

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 15 CVS 9591

THE NEWS AND OBSERVER
PUBLISHING COMPANY; THE
CHARLOTTE OBSERVER
PUBLISHING COMPANY; CAPITOL
BROADCASTING COMPANY,
INCORPORATED; BONEY
PUBLISHERS d/b/a THE ALAMANCE
NEWS; THE SOUTHERN
ENVIRONMENTAL LAW CENTER;
ZM INDY, INC. d/b/a INDY WEEK;
MEDIA GENERAL OPERATIONS,
INC., and THE NORTH CAROLINA
JUSTICE CENTER d/b/a NC POLICY
WATCH,

Plaintiffs,

v.

PAT McCRORY, as Governor of North
Carolina; JOHN E. SKVARLA, III, as
Secretary of the North Carolina
Department of Commerce; DONALD R.
VAN DER VAART, as Secretary of the
North Carolina Department of
Environment and Natural Resources;
Dr. ALDONA Z. WOS, as Secretary of
the North Carolina Department of
Health and Human Services; FRANK L.
PERRY, as Secretary of the North
Carolina Department of Public Safety;
WILLIAM G. DAUGHTRIDGE, JR., as
Secretary of the North Carolina
Department of Administration;
ANTHONY J. TATA, as Secretary of
the North Carolina Department of
Transportation; SUSAN W. KLUTTZ,
as Secretary of the North Carolina
Department of Cultural Resources; and
LYONS GRAY, as Secretary of the
North Carolina Department of Revenue,

Defendants.

AMENDED COMPLAINT
[COMP]

FILED
2015 JUL 22 P 1:54
WAKE COUNTY, C.S.C.
BY

Pursuant to Rules 3, 7 and 8 of the North Carolina Rules of Civil Procedure the plaintiffs, complaining of the defendants, allege and say:

Introduction

This is an action pursuant to the North Carolina Public Records Law, Chapter 132 of the General Statutes. As described more specifically in the numbered allegations set out below, the plaintiffs seek:

(1) an order compelling the defendants to permit the inspection and copying of public records pursuant to N. C. Gen. Stat. § 132-9(a);

(2) an order declaring that fees may not be assessed in response to a request to inspect public records absent a request for copies of the public records;

(3) an order declaring that certain policies and practices adopted and followed by the defendants are in violation of the Public Records Law;

(4) an order in the nature of a writ of mandamus requiring the defendants to comply with the Public Records Law including, but not limited to, G.S. § 132-6(a);
and

(5) an order awarding the plaintiffs their reasonable attorney fees pursuant to G.S. § 132-9(c)(1).

The Plaintiffs

1. The News and Observer Publishing Company (*The News & Observer*) is a North Carolina corporation that maintains its principal place of business in Raleigh, Wake County, North Carolina. Among other things, the company publishes *The News & Observer*, a general interest newspaper that is published in Wake

County and distributed throughout the surrounding area of North Carolina. *The News & Observer* also publishes an online edition at www.newsobserver.com.

2. The Charlotte Observer Publishing Company is a Delaware corporation that maintains its principal place of business in Mecklenburg County, North Carolina. Among other things, the company publishes *The Charlotte Observer*, a general interest newspaper that is published in Mecklenburg County and distributed throughout the surrounding areas of North Carolina and South Carolina. The Observer also publishes an online edition at www.charlotteobserver.com.

3. Capitol Broadcasting Company, Incorporated (“Capitol Broadcasting”) is a North Carolina corporation whose principal place of business is located in Raleigh, Wake County, North Carolina. Capitol Broadcasting is a diversified communications company which, among other things, owns and operates three television stations in North Carolina, including WRAL-TV in Raleigh, which covers news in the Research Triangle and surrounding areas of Piedmont and Eastern North Carolina, including Wake, Durham and Orange Counties and their surrounding areas. WRAL-TV also disseminates broadcast news coverage via WRZA-TV and online coverage at www.wral.com.

4. Media General Operations, Inc. (“Media General”) is a Delaware corporation whose principal place of business is located in Richmond, Virginia. Media General is a local broadcast television and digital media company which, among other things, owns and operates newsrooms at WNCN-TV in Raleigh and

WNCT-TV in Greenville that provide news coverage from the Research Triangle area to the North Carolina coast. Media General also disseminates its news coverage online at www.wncn.com and www.wnct.com.

