

No. COA 23-154

TWENTY-FOURTH JUDICIAL DISTRICT

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

GRAY MEDIA GROUP, INC.,            )  
d/b/a WBTV,                            )  
  )  
          Plaintiff-Appellant,         )  
  )  
v.   )  
  )  
CITY OF CHARLOTTE,                 )  
  )  
          Defendant-Appellee.        )

From Mecklenburg County  
CASE NO. 21-CVS-10398

---

\*\*\*\*\*

BRIEF OF AMICI CURIAE

\*\*\*\*\*

INDEX

TABLE OF CASES AND AUTHORITIES.....	ii
INTRODUCTION .....	2
ARGUMENT .....	5
I. THE CITY'S RESTRICTIVE INTERPRETATION OF THE ACT STYMIES REPORTING ON MATTERS OF PUBLIC CONCERN.....	5
II. JURISDICTIONS AROUND THE COUNTRY HAVE FOUND DOCUMENTS ARE PUBLIC RECORDS IF THEY ARE WITHIN A GOVERNMENT AGENCY'S CONSTRUCTIVE CONTROL.....	8
CONCLUSION .....	15
CERTIFICATE OF COMPLIANCE.....	16
CERTIFICATE OF SERVICE.....	17

TABLE OF CASES AND AUTHORITIES

**CASES**

*Advance Publ'ns, Inc. v. City of Elizabeth City*,  
53 N.C. App. 504, 281 S.E.2d 69 (1981) ..... 5

*Barkeyville Borough v. Stearns*,  
35 A.3d 91 (Pa. Commw. Ct. 2012) ..... 13

*City of San Jose v. Superior Court*,  
2 Cal. 5th 608, 389 P.3d 848 (2017)..... 12

*Comstock Residents Ass'n v. Lyon Cnty. Bd. of Comm'rs*,  
134 Nev. 142, 414 P.3d 318 (2018) ..... 13

*Consol. Irrigation Dist. v. Superior Court*,  
205 Cal. App. 4th 697, 140 Cal. Rptr. 3d 622 (2012),  
*as modified on denial of reh'g* (May 23, 2012)..... 12

*Dental Benefit Providers, Inc. v. Eiseman*,  
86 A.3d 932 (Pa. Commw. Ct. 2014),  
*aff'd*, 633 Pa. 205, 124 A.3d 1214 (2015) ..... 12

*DTH Media Corp. v. Folt*,  
374 N.C. 292, 841 S.E.2d 251 (2020) ..... 8

*Evertson v. City of Kimball*,  
278 Neb. 1, 767 N.W.2d 751 (2009) ..... 11

*Fann v. Kemp*,  
No. 1 CA-SA 21-0141, 2021 WL 3674157 (Ariz. Ct. App. Aug.  
19, 2021),  
*review denied* (Sept. 14, 2021) ..... 14

*Frederick v. City of Falls City*,  
289 Neb. 864, 857 N.W.2d 569 (2015) ..... 11

