7/30/2024 4:38:27 pm

STATE OF NORTH CAROLINA	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION
ORANGE COUNTY	22CVS000463-670
US RIGHT TO KNOW, Plaintiff, v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Defendant.	**REFEREE'S REPORT**

I, Hon. Robert Neal Hunter, Jr., pursuant to Rule 53(g) of the North Carolina Rules of Civil Procedure, report upon the matters submitted to me by order of reference as follows:

Facts and Procedural History

1. Plaintiff, U.S. Right to Know (hereinafter "USRTK"), is an investigative public interest research entity that promotes transparency for public health and has been investigating the origins of COVID-19 and the virus that causes it.

2. Between July 2, 2020, and October 8, 2021, USRTK submitted a series of public records requests[1] to Defendant, The University of North Carolina at Chapel Hill (hereinafter "UNC"), regarding Dr. Ralph Baric and his connections with the Wuhan Institute of Virology.

3. In response to the public records requests, UNC produced over 130,000 pages of responsive documents it deemed subject to public disclosure under the Public Records Act, N.C. Gen. Stat. § 132-1, *et seq*. UNC also withheld approximately 5,124 documents (not pages) pursuant to various exceptions, of which UNC claims 4,456 are protected by the university research exemption in N.C. Gen. Stat. § 116-43.17.

4. On April 18, 2022, USRTK filed its Complaint[2] pursuant to N.C. Gen. Stat. § 132-1, *et seq.* and alleged it believed UNC was interpreting the university research exemption in an overly broad manner. USRTK also sought relief of an *in camera* review to determine which records were protected by the university research exemption.

5. UNC filed its Answer[3] on March 13, 2023. UNC also filed a motion for judgment on the pleadings[4] on July 21, 2023.

6. On December 8, 2023, Judge Alyson Adams Grine issued an order[5] appointing the undersigned referee to review the records and determine whether each record is exempt

[1] The public records requests were sent on the following dates: July 2, 2020; July 30, 2020; November 26, 2020; January 26, 2021; February 17, 2021; February 19, 2021; and October 8, 2021. The requests are attached as Exhibit A to Plaintiff's Complaint on file.
[2] Plaintiff's Complaint on file..
[3] Defendant's Answer on file.
[4] Defendant's Motion for Judgment on the Pleadings on file
[5] Order Appointing Referee filed on December 11, 2023.

from disclosure under the Public Records Act. The parties subsequently submitted two sets of memoranda at the referee's request detailing each party's interpretation of the exemption in N.C. Gen. Stat. § 116-43.17.

Legal Contentions

7. In 2014, the General Assembly enacted N.C. Gen. Stat. § 116-43.17, which 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." N.C. Gen. Stat. § 116-43.17.

8. In the first set of memoranda[6], the parties detailed their positions regarding whether the modifier "of a proprietary nature" should apply only to the word "information," or should also apply to the words "data" and "records." Additionally, the parties included arguments regarding whether the word "research" modifies all three types of records or only "data."

9. USRTK, arguing for the narrowest interpretation of the statute, claims (1) "of a proprietary nature" applies to data, records, and information; and (2) "research" modifies data, records, and information.

10. UNC likewise acknowledges that the term "research" should modify data, records, and information. However, it is UNC's position that "of a proprietary nature" only applies to research information, with research data and research records being protected regardless of whether they are of a proprietary nature.

11. Both parties requested the referee not provide the court with his view of the law but instead classify the documents, leaving the statutory interpretation question for the trial judge.

12. In the second set of memoranda[7], the parties argued their positions on how the term "proprietary" should be defined.

13. USRTK's view is that "proprietary" in this context is equivalent to a trade secret. Trade secrets are defined by North Carolina statute as:

> business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that (a) derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

N.C. Gen. Stat. § 66-152(3).

---

[6] **Exhibit A**, Plaintiff's Memorandum to the Referee; **Exhibit B**, Defendant's Memorandum of Law for Referee.
[7] **Exhibit C**, Plaintiff's Memorandum to the Referee on the Term "Proprietary"; **Exhibit D**, Second Memorandum of Law for Referee (Defendant's Second Memo).

14. Thus, under USRTK's definition, only research data, research records, or research information that meets the definition of a trade secret are protected from disclosure under N.C. Gen. Stat. § 116-43.17.

15. The definitions of "proprietary" offered by UNC are broader, and include "ownership interest[s], whether characterized as property, protectable, or an exclusive right." UNC specifically argues (1) copyrights which have not been registered fall within this definition of "proprietary," and (2) copyright protection attaches to the records at issue, making them protected from disclosure.

16. In determining whether each document at issue falls within the research exemption found in N.C. Gen. Stat. § 116-43.17, I have compiled two lists, one applying USRTK's definition of "proprietary," and the other applying UNC's definition. Each list notes which documents are protected or required to be disclosed under the applicable definition. The application of two separate definitions is based on the understanding that it is the judge, not the referee, who shall ultimately determine what definition of "proprietary" applies in this case.

