

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. )

**MEMORANDUM OF LAW IN  
SUPPORT OF PLAINTIFF'S MOTION  
FOR JUDGMENT ON THE  
PLEADINGS**

FILED  
JUL 2 11 03  
COUNTY CLERK

NOW COMES Plaintiff North Carolina Institute for Constitutional Law (hereinafter referred to as "NCICL"), and urges this Court to enter Judgment on the Pleadings for Plaintiff, pursuant to N.C. Gen. Stat. §1A-1, Rule 12(c) of the North Carolina Rules of Civil Procedure for the reasons set out below.

**INTRODUCTION**

NCICL brings this action to challenge Defendants' denial of NCICL's request for public records and for information pertaining to a lobbying law violation complaint filed by NCICL. As more fully detailed below, NCICL requested copies of all documents relating to lobbyist activity for or on behalf of Spirit AeroSystems, Inc. ("Spirit Aero"), the recipient of "economic development incentives" paid by public funds and a commitment for a manufacturing facility worth approximately \$100 million dollars to be leased to the corporation for a nominal sum in connection with the solicitation and negotiation of economic development incentive activity with

North Carolina government officials and office holders. The Lobbying Compliance Division Director of the North Carolina Department of the Secretary of State replied repeatedly that the Secretary of State had no filings related to Spirit Aero, whether protected as an economic development initiative or not. NCICL also asked whether the Lobbying Compliance Division takes action if a principal or lobbyist fails to register lobbying activity. NCICL was advised that that the Lobbying Compliance Division opens an investigation pursuant to Article 6 of the Lobbying Act in the event of a complaint that a principal or lobbyist fails to register. NCICL subsequently submitted a formal complaint to the Secretary of State. The Department of the Secretary of State has refused to provide any information about the status of NCICL's complaint or any action taken by the Department in regard to it.

#### **UNDISPUTED FACTS**

The facts of this case are largely undisputed. Defendants' Answer admits the material allegations of the Complaint and neither admits nor denies other allegations on the grounds that, absent a court order (precisely the relief sought by Plaintiff), Defendants are not authorized to respond. The facts below are derived from the Complaint and the Answer.

#### **Parties**

Plaintiff North Carolina Institute for Constitutional Law ("NCICL") is a nonprofit corporation incorporated in North Carolina and is authorized by the laws of North Carolina to sue and to be sued. NCICL has its principal place of business in Wake County, North Carolina. (Compl. ¶ 2; Ans. ¶ 2)

Curiously, Defendants allege they are without sufficient knowledge to admit or deny that Defendant State of North Carolina is a general purpose state government which is capable of being sued, and which is being sued, for unlawfully denying Plaintiff's public records request

and request for information pursuant to a complaint filed by Plaintiff pertaining to a lobbying law violation.” (Ans. ¶ 3) Defendants admit Defendant North Carolina Department of the Secretary of State is an agency and department of the State of North Carolina created by N.C. Gen. Stat. § 143A-19. (Ans. ¶ 4) Defendant Elaine F. Marshall is sued in her official capacity as the North Carolina Secretary of State. Pursuant to N.C. Gen. Stat. § 143A-19, the Secretary of State is head of the Department of the Secretary of State. Pursuant to N.C. Gen. Stat. § 132-2, as head of the Department of Secretary of State, Defendant Marshall is the custodian of the public records of Defendant Department of Secretary of State. Pursuant to N.C. Gen. Stat. § 120C-603(a), the Secretary of State “may investigate complaints of violations of [lobbying laws] and shall report apparent violations [of lobbying laws] to the district attorney of the prosecutorial district defined in G.S. 7A-60 of which Wake County is a part . . .” (Compl. ¶ 5; Ans. ¶ 4)

### **Records Requests, Lobbying Violation Complaint and Responses**

On 14 May 2008, the Office of the Governor of North Carolina issued a press release announcing the commitment of Spirit Aero to locate a manufacturing plant at the North Carolina Global TransPark in Kinston, North Carolina. Upon information and belief, Spirit Aero extracted from government officials promises for millions of dollars in public assistance in the way of so-called economic development incentives plus a commitment for a facility worth approximately \$100 million dollars. The \$100 million facility was to be paid for with primarily public money distributed from the Golden Leaf Foundation and laundered through the Global TransPark for the benefit of Spirit Aero. (Compl. ¶ 20).