5. The Southern Environmental Law Center, Inc. (SELC) is a § 501(c) not-for-profit organization chartered as a non-profit North Carolina corporation. SELC's principal place of business is located in Charlottesville, Albemarle County, Virginia; it maintains registered offices in Chapel Hill, Orange County, North Carolina and in Asheville, Buncombe County, North Carolina. SELC works to protect the environment in North Carolina and other Southeastern states by representing partner groups with respect to issues related to climate change and energy; air and water quality; the coasts and wetlands; forests; transportation; and land use. SELC also researches and analyzes environmental issues and policies in order to engage in public education and advocate for environmental protection. SELC disseminates information online at www.southernenvironment.org.

6. Boney Publishers, Inc. is a North Carolina corporation that has its principal place of business in Graham, Alamance County, North Carolina. Among other things, Boney Publishers, Inc. publishes and does business as *The Alamance News*, a weekly general interest newspaper.

7. ZM INDY, Inc. ("Indy") is a North Carolina corporation that has its principal place of business in Durham, Durham County, North Carolina. Among other things, ZM INDY, Inc. publishes and does business as *INDY Week*, a general

interest weekly newspaper that covers news, politics and culture in the Research Triangle area. *INDY WEEK* also disseminates news online via www.indyweek.com.

8. North Carolina Justice Center (Justice Center) is a § 501(c) not-for-profit North Carolina organization located in Raleigh, North Carolina. NC Policy Watch (“N.C. Policy Watch”), which is a project of the Justice Center, is a news and commentary outlet dedicated to informing the public, including elected officials as they debate important issues, and to improving the quality of life for all North Carolinians. NC Policy Watch is published online at <http://www.ncpolicywatch.com>.

9. In the course of gathering information about the policies and actions of North Carolina government each of the plaintiffs regularly makes use of and relies upon the North Carolina Public Records Law to gain access to government documents, records and information. Compliance with the Public Records Law on the part of the defendants and other public officials is critical to the plaintiffs’ work. When the defendants fail or refuse to respond to public records requests or to provide requested public records as promptly as possible, the news media companies are thwarted in their attempts to provide their readers and viewers with accurate, timely and thorough information about the defendants’ decisions, actions and policies. The work of SELC and the Justice Center similarly depends on prompt access to public records, which these organizations request on behalf of themselves and on behalf of clients and other entities. SELC and the Justice Center use the records to inform the public about important social and economic issues, environmental and conservation issues, and other public policy issues; to research

and develop positions on those issues; and to work with government officials to improve environmental and conservation policies, laws, regulations and outcomes within North Carolina. When public agencies fail or refuse to respond to public records requests, SELC and the Justice Center are limited in their ability to engage in administrative, judicial and legislative processes and are thwarted in their aim to provide their clients and the public with accurate, timely and thorough information about the defendants' decisions, actions and policies.

The Defendants

10. Pat McCrory ("the Governor" or "Governor McCrory") is the duly elected and serving governor of North Carolina and is sued in that official capacity. As the Governor, defendant McCrory is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

11. John E. Skvarla, III ("Skvarla") is the duly appointed and serving Secretary of the North Carolina Department of Commerce and is sued in that official capacity. As Secretary of Commerce, defendant Skvarla is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

12. Donald R. Van Der Vaart ("Van Der Vaart") is the duly appointed and serving Secretary of the North Carolina Department of Environment and Natural Resources ("DENR") and is sued in that official capacity. As Secretary of DENR, defendant Van Der Vaart is a public agency of North Carolina government as

defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

13. Dr. Aldona Z. Wos (“Wos”) is the duly appointed and serving Secretary of the North Carolina Department of Health and Human Services (“HHS”) and is sued in that official capacity. As Secretary of HHS, defendant Wos is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

14. Frank L. Perry (“Perry”) is the duly appointed and serving Secretary of the North Carolina Department of Public Safety and is sued in that official capacity. As Secretary of the Department of Public Safety, defendant Perry is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

15. William G. “Bill” Daughtridge, Jr. (“Daughtridge”) is the duly appointed and serving Secretary of the North Carolina Department of Administration and is sued in that official capacity. As Secretary of the Department of Administration, defendant Daughtridge is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

16. Anthony J. “Tony” Tata (“Tata”) is the duly appointed and serving Secretary of the North Carolina Department of Transportation (“DOT”) and is sued in that official capacity. As Secretary of the DOT, defendant Tata is a public agency

of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

17. Susan W. Kluttz (“Kluttz”) is the duly appointed and serving Secretary of the North Carolina Department of Cultural Resources and is sued in that official capacity. As Secretary of Cultural Resources, defendant Kluttz is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

18. Lyons Gray (“Gray”) is the duly appointed and serving Secretary of the North Carolina Department of Revenue and is sued in that official capacity. As Secretary of Revenue, defendant Gray is a public agency of North Carolina government as defined by G.S. § 132-1(a) and is the custodian of records that are public under the Public Records Law.

