STATE OF NORTH CAROLINA ORANGE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 463
US RIGHT TO KNOW, Plaintiff, v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Defendant.	**MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS**

INTRODUCTION

This case presents a novel challenge to the plain language of a statute that exempts university research records from public disclosure. Because the complaint fails to invoke this Court's jurisdiction, and because no grounds exist to grant the requested relief, the University is entitled to final judgment in its favor. Alternatively, because the documents at issue fall squarely within N.C. Gen. Stat. § 116-43.17, even if that statute is viewed as an exception to the North Carolina Public Records Act, the University is still entitled to final judgment in its favor.

In 2014, the North Carolina General Assembly passed House Bill 1113 into law, creating N.C. Gen. Stat. § 116-43.17. This new law established that:

> 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.

Id. In enacting this law, North Carolina joined more than twenty states that protect their universities' research records and proprietary information from public disclosure under state public records law.[1]

The plain language of § 116-43.17 is clear: University "[r]esearch data, records, or information of a proprietary nature . . . *are not public records* as defined by G.S. 132-1." (emphasis added). Since § 116-43.17's passage nearly a decade ago, there is no known lawsuit, until now, challenging its protection of university research data from public disclosure under N.C. Gen. Stat. § 132 *et seq.* (the "Public Records Act").

Despite this statutory clarity and its durable acceptance, Plaintiff US Right to Know ("USRTK") seeks research records from Defendant The University of North Carolina at Chapel Hill (the "University") under the Public Records Act. USRTK is not entitled to these documents and the University's Rule 12(c) Motion for Judgment on the Pleadings should be granted for at least two reasons.[2]

First, the University's research records are not public records under § 116-43.17 and thus USRTK's action under § 132-9 of the Public Records Act fails.

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[1] *See* Ariz. Rev. Stat. § 15-1640; Fla. Stat. § 1004.22(2); Ga. Code Ann. § 50-18 72(a)(35); Idaho Code §§ 74-107(20)–(23); Ind. Code § 5-14-3-4(6); Kan. Stat. Ann. §§ 45-221 (20), (34); La. Stat. Ann. § 44:4(16); Md. Code Ann. § 4-347; Mo. Rev. Stat. § 610.021(23); Neb. Rev. Stat. § 84-712.05(3); N.J. Stat. Ann. § 47:1A-1.1; Ohio Rev. Code Ann. § 149.43(A)(5); Okla. Stat. tit. 51, § 24A.19; Or. Rev. Stat. § 192.345(14); 65 Pa. Cons. Stat. § 67.708(b)(14); S.C. Code Ann. § 30-4-40(14); S.D. Codified Laws § 1-27-1.5; Utah Code Ann. § 63G-2-305(40)(a); Vt. Stat. Ann. tit. 1, § 317; Va. Code Ann. § 2.2-3705.4; Wash. Rev. Code § 42.56.270; Wyo. Stat. Ann. § 16-4-203.

[2] The University's Answer includes Motions to Dismiss under Rules 12(b)(1), (2), and (6). Those Motions should be granted for the same reasons provided here.

Specifically, § 132-9 creates a cause of action for "[a]ny person who is denied access to public records." But § 116-43.17 establishes that the University's research records "are not public records." Thus, § 132-9 is inapplicable and there is no cause of action or jurisdictional basis for the Court to hear this matter.

Second, even if § 132-9 were the proper mechanism for USRTK to disagree with the University's non-disclosure of research records, that non-disclosure is permissible because (1) § 116-43.17 excepts the University's research records from public disclosure, and (2) that exception is supported by public policy rationales found in North Carolina law and the laws of other states too.

Additionally, USRTK's requested relief is both improper and unnecessary. Accordingly, USRTK's Complaint should be dismissed in its entirety.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties.

USRTK is a California-based "investigative research group"[3] that has decided to look into the "origins of COVID-19" and those who have "associations with the Wuhan Institute of Virology." (Compl. at 1).