Pursuant to the Public Records Law, on 27 May 2009, Plaintiff requested copies of all documents relating to lobbyist activity for or on behalf of Spirit Aero in connection with the

solicitation and negotiation of economic development incentive activity with North Carolina government officials and office holders. (Compl. ¶ 21) On 1 June 2009, Plaintiff sent that same request to Joal Broun, Lobbying Compliance Division Director, North Carolina Department of the Secretary of State. (Compl. ¶ 22). Defendants have answered they are “not authorized to respond at this time” to allegations Plaintiff made records requests as alleged at paragraphs 21 and 22. (Ans. ¶ 10)

On 2 June 2009, Broun advised Plaintiff via email: “The Secretary of State has no lobbying filings related to Spirit Aerosystems.” (Compl. ¶ 23) On 3 June 2009, Plaintiff confirmed via email with Broun that “the Secretary of State has no filings related to Spirit Aerosystems, whether protected as an economic development initiative or not.” In the same email, Plaintiff asked Broun whether the Lobbying Compliance Division takes action “if a principal or lobbyist fails to register lobbying activity.” (Compl. ¶ 24). On 9 June 2009, Broun advised Plaintiff that the Lobbying Compliance Division opens an investigation pursuant to Article 6 of the Lobbying Act in the event of a complaint that a principal or lobbyist fails to register. (Compl. ¶ 25) Again, Defendants answered they are “not authorized to respond at this time” to allegations of paragraphs 23 through 25. (Ans. ¶ 10)

On 16 July 2009, Plaintiff by and through its executive director filed a formal complaint with the Department of the Secretary of State, pursuant to Article 6, Chapter 120 of the General Statutes. The complaint was addressed to Defendant Marshall and outlined alleged violations of the Lobbying Act. (Comp. ¶ 27) This formal complaint included email correspondence and other documents obtained by Plaintiff demonstrating that, over the course of a year and a half, Mike Mullis, president of J.M. Mullis, Inc., a project location firm, attempted to influence then Governor Michael F. Easley, then Secretary of Commerce James T. Fain, and other officials in

the Office of the Governor and the Department of Commerce to award economic incentives to Spirit Aero. (Compl. ¶ 28) Plaintiff's complaint urged Defendant Marshall to investigate its complaint and take all necessary action to remedy the violations. (Compl. ¶ 29) Again, Defendants answered they are "not authorized to respond at this time" to allegations of paragraphs 23 through 25. (Ans. ¶ 10)

Although Defendants do not respond to the allegations that Plaintiff made a complaint, they do admit, "that during a period of months, Plaintiff received no communication from Defendants regarding Plaintiff's complaint dated 16 July 2009." (Ans. ¶ 11)

Again, although Defendants do not respond to the allegations Plaintiff made a complaint, they do admit their response to Plaintiff's complaint. Specifically, on or about 23 November 2009, Broun, on behalf of the Department of the Secretary of State, refused to provide any information to Plaintiff about the status of its complaint or any action taken by the Department in regard to it. Broun maintained that N.C. Gen. Stat. § 120C-600(c) precluded 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." (Compl. ¶ 31; Ans. ¶ 12).

On or about 10 March 2010, Plaintiff again requested information pertaining to two matters. First, Plaintiff renewed its May 2009 request for copies of documents relating to lobbyist activity for or on behalf of Spirit Aero in connection with the solicitation and negotiation of economic development incentive activity with North Carolina government officials and office holders. Second, Plaintiff requested "any and all documents pertaining to the action or inaction taken by [the Department of the Secretary of State] on [NCICL's] complaint." Plaintiff explicitly stated its request was not for criminal investigations records, rather it

requested “the release of information as to what action the Secretary of State’s office took in regard to [Plaintiff’s complaint].” A copy of this letter was attached to the Verified Complaint as Exhibit D and incorporated by reference. (Compl. ¶ 32). Defendants answered they are “not authorized to respond at this time” to allegations of paragraph 32. (Ans. ¶ 13)

Although Defendants did not respond to Plaintiff’s allegations concerning its 10 March 2010 letter, Defendants do admit their alleged response to that letter. Specifically, by letter dated 24 March 2010, Broun on behalf of the Defendants stated the Secretary of State “still has no lobbying registration or expense report filings related to Spirit AeroSystems.” The letter again denied a status report or other documents related to Plaintiff’s lobbying violation complaint filed in July 2009, stating the Attorney General’s Office advised “the Department that we could not confirm the existence, the status, or the conclusion of an investigation pursuant to G.S. 120C-600(c).” A copy of the letter was attached to the Complaint as Exhibit E and incorporated by reference. (Compl. ¶ 33; Ans. ¶ 14)