19. Defendants Skvarla, Van Der Vaart, Wos, Perry, Daughtridge, Tata, Kluttz and Gray were appointed to their respective official positions by Governor McCrory and serve in those positions at his pleasure and subject to his direction; accordingly, they are referred to collectively hereafter as Governor McCrory’s “Cabinet.” Each is the custodian of public records in the possession or control of his or her department. On information and belief, each adheres to public records policies and practices prescribed by the Governor.

20. The North Carolina Public Records Law (“the Public Records Law”) is codified at N.C. Gen. Stat. §§132-1 through 132-10.

21. The public policy underlying the Public Records Law is set out in G.S.

§ 132-1(b), which provides:

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 this 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. As used herein, 'minimal cost' shall mean the actual cost of reproducing the public record or public information.

22. The Public Records Law, in G.S. §132-1(a), defines public

records 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. (Emphasis added.)

22. The Public Records Law further provides that "Every 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 upon payment of any fees as may be prescribed by law." G.S. §132-6(a).

23. The Public Records Law further provides, in G.S. §132-6(c), that

No 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. If it is necessary to separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of the public records, the public agency shall bear the cost of such separation . . .

24. Since Governor McCrory took office in January 2013, he and his Cabinet have violated the Public Records Law regularly and repeatedly. These violations include, but are not limited to:

- a. failing or refusing to furnish requesters with copies of requested public records “as promptly as possible”;
- b. failing or refusing to permit the inspection and examination of public records at reasonable times and under reasonable supervision;
- c. imposing or requesting unjustified fees for copies of public records;
- d. imposing or requesting unjustified and unreasonable “special service charges” for locating, retrieving and copying public records;
- e. imposing or requesting fees for inspecting and examining public records absent a request for copies thereof.
- f. failing to timely acknowledge or respond to public records requests; and,
- g. denying or concealing the existence of public records.

25. The defendants’ behaviors suggest, and therefore plaintiffs believe and allege, that some or all of the violations described above are the consequence of concerted policies and practices adopted and followed by the defendants for the purposes of avoiding or circumventing the Public Records Law and discouraging or intimidating public records requesters. These policies and practices include, but are not limited to:

- a. ignoring or delaying responses to public records requests with the intention of rendering the requests moot and/or rendering the records untimely and useless to the requesters;
- b. providing requesters with false or unreasonable estimates of fees and charges for locating, retrieving or copying public records with the intention of discouraging requesters from pursuing their requests;
- c. misleading requesters by acknowledging their requests, promising to provide access to requested public records on or before a specific date, and then failing to provide the records as promised;
- d. responding to public records requests in the order they are received without regard to their scope or complexity rather than responding to each request “as promptly as possible.”

Consequences of the Defendants' Violations

26. The defendants' repeated, concerted and systematic violations of the Public Records Law described above have resulted in myriad instances in which the plaintiffs effectively have been denied access to public records despite the defendants' tacit acknowledgement that the requested records are public. Collectively these instances disclose patterns and practices of delay, obfuscation, non-responsiveness, foot-dragging and stonewalling on the part of the defendants that effectively defeat and defy the public policy of transparent and open government that underlies the Public Records Law. For example:

a. On November 8, 2013, plaintiff Indy requested copies of defendant Governor McCrory's travel records. Over the ensuing 17 months, Indy repeatedly narrowed and refined the scope of the request; communicated repeatedly with the Governor's office about the status of the request; and engaged an attorney to pursue the request through the Governor's counsel. Despite these efforts by Indy, the Governor's office produced no records until March 13, 2015. Some portions of the records were redacted without explanation. An Indy representative called and emailed the Governor's office seeking an explanation for the redactions. To date Indy has received no response to that inquiry. Similarly, in February 2015, WRAL.com submitted identical requests for travel records to the Governor and to other state agencies, including the Cabinet secretaries and the Secretaries of Agriculture, Labor, Insurance and State. To date WRAL.com has received none of the requested records from the Governor's office.

b. Plaintiffs *The News & Observer* and Capitol Broadcasting have experienced repeated and longstanding delays in responses to requests for correspondence among and between officials of the McCrory administration regarding the State of North Carolina's sale of the Dorothea Dix property to the City of Raleigh. In July 2014, *The News & Observer* requested email correspondence sent or received after March 1, 2014, by officials of the Department of Administration regarding the potential sale. *The News & Observer* has received no records in response to that request until June 9,