The University is a constituent institution of the University of North Carolina ("UNC System"). N.C. Gen. Stat. § 116-4. The UNC System's "mission is to discover,

[3] The Public Records Act states that "public records . . . are the property of *the people*," N.C. Gen. Stat. § 132-1(b) (emphasis added), but it does not specify if "the people" include corporations or residents of states other than North Carolina.

create, transmit, and apply knowledge to address the needs of individuals and society." *Id.,* § 116-1(9).

B. USRTK's Public Records Requests to the University.

Between July 2020 and October 2021, USRTK submitted eight public records requests to the University. (Compl. Exs. A-H).[4] Several of these requests overlapped and were duplicative. (*Id.* ¶¶ 5-6). The requests largely concerned University researchers and their communications with other researchers or research organizations. (Compl. Exs. A–H).

The University produced more than 130,000 pages of public records to USRTK. (Aff. ¶ 7). They included, among other items, published research papers and related discussions of their contents, and public health policy advice on behalf of government advisory groups on topics such as masking or social distancing.

The University withheld about 4,500 research records protected by N.C. Gen. Stat. § 116-43.17. (Aff. ¶ 7).[5] These documents concerned:

(a) research grant applications, administration, and funding ("Grant Administration");

(b) unpublished, draft manuscripts and presentations ("Manuscripts and Presentations");

(c) the transfer of research materials from one researcher to another researcher or research institution ("Material Transfer Agreements"); and

[4] The Affidavit of Gavin Young is attached to the University's Motion for Judgment on the Pleadings as Exhibit A.

[5] The University withheld other documents from USRTK pursuant to other state and federal laws, but those documents are not in dispute here. (*See* Aff. ¶ 7).

(d) research project collaborations, including unpublished research data ("Research Project Collaborations").

(Aff. ¶ 8).

C. USRTK's Lawsuit Against the University.

In April 2022, USRTK filed a Complaint against the University under § 132-9 of the Public Records Act, contesting the University's nondisclosure of documents pursuant to N.C. Gen. Stat. § 116-43.17. The complaint does not claim that the University improperly applied section 116-43.17. Instead, it invites this Court to re-review, *in camera*, the University's review of research records withheld from disclosure.

In March 2023, following extensions of time to allow the parties to attempt to resolve their differences, the University answered and moved to dismiss the Complaint. In July 2023, the University filed its present Motion for Judgment on the Pleadings and the Affidavit of Gavin Young.

LEGISLATIVE BACKGROUND

The North Carolina General Assembly has helped foster the mission of the UNC System and its constituent institutions in a number of ways. In 2014, the General Assembly protected State university research data, records, and proprietary information from disclosure under the Public Records Act. N.C. Gen. Stat. § 116-43.17.

That same year, the General Assembly recognized that North Carolina's "top-tier research universities" contribute to the State's growth and that patented

technologies are critical to that growth. *Id.* § 75-141(a)(1). Notably, "[p]atents encourage research, development, and innovation." *Id.* § 75-141(a)(2). And State universities may pursue patent infringement actions to protect that research, development, and innovation. *Id.* § 75-143(c)(2).

In enacting laws like § 75-141 and § 116-43.17, the General Assembly reiterated the need to promote innovation at North Carolina's universities and provide protections for public university research to ensure that such innovations are not jeopardized before the benefits to the State can be realized.

STANDARD OF REVIEW

Rule 12(c) is an important tool for courts "to dispose of baseless claims . . . when the formal pleadings reveal their lack of merit." *Ragsdale v. Kennedy*, 286 N.C. 130, 137, 209 S.E.2d 494, 499 (1974). A Rule 12(c) motion should be granted when the movant "show[s] that the complaint fails to allege facts sufficient to state a cause of action or admits facts which constitute a complete legal bar thereto." *Anderson Creek Partners, L.P. v. Cnty. of Harnett*, 382 N.C. 1, 12, 876 S.E.2d 476, 485 (N.C. 2022). Such a ruling is proper when there are no disputes of material facts and only legal questions remain. *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499.