Although Defendants did not respond to Plaintiff’s allegations that Plaintiff made records requests, Defendants do admit the reason for denying the request. Specifically, Defendants admit that they “relied in part on an advisory letter dated 16 June 2009 from the Department of Justice regarding the confidentiality requirements under N.C. Gen. Stat. § 120C-600(c)” when denying Plaintiff’s public records request. (Answer ¶15)

Defendants also admit the Attorney General advisory letter referenced above states in pertinent part:

Your first question is whether the Department [of the Secretary of State] can disclose documents obtained pursuant to complaint investigations or systematic reviews without obtaining a court order. If those documents resulted from a review initiated pursuant to N.C. Gen. Stat. § 120C-600(a) or a complaint of violation of Articles 2, 4, and 8, those documents are confidential pursuant to N.C. Gen. Stat. § 120-600(c) and are not to be released by the Department [of the Secretary of State] except by court order.

(Compl. ¶ 35; Ans. ¶ 16).

The Attorney General advisory letter referenced above addressed at least six questions asked by the Department of the Secretary of State. The advisory letter does not reference Plaintiff's records requests and, in fact, predates Plaintiff's records requests in connection with SpiritAero. (Compl. ¶ 36; Ans. ¶ 16)

Defendants admit that they "have not provided records to Plaintiff in response to Plaintiff's public records requests." (Ans. ¶ 17).

### **ARGUMENT**

#### **A. Applicable Standard**

"A motion for judgment on the pleadings, or a Rule 12(c) motion, is proper when all the material allegations of fact are admitted on the pleadings and only questions of law remain." *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987) (citation omitted). The moving party "must show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law." *Id.* The function of N.C. Gen. Stat. § 1A-1, N.C. R. Civ. P. 12(c) is to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. *Skinner v. Quintiles Transnational Corp.*, 167 N.C. App. 478, 606 S.E.2d 191 (2004).

#### **B. Legal Argument**

The critical facts are admitted. The only factual allegations neither admitted nor denied are those which Defendants allege they are "not authorized to respond at this time" because "[r]esponding to the allegations contained in these paragraphs in the absence of an order of a court of competent jurisdiction directing the release of such records would require Defendants to disclose information from records that are confidential under N.C. Gen. Stat. § 120C-600(c)."

(Ans. ¶¶ 10, 13) Thus, only questions of law remain. Specifically, the question of whether N.C. Gen. Stat. § 120C-600(c) prohibits disclosure of the public records requested by Plaintiff.

1. *Plaintiff Is Entitled to Judgment in Its Favor on the First Claim for Relief Alleging a Violation of the Public Records Law*

Plaintiff's first claim for relief alleges a violation of the North Carolina Public Records Law ("the Public Records Law"), N.C. Gen. Stat. §§ 132-1 through 132-10. As explained in the facts set out above, Plaintiffs requested certain public records and public information, and Defendants denied that request. Defendants' refusal to allow full access to the public records regarding lobbying registration and reporting and enforcement of lobbying laws is in contravention of the intent of the Public Records Law, lobbying laws and the policies of the State. The Public Records Law affords the public a broad right of access to records in the possession of public agencies and their officials. *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 596 S.E.2d 431 (2004), *disc. review denied*, 359 N.C. 69, 603 S.E.2d 131 (2004). The policy underlying the Public Records Law is intended to give liberal access to public records. N.C. Gen. Stat. § 132-1(b); *see also Gannett Pacific Corp. v. North Carolina State Bureau of Investigation*, 164 N.C. App. 154, 156-57, 595 S.E.2d 162, 163-64 (2004). Public records and public information compiled by agencies of North Carolina government or its subdivisions "are the property of the people." N.C. Gen. Stat. § 132-1(b). The Public Records Law generally requires the release of public records upon request because:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of the State that the people may obtain copies of their public records and public information free or at minimal cost *unless otherwise specifically provided by law*.

N.C. Gen. Stat. § 132-1(b)(emphasis added).