17. I received a disk drive containing the privilege log and documents for review. Upon receipt of the documents, I and my assistants printed out the privilege log and began characterizing each document as described above. Each document was considered as a whole except with respect to determining what, if anything, should be redacted. My decision with respect to each document is noted using an identifying number, based on the following categories:

    1. Required disclosure under USRTK's definition.
    2. Required disclosure under UNC's definition.
    3. No disclosure under USRTK's definition.
    4. No disclosure under UNC's definition.
    5. Required disclosure with redactions under USRTK's definition.
    6. Required disclosure with redactions under UNC's definition.

18. To illustrate the application of the above definitions, consider the following examples:

    a. A document consisting of only blank pages contains no proprietary information under either party's definition, thus the document is assigned a 1 using USRTK's definition and a 2 using UNC's definition.
    b. A blank form or application from a third party that has not been filled out contains no proprietary information and is assigned a 1 using USRTK's definition and a 2 using UNC's definition.
    c. A document containing material that UNC has promised to keep confidential pursuant to a subcontractor agreement is assigned a 3 using USRTK's definition and a 4 using UNC's definition.
    d. Copyrighted material, such as a published article, is excluded from the university research exemption, thus these documents are assigned a 1 using USRTK's definition and a 2 using UNC's definition.
    e. A document such as an email chain that contains some information which could be considered a trade secret, but other information that does not constitute a trade

secret, is assigned a 5 using USRTK's definition, requiring some redactions, and a 4 using UNC's definition.

19. My findings as to the numerical characterization of each document are summarized below:

USRTK Definition

		SHEET NAME				
		Research Grant Administration	Manuscripts & Presentations	MTAs	Research Project Collaboration	TOTAL
NUMBERS	1	129	23	23	87	262
	2	0	0	0	1	1
	3	927	179	0	477	1583
	4	0	0	0	0	0
	5	972	629	176	914	2691
	6	0	0	0	0	0
	TOTAL	2028	831	199	1479	

UNC Definition

		SHEET NAME				
		Research Grant Administration	Manuscripts & Presentations	MTAs	Research Project Collaboration	TOTAL
NUMBERS	1	0	0	0	0	0
	2	120	20	23	88	251
	3	0	0	0	0	0
	4	1908	811	176	1391	4286
	5	0	0	0	0	0
	6	0	0	0	0	0
	TOTAL	2028	831	199	1479	

TOTAL: USRTK + UNC

		SHEET NAME				
		Research Grant Administration	Manuscripts & Presentations	MTAs	Research Project Collaboration	FINAL TOTAL
NUMBERS	1	129	23	23	87	262
	2	120	20	23	89	252
	3	927	179	0	477	1583
	4	1908	811	176	1391	4286
	5	972	629	176	914	2691
	6	0	0	0	0	0
	TOTAL	4056	1662	398	2958	

20. Should the court adopt Plaintiff's definition, documents marked as category 5 may need further redactions because parts of the document may contain proprietary information and other parts may not.

21. A listing of the documents by privilege log number, my characterization, and description will be provided to the parties on a password protected thumb drive. The Parties have agreed the privilege log is submitted to each counsel on an "attorney eyes only" restriction. The Parties will have the obligation after they have examined the thumb drive on how best to file this information with the Court.

22. My time and costs in this matter will be presented to the parties under separate cover as provided in our engagement agreement.

It remains for the Court to decide which of the two (2) competing statutory constructions the Court wishes to adopt.

This the 30th day of July, 2024.

Hon. Robert Neal, Hunter, Jr., Referee

EXHIBIT A

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

EXHIBIT B

STATE OF NORTH CAROLINA ORANGE COUNTY US RIGHT TO KNOW, Plaintiff, v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Defendant.	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 22 CVS 463 **DEFENDANT'S MEMORANDUM OF LAW FOR REFEREE**

INTRODUCTION

This case presents a novel challenge to the plain language of N.C. Gen. Stat. § 116-43.17, which exempts university research records from public disclosure. Between July 2020 and October 2021, Plaintiff US Right to Know ("USRTK") submitted eight public records requests to The University of North Carolina at Chapel Hill (the "University"). The University responded by producing over 130,000 pages of public records, also withholding approximately 50,000 pages of records as subject to § 116-43.17 and other statutes. Because the records that remain at issue fall squarely within N.C. Gen. Stat. § 116-43.17, the University properly withheld them and responded to USRTK's requests in full.

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 laws.[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 records from public disclosure under N.C. Gen. Stat. § 132 *et seq.* (the "Public Records Act").

Despite this statutory clarity and its durable acceptance, USRTK was not content to accept the 130,000 pages of public records produced by the University. Instead, it filed suit to also seek the research records withheld under § 116-43.17. USRTK wants these research records to further its private investigation into "the origins of COVID-19 and the virus that causes it." (Compl. Intro.).

The University's non-disclosure of these research records is proper 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.

---

[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.

FACTUAL AND PROCEDURAL BACKGROUND

A. The Parties.

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

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, 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). Several of these requests overlapped and were duplicative. (Amended Affidavit of Gavin Young, ¶¶ 6-7).[2] The requests largely concerned University researchers and their communications with other researchers or research organizations. (Compl. Exs. A–H).