Sovereign immunity bars suits against the State of North Carolina and its agencies absent waiver or consent. *See Guthrie v. State Ports Auth.*, 307 N.C. 522, 534, 299 S.E.2d 618, 625 (1983). As a constituent institution of the University of North Carolina System and thus an agency of the State, the University generally enjoys immunity from suit. *Kawai America Corp. v. Univ. of N. Carolina at Chapel*

Hill, 152 N.C.App. 163, 165, 567 S.E.2d 215, 217 (2002). Sovereign immunity is, in part, a question of subject matter jurisdiction. *M Series Rebuild, LLC v. Mt. Pleasant*, 222 N.C.App. 59, 62, 730 S.E.2d 254, 257 (2012) ("A motion to dismiss based on sovereign immunity is a jurisdictional issue; whether sovereign immunity is grounded in a lack of subject matter jurisdiction or personal jurisdiction is unsettled in North Carolina.").

Lack of subject matter jurisdiction may be raised at any time. N.C. R. Civ. P. 12(h)(3). Affidavits and other evidence outside the pleadings are proper when determining subject matter jurisdiction. *Harris v. Matthews*, 361 N.C. 265, 271, 643 S.E.2d 566, 570 (2007). When considering affidavits for non-jurisdictional purposes, it is proper to convert a Rule 12(c) motion to one for summary judgment under Rule 56. *Horne v. Town of Blowing Rock*, 223 N.C.App. 26, 31, 732 S.E.2d 614, 618 (2012) ("In light of its consideration of the additional documents . . . the trial court did not err in converting defendant's Rule 12(c) motion into a motion for summary judgment."). When ruling on a motion for summary judgment, the Court may grant judgment in either party's favor. N.C. R. Civ. P. 56(c).

ARGUMENT

USRTK's Complaint should be dismissed because the University's research records (1) are not public records under § 116-43.17, or, alternatively, (2) are, at the very least, exempted from public disclosure under § 116-43.17. Additionally, (3) USRTK's seeks relief to which it is not entitled, namely, an *in camera* review that would result in an advisory opinion.

I. The University's Research Records Are Not "Public Records" and Thus There Is No Cause of Action or Jurisdiction for This Case.

Under the Public Records Act, "[a]ny person who is denied access to public records" may seek a court "order compelling disclosure." N.C. Gen. Stat. § 132-9. USRTK's action is ostensibly brought under § 132-9, but that mechanism for relief is not applicable here.

Under N.C. Gen. Stat. § 116-43.17, the University's "[r]esearch data, records, or information of a proprietary nature... *are not public records*." (emphasis added). Thus, USRTK has not been denied access to public records and § 132-9 provides no basis for this action. *See U.S. Right to Know v. Univ. of Vt.*, 255 A.3d 719, 721, 724-26 (Vt. 2021) (professor's personal emails on university server were "not public records" because they did not meet the state's definition of "public records," which must be "produced or acquired in the course of public agency business.").

To be sure, the Grant Administration, Manuscripts and Presentations, Material Transfer Agreements, and Research Project Collaboration documents that the University withheld were "produced or collected" as part of the University's

"commercial, scientific, or technical research," and "the data, records or information has not been patented, published, or copyrighted." *See* N.C. Gen. Stat. § 116-43.17.

Accordingly, the University's nondisclosure of these documents falls squarely within § 116-43.17. Because these documents are not public records, there is no jurisdictional basis for USRTK's action under § 132-9 or otherwise, and the University therefore maintains its sovereign immunity, meaning this lawsuit should be dismissed.

II. The University's Research Records Are Exempted from Public Disclosure.

Alternatively, even if § 132-9 applied in this case, the University's research records were properly withheld because (1) § 116-43.17 is an exception to the Public Records Act, and (2) this exception is supported by public policy rationales found in North Carolina law, and as shown by other states with similar laws.