The Public Records Law “permits public access to all public records in any agency’s possession unless either the agency or the record is specifically exempted from the statute’s mandate.” *Gannett*, 164 N.C. App. at 156, 595 S.E.2d at 164. (internal citations omitted) Accordingly, an analysis of whether documents are subject to disclosure as public records has two parts. First, there must be a determination of whether the entity holding the records is an “agency of North Carolina government or its subdivisions,” and second, if so, whether the records are “public records” not specifically exempt from disclosure. N.C. Gen. Stat. § 132-1(a); *Womack Newspapers v. The Town of Kitty Hawk*, 181 N.C. App. 1, 12, 639 S.E.2d 96, 104 (2007).

The “public agency” portion of the test for disclosure is satisfied here by the allegations and admissions. The Public Records Law defines “agency of North Carolina government or its subdivisions” as “every public office, public officer, or official (State or local, elected or appointed) . . . “ N.C. Gen. Stat. § 131-1(a). The Complaint alleges and Defendants admit that Defendant Department of the Secretary of State is an agency of the State of North Carolina and that Defendant Marshall is head of that Department.

What remains, then, is for this Court to determine whether the requested records and information are “public records and public information” not specifically exempt from disclosure.

Public records are defined at N.C. Gen. Stat. § 132-1(a) as:

all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions.

Plaintiff sought public records of lobbying by or on behalf of SpiritAero after the Governor announced incentives which included the construction of a \$100 million facility to be

paid for with public funds through the Golden Leaf Foundation. Upon learning that the Secretary of State had no lobbying registration records for SpiritAero, Plaintiff filed a formal complaint with supporting documentation setting out that Mike Mullis, president of J.M. Mullis, Inc., a project location firm, attempted to influence then Governor Michael F. Easley, then Secretary of Commerce James T. Fain, and other officials in the Office of the Governor and the Department of Commerce to award economic incentives to SpiritAero. After receiving no communication from Defendants, Plaintiff requested public records and information regarding the status of its formal complaint. Defendants refused to tell Plaintiff anything at all about its lobbying law violation complaint. While Defendants have not responded to allegations about whether Plaintiff made such requests, Defendants did admit that they had not fulfilled the requests and that they relied on legal advice in so doing. By admitting they have not satisfied the records requests and that they relied on legal advice to do so, Defendants have implicitly admitted they received such records requests from Plaintiff. *Consider United States v. Hubbell*, 530 U.S. 27, 36, 120 S. Ct. 2037, 2043, 147 L. Ed. 2d 24, 36 (2000) (noting that "the act of producing documents in response to a subpoena . . . may implicitly communicate statements of fact" because "[b]y producing documents . . . the witness would admit that the papers existed, were in his possession or control, and were authentic" (internal quotations omitted)).

Defendants refuse to acknowledge receipt of Plaintiff's complaint about lobbying law violations, much less disclose what action, if any, was taken in response to Plaintiff's lobbying violation complaint. For all Plaintiff knows, the complaint was never received, was received and thrown in the garbage can, was received and filed away with no action, was received and investigated, or was received and forwarded to the District Attorney. Information related to

Defendants' actions on receiving a complaint are not always and necessarily part of an investigation and exempt from disclosure.

N.C. Gen. Stat. § 120C-600 enumerates the "powers and duties" of the Secretary of State with regard to enforcement of the Lobbying Act and, Defendants contend that certain documents are shielded from public disclosure, relying in pertinent part on the following:

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.

N.C. Gen. Stat. § 120C-600(c)(emphasis added).

N.C. Gen. Stat. § 120C-600(c) was first enacted after the Secretary of State was given investigative powers, including the authority to issue subpoenas, effective 1 January 2007. In anticipation of that authority, the Attorney General issued a formal Advisory Opinion dated 3 April 2006 addressing whether records gathered by the Secretary of State during an investigation would be considered criminal records subject to disclosure. The Advisory Opinion stated those records would be public records subject to disclosure under the law at that time:

This letter is in response to your request for an opinion whether records obtained and produced by the North Carolina Department of the Secretary of State (hereinafter "the Department") solely for the purpose of making a report of an apparent criminal violation under N.C. Gen. Stat. § 120-47.10, fall within the exception to the Public Records Act found in N.C. Gen. Stat. § 132-1.4. In our opinion, as a general rule, the records in your possession are not records of criminal investigations or intelligence and are a public record. In reaching this determination, we considered relevant statutes from the Public Records Act, as well as current and recent amendments to the lobbying laws.

