

STATE OF NORTH CAROLINA  
WAKE COUNTY

THE NEWS AND OBSERVER  
PUBLISHING COMPANY, et al.,

Plaintiffs,

v.

PAT McCrory, as Governor of North  
Carolina, et al.,

Defendants.

IN THE GENERAL COURT OF JUSTICE  
SUPERIOR COURT DIVISION

15 CVS 9591

FILED  
2016 APR 29 P 1:51

WAKE CO., C.S.C.

ORDER

This cause came on for hearing before the undersigned at the March 23, 2016 session of the General Court of Justice, Superior Court Division, High Point in Guilford County, North Carolina, on (1) Defendants' Motion for Partial Judgment on the Pleadings; (2) Plaintiffs' Motion for Partial Judgment on the Pleadings; and (3) Plaintiffs' Motion for a Discovery Conference, for the Creation of a Discovery Plan and to Compel Discovery ("Discovery Motion").

After reviewing the material submitted in support of and in opposition to the motions, and after hearing the arguments of counsel, Defendants' Motion for Partial Judgment on the Pleadings is DENIED IN PART and GRANTED IN PART; judgment on Plaintiffs' Motion for Partial Judgment on the Pleadings is postponed to a later date; and Plaintiffs' Discovery Motion is GRANTED IN PART, as described below.

1. As to Defendants' Motion for Partial Judgment on the Pleadings, the Court GRANTS IN PART AND DENIES IN PART, the motion. Specifically, the Court DISMISSES Plaintiffs' Complaint insofar as it seeks any relief (including relief based on an alleged systematic failure or refusal to comply with Chapter 132) pertaining to any public records requests made by any persons other than Plaintiffs in this Action to

Defendants named herein. The Court DENIES this motion, to the extent it seeks dismissal of Plaintiffs' complaint for declaratory relief or relief available pursuant to N.C. Gen. Stat. § 132-9(a) with respect to public records requests made by Plaintiffs to Defendants named herein that have not yet been acted upon in whole or in part. The Court also DENIES the motion to the extent it seeks, at this juncture, to preclude the Court from potentially granting a remedy in the nature of a writ of mandamus with respect to public records requests made by Plaintiffs to Defendants named herein that have not been yet acted upon in whole or in part. In so ruling, except as stated, the Court believes that it needs to receive further evidence before determining whether the "capable of repetition but evading review" exception to the mootness doctrine may be potentially applicable to one or more of the public records requests made by Plaintiffs in this case. The Court, at this stage of the proceedings, and except as stated, DENIES Defendants' Motion for Partial Judgment on the Pleadings, to the extent such Motion attempts to dismiss Plaintiffs' claims on grounds that the General Assembly did not authorize Plaintiffs to assert such claims against Defendants, including as set forth particularly in the sovereign immunity discussion in *Nat Harrison Assocs., Inc. v. North Carolina State Ports Authority*, 280 N.C. 251, 258 (1972) and related cases. The Court is aware that the General Assembly decides when and under what circumstances the State may be sued; in such instances, the procedures and remedies prescribed by statute are exclusive. However, when questions arise pertaining to statutory construction, a request for declaratory relief appears to be the best, if not the only, procedural method in which the provisions of Chapter 132 can be interpreted and construed. The Court anticipates that it may revisit the question of sovereign immunity as it may pertain to exclusivity of remedies as well as the panoply of other potentially available remedies

such as mandamus, at some future date in the proceedings, pending the receipt of additional evidence adduced in the discovery process, as outlined below.

2. Defendants' Motion for Partial Judgment on the Pleadings and Plaintiffs' Motion for Partial Judgment on the Pleadings each concerned the lawfulness of a governmental agency assessing a "special service charge" under N.C. Gen. Stat. § 132-6.2(b) "if the request is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance" by agency personnel. Plaintiffs contended, in their motion, that it is illegal for an agency to assess a special service charge except with respect to requests for copies of public records. Defendants, on the other hand, contended that, in appropriate circumstances, it is lawful to charge such fees regardless of whether a requestor seeks copies or inspection of public records. At this juncture, although the Court does not accept Plaintiffs' argument that merely asking to inspect but not copy documents lets the requestor avoid special service charges in all instances, and pending further assessment of information pertaining to actual charges assessed in conjunction with the specific requests that are at issue in this case, the Court DENIES each of these motions pertaining to these charges.