A. The Plain Language of § 116-43.17 Protects the University's Research Records from Public Disclosure.

As described above, the University withheld research data, records or information that it produced or collected and that is not patented, published, or copyrighted. Such documents "are not public records" under § 116-43.17. Even if this broad exclusion does not foreclose an action under § 132-9, § 116-43.17 should be read as an exception to the disclosure requirements of § 132-1.

The Public Records Act anticipates that there will be disclosure exceptions, stating "it is the policy of this State that the people may obtain copies of their public

records . . . *unless otherwise specifically provided by law*." N.C. Gen. Stat. § 132-1(b) (emphasis added). Many of these exceptions are listed within the Public Records Act. *See, e.g.*, N.C. Gen. Stat. §§ 132-1.1, 132-1.2. Many other statutory exceptions appear elsewhere. *See, e.g.*, N.C. Gen. Stat. § 126-22 ("[P]ersonnel files of State employees shall not be subject to inspection and examination as authorized by G.S. 132-6."); *LexisNexis Risk Data Mgmt. Inc. v. N.C. Admin. Off. of Cts.*, 368 N.C. 180, 188, 775 S.E.2d 651, 656 (2015) (finding § 7A-109(d) was intended to limit public access to certain types of court records).

If Section 116-43.17 is considered part of the public records framework, it is one of these many exceptions. And this is confirmed by well-established doctrines of statutory interpretation.

"It is a fundamental principle of statutory interpretation that courts should evaluate a statute as a whole and not construe an individual section in a manner that renders another provision of the same statute meaningless." *Lunsford v. Mills*, 367 N.C. 618, 628, 766 S.E.2d 297, 304 (2014) (cleaned up).[6] Here, if USRTK's understanding of § 116-43.17 were adopted, then the statute would be meaningless. If university research records are not public records, but they still need to be produced in response to public records requests, then the General Assembly would have achieved nothing in enacting § 116-43.17.

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[6] *Reading Law* at 167-69 ("[T]he whole-text canon . . . calls on the judicial interpreter to consider the entire text, in view of its structure and of the physical and logical relation of its many parts.").

In sum, and in the alternative, § 116-43.17 exempts the University's research records from public disclosure under the Public Records Act, and thus USRTK is not entitled to an order compelling production of these records and the University is entitled to judgment as a matter of law.

B. The Protection of the University's Research Records Is Sound Public Policy.

As a final consideration, the University's interpretation of § 116-43.17 aligns with public policy rationales found throughout North Carolina law. Indeed, the same year the General Assembly enacted § 116-43.17 it also enacted § 75-140 *et seq*. That law recognized the importance of patents and innovation to the State's growth, and the role North Carolina's "top-tier research universities" play in that growth. *See id.* §§ 75-141(a). In doing so, the General Assembly specifically avoided placing limits on State universities' pursuit of patent infringement actions. *See id.* §§ 75-14(c)(2).

University research leads to both patented inventions and influential publications and scholarship that, among many other public goods, save lives, reduce suffering, protect the environment, and improve the well-being of North Carolina's people. The same innovations and scholarship drive economic development, create jobs, and increase the State's tax base. By protecting university research data, records and information from public disclosure under § 116-43.17, the General Assembly ensures that North Carolina's public universities may pursue research and scholarship on a level playing field with private universities and private industry,

none of whom are generally subject to state public records laws. Only then may the State reap the benefits of that research and scholarship-.

Following similar policy rationales, more than twenty states have adopted laws akin to § 116-43.17, *supra* note 1, and courts analyzing those laws have recognized their important policy objectives. For example, the Virginia Supreme Court affirmed the denial of a public records request that sought all documents a professor "produced and/or received while working for the University." *Am. Tradition Inst. v. Rector & Visitors of Univ. of Va.*, 287 Va. 330, 334, 345 756 S.E.2d 435, 437, 443 (2014).