Apparently as a result of this opinion, N.C. Gen. Stat. § 120C-600(c) was enacted to treat records of the Secretary of State like criminal investigation records. In fact, prior to 2008, N.C. Gen. Stat. § 120C-600(c) specifically cited the criminal investigations exemption to the Public Record Law:

Complaints of violations of Articles 2, 4, and 8 of this Chapter, all other records accumulated in conjunction with the investigation of these complaints shall be considered records of criminal investigations under G.S. 132-1.4.

In 2008, the General Assembly modified the language of N.C. Gen. Stat. § 120C-600(c) to that which is now in force. The 2008 amendments did two things. First, it elaborated on the types of “records” to which it applied to include records gathered in conjunction with an investigation and records gathered as part of a systematic review; and second, it sought to provide such records the kind of confidentiality given to criminal investigation records.

This history dictates the construction of N.C. Gen. Stat. § 120C-600(c) because “[t]he polar star in statutory construction is that the intent of the legislature controls.” *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 570, 525 S.E.2d 786, 789 (2000) (citing *State v. Fulcher*, 294 N.C. 503, 520, 243 S.E.2d 338, 350 (1978)). “That intent must be found from the language of the act, its legislative history and the circumstances surrounding its adoption which throw light upon the evil sought to be remedied.” *Multimedia Publ'g of N.C.*, 136 N.C. App. at 570-71, 525 S.E.2d at 789 (citing *Milk Commission v. Food Stores*, 270 N.C. 323, 332, 154 S.E.2d 548, 555 (1967)).

In light of the history of N.C. Gen. Stat. §120C-600(c), the types of records not subject to disclosure, i.e. records “*accumulated in conjunction with the investigation*” of certain classes of lobbying violations, are limited to the types of records exempt from disclosure under N.C. Gen. Stat. § 132-1.4, the statute expressly referenced in the pre-2008 version of N.C. Gen. Stat. §120C-600(c). Although 132-1.4 generally shields records of criminal investigations from disclosure as public records, the statute specifically allows disclosure of “[t]he time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency” N.C. Gen. Stat. § 132-1.4(c)(1). Telephone calls to 911 are also subject to

disclosure as is certain information about a complaining witness. N.C. Gen. Stat. §132-1.4(c)(4) and (6). By reading N.C. Gen. Stat. §120C-600(c) together with N.C. Gen. Stat. § -132-1.4(c), the scope of its exclusions from the Public Records Law is seen more narrowly than Defendants assert. The public records and public information sought by Plaintiff are analogous to public records subject to disclosure under N.C. Gen. Stat. § 132-1.4(c). Plaintiff's complaint and Defendants response are similar to 911 call recordings which reflect both a complaint of a crime from a caller and statements from 911 operators concerning a response, e.g. an operator telling a caller that police are on the way. Just as a 911 recording including statements from an operator that police have been dispatched in response to a caller's request are public records subject to disclosure so too are records of Defendants response, if any, to Plaintiff's request for an investigation of lobbying law violations. Plaintiff request seeks information less detailed than the "time, date, and nature of a violation" subject to disclosure in criminal cases. Plaintiff is not asking for details about the apparent lobbying law violation; it just seeks to know if Defendants have bothered to investigate a reported lobbying law violation.

The statute Defendants are hiding behind shields "complaints" from disclosure, but that must be read together with the first part of that statute which states: "The Secretary of State shall refer to the Commission any complaints of violations of this Chapter other than those related solely to Articles 2, 4, or 8 of this Chapter." N.C. Gen. Stat. § 120C-600(a). The "complaints" which are exempt from public disclosure are only complaints sent from the Secretary of State to the Commission. The term "complaint" as used at N.C. Gen. Stat. § 120C-600(c) refers to the kinds of complaints addressed elsewhere in that statute. Paragraph (a) addresses complaints of violations of articles other than Articles 2, 4, and 8. Paragraph (c) addresses complaints of violations of Articles 2, 4, and 8. Paragraph (a) talks about complaints from the Secretary of

State, not the public. Similarly, Paragraph (c) contemplates complaints from the Secretary of State, not the public. Complaints from the public, including Plaintiff, are the functional equivalent of a request that an investigation take place.

N.C. Gen. Stat. § 132-6(c) states, “[n]o request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information.” Thus, to the extent that Plaintiff’s request could be construed to encompass investigation records exempt from disclosure, Defendants have a legal duty to provide all requested public records and public information which is nonconfidential.