The 130,000 pages of public records produced by the University include published research papers and related discussions of their contents; public health policy advice on behalf of government advisory groups on topics such as masking or

[2] The Amended Affidavit of Gavin Young is attached here for ease of reference. The original Affidavit of Gavin Young was attached to the University's Motion for Judgment on the Pleadings as Exhibit A; as noted in the amended version, its purpose is only to correct the previously-stated numbers in two paragraphs.

social distancing; and many other non-research records relevant to USRTK's investigation.

In contrast, the protected research records concern:

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

(b) unpublished 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

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

(Amended Young Aff. ¶ 10).

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.

ARGUMENT

The purpose of this *in camera* review is to determine whether the University complied with its obligations under the NC Public Records Act. The 130,000+ pages produced by the University support its compliance. As illustrated below, the plain language of § 116-43.17 protects the University's research records from disclosure, and the withheld records are all research records under that statute. Moreover, the public policy rationales underpinning this protection are central to the University's ability to compete, on equal footing, in the research funding and commercialization marketplace, and are thus also critical to the University's ability to help power the state's economy.

I. 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.

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 § 116-43.17 is considered part of the public records framework,[3] 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).[4] Here, if USRTK's understanding of § 116-43.17 were adopted, then the statute would be meaningless.

---

[3] On its Rule 12(c) Motion, the University first argued that the Court lacked subject matter jurisdiction. While that argument is not central to this briefing, and therefore not discussed, the University preserves that argument.

[4] *See* A. Scalia & B. Garner, *Reading Law: The Interpretation of Legal Texts* 167-69 (2012) ("*Reading Law*") ("[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.").

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. This could not be the intent of the General Assembly. *Cf. Surgical Care Affiliates, LLC v. North Carolina Industrial Commission*, 256 N.C.App. 614, 620, 807 S.E.2d 679, 684 (2017) (citing *Housing Authority of City of Greensboro v. Farabee*, 242 N.C. 242, 245, 200 S.E.2d 12, 14 (1973)) ("In the interpretation and construction of statutes, the task of the judiciary is to seek the legislative intent.").

In contrast, the University's interpretation of § 116-43.17 as an exception to the Public Records Act does not render the Act superfluous. The Public Records Act would continue to apply to a host of state agency documents that meet the definition of a "public record." *See* N.C. Gen. Stat. § 132-1(a). Indeed, the University already produced many such documents to USRTK. (Amended Young Aff. ¶ 8).

II. The Withheld Records Constitute Research Records Within the Meaning of § 116-43.17.

a. The Definitions of Research, Data and Records Are Broad.

As discussed above, the language of § 116-43.17 is clear: it provides confidentiality protection for all research data, all research records, and all research information of a proprietary nature.[5] While "research information of a proprietary

[5] Under the last-antecedent canon of statutory interpretation, "proprietary nature" only modifies "information." *See Reading Law at* 144–46; *see also Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 545, 809 S.E.2d 853, 857 (2018) (Under the doctrine of the last antecedent, "relative and

nature" may be narrower, "research data" and "research records" must be read as broad terms.[6]

"When a statute employs a term without redefining it, the accepted method of determining the word's plain meaning is not to look at how other statutes or regulations have used or defined the term—but to simply consult a dictionary." *Surgical Care Affiliates*, 256 N.C.App., at 621 (citation omitted). According to Black's Law Dictionary, the relevant definitions of "research" and "record" are as follows:

Research: "1. Serious study of a subject with the purpose of acquiring more knowledge, discovering new facts, or testing new ideas. 2. The activity of finding information that one needs to answer a question or solve a problem." Black's Law Dictionary (11th ed. 2019), research.

Record: "2. Information that is inscribed on a tangible medium or that, having been stored in an electronic or other medium, is retrievable in perceivable form." Black's Law Dictionary (11th ed. 2019), record (citing UCC § 1-201(b)(31)).

Black's Law Dictionary does not define "data," though Merriam Webster's Dictionary defines it, in relevant part, as "1. Factual information (such as measurements or statistics) used as a basis for reasoning, discussion, or calculation." Merriam Webster, https://www.merriam-webster.com/dictionary/data (Jan. 24, 2024).

---

qualifying words, phrases, and clauses ordinarily are to be applied to the word or phrase immediately preceding.").

[6] This reading does not render "information of a proprietary nature" superfluous because of the difference between "information," on the one hand, and "data" and "records" on the other.

It is clear, if for no other reason than the ability of the Referee to review these materials *in camera* in a "perceivable form," that the withheld documents constitute "records." Some subset of the records would also constitute "data." The question, then, turns on whether these records also fall within the definition of "research" such that they are "research records" under § 116-43.17.[7]

b. The Documents At Issue Constitute Research Records.

The Young Affidavit organizes the records withheld under § 116-43.17 in four categories. (Amended Young Aff. ¶ 10). Each category contains numerous records, largely (but not entirely) in the form of emails and their attachments. These records discuss many topics, and in some instances may fairly fall within multiple of the four categories. Where that was the case, the University placed them in the most relevant category only. Each category relates to core grant-funded University research activities, falling well within Black's expansive definition of "research." However, it may be helpful for the Referee to have additional context as to why certain types of documents relate to research. For that reason, each category is discussed generally below.