There, the court interpreted Va. Code Ann. § 2.23705.4(4)'s protection of public university "[i]nformation of a proprietary nature" as showing the Virginia General Assembly's "intent to protect public universities and colleges from being placed at a competitive disadvantage in relation to private universities and colleges." *Id.* at 342, 756 S.E.2d ay 442-43. Without such protections, the court reasoned there would be "not only financial injury, but also harm to university-wide research efforts, damage to faculty recruitment and retention, undermining of faculty expectations of privacy and confidentiality, and impairment of free thought and expression." *Id.*

Relying on similar reasoning, the Arizona Supreme Court granted a stay to prevent the disclosure of university research records while the lower courts interpreted Ariz. Rev. Stat. § 15-1640, which protects public university "[i]nformation or intellectual property that is not available to the public," among other things. *Ariz. Board of Regents v. Energy & Environment Legal Institute*, 2018 WL 4151260, at *18–19, 24 (Ariz. 2018).

Taken together, these policy rationales further support the plain meaning of § 116-43.17. -That law permitted the University to withhold research records from USRTK. And that nondisclosure serves important policy objectives recognized in North Carolina law and the law of other states, too.

III. An *In Camera* Review Is Not Necessary

In its Memorandum, USRTK does not argue the merits or scope of § 116-43.17, nor does it seek to apply the facts of the Young Affidavit to the law. Instead, USRTK addresses only three salient points. First, on pages 5-6, it admits that § 116-43.17 is, in its words, an "exemption" from the Public Records Act rather than a part of the Act itself. Second, it appears to agree with the University that the inclusion of the Young Affidavit, at least for non-jurisdictional purposes, should convert the University's Motion to one for summary judgment under N.C. R. Civ. P. 56. Third, it requests an *in camera* review, preferably by an appointed special master.

The first point concedes that § 116-43.17 is not appropriately viewed within the Public Records Act framework. Despite this concession, USRTK seeks to extend that framework to § 116-43.17 for policy reasons. USRTK's policy arguments cannot make a public records case out of materials expressly exempt from the public records framework.

USRTK's remaining arguments simply request a special kind of relief. That relief is not judgment in its favor, or a request for a ruling that the documents are not subject to § 116-43.17. Rather, USRTK seeks a special master to review the documents, and requests a judicially sponsored report describing the records and

determining whether each one is subject to § 116-43.17. This relief is both improper and not necessary.

USRTK's requested relief is improper. It invites an advisory opinion on exempt documents – a transparent attempt to learn the contents of material expressly exempt from disclosure by § 116-43.17. Such an advisory opinion is not within this Court's jurisdiction.

USRTK's requested relief also is unnecessary. The Young Affidavit already identifies documents in a manner that allows the Court to apply § 116-43.17. Should the Court conclude that it has jurisdiction, despite the arguments above, the Young Affidavit would permit final judgment. If necessary, the Young Affidavit also provides ways to narrow the issues based on the subcategories listed in paragraph 8.

CONCLUSION

The University produced over 130,000 pages of documents in response to USRTK's requests. Those produced documents are not protected by § 116-43.17 and instead are subject to the Public Records Act. The remaining documents are research records, protected by § 116-43.17 and not subject to the Public Records Act. This result reflects the plain language of § 116-43.17 and the State policy it embodies. USRTK's quarrel with it belongs not in this Court, but instead where such policy judgments are made.

For all these reasons, the Court should grant the University's Motion for Judgment on the Pleadings and dismiss USRTK's Complaint in its entirety with prejudice.

This 2nd day of November, 2023.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MEMORANDUM OF LAW IN SUPPORT OF MOTION FOR JUDGMENT ON THE PLEADINGS was served upon counsel for Plaintiff via electronic mail and by depositing the same in the United States mail, first class postage prepaid, and addressed to:

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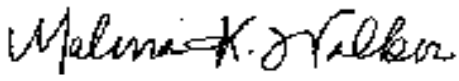

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