As alleged at Paragraph 42 of the Complaint, the interpretation relied upon by Defendants to refuse to inform Plaintiff of the status of Plaintiff’s complaint of a lobbying law violation and as to what action, if any, was taken by the Secretary of State’s office is incorrect, inaccurate and serves only to hide from Plaintiffs, the public, and the press what official action, pursuant to the laws of North Carolina, has been taken by the Secretary of State. Plaintiff submits N.C. Gen. Stat. § 120C-600(c) protects records gathered as *part* of an investigation, but not a complaint from the public, which is the functional equivalent of a request that an investigation take place. Accordingly, Plaintiff is entitled to judgment on the First Claim for Relief and an order compelling Defendants to provide public records and public information as requested in Plaintiff’s public records requests and as identified in the Complaint.

2. *Plaintiff is Entitled to Judgment in Its Favor on the Second Claim for Relief Alleging a Violation of the Freedom of the Press*

Plaintiff’s Second Claim asserts a violation of freedom of the press. Defendants’ misinterpretation and misapplication of N.C. Gen. Stat. § 120C-600(c) and refusal to disclose what action was taken in regard to Plaintiff’s lobbying law violation complaint constitutes a restraint on the press in that said refusal to disclose what action was taken effectively precludes

the press in all its iterations from reporting to the public on the actions of government officials and those seeking to influence government action and what actions government officials have taken or not taken as to violations of the lobbying laws of this State. Plaintiff performs many press functions, including publishing newsletters, reports and other materials for publication in hardcopy and on its website. However, because Defendants refused to disclose what action was taken in regard to Plaintiff's lobbying law violation complaint, Plaintiff's ability to prepare articles has been impaired. (Compl. ¶ 48) As a consequence, Plaintiff cannot inform its readership of what action was taken in response to Plaintiff's lobbying law violation complaint, nor, more importantly, can Plaintiff inform its readership of the status of enforcement of North Carolina's lobbying laws with regard to SpiritAero and other similar lobbying activities.

Public records by their very nature are of interest to those concerned with the administration of government, and a public benefit is performed by the reporting of the true contents of the records by the media. The freedom of the press to publish that information appears to us to be of critical importance to our type of government in which the citizenry is the final judge of the proper conduct of public business.

*Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 495, 95 S. Ct. 1029, 1046, 43 L. Ed. 2d 328, 349 (1975); *see also Landmark Communications, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 1542, 56 L. Ed. 2d 1, 11 (1978) (deeming the operation of government affairs "a matter of public interest").

Plaintiff's right to produce reports, articles and other commentary critical of Defendants' enforcement or lack thereof of North Carolina's lobbying laws has been impaired by Defendants refusal to comply with Plaintiff's request for public records and public information. This violates Plaintiff's right to freedom of the press. Although not a member of traditional press, Plaintiff is nevertheless entitled to freedom of press protections. *See Ostergren v. Cuccinelli*, 615 F.3d 263, FN11 (4th Cir. 2010)(applying freedom of press protections to individual citizen's "advocacy

website” critical of state government)(quoting *Sheehan v. Gregoire*, 272 F. Supp. 2d 1135, 1145 (W.D. Wash. 2003) (“considering a website about police accountability ‘analytically indistinguishable from a newspaper’ where the website ‘communicates truthful lawfully-obtained, publicly-available personal identifying information with respect to a matter of public significance’”)).

Turning to the test the question of whether Plaintiff’s freedom of the press rights have been violated by the denial of its records request, Plaintiff points to *In re Search Warrants Issued in Connection with the Investigation into the Death of Nancy Cooper*, \_\_\_ N.C. App. \_\_\_, 683 S.E.2d 418 (2009), considering the press’s right to access search warrants sealed by the trial court, the North Carolina Court of Appeals articulated the legal test for access to records:

[t]he test for determining whether a first amendment right of access is available is: 1) "whether the place and process have historically been open to the press and general public," and 2) "whether public access plays a significant positive role in the functioning of the particular process in question."

*Id.* \_\_\_ N.C. App. at \_\_\_, 683 S.E.2d at 425 (quoting *Baltimore Sun Co. v. Goetz*, 886 F.2d 60, 64 (4th Cir. 1989)).