2015, by which date some of the correspondence was more than a year old. The N&O has received nothing in response to a subsequent request dated March 30, 2015, seeking correspondence sent or received since January 12, 2015. Plaintiff Capitol Broadcasting, through WRAL-TV, requested similar records in October 2014; despite repeated inquiries, WRAL likewise received no records in response to that request until June 9, 2015. By contrast, the City of Raleigh promptly provided WRAL and *The News & Observer* with extensive public records regarding the Dorothea Dix negotiations.

c. On April 22, 2014, plaintiff SELC submitted a public records request to the Office of the Governor requesting access to records relating to the implementation of the Strategic Transportation Investments Act (HB 817) between July 2013 and the date of the request. SELC requested updates or status reports in August and September 2014 and in January 2015. The Governor's office did not acknowledge the request until January 27, 2015. SELC did not receive the records until July 2015, after the Strategic Transportation Investments Act implementation had been fully finalized and after the close of public comment.

d. In January 2014, SELC requested public records from the Department of Transportation related to the potential expansion of Interstate 77 by the addition of High Occupancy Toll ("HOT") lanes. After following up several times over the ensuing months, SELC finally received the requested

records in May 2015 after a contract had been signed with a private party to construct the HOT lanes.

e. In May 2014 plaintiff Capitol Broadcasting, through WRAL.com, requested emails from the Governor's office related to the proposal to move the State Bureau of Investigation from the Office of the Attorney General to the Department of Public Safety. The request sought emails sent or received between January 1, 2014, and the date of the request. On June 9, 2014, WRAL.com narrowed the request by excluding emails to or from members of the Governor's general counsel staff. Despite calling, emailing and texting members of the Governor's staff, WRAL.com was unable to obtain a response to or status report about the request over many months. WRAL didn't receive a single page of the requested records until June 17, 2015, and then only after threatening litigation. The request finally was fulfilled on June 22, 2015.

f. On April 22, 2013, SELC requested records from the Governor's office related to Governor McCrory's public assertion that his "Strategic Mobility Formula" would "fund at least 260 projects and create more than 240,000 jobs over the next 10 years" as compared to "175 projects and 174,000 jobs under the Department of Transportation's existing 10-year plan." Governor McCrory's counsel acknowledged the request that same day. Although the legislation to which the requested records relate has been finalized and fully implemented, SELC did not receive what the Governor's

Office described as the “first batch” of the requested records until July 20, 2015, and then only after threatening litigation.

g. On October 18, 2013, SELC requested to inspect records in the custody of the North Carolina Department of Environmental and Natural Resources, Division of Marine Fisheries relating to a proposed quarry development at Blounts Creek. Despite the fact that no request to copy documents was made, the agency refused to allow inspection of the documents unless SELC paid a special fee. Because the documents were needed for a time-sensitive investigation, SELC paid the fees under protest.

h. On April 30, 2013, SELC requested to inspect records in the custody of the North Carolina Department of Transportation related to two proposed wood pellet storage facilities. The agency initially refused to permit SELC to inspect the documents without paying a special fee. After protracted discussions with NCDOT's counsel, SELC was permitted to inspect the documents without charge as a one-time deal, with a warning that in the future, fees would be charged for inspection.

i. On August 23, 2013, NC Policy Watch submitted a public records request to the North Carolina Department of Health and Human Services seeking access to records related to a February 1, 2013 memo regarding salary freezes within the Department and any subsequent salary increases in excess of 10 percent approved by the Department. The request was

acknowledged that same day. A follow up inquiry was made on December 30, 2013, but these records have never been provided.

j. In 2012, after several families sued the State alleging that medical examiners had botched investigations into the deaths of their loved ones, *The Charlotte Observer* requested a database from the Office of the State Medical Examiner (the "OSME"), which is housed in HHS's Division of Public Health. The requested database included information compiled by the OSME about every death that medical examiners had investigated since 2001. HHS repeatedly responded to the *Observer's* request by providing inaccurate and/or incomplete data. At one point, for example, the OSME said it did not have data that it routinely collects; at another, it provided a database that omitted several years of records; at still another, it failed to include unique identifiers required to link tables of data. The complete database was provided only after a year's delay, numerous reiterations of the *Observer's* request, and threats of legal action.

k. On November 13, 2013 the *Observer* requested emails from OSME related to the autopsy performed on a Cumberland County homicide victim. On November 26 the OSME sent the newspaper copies of four email messages but did not provide another email that the *Observer* knew to exist, in which the autopsy facility manager for OSME acknowledged that the pathologist who performed the autopsy failed to turn over to the police a bullet recovered from the victim's body. After the *Observer's* attorney got

involved the email was produced on March 3, 2014 – 110 days after the original request.

