STATE OF NORTH CAROLINA ORANGE COUNTY	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22CVS463
US RIGHT TO KNOW, Plaintiff v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Defendant	PLAINTIFF'S MEMORANDUM TO THE REFEREE

Plaintiff, by and through undersigned counsel, respectfully submits the following Memorandum to the Referee.

FACTS AND BACKGROUND

US Right to Know, a nonprofit investigative public health research group, has been investigating the origins of COVID-19 and the virus that causes it. Its investigation led them to request public records from the University of North Carolina at Chapel Hill regarding the work of Dr. Ralph Baric and his association with the Wuhan Institute of Virology. The subject matter of this case is of great public interest, since more than one million American lives have been lost because of COVID-19. This case is also of significant public interest in that the National Institutes of Health reports, per the NIH RePORTER (http://reporter.nih.gov), that Dr. Baric has been awarded grants or other funding for projects and sub-projects in an amount exceeding $200 million since 1986.

On July 2, 2020, plaintiff submitted a public records request to defendant requesting records regarding Dr. Ralph Baric (hereinafter Dr. Baric) and his work

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. The time period is critical because it is the period of the initial outbreak of COVID-19 and the months immediately preceding it. 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.

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, relevant to this memorandum, 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. The Court determined that an *in camera* review would be proper, and ordered the appointment of a referee to assist the Court in reviewing the records to determine whether each record was exempt from the Public Records Act. The referee requested, and the Court ordered, the parties to submit concise briefs detailing each party's

interpretation of N.C. Gen. Stat. § 116-43.17. Accordingly, plaintiff submits this brief.

ANALYSIS

N.C. Gen. Stat. § 132-1 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 is a case of first impression, as N.C. Gen. Stat. § 116-43.17 has yet to be interpreted by our courts.

Plaintiff is at a distinct disadvantage as plaintiff does not know the contents of the withheld records, and, accordingly, plaintiff can only suggest general principles regarding how the referee should analyze the documents in preparation of the referee's report.

"Exceptions and exemptions to the Public Records Act must be construed narrowly." *DTH Media Corp. v. Folt*, 374 N.C. 292, 301, 841 S.E.2d 251, 258 (2020) (internal quotation marks and citations omitted). This narrow construction of exceptions and exemptions is mandated because the legislature "has clearly expressed its intent through the Public Records Act to make public records readily accessible as 'the property of the people.'" *Id.* at 300, 841 S.E.2 at 257. While the exceptions and exemptions are to be narrowly construed, the Public Records Act itself is to be "liberally construed to ensure that governmental records be open and made available to the public . . .." *Id.*

Accordingly, each clause of N.C. Gen. Stat. § 116-43.17 should be construed as narrowly as possible to effectuate the purpose of the Public Records Act. While most of the statute is straight-forward, there do exist questions as to whether the modifier "or a proprietary nature" applies only to its closest antecedent or whether it applies to the series of antecedents, and whether the modifier "research" applies not only to the word "data" but also to "records" and "information." In essence, the question is whether the statute should be read as "Research data (regardless of its

nature), records (regardless of its nature), or information (that is of a proprietary nature)" or should be read as "research data of a proprietary nature, research records of a proprietary nature, or research information of a proprietary nature."

The only way to read the statute in a way that follows normal rules of statutory construction and effectuates the narrow construction given to exceptions and exemptions to the Public Records Act is to interpret the statute in a manner in which the modifier "research" modifies all three types of excluded records, and the modifier "of a proprietary nature" similarly modifies all three types of excluded records.

That "research" should modify all three nouns in the list is simple common sense. Otherwise, the word "records" would be much too broad and the exemption would swallow the rule. Further, the statute later uses the same list of categories of records "data, records, and information" without the "research" modifier. Under the series-qualifier canon of construction, "a prepositive or postpositive modifier normally applies to the entire series." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012). This suggests that the General Assembly meant to only exclude research data, research records, and research information. Accordingly, any of the withheld records that do not contain research should be deemed outside the scope of N.C. Gen. Stat. § 116-43.17 and provided to the plaintiff, and any records that do contain research in which the research could be redacted should be redacted and the remainder of the document should be provided to the plaintiff.

Similarly, the modifier "of a proprietary nature" should apply to the words "data," "records," and "information." The Supreme Court of the United States has explained, in adopting such a construction using the series-qualifier canon: "Under conventional rules of grammar, '[w]hen there is a straightforward, parallel construction that involves all nouns or verbs in a series,' a modifier at the end of the list 'normally applies to the entire series.'" *Facebook, Inc. v. Duguid*, 592 U.S. 395, 402–03 (2021) (quoting A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 147 (2012) (Scalia & Garner)). In an integrated list like the one at issue here, the series-qualifier canon should be employed in interpretation rather than the rule of the last antecedent. "Under [the rule of the last antecedent], 'a limiting clause or phrase ... should ordinarily be read as modifying only the noun or phrase that it immediately follows.' The rule of the last antecedent is context dependent. **This Court has declined to apply the rule where, like here, the modifying clause appears after an integrated list.**" Id. at 404 (internal quotation marks and citations omitted, emphasis added).

The most straightforward reading of the statute, with prepositive and postpositive modifiers applying to the entire series, would be to only exclude from the Public Records Act "research data of a proprietary nature, research records of a proprietary nature, or research information of a proprietary nature."

Accordingly, the referee report should recommend disclosure of all records, unless those records are both "research" and "proprietary."

RESPECTFULLY SUBMITTED this 30th day of January, 2024.

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

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

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 30th day of January, 2024.

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