No. COA25-420 EIGHTEENTH DISTRICT

NORTH CAROLINA COURT OF APPEALS

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US RIGHT TO KNOW, Plaintiff	)	
v.	)	FROM ORANGE COUNTY
THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, Defendant	)	No. 22CV000463-670

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PLAINTIFF-APPELLANT'S BRIEF

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STATEMENT OF JURISDICTION

This matter was initiated on April 18, 2022, by the plaintiff's filing of a verified complaint and the issuance of a summons by the Clerk to the defendant. The defendant was properly served, and the Superior Court, Orange County had subject matter and *in-personam* jurisdiction over the parties. On October 31, 2024, the Honorable Alyson Adams Grine, Superior Court Judge in Superior Court, Orange County entered an order granting summary judgment in part to the defendant and in part to the plaintiff. On November 20, 2024, plaintiff, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to this Honorable Court. Subject matter and personal jurisdiction lie with the Court of Appeals pursuant to N.C. Gen. Stat. § 7A-27(b).

STATEMENT OF THE CASE

Plaintiff initiated this action on April 18, 2022 by the filing of a verified complaint and the issuance of a summons by the Clerk to the defendant. (R. 3-34) On March 13, 2023, Defendant The University of North Carolina at Chapel Hill filed its answer and defenses to the complaint. (R. 35) On July 21, 2023, defendant filed a Motion for Judgment on the Pleadings, which was heard during the November 6, 2023 session of Superior Court, Orange County. (R. 85) On November 21, 2023, the Superior Court entered an order determining that a referee was needed prior to the Court ruling on

defendant's motion. (R. 85) On December 11, 2023, the Superior Court entered an order appointing the Honorable Robert N. Hunter, Jr., former Associate Justice of the North Carolina Supreme Court and former Associate Judge of the North Carolina Court of Appeals to serve as the referee. (R. 90) On July 30, 2024, the referee submitted his report to the Superior Court. (R. 100) On October 18, 2024, the Superior Court held a hearing to further consider defendant's motion for judgment on the pleadings. (R. 153) The Superior Court then found it appropriate to treat the matter as a motion for summary judgment, and on October 31, 2024, the Superior Court entered an order granting summary judgment in part to defendant and in part to plaintiff. (R. 153) On November 20, 2024, plaintiff, by and through counsel, caused to be filed a Notice of Appeal, appealing the matter to this Honorable Court. (R. 158). The Record on Appeal was timely filed, and the matter is ripe for decision by this Honorable Court.

STATEMENT OF FACTS

US Right to Know ("USRTK"), a nonprofit investigative public health research group, has been investigating the origins of COVID-19 and the virus that causes it. (R. 7). Its investigation led them to request public records from the University of North Carolina at Chapel Hill ("UNC") 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. (R. 8) On July 30, 2020, plaintiff submitted an updated public records request, which updated the search terms for the July 2, 2020 request. (R. 8) 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. (R. 8) 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. (R. 8) 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. (R. 8)

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. (R. 9)

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. (R. 9)

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. (R. 9)

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. (R. 9) On October 6, 2021, plaintiff requested from defendant various documents and records concerning certain NIH grants and programs. (R. 9) Defendant provided no records for this request to plaintiff. (R. 9) 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. (R. 10).

STANDARD OF REVIEW

The issues raised on appeal are questions of law, namely the proper interpretation of N.C. Gen. Stat. § 116-43.17. "On appeal, an order allowing summary judgment is reviewed *de novo*." *James H.Q. Davis Tr. v. JHD Props., LLC,* 387 N.C. 19, 23, 910 S.E.2d 652, 657 (2025) (quoting *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440, 470, 597 S.E.2d 674 (2004)). Moreover, appellate courts "review questions of law *de novo*, considering the matter anew and freely substituting our own judgment for those of the lower courts." *State v. Wilkins*, 386 N.C. 923, 928, 909 S.E.2d 215, 219 (2024). As this case presents an appeal of a summary judgment order, and only presents questions of law, the standard of review is *de novo*.