Plaintiff satisfied both prongs of this two-part test. As explained above, the State has a strong policy as articulated in the Public Records Law. Public records are the “property of the people.” N.C. Gen. Stat. § 132-1(b). Generally, public records have been and continue to be “open to the press and general public.” *In re Search Warrants Issued in Connection with the Investigation into the Death of Nancy Cooper*, \_\_\_ N.C. App. at \_\_\_, 683 S.E.2d at 425 . On a more specific note, the particular records sought by Plaintiff have a history of being available. Records of the Secretary of State were not originally shielded at all from the public. In 2006, the Attorney General wrote a formal Advisory Opinion opining that records including investigatory records collected by the Secretary of State would be public records subject to disclosure and not

entitled to confidentiality as criminal investigations records. Plaintiff therefore satisfies part one of the freedom of press access test in *In re Search Warrants Issued in Connection with the Investigation into the Death of Nancy Cooper*.

The second prong of the test asks whether public access plays a significant positive role in the functioning of the particular process in question. The answer to this seems painfully obvious. If the public and press cannot access information about *whether* the State is enforcing its lobbying law, then they have no way to monitor lobbying enforcement or lobbying activity. Recent years have seen a flood of laws aimed at improving sunshine in government. Not least among these efforts have been reforms of lobbying laws. *See* 2006 Lobbying and Ethics Reforms: An Overview, North Carolina Coalition for Lobbying and Government Reform (5 December 2006) (summarizing lobbying reform efforts enacted that year). But, if Defendants' sweeping view of the exemptions from the Public Records Law stand, legislative reforms will have all been for naught. Reforms intended to force lobbyists and the principals who hire them to report their relationship and activities will be entirely meaningless if the State does not enforce those requirements.

The public has a right to know if that is happening. If members of the public cannot find out whether those charged with enforcing lobbying laws are doing their jobs, the public cannot determine whether to maintain reforms, demand more reforms, support or oppose elected officials, and criticize the influence of lobbyist and special interests. Not only does public access to the records request here play a "significant positive role in the functioning of the particular process," it plays the predominant foundational role in lobbying accountability and government transparency.

3. *Plaintiff Is Entitled to Judgment in Its Favor on the Third Claim for Relief Alleging a Violation of the Constitutional Mandate of Open Courts.*

Defendants' misinterpretation and misapplication of N.C. Gen. Stat. § 120C-601(c) and refusal to disclose what action was taken in regard to Plaintiff's lobbying law violation complaint effectively closes court proceedings to Plaintiff, the public and the press by keeping hidden whether the complaint at issue was forwarded to the district attorney of Wake County pursuant to N.C. Gen. Stat. § 120C- 603(a) and whether fines were imposed by the Secretary of State pursuant to N.C. Gen. Stat. § 120C-602.

The North Carolina Lobbying Act, N.C. Gen. Stat. § 120C-1, *et seq.*, regulates the activities and conduct of lobbying efforts in North Carolina. "Lobbying" is defined as any of the following:

- a. Influencing or attempting to influence legislative or executive action, or both, through direct communication or activities with a designated individual<sup>1</sup> or that designated individual's immediate family.
- b. Developing goodwill through communications or activities, including the building of relationships, with a designated individual or that designated individual's immediate family with the intention of influencing current or future legislative or executive action, or both.

N.C. Gen. Stat. § 120C-100(a)(9).

Among the Lobbying Act's provisions are various registration requirements which lobbyists and principals must satisfy, as well as requirements that the Secretary of State make such registrations available in electronic, searchable format. N.C. Gen. Stat. § 120C-200 through 220.

The Lobbying Act codifies the enforcement procedure to be employed for alleged violations of the act:

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<sup>1</sup> A "designated individual" is a "legislator, legislative employee, or public servant." N.C. Gen. Stat. § 120C-100(a)(2).

The [State Ethics] Commission or the Secretary of State, as appropriate, may investigate complaints of violations of this Chapter and shall report apparent violations of this Chapter to the district attorney of the prosecutorial district as defined in G.S. 7A-60 of which Wake County is a part, who shall prosecute any person or governmental unit who violates any provisions of this Chapter.

N.C. Gen. Stat. § 120C-603(a).

The Lobbying Act also authorizes the Secretary of State to impose civil punishment:

In addition to the criminal penalties set forth in this section, the Secretary of State may levy civil fines for a violation of any provision of Articles 2, 4, or 8 of this Chapter up to five thousand (\$5,000) per violation.

N.C. Gen. Stat. § 120C-602(b).

