Investigations of complaints and systematic reviews would be severely hampered without the protection provided by N.C. Gen. Stat. §120C-600(c).

For the above-stated reasons, Defendants pray that the Court:

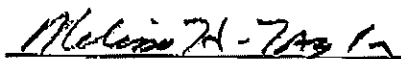
1. Deny Plaintiff's request for an order granting Judgment on the Pleadings pursuant to N.C. Gen. Stat. §1A-1, Rule 12(c) of the North Carolina Rules of Civil Procedure;
2. Deny all relief sought by Plaintiff's complaint and petition for declaratory judgment;
3. Deny Plaintiff's prayer for an Order that declares that the advisory letter dated 16 June 2009 by the North Carolina Department of Justice does not prohibit Defendants from fulfilling Plaintiff's public records request;
4. Deny Plaintiff's prayer for attorneys fees and reimbursement costs;
5. Deny Plaintiff's prayer for the costs of this action to be taxed against Defendants;
6. Find that Defendants are not required to release "[c]omplaints of violations of Articles 2, 4, and 8 of this Chapter, all other records accumulated in conjunction with the investigation of these complaints, and any records accumulated in the performance of a systematic review;"
7. Find that Defendants properly denied Plaintiff's records request pursuant to N.C. Gen. Stat. §120C-600(c); and
8. Provide for such further relief as to the Court may seem just and proper.

This the 2nd day of November 2010.

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the above and foregoing DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS has been served on the Plaintiff by facsimile and by depositing it in the United States mail, postage prepaid, addressed as follows:

Robert F. Orr
Jeanette Doran
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This the 02 day of November 2010.

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