Grant Administration

Much, though not all, of the research performed at the University is funded by external grants. The administration of those grants, from requests for proposals

[7] In § 116-43.17, "research" is later modified by "commercial, scientific, or technical." The University is not aware of any dispute as to whether the research at issue here constitutes, at a minimum, scientific research—it does. Thus, this memorandum focuses instead on whether the records are "research records." The University contends that they are.

through close-out of the awards at the end of the term, generates substantial records. These records include, among other items: 1) both internal and external communications to share confidential ideas and strategize for potential grant proposals; 2) administrative documents such as budgets, proposals, progress reports and close-out documentation; and, especially on large awards that may cut across multiple institutions, 3) numerous emails and attachments associated with coordinating all aspects of the grantmaking process among collaborators.

Applying for, and receiving, external grant funding is a highly competitive process. Many aspects of the process of grant administration divulge, to a limited audience, the confidential details of this process that, if publicly available, would undermine the ability of the University to compete. The records covered by this category share ideas, in the form of email conversations, draft proposals and otherwise, that could form the basis for future grant proposals. They also share results, through communications with collaborators and reporting requirements during the course of the grant funding period, that may remain unpublished and could serve to support future patent applications or ongoing research.

Manuscripts and Presentations

In many cases, the goal of grant-funded research is to publish and/or present the results. Those publications are not protected by § 116-43.17, but all of the work leading up to publishing is. It is not uncommon for a publication to include ten or more authors across several institutions. As one might expect, that generates voluminous email traffic related to, among other items, the sharing and editing of

drafts, decisions on what and how much data to include in the publication, and strategizing over which journals to target for submission. Communications with the journal about edits to manuscripts[8] or the administrative details of publishing also fall in this category. Similarly, draft presentations, often in the form of slide decks and that contain unpublished data, are included here. In this particular instance, some of those presentations were made in closed door meetings with government officials that were convened to develop countermeasures to combat the pandemic. Records containing policy discussions around those issues are not research records and have been produced, but closed door presentations of research data and records are subject to § 116-43.17.

Like with grantmaking, the scholarly publication world is highly competitive, and often times multiple researchers will independently (and perhaps unknown to each other) work on similar projects and reach similar conclusions. In that scenario and many others, beating the competition to press, or doing so in a higher impact journal, is crucial for advancing a researcher's own career. Requiring the production of these unpublished materials would undermine potential future publication opportunities and could make it difficult to attract top notch faculty to North Carolina's public universities.

Material Transfer Agreements

[8] Journals typically require a peer-review process where several neutral researchers from the same field review drafts and provide feedback. This process is highly confidential, and the feedback is often extensive and substantive.

The term "material transfer agreements" is used here as a catch all for the documentation surrounding the transfer of materials, such as cells or tissue samples, between institutions. Many grantmaking agencies and journals require a researcher to, upon request, make available certain physical materials developed during the research to other researchers. Who requests these materials, the terms under which they are provided, and the purpose of the request all may serve to identify the confidential ideas underpinning ongoing research, and records reflecting the same certainly fall within the definition of "research records."

Research Project Collaborations

As has been described in detail in the sections above, research often requires significant collaboration across multiple labs, sometimes within the same university and sometimes across several institutions. Researchers routinely share data and ideas through emails and their draft publications and presentations. Collaborators on a project also meet regularly to coordinate their work, and those meetings may generate agendas, meeting minutes and other documents that include confidential ideas and data. Researchers who have worked together previously may also email about early-stage ideas for new projects that would form the basis of a future grant proposal. To wit: an email between two colleagues suggesting a future collaboration in a certain area may look innocuous, but in fact, if made public, could influence the ability of those two researchers and their competitors to assemble a viable team without concern for potential poaching in a competitive grant proposal process. If a competitor at another institution is able to request such emails, that competitor may

fold the ideas into their own, or gain insight into the type of scientists needed on a team to persuade a funding agency of the team's viability. This would undermine the University's researchers' ability to put together competitive, and unique, grant proposals.

The sharing of information among collaborators is the essence of successful research programs. To require the research records that reflect this information-sharing to be made publicly available would undermine that process. Likewise, protecting both those ideas and the teams that may work on them are crucial to a researcher's ability to compete for future funding. When an agency or other entity considers a grant proposal, it evaluates both whether the proposed research will advance the field of scientific study and its degree of confidence in the team that would carry it out.

c. The Research Records Were Not Patented, Published, or Copyrighted.

To be sure, § 116-43.17 requires the production of patented, published or copyrighted information. Once manuscripts are published or patents issue, they are available publicly, and the 130,000+ pages produced by the University include some of these documents. However, these published documents often cite only a fraction of the data or ideas generated during the course of a project. Section 116-43.17's protection of the remainder preserves the use of those records to secure future funding, patents or copyrighted works.