As a result of N.C. Gen. Stat. §§ 120C-602 and 603, the violations which were the subject of Plaintiff's formal complaint, i.e. that SpiritAero and its lobbyist failed to comply with registration and reporting requirements, could be the subject of civil and/or criminal proceedings in court. Plaintiff and the public generally have a constitutional right to attend court proceedings.

N.C. Const. art. I, § 18.

[T]he tradition of our courts is that their hearings shall be open. The Constitution of North Carolina so provides, Article I, Section 35 [now Section 18]. The public, and especially the parties are entitled to see and hear what goes on in the courts.... That courts are open is one of the sources of their greatest strength.

*Raper v. Berrier*, 246 N.C. 193, 195, 97 S.E.2d 782, 784 (1957).

It bares repeating, as Chief Justice Sharp did, "[t]hat courts are open is one of the sources of their greatest strength." *In re Nowell*, 293 N.C. 235, 249, 237 S.E.2d 246, 255 (1977).

Subsequent Supreme Court decisions have likewise emphasized the importance of meaningful public access to courts and the constitutional guarantee of open courts. For example in *In re Edens*, 290 N.C. 299, the Supreme Court affirmed an order of censure by the Judicial Standards Commission admonishing a judge allowing a defendant to plead guilty of a drunk driving offense

outside the presence of the prosecution and without notice. Agreeing with the Commission there, the Supreme Court reasoned:

The trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court. The public, and especially the parties are entitled to see and hear what goes on in the court.

*In re Edens*, 290 N.C. 299, 306, 226 S.E.2d 5, 9-10 (1976) (internal quotations and citations omitted).

More expressly, in *Virmani v. Presbyterian Health Servs. Corp.*, Chief Justice Mitchell, writing for the majority, explained and expounded upon *Raper*, quoted above:

Our reference to the right of the public there was mere *obiter dictum* unnecessary to the decision of the case, however, as the issue presented in *Raper* was whether the trial court could accept evidence at a hearing from which a *party* to the case was excluded. This Court has never expressly held that Article I, Section 18 provides members of the general public a right to attend *civil* court proceedings or to inspect or copy the records of such proceedings.

We now hold that the open courts provision of Article I, Section 18 of the North Carolina Constitution guarantees a *qualified* constitutional right on the part of the public to attend civil court proceedings.

*Id.*, 350 N.C. 449, 476, 515 S.E.2d 675, 693 (1999) (emphases in original)

Applying that reasoning to this situation, if the Secretary of State has or does refer Plaintiff's complaint of a lobbying law violation to the Wake County District Attorney, as required by N.C. Gen. Stat. § 120C-603, but refuses to acknowledge that referral, the public including Plaintiff will be unable to "see and hear" what goes on during ensuing court proceedings because the public including Plaintiff will have no way to determine if court proceedings are underway in the first place.

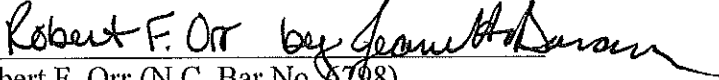
## CONCLUSION

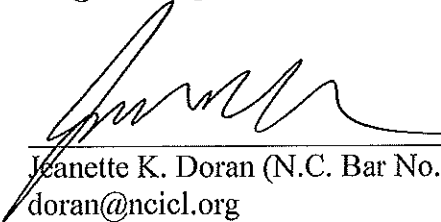
For the reasons above, Plaintiff NCICL respectfully prays the Court for an order granting Judgment on the Pleadings pursuant to N.C. Gen. Stat. §1A-1, Rule 12(c) of the North Carolina Rules of Civil Procedure.

Dated: This the 3<sup>rd</sup> th day of November 2010.

Respectfully Submitted,

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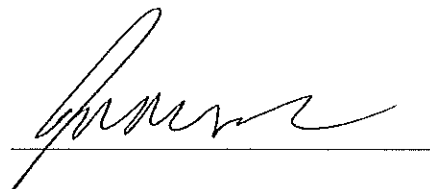
  
Jeanette K. Doran (N.C. Bar No. 29127)  
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## CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing PLAINTIFF'S MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF'S MOTION FOR JUDGMENT ON THE PLEADINGS by facsimile to 919-716-6757 and depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following address which is the last address known to me:

Brandon L Truman  
Melissa H. Taylor  
Assistants Attorney General  
NC Department of Justice  
Post Office Box 629  
Raleigh, North Carolina 27601-0629

This the 3<sup>rd</sup> day of November, 2010.



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