3. The Court would benefit from discovery before determining whether, as Defendants contend, Plaintiffs' claims are moot and whether the "capable of repetition, yet evading review" exception to the mootness doctrine is applicable to this case. The Court is also of the opinion that discovery is necessary to shed light on whether declaratory judgment, injunctive relief, or a writ of mandamus is an appropriate remedy for any of Plaintiffs' claims. In this State, public records are the property of the people

and the Public Records Act is egalitarian on its face; consequently, fulfilling public records requests is an intrinsically important responsibility of government agencies, and public records requests must be fulfilled in a neutral manner, without regard to the motive or identity of the requester. The Court notes with concern and some distaste the contents of the July 21, 2016 press release issued by the Office of the Governor, which appears to the Court to be an effort to politicize this legal proceeding; it included pejorative references to Plaintiffs, questioned their motives in requesting public records and in pursuing this litigation, and suggested that Defendants may not assign appropriate priority to compliance with the Public Records Act. Discovery will enable this Court to determine whether Defendants' policies or practices contradict the egalitarian principles underlying the Public Records Act with respect to Plaintiffs' requests made to Defendants.

However, the scope of discovery will be limited to the degree reasonably calculated to inform this Court's ruling on the merits of Plaintiffs' claims. The Court has the authority to review Defendants' policies and practices to determine whether or not Defendants are improperly delaying requests for public records submitted by Plaintiffs, and to determine if any such delays are motivated by political or other discriminatory factors. Discovery will also help this Court evaluate the degree to which Defendants have conditioned Plaintiffs' right to access public records for inspection on the payment of a "special service charge" pursuant to G.S. 132-6.2.

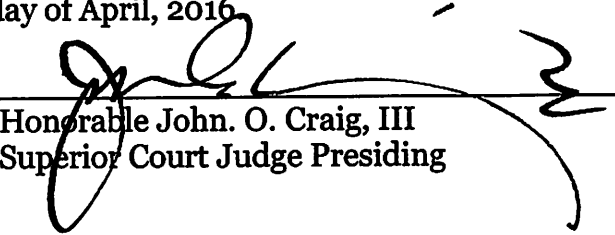
4. Because the Court has dismissed Plaintiffs' Complaint insofar as it seeks any relief pertaining to public records requests made by any persons other than Plaintiffs in this Action to Defendants named herein, discovery will only be allowed at this juncture with respect to the public record requests made to Defendants by Plaintiffs, and

Defendants' response to those requests. Initial discovery shall proceed as follows: counsel for Plaintiffs shall provide defense counsel with a list of public records requests made by Plaintiffs as to which they allege that Defendants failed to respond adequately or as promptly as possible, charged an improper fee, or otherwise acted contrary to the Public Records Act. The Plaintiffs will then have the opportunity to depose the four Public Information Officers employed by Defendants whose depositions were noticed previously by Plaintiffs (Josh Ellis, Sophia Spencer, Jamie Kritzer and Kim Genardo). The depositions will be confined to questions about Defendants' policies, practices and procedures as they relate to Plaintiffs' requests and to questions about the requests identified in the list provided to Defendants' counsel. Once this initial discovery phase is complete, the Court will hold a further hearing to determine whether any additional discovery is appropriate or necessary.

WHEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that

1. Defendants' Motion for Partial Judgment on the Pleadings is GRANTED IN PART and DENIED IN PART;
2. The court's ruling on Plaintiffs' Motion for Partial Judgment on the Pleadings is POSTPONED; and
3. Discovery is ALLOWED, but limited in scope as detailed herein.

SO ORDERED this the 25<sup>th</sup> day of April, 2016

  
Honorable John. O. Craig, III  
Superior Court Judge Presiding