1. On December 30, 2013, NC Policy Watch submitted a public records request to the Office of the Governor requesting access to records related to travel costs incurred by Governor McCrory and his predecessor. On January 30, 2014, the Governor's Office forwarded this request to DOT based on a determination that DOT was the custodian of some of the records requested (flight logs). NC Policy Watch inquired about the status of this request on March 17, 2014 and was informed that records were being reviewed. NC Policy Watch made additional follow up requests by telephone and e-mail on March 20, April 23 and May 2, 2014. NC Policy Watch made a formal inquiry to DOT for the flight logs on May 12, 2014 and received them on May 20, 2014. The Governor's Office produced the same flight logs on the following day, May 21, 2014. That day NC Policy Watch reiterated its request for the additional records it had requested – i.e., records detailing the costs of the flights and records related to other commercial travel utilized by Governor McCrory. On June 27, 2014, NC Policy Watch followed up on this request and requested additional public records relating to Governor McCrory's schedule on several specific dates in 2013. Despite several inquiries neither these records, or the records that NC Policy Watch had requested on December 30, have been provided.

m. On July 11, 2014 *The Alamance News* requested public records from the Department of Commerce related to economic development projects located in Alamance County and the Town of Mebane (which is located in Alamance and Orange counties) for which tax and financial incentives had been requested. The DOC acknowledged the request promptly, saying that because it involved at least 14 projects dating back several years, “you will need to be patient.” On August 29, 2014 DOC promised to provide records related to one project “by mid-week” and said the others would be provided “one by one.” On September 10, 2014 DOC provided records related to Morinaga, a Japanese candy company that located in Mebane. DOC said it would “continue to gather more documentation, company by company.” To date *The Alamance News* has received no records with respect to any of the 13 other projects identified by DOC.

27. Based on the patterns and practices described above, the plaintiffs believe and allege that the defendants’ concerted and repeated violations of the Public Records Law constitute willful and contumacious failures by the defendants to carry out the mandatory and prescribed duties of their respective offices.

WHEREFORE, the plaintiffs respectfully pray that the court:

1. set the matter down for an immediate hearing pursuant to G.S. § 132-9(a);

2. enter an order in the nature of a writ of mandamus requiring the defendants and all persons acting at their direction or in concert with them to comply with the Public Records Law, including G.S. § 132-6(a);

3. enter an order pursuant to G.S. § 132-9(a) compelling the defendants to make available for inspection and copying any public records requested by any of the plaintiffs that are determined by the court to be within their custody or control and that have not been previously made available for inspection and copying in compliance with G.S. § 132-6;

4. enter an order declaring that certain policies and practices adopted and followed by the defendants are in violation of the Public Records Law;

5. enter a declaratory order that Defendants may not assess fees for the "inspection" of public records when no copies have been requested, and

6. enter an order awarding the plaintiffs their reasonable attorney fees pursuant to G.S. § 132-9(c)(1).

The plaintiffs further pray that the court provide them with such further and additional relief as the court shall deem to be just, proper and authorized by law, and that the costs of this action be taxed against the defendants.

This the 21st day of July, 2015.

STEVENS MARTIN VAUGHN & TADYCH, PLLC

By:


Hugh Stevens

N.C. State Bar No. 4158

C. Amanda Martin

N.C. State Bar No. 21186

Michael J. Tadych

N.C. State Bar No. 24556

1101 Haynes Street, Suite 100

Raleigh, NC 27604

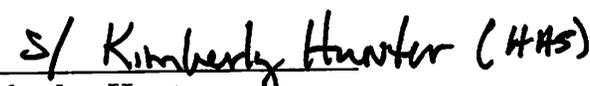
919.582.2300

866-593-7695 toll free facsimile

Attorneys for Plaintiffs

SOUTHERN ENVIRONMENTAL LAW CENTER

By:


Kimberley Hunter

N.C. State Bar No. 41333

Douglas William Hendrick

N.C. State Bar No. 39750

601 West Rosemary Street, Suite 220

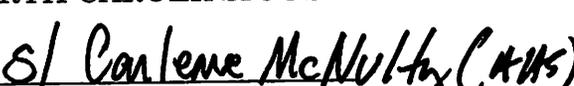
Chapel Hill, NC 27516

919.967 1450

Attorneys for plaintiff, Southern Environmental
Law Center

NORTH CAROLINA JUSTICE CENTER

By:


Carlene McNulty

N.C. State Bar No. 12488

224 South Dawson Street

PO Box 28068

Raleigh, NC 27611

919-856-2161

919-856-2175 facsimile

Attorney for Plaintiff, North Carolina Justice
Center