It is also true that federal agencies or other state institutions are subject to different open records laws that may not protect some of the research records withheld by the University. Savvy plaintiffs like USRTK may seek those documents from those other institutions,[9] but the University is not in a position to know the full universe of what may be produced publicly by others. What the University does do is comply with its obligations under this State's Public Records Act.

III. 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 and the intent of the General Assembly as described below and on pp. 4-5, *supra*. 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

[9] And in fact, USRTK has obtained many documents from entities located in other jurisdictions, some of which, in the University's hands, are protected by § 116-43.17.

jobs, and increase the State's tax base. By protecting university research 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 subject to state public records laws. Only then may the State reap the full 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 empowers the University to keep its non-published research records confidential. And that nondisclosure aligns with legislative intent and serves important policy objectives recognized in North Carolina law and the law of other states, too.

CONCLUSION

In sum, 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 still at issue 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.

For all these reasons, the Referee should affirm that the University properly withheld all of its research records.

This 30th day of January, 2024.

JOSHUA H. STEIN
ATTORNEY GENERAL

Melissa K. Walker
N.C. Bar No. 34273
Assistant Attorney General
North Carolina Department of Justice
Education Section
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6918
Fax: (919) 716-6764
mwalker@ncdoj.gov

David T. Lambeth III
N.C. Bar No. 47878
dlambeth@email.unc.edu

Marla S. Bowman
N.C. Bar No. 49097
marla_bowman@unc.edu

Office of University Counsel
The University of North Carolina at Chapel Hill
123 W. Franklin St., Suite 600A
Chapel Hill, NC 27599-9105
(919) 962-1219

Attorneys for The University of North Carolina at Chapel Hill

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing MEMORANDUM OF LAW FOR REFEREE was served upon counsel for Plaintiff via electronic mail, and addressed to:

Steven Walker
Korey Kiger
WALKER KIGER, PLLC
steven@walkerkiger.com
korey@walkerkiger.com

This 30th day of January, 2024.

JOSHUA H. STEIN
ATTORNEY GENERAL

Melissa K. Walker

Melissa K. Walker
N.C. Bar No. 34273
Assistant Attorney General
North Carolina Department of Justice
Education Section
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6918
Fax: (919) 716-6764
mwalker@ncdoj.gov

EXHIBIT A

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.	**AMENDED AFFIDAVIT OF GAVIN YOUNG**

I, Gavin Young, having been duly sworn, depose and state that:

1. I am an adult over the age of 18, have never been adjudicated incompetent and make this affidavit of my own free will.

2. I am the Senior Director of Special Projects and Public Records at The University of North Carolina at Chapel Hill ("University").

3. In this role and my prior roles at the University, I lead the University's four-person Public Records Office. I have led that office since 2016.

4. I submit this amended affidavit to correct errors in the numbers used in Paragraphs 8 and 10 related to the number of documents withheld pursuant to § 116-43.17.

5. Between July 2, 2020, and October 8, 2021, the Plaintiff in this lawsuit, US Right to Know ("USRTK"), submitted eight public records requests to the University that are a part of this lawsuit ("USRTK Requests").

6. The USRTK Requests often generated duplicate results due to the overlapping nature of the requests and resulting search terms. For example, USRTK's request located at Exhibit H to the complaint asks for records mostly within the same date range as the requests in Exhibits B and D. While Exhibit H uses different email addresses and search terms, a large portion of the records gathered were responsive to, and had already been withheld or produced in response to, the previous requests.

7. As this example and others illustrate, many documents were responsive to multiple requests, though they may have been produced only once. Therefore, the most accurate way to analyze the responsive documents is to view the USRTK Requests as a whole rather than individually.

EXHIBIT A

8. The USRTK requests, in total, generated over 130,000 pages of responsive documents that were produced[1]. In addition, 5,205 documents (not pages) were withheld pursuant to various exceptions, as follows:

A. Confidential Personnel Information pursuant to N.C. Gen. Stat. § 126-24: 108 documents withheld.

B. Federal Education Rights and Privacy Act student records: 147 documents withheld.

C. Documents not made or received in connection with the transaction of public business pursuant to N.C. Gen. Stat. § 132-1: 413 documents withheld.

D. Documents withheld pursuant to N.C. Gen. Stat. § 116-43.17 (the "Research Exception"): 4,537 documents withheld.

9. The parties later agreed to narrow the dispute, thus eliminating the documents withheld solely due to categories A-C above. Thus, the Research Exception (category D) forms the basis for withholding all remaining documents at issue.[2]

10. The documents subject to the Research Exception may be divided into four general subcategories:

A. Grant Administration: Documents related to the mechanics of applying for, receiving, administering, and closing out research funded by external grants: 2,028 documents withheld.

B. Manuscripts and Presentations: Documents related to planning, preparing for, collaborating, or writing draft manuscripts and presentations[3]: 831 documents withheld.

C. Material Transfer Agreements: Documents related to the transfer of tangible research materials from one researcher, or research institution, to another: 199 documents withheld.

D. Research Project Collaboration: Documents related to proposed or actual collaboration on research projects, including the sharing of unpublished data: 1,479 documents withheld.

