



with the Wuhan Institute of Virology, among other matters. On July 30, 2020, plaintiff submitted an updated public records request, which updated the search terms for the July 2, 2020 request. Initially defendant indicated that there were 3.36 gigabytes of records, which was estimated to be over 336,000 pages of documents. Most of these records were not turned over to US Right to Know. Defendant provided only 6 pages of responsive documents from a critical time period concerning the origins of COVID-19, namely from March 20, 2019 to January 9, 2020. Defendant indicated that of the 86,934 pages that were finally pulled in response to this request, many of them were not provided as they were subject to the N.C. Gen. Stat. § 116-43.17 (2020) university research exemption. Plaintiff believes that not all of the attachments to these emails were provided.

On November 26, 2020, plaintiff submitted a public records request to defendant requesting records regarding the work of Dr. Lishan Su. Defendant indicated that 81 pages were pulled in response to the November 26, 2020 request, that 31 were produced, 3 were duplicates, and 47 pages were exempt as subject to N.C. Gen. Stat. § 116-43.17.

On January 26, 2021, another request was made to defendant by plaintiff for records of Dr. Baric's work. Defendant indicated that 969 pages were responsive to that request, and 453 were produced, while 352 were exempt as subject to N.C. Gen. Stat. § 116-43.17, 7 were duplicate, 7 were confidential education records, and 150 were deemed non-responsive.

On February 17, 2021, a request was made by plaintiff to defendant for records regarding Ms. Toni Baric. Defendant indicated that only 4 pages of documents were responsive to this request.

On February 19, 2021, a request was made by plaintiff to defendant for additional records regarding Dr. Baric. Defendant indicated that 652 pages were pulled relevant to this request, that 18 were responsive and provided, that 472 were subject to N.C. Gen. Stat. § 116-43.17, that 27 were education records, that 6 were confidential personnel records, and that 129 were deemed non-responsive.

On October 6, 2021, plaintiff requested from defendant various documents and records concerning certain NIH grants and programs. Defendant provided no records for this request to plaintiff.

On October 8, 2021, plaintiff requested from defendant records relating to Dr. Baric's work. Defendant provided 24 pages to plaintiff in response to this request.

Plaintiff filed suit pursuant to the Public Records Act, N.C. Gen. Stat. § 132-1, *et seq.* and alleged that it believed the University was interpreting the "Research Exemption" in N.C. Gen. Stat. § 116-43.17 in an overly broad manner and sought the relief of an *in camera* review. Further, plaintiff alleged that it was unlikely that so few relevant records exist in regards to many of the public records requests. Plaintiff averred that it would be "reasonable and in the best interest of justice for the University to demonstrate to the Court that its searches have been complete, proper, and thorough and have met the requirements of the Public Records Act, and

whether any processing errors may have led to the failure to disclose records to US Right to Know.” (Complaint ¶ 36).

Defendant has moved the court for judgment on the pleadings.

## ANALYSIS

N.C. Gen. Stat. § 132-1 (2020) 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. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.”

The Public Records Act is broad, and encompasses virtually all records of an agency unless otherwise exempted from the Act. The main crux of this case is the interpretation of the “Research Exemption” found in N.C. Gen. Stat. § 116-43.17. This exemption was enacted by the General Assembly in 2014 and states: “Research data, records, or information of a proprietary nature, produced or collected by or for state institutions of higher learning in the conduct of commercial, scientific, or

technical research where the data, records, or information has not been patented, published, or copyrighted are not public records as defined by G.S. 132-1.” N.C. Gen. Stat. § 116-43.17 (2023). This case appears to be a case of first impression, as the Research Exemption has not been interpreted by our courts.

Plaintiffs are at an extreme disadvantage in Public Records Act cases, especially when there is an assertion of an exemption by a defendant. This is because only the defendant has access to the record and only the defendant has made the determination that the record is subject to the exemption. Our Supreme Court recognized this in formulating its approach to suits brought under the Public Records Act:

The final determination of possession or custody of the public records requested is not properly conducted by the state agency itself. The approach that the state agency has the burden of compliance, subject to judicial oversight, is entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that, as noted above, public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

*State Emps. Ass'n of N. Carolina, Inc. v. N. Carolina Dep't of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010).

The same could certainly be said for a record in which the state agency has admitted custody, but has asserted an exemption to the Public Records Act in withholding the record from the public. Allowing the University to make the final determination that the records requested by US Right to Know are subject to

withholding pursuant to the Research Exemption would allow the University to “police its own compliance” and would thwart the important public purpose of the Public Records Act. *Id.* Indeed, the University “has the burden of compliance” and that compliance is to be with “judicial oversight.” *Id.*

Accordingly, that is why the relief suggested by US Right to Know is perfectly appropriate. When a court determines matters outside the pleading (such as the affidavit attached to defendant’s motion for judgment on the pleadings) the “motion shall be treated as one for summary judgment . . .” N.C. Gen. Stat. § 1A-1, Rule 12(c). It would be impossible, without the Court or the Court’s representative viewing the records in this case to determine whether the requested records are not subject to the Public Records Act because they fall under the definition of the Research Exemption. It would be appropriate for the Court to order an *in camera* review of those documents. *Times News Pub. Co. v. Alamance-Burlington Bd. of Educ.*, 242 N.C. App. 375, 380, 774 S.E.2d 922, 926 (2015) (“where the withholding of information is challenged in court, the court must review those minutes *in camera*”). Additionally, given the complex scientific nature of the documents and the large volume of records that are withheld, it would be appropriate for the Court to appoint a Special Master pursuant to Rule 53 of the Rules of Civil Procedure to review the records and to provide the Court and the parties with a report detailing the records and what documents, if any, the Special Master determines to be subject to the Research Exemption. Following this *in camera* review and the receiving of

the Special Master's report, it would then be appropriate for the Court to render a decision regarding these records.

Accordingly, plaintiff requests that the Court order that the records at issue be submitted for *in camera* review, that a Special Master be appointed, and that the Special Master submit a report to the Court and the parties so that additional arguments may be heard by the Court before it rules on this matter.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of October, 2023.

WALKER KIGER, PLLC  
Attorneys for Plaintiff  
100 Professional Court, Ste. 102  
Garner, NC 27529  
(984) 200-1930 (Telephone)  
(984) 500-0021 (Fax)



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David "Steven" Walker  
NC Bar #34270  
steven@walkerkiger.com (email)



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Korey Kiger  
NC Bar #54194  
korey@walkerkiger.com (email)

## CERTIFICATE OF SERVICE

The undersigned certifies that he has cause a copy of the foregoing to be served upon defendant pursuant to Rule 5 of the Rules of Civil Procedure by emailing a copy of same to the email address of record for defendant's counsel as follows: Melissa Walker, mwalker@ncgoj.gov; David Lambeth, dlambeth@email.unc.edu; and Marla Bowman, marla\_bowman@unc.edu.

This the 30<sup>th</sup> day of October, 2023.



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David "Steven" Walker  
NC Bar #34270  
Attorney for Plaintiff