ARGUMENT

Introduction and General Principles

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

Following the referee's appointment by the Superior Court, defendant produced a disk drive and a privilege log containing any records responsive to plaintiff's public records request. (R. 101). The referee also solicited two rounds of briefing from the parties to assist in framing the issues for the categorization of the records provided. (R. 101) Plaintiff, in its briefs to the referee argued that the term "research" in N.C. Gen. Stat. § 116-43.17 modifies not only "data," but also "records" and "information of a proprietary nature" and that the phrase "of a proprietary nature" similarly modified the

nouns "research," "data," and "information." (R. 101) Plaintiff further argued that the word "proprietary" was equivalent to a trade secret under N.C. Gen. Stat. § 66-152(3). (R. 101). Defendant acknowledged that the term "research" modifies "data," "records," and "information of a proprietary nature." However, defendant argued that research data and records were exempt, regardless of whether they were proprietary in nature. (R. 101-102) Further, defendant provided a much broader view of the word "proprietary." (R. 102) As explained by the referee, defendant's position on "proprietary" would "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." (R. 102)

The referee reviewed those records and privilege log, and assigned a category number to each record as to whether disclosure would be required depending on whether plaintiff's or defendant's interpretation of the statute was correct. (R. 102) The category numbers were as follows:

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.

Following his categorization of each document, the referee presented the Superior Court in his report with the below findings: (R. 103)

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	

Following its receipt of the referee's report and after hearing the arguments of counsel for both parties, the Superior Court adopted defendant's interpretation of N.C. Gen. Stat. § 116-43.17 and held, in pertinent part,

> The Court reads N.C. Gen. Stat. § 116-43.17 such that "of a proprietary nature" only modifies "information," and does not modify either "data" or "records." This reading is consistent with *Lockhart v. United States*, 577 U.S. 347, 351 (2016), in which the

> Supreme Court applied the "last antecedent" rule of statutory interpretation, pursuant to which a "limiting clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows." The statute at issue in *Lockhart* is constructed similarly to N.C. Gen. Stat. § 116-43.17, and the Court's reasoning is therefore persuasive.

(R. 155) The Court further held that "[t]he phrase 'of a proprietary nature' is not defined in N.C. Gen. Stat. § 116-43.17. In the absence of delineation, the Court interprets the phrase broadly to include information in which the owner has a protectable interest. See Proprietary Information, Black's Law Dictionary (11th ed. 2019). This definition includes records to which copyright ownership attaches." (R. 155)

Both of these holdings by the trial court were in error. First, the trial court erred in concluding that the phrase "of a proprietary nature" only modified "information" and did not modify "data" and "records." Second, the trial court erred in adopting an overly broad definition of "proprietary."

"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. Rather than applying the narrowest possible definition to the statute, the trial court instead erroneously applied the broadest possible interpretation of the research exemption.

I. THE TRIAL COURT ERRED IN CONCLUDING THAT THE PHRASE "OF A PROPRIETARY NATURE" IN N.C. GEN. STAT. § 116-43.17 ONLY MODIFIED THE WORD "INFORMATION" AND DOES NOT MODIFY EITHER "DATA" OR "RECORDS."

The modifier "of a proprietary nature" found in N.C. Gen. Stat. § 116-43.17 should apply to the words "data," "records," and "information." This interpretation is consistent with rules of statutory construction and is consistent with the admonition that any exception or exemption to the Public Records Act is to be construed narrowly. *DTH Media Corp. v. Folt*, 374 N.C. at 301, 841 S.E.2d at 258.

The Supreme Court of the United States has explained the appropriate use of the series-qualifier canon, which this Court should adopt: "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).

In *Facebook*, the statute at issue was 47 U.S.C. § 227(a)(1), which defines an autodialer as "equipment which has the capacity . . . to store or produce telephone numbers to be called, using a random or sequential number generator . . ." The issue was whether the clause "using a random or sequential number generator" modified both "store" and "produce" or only "produce." The Supreme Court applied the series-qualifier canon and held that the clause modified both preceding terms. *Facebook, Inc.,* 592 U.S. at 403-04.