Further Affiant sayeth not.

This the 30th Day of January, 2024.

Gavin Young

[1] Due to the way records requests are processed and produced at the University, it is difficult to precisely determine the number of unique documents that total the 130,000+ page number.
[2] A small subset of documents were withheld based on both NCGS § 116-43.17 and FERPA. These documents remain at issue.
[3] Published works are not subject to the Research Exception and, where responsive, were produced.

EXHIBIT A

Senior Director of Special Projects and Public Records
The University of North Carolina at Chapel Hill

NORTH CAROLINA

ORANGE COUNTY

On this the 30th day of January, 2024, before me personally appeared Gavin Young, to me known to be the person described herein, and who executed the foregoing Affidavit; and he acknowledged that he voluntarily executed said Affidavit.

Notary Public

My Commission Expires: October 28, 2027

AMY L. SINGLETON
Notary Public
Orange
County
My Comm. Exp.
Oct. 28, 2027
NORTH CAROLINA

EXHIBIT C

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 ON THE TERM "PROPRIETARY"

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

ISSUE

How should the phrase "proprietary" be applied as used in N.C. Gen. Stat. § 116-43.17?

ANALYSIS

At the risk of beginning this memorandum like a middle school paper, Black's Law Dictionary, 9th Edition, defines proprietary information[1] as "[i]nformation in which the owner has a protectable interest. See TRADE SECRET."

The definition of proprietary certainly varies in the context in which it is used. It does not appear from the legislative intent that the General Assembly desired to make a distinction between governmental and proprietary functions, but

[1] Black's defines proprietary as "1. Of or relating to a proprietor <the licensee's proprietary rights>. 2. Of, relating to, or holding as property <the software designer sought to protect its proprietary data>." This definition is of little value when determining whether records are or are not proprietary. Accordingly, this memo focuses on the definition of "proprietary information," the definition of which is instructive as to research data, research records, and research information.

instead desired to convey a definition of proprietary like a trade secret. N.C. Gen. Stat. § 66-152 defines a trade secret as "business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique or process" that meets both of the following criteria: (a) "derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use" and (b) "is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." Further, the statute provides that "[t]he existence of a trade secret shall not be negated merely because the information comprising the trade secret has also been developed, used, or owned independently by more than one person, or licensed to other persons." N.C. Gen. Stat. § 66-152(3).

The proper reading of N.C. Gen. Stat. § 116-43.17 as propounded in plaintiff's previous memorandum to the referee is that it excludes only "research data of a proprietary nature, research records of a proprietary nature, or research information of a proprietary nature." Treating the word "proprietary" to be defined as a trade secret is an appropriate and straightforward reading that would advance the dual purposes of the legislature to have access to records as broad as possible while reading exclusions as narrow as possible. Accordingly, it is only records that are research data, research records, or research information that are business or technical information that derives independent or actual commercial value from not being generally known or readily ascertainable, and in which reasonable efforts

have been made to keep the records confidential. Otherwise, the records should be disclosed.

RESPECTFULLY SUBMITTED this 29th day of February, 2024.

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

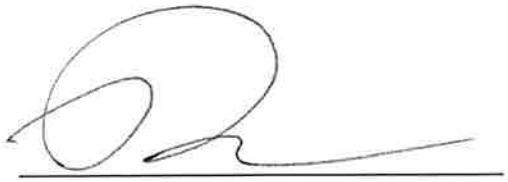
David "Steven" Walker
NC Bar #34270
steven@walkerkiger.com (email)

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: Kimberly Potter, KPOTTER@ncdoj.gov; David Lambeth, dlambeth@email.unc.edu; and Marla Bowman, marla_bowman@unc.edu.

This the 29th day of February, 2024.



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

EXHIBIT D

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.	**SECOND MEMORANDUM OF LAW FOR REFEREE**

INTRODUCTION

This Second Memorandum of Law for Referee responds to questions the Referee posed to the Parties related to the intersection of N.C. Gen. Stat. § 116-43.17 and copyright law. N.C. Gen. Stat. § 116-43.17 provides as follows:

> 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.

The University of North Carolina at Chapel Hill ("University") understood the correspondence from the Referee to present three questions:

1) Does copyright protection attach to some or all of the withheld documents?

2) If so, what person or entity owns the copyright?

3) Is copyright "of a proprietary nature," and if so, how does N.C. Gen. Stat. § 116-43.17 treat copyrighted works?

In light of previous briefing and in the interest of efficiency, this Memorandum does not recite the facts and procedural history, and instead takes each question in turn.

For purposes of this Memorandum, the University analyzes each issue under U.S. Right to Know's ("USRTK") narrow reading of § 116-43.17, assuming that "of a proprietary nature" modifies all of "research records" and "research data," in addition to "research information."[1] Because copyright protection attaches to the research records at issue, copyright is "of a proprietary nature," and only registered copyrights are excluded from § 116-43.17's protection, the University properly withheld its research records.