*Honaman v. Twp. of Lower Merion*,  
13 A.3d 1014 (Pa. Commw. Ct. 2011)..... 13

*Hurlbert v. Matkovich*,  
233 W. Va. 583, 760 S.E.2d 152 (2014) ..... 13

<i>Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood</i> , 186 Wis. 2d 443, 521 N.W.2d 165 (Wis. Ct. App. 1994).....	14
<i>Maready v. City of Winston-Salem</i> , 342 N.C. 708, 467 S.E.2d 615 (1996) .....	5
<i>Nat’l Collegiate Athletic Ass’n v. Associated Press</i> , 18 So. 3d 1201 (Fla. Dist. Ct. App. 2009), <i>review denied</i> , 37 So. 3d 848 (Fla. 2010) .....	10, 11
<i>News &amp; Observer Publ’g Co. v. Poole</i> , 330 N.C. 465, 412 S.E.2d 7 (1992) .....	5
<i>News &amp; Observer Publ’g Co. v. State ex rel. Starling</i> , 312 N.C. 276, 322 S.E.2d 133 (1984) .....	9
<i>News &amp; Observer Publ’g Co. v. Wake Cnty. Hosp. Sys., Inc.</i> , 55 N.C. App. 1, 284 S.E.2d 542 (1981) .....	10
<i>News Rep. Co. v. Columbus Cnty.</i> , 184 N.C. App. 512, 646 S.E.2d 390 (2007) .....	4, 15
<i>NLRB v. Robbins Tire &amp; Rubber Co.</i> , 437 U.S. 214 (1978) .....	5
<i>State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer</i> , 364 N.C. 205, 695 S.E.2d 91 (2010) .....	5, 9
<i>State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer</i> , 200 N.C. App. 722, 685 S.E.2d 516 (2009) .....	9
<i>Swaney v. Tilford</i> , 320 Ark. 652, 898 S.W.2d 462 (1995) .....	14
<i>Times Publ’g Co. v. City of St. Petersburg</i> , 558 So. 2d 487 (Fla. Dist. Ct. App. 1990) .....	11
<i>Times-Picayune Publ’g Co. v. Johnson</i> , 94-0790 (La. App. 4 Cir. 10/3/94), 645 So. 2d 1174, <i>writ not considered</i> , 95-0212 (La. 3/17/95), 651 So. 2d 259, <i>and writ denied</i> , 95-0083 (La. 3/17/95), 651 So. 2d 260.....	14
<i>Trib.-Rev. Publ’g Co. v. Westmoreland Cnty. Hous. Auth.</i> , 574 Pa. 661, 833 A.2d 112 (2003) .....	13
<i>Wisner v. City of Tampa Police Dep’t</i> , 601 So. 2d 296 (Fla. Dist. Ct. App. 1992) .....	11

*Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*,  
181 N.C. App. 1, 639 S.E.2d 96 (2007) ..... 4, 15

**STATUTES**

65 Pa. Stat. § 67.305 ..... 13

Cal. Gov't Code § 7922.535 ..... 12

Fla. Stat. § 119.011 ..... 10

Fla. Stat. § 119.07 ..... 10

N.C. Gen. Stat. § 132-1 ..... *passim*

N.C. Gen. Stat. § 132-6 ..... 9, 10

Neb. Rev. Stat. § 84-712.01 ..... 11

**OTHER AUTHORITIES**

David Hodges, *A private company runs CATS bus operations. Charlotte leaders didn't know that until this story*, WBTV (July 14, 2022),  
<https://perma.cc/T9F3-VFFF> ..... 8

David Hodges, *Charlotte enters \$46,500 contract to help build teamwork among council*, WBTV (Mar. 4, 2021),  
<https://perma.cc/YR85-3KH3> ..... 3

David Hodges, *Charlotte's bus system didn't hold contractor accountable for poor performance, records show*, WBTV (Nov. 10, 2022),  
<https://perma.cc/YE4R-NM8H> ..... 8

Lisa Sorg, *Frustration, disbelief and a call for resignation: Lawmakers grill hurricane recovery official at oversight hearing*, NC Policy Watch (Dec. 16, 2022),  
<https://perma.cc/P42M-WG3F> ..... 7

Lisa Sorg, *ReBuild NC's modular home program still faltering; hurricane survivors now receiving different housing types*, NC Policy Watch (Feb. 22, 2023),  
<https://perma.cc/R9RH-3MVA> ..... 6, 7

NORTH CAROLINA COURT OF APPEALS

\*\*\*\*\*

GRAY MEDIA GROUP, INC., )  
d/b/a WBTV, )  
) )  
Plaintiff-Appellant, )  
) )  
v. )  
) )  
CITY OF CHARLOTTE, )  
) )  
Defendant-Appellee. )

---

From Mecklenburg County  
CASE NO. 21-CVS-10398

\*\*\*\*\*

BRIEF OF AMICI CURIAE

\*\*\*\*\*

The amici listed below, through their counsel, and pursuant to Rule 28(i) of the North Carolina Rules of Appellate Procedure and their accompanying Motion for Leave to File Brief of Amici Curiae, hereby submit this brief in support of Plaintiff-Appellant Gray Media Group, Inc., d/b/a WBTV (“WBTV”).<sup>1</sup>

Amici are the Reporters Committee for Freedom of the Press, The Center for Investigative Reporting (d/b/a Reveal), Committee to Protect Journalists, Freedom

---

<sup>1</sup> No person or entity—other than amici curiae, their members, or their counsel—directly or indirectly wrote this brief or contributed money for its preparation. N.C. R. App. P. 28(i)(2).

of the Press Foundation, Gannett Co., Inc., International Documentary Association, The McClatchy Company, LLC, The Media Institute, National Association of Black Journalists, National Freedom of Information Coalition, National Newspaper Association, The National Press Club, National Press Club Journalism Institute, National Press Photographers Association, News/Media Alliance, North Carolina Open Government Coalition, North Carolina Press Association, Radio Television Digital News Association, Sinclair Broadcast Group, Inc., Society of Environmental Journalists, Society of Professional Journalists, Student Press Law Center, and Capitol Broadcasting Company, Incorporated, d/b/a WRAL-TV. Statements of interest for each of the amici are set forth in the Appendix.

### INTRODUCTION

This case presents the question of whether a government agency may disclaim its obligations to disclose records under the Public Records Act, N.C. Gen. Stat. §§ 132-1 *et seq.* (the “Public Records Act” or the “Act”), on the grounds that the requested documents are in the physical possession of a third-party contractor, even when the agency has retained control over those records.

In 2020, Defendant-Appellee the City of Charlotte (the “City”) contracted with Ernst & Young (“EY”), a consulting firm, to review the operations of the Charlotte City Council, with the aim of improving communication among councilmembers. *See* David Hodges, *Charlotte enters \$46,500 contract to help build teamwork among council*, WBTV (Mar. 4, 2021), <https://perma.cc/YR85-3KH3>. Under the contract’s explicit terms, the City retained control over records produced

as part of EY's consultancy, including "exclusive ownership" over EY's work product and any data provided by the City to EY. R pp. 132, 143–44. The contract also required EY to produce data upon the City's request. R p. 144 ¶ 10 ("[T]he City shall be permitted to reproduce, copy, duplicate, disclose, or use the Supporting Data for any purpose, and it *shall be treated as a public record under North Carolina law.*" (emphasis added)).

As part of the "High-Performing Charlotte City Council" project, EY conducted a survey, which was sent to the mayor and each councilmember via an emailed link. R pp. 164–70. WBTV requested a copy of the survey form and responses under the Public Records Act (the "Requested Records"). The City denied the request, arguing that because the Requested Records were in EY's possession and "not in the Defendant's custody, control, or possession, as those concepts are defined by North Carolina law," they were beyond the scope of the Public Records Act. R p. 208.

After WBTV filed suit and moved for summary judgment, the City issued a subpoena *duces tecum* to EY, which produced the Requested Records. R p. 241. The City then provided the Requested Records to WBTV. *Id.* In the City's subsequent motion for summary judgment, it reiterated its view that, "until the City received a response to its subpoena *duces tecum*, the City did not have possession or custody of the records Plaintiff requested." *Id.* at p. 242. The lower court awarded summary judgment to the City, finding that because the City had produced the Requested



Records, WBTV's motion for injunctive and declaratory relief was moot. *Id.* at pp. 249–50.

Amici agree with WBTV that the lower court erred in granting summary judgment to the City and dismissing the case as moot. Amici write to specifically address the City's argument that because the Requested Records were in EY's possession, the City was not required to produce—or require EY to produce—the Requested Records under the Act. As this Court has recognized, government agencies cannot evade their obligations under the Act simply by “lodging public records . . . in a particular location not generally subject to disclosure,” such as with third-party contractors. *News Rep. Co. v. Columbus Cnty.*, 184 N.C. App. 512, 516, 646 S.E.2d 390, 394 (2007) (citing *Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*, 181 N.C. App. 1, 14, 639 S.E.2d 96, 105 (2007)). And, in construing statutes similar to the Public Records Act, courts in jurisdictions around the country have likewise found that government documents remain subject to disclosure if they are within an agency's constructive control, even if they are in the actual possession of a third party.

Members of the news media—whose job it is to inform the public about how agencies spend taxpayer money and outsource important functions to private entities—have a keen interest in ensuring that the Public Records Act remains a powerful tool for government oversight. Journalists in North Carolina rely on access to public records under the Act to inform the public on the activities of their government. The City's narrow, incorrect reading of the Public Records Act, if

accepted, would hamper reporting on matters of public concern and incentivize agencies to transfer records to private parties to avoid accountability and public oversight. Amici urge this Court to find that the Requested Records were, at all times, public records subject to disclosure under the Public Records Act, and reverse the Superior Court's order denying WBTV's motion for summary judgment.

### ARGUMENT

#### I