The trial court relied on *Lockhart v. United States*, 577 U.S. 347 (2016) in coming to a different conclusion. In *Lockhart* the issue was 18 U.S.C. § 2252(b)(2), which contained the phrase "aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." *Id.* at 350. The Court in Lockhart found that the phrase "involving a minor or ward" only modified the term "abusive sexual conduct" and not "aggravated sexual abuse" or "sexual abuse." *Id.* at 350-51. The Court noted that the statute was

"awkwardly phrased (to put it charitably)" but that the text and context led the Court to apply the "rule of the last antecedent." *Id.* The Court went on to explain that the rule of the last antecedent is not absolute. *Id.* at 352. In fact, it can be overcome by context of the statutory scheme as a whole. *Id.* The Court found that the context of the statutory scheme did support the use of the rule of the last antecedent because to apply the series qualifier canon would result in a redundant statute. *Id.* at 356. Such is not the case *sub judice*. Instead to apply the series qualifier canon would comport with the statutory construction rule in Public Records Act cases that all exemptions and exceptions are to be construed as narrowly as possible.

Importantly, in *Lockhart*, the Court rejected the use of the rule of lenity to interpret the statute favorably for the defendant. *Id.* at 361. Here, the Court does not need to consider the rule of lenity, but simply apply the long-standing rule that the exemptions and exceptions are to be construed as narrowly as possible. The scheme of the Public Records Act is that the records produced by our government, with our money and our employees, elected officials, or appointed officials, belong to the people and unless it is absolutely certain that the record should not be produced pursuant to a narrowly-defined exemption or exception, it must be produced.

Accordingly, the trial court erred in concluding that the phrase "of a proprietary nature" only modified "information" and not "data" and "records."

This Court should hold that that phrase modifies the entire list, narrowing the scope of any purported exemption to the Public Records Act.

II. THE TRIAL COURT ERRED IN INTERPRETING THE PHRASE "PROPRIETARY NATURE" IN N.C. GEN. STAT. § 116-43.17 BROADLY "TO INCLUDE INFORMATION IN WHICH THE OWNER HAS A PROTECTABLE INTEREST."

The trial court erred in defining proprietary "broadly to include information in which the owner has a protectable interest." (R. 155) Black's Law Dictionary defines proprietary information as "[i]nformation in which the owner has a protectable interest. See TRADE SECRET." Black's Law Dictionary (12th ed. 2024). Black's further defines proprietary, in pertinent part, 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>." *Id.* This definition is of little value when determining whether records are or are not proprietary. A focus on the definition of "proprietary information," is instructive as to research data, research records, and research information as those phrases are used in N.C. Gen. Stat. § 116-43.17.

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 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 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.

The broad interpretation given by the trial court to the word "proprietary" nearly, if not completely, causes the exception to swallow the rule, making almost all university records relating in any way to research not subject to disclosure. *See Good Hope Hosp., Inc. v. N. Carolina Dep't of Health & Hum. Servs.,* 175 N.C. App. 309, 313, 623 S.E.2d 315, 319 (2006) (rejecting an interpretation that would have "the exception . . . swallow the rule" and instead adopting an interpretation that does not "contravene the legislature's purpose"). Given the default nature of the statutory scheme of the Public Records Act (that all records are subject to disclosure), and our appellate courts' admonitions that exceptions and exemptions to that broad statutory language are to be interpreted narrowly, the General Assembly could not have intended to exclude such a vast number of records from the Act's purview. It is much more likely that the General Assembly recognized the competitive nature of scientific research among the nation's universities and simply sought to shield and protect against disclosure information that was akin to a trade secret in the commercial context.

Accordingly, the trial court erred in not treating the term "proprietary" to be synonymous with "trade secret." This Court should hold that the most narrow definition applies to the term, and reverse the decision of the trial court.

CONCLUSION

For the foregoing reasons, the decision of the Superior Court should be reversed, and the matter should be remanded to Superior Court, Orange County for further proceedings consistent with the opinion of this Honorable Court, instructing the trial court to order the release of all documents determined by the referee to be required disclosures under plaintiff's definition.

RESPECTFULLY SUBMITTED, this the 27th day of May, 2025.

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CERTIFICATE OF WORD COUNT COMPLIANCE

I hereby certify that the Brief of Plaintiff-Appellant complies with North Carolina Rule of Appellate Procedure 28(j).

Respectfully submitted, this the 27th day of May, 2025.

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CERTIFICATE OF FILING AND SERVICE

This shall certify that a copy of the foregoing was this day served upon opposing counsel by emailing it to the email of record as follows:

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