ARGUMENT

I. Copyright protection does attach to likely all of the withheld research records.

Title 17 of the United States Code governs the provision of copyrights, and expressly preempts any state law or common law on the same subject matter. 17 U.S.C. § 301(a). Title 17 confers copyright protection to a broad range of records or other reduction to a tangible medium, whether located in an email, written on a piece of paper, drawn through a computer program, or any other number of ways:

> Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
>
> (1) literary works;

[1] The University does not abandon and continues to assert the arguments in its earlier briefing, including that "of a proprietary nature" only modifies "information." However, if the Referee, and the Court, were to find the research records to be properly withheld under USRTK's narrower reading, it should find the same under the University's interpretation. The University also preserves its earlier jurisdictional arguments.

(2) musical works, including any accompanying words;
(3) dramatic works, including any accompanying music;
(4) pantomimes and choreographic works;
(5) pictorial, graphic, and sculptural works;
(6) motion pictures and other audiovisual works;
(7) sound recordings; and
(8) architectural works.

Id. § 102(a). "Literary works" are then defined as "works, other than audiovisual works, expressed in words, numbers, or other verbal or numerical symbols or indicia, regardless of the nature of the material objects, such as books, periodicals, manuscripts, phonorecords, film, tapes, disks, or cards, in which they are embodied." *Id.* § 101.

All, or almost all, of the research records at issue fall within the definition of "literary works" such that copyright protection attaches.

II. Ownership will vary, but that has no impact on the N.C. Gen. Stat. 116-43.17 analysis.

The question of who would own the copyright is more complicated and fact intensive. Title 17 defines a "work made for hire" as, in relevant part, "a work prepared by an employee within the scope of his or her employment." *Id.* § 101. Works made for hire are owned by the employer, "unless the parties have expressly agreed otherwise in a written instrument signed by them[.]" *Id.* § 201(b).

Public records, almost by definition, are created within the scope of employment, putting the research records at issue within the definition of a work made for hire. The University, however, has a Copyright Policy that governs when

works made for hire are owned by the University or the employee. *See Copyright Policy of The University of North Carolina at Chapel Hill*, The University of North Carolina at Chapel Hill, https://policies.unc.edu/TDClient/2833/Portal/KB/ArticleDet?ID=132138 (last modified Apr. 18, 2023, 11:11 AM). That policy covers many scenarios and affords discretion to the University, making the question of who owns the copyright to any given research record a fact intensive inquiry. *See id.*

The University would retain ownership over most of the research records at issue per its Policy because they either involve exceptional use of University resources or are directed works or work for hire as defined by the Policy. However, the relevant question is not who owns the copyright, but instead whether the record at issue is indeed a research record protected by § 116-43.17.[2] As described below, even under USRTK's restrictive reading, because a copyright interest is "of a proprietary nature," the research records at issue are protected from public disclosure so long as the copyright is not registered.[3]

III. N.C. Gen. Stat. § 116-43.17 affords protection to most copyrighted works.

[2] Research data, or research information, are also protected if, under USRTK's reading, those data or information are of a proprietary nature. Because this is a public records case, the University is not aware of any dispute that the documents at issue qualify as "records." Likewise, the University is not aware of a dispute as to whether the records constitute "the conduct of commercial, scientific, or technical research" under § 116-43.17

[3] A large portion of the research records may also be protected as other records "of a proprietary nature," such as trade secrets. The University's earlier Memorandum describes, in detail, why protecting each category of records helps to preserve the University's ability to compete in the grant funded research marketplace.

A. Copyright ownership is "of a proprietary nature."

N.C. Gen. Stat. § 116-43.17 does not define "proprietary" or "of a proprietary nature." "In the construction of any statute . . . words must be given their common and ordinary meaning, nothing else appearing." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974) (citations omitted). Relevant definitions from Black's Law Dictionary and Merriam-Webster.com Dictionary are as follows:

Proprietary: "1. Of, relating to, or involving a proprietor . . . . 2. Of, relating to, or holding as property . . . ." *Proprietary, Black's Law Dictionary* (11th ed. 2019).

Proprietary Information: "Information in which the owner has a protectable interest. See Trade Secret." *Proprietary Information, Black's Law Dictionary* (11th ed. 2019).

Proprietary (adjective): "1: Of, relating to, or characteristic of an owner or title holder . . . 2: used, made, or marketed by one having the exclusive legal right . . . ." *Proprietary*, Merriam-Webster, https://www.merriam-webster.com/dictionary/proprietary (last visited Feb. 27, 2024).

All these definitions refer to an ownership interest, whether characterized as property, protectable, or an exclusive legal right. The federal copyright laws echo this language, affording copyright holders "ownership" and "exclusive rights." *See, e.g.*, U.S. Const. art. I, § 8, cl. 8 ("The Congress shall have Power . . . To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries[.]"); 17 U.S.C. § 101 (defining "Copyright owner" as "with respect to any one of the exclusive

rights comprised in a copyright, refers to the owner of that particular right."); 17 U.S.C. § 106 (granting certain exclusive rights to the "owner of copyright under this title[.]"); 17 U.S.C. § 501-513 (providing a framework to protect copyright owners from infringement of their rights).

Likewise, Title 17's regulation of copyright ownership transfer is analogous to regulation of the transfer of other real or personal property interests. *See, e.g.*, 17 U.S.C. § 201(d)(1) (referring to copyright ownership passing as personal property); *Id.* § 203(a)(2) (dictating rules for intestate succession of copyright ownership); *Id.* § 204(a) (requiring a written instrument to transfer a copyright interest unless by operation of law); *Id.* § 205 (regulating the recording of copyright ownership to govern conflicting ownership claims); *see also Wheaton v. Peters*, 33 U.S. 591 (1834) (discussing, in an early seminal case addressing copyright ownership, the interest as property of the author).

This enduring treatment of a copyright interest as one sounding in property and affording exclusive rights to its holder is entirely consistent with longstanding definitions of "proprietary."[4] Records to which copyright ownership attaches under

[4] The Referee also analogized § 116-43.17's reference to "proprietary" to the sovereign immunity analysis of governmental versus proprietary functions. While such an immunity analysis is not at issue where the General Assembly has explicitly waived immunity from suit, as in N.C. Gen. Stat. 132-9, viewing the University's research activity as a proprietary function is consistent with that framework. *See Estate of Williams ex rel. Overton v. Pasquotank Cnty. Parks & Rec. Dep't.*, 366 N.C. 195, 199, 732 S.E.2d 137, 141 (2012) ("A proprietary function, on the other hand, is one that is commercial or chiefly for the private advantage of the compact community.") (internal quotation marks and citations omitted). One primary factor in such an analysis "is whether, and to what degree, the legislature has addressed the issue." *Id.* at 200, 732 S.E.2d at 141-42. N.C. Gen. Stat. § 116-43.17 explicitly does so by using "proprietary" as a qualifier and protecting records related to "the conduct of *commercial*, scientific, or technical research[.]" N.C. Gen. Stat. § 116-43.17 (emphasis added).

Title 17 are, therefore, squarely within the "of a proprietary nature"[5] scope. What, then, to make of § 116-43.17's potentially inconsistent carve out of "patented, published, or copyrighted" records as subject to the Public Records Act? As discussed below, only one conclusion allows for an internally consistent interpretation.

B. "Copyrighted" in N.C. Gen. Stat. § 116-43.17 refers only to registered copyrights.

Section I, *supra*, explains that copyright protection attaches to likely all of the research records at issue, and that would be the case under almost any scenario involving § 116-43.17. If the General Assembly intended to remove all such documents from the statute's purview, the statute would protect virtually nothing and there would have been no reason to pass it at all. Instead, the only logical conclusion is that the exclusion of copyrighted records refers to those copyrighted works that are registered.

"Copyrighted" in the statute is part of a list that also includes "patented" and "published." N.C. Gen. Stat. § 116-43.17. All three words are in past tense verb form, implying that affirmative actions must be taken to achieve such a result. Indeed, that is true with respect to "patented," which involves submission to and approval of an application by a federal agency, and "published," which likewise involves submission to and approval of a manuscript by a journal. While copyright *protection*

[5] Arguably, "proprietary nature" expands the universe of protected research records, data or information beyond that which is simply "proprietary." Regardless, copyright would fall within its ambit.

attaches upon creation, copyright *registration* is only achieved through a very similar submission to and approval by a federal agency.

CONCLUSION

Even under USRTK's narrower reading of N.C. Gen. Stat. § 116-43.17, the research records at issue are protected. Copyright protection attaches to the records, a copyright interest is "of a proprietary nature," and only registered copyrights are excluded from the statute's shield. For all these reasons and those in the University's earlier Memorandums, the Referee and the Court should affirm that the University properly withheld all of its research records.

This 29th day of February, 2024.

JOSHUA H. STEIN
ATTORNEY GENERAL

/s/ Kimberly D. Potter
Kimberly D. Potter
N.C. Bar No. 24314
Special Deputy Attorney General
North Carolina Department of Justice
Education Section
Post Office Box 629
Raleigh, NC 27602-0629
Telephone: (919) 716-6920
Fax: (919) 716-6764
kpotter@ncdoj.gov

David T. Lambeth III
N.C. Bar No. 47878
dlambeth@email.unc.edu

Marla S. Bowman
N.C. Bar No. 49097
marla_bowman@unc.edu

Office of University Counsel
The University of North Carolina at Chapel Hill
123 W. Franklin St., Suite 600A
Chapel Hill, NC 27599-9105
(919) 962-1219

Attorneys for The University of North Carolina at Chapel Hill

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing SECOND MEMORANDUM OF LAW FOR REFEREE was served upon counsel for Plaintiff via electronic mail addressed to:

Steven Walker
Korey Kiger
WALKER KIGER, PLLC

steven@walkerkiger.com
korey@walkerkiger.com

This 29th day of February, 2024.

David T. Lambeth III
N.C. Bar No. 47878
Director of Strategic Research and Compliance
Office of the Vice Chancellor for Research
The University of North Carolina at Chapel Hill
(919) 843-8245
dlambeth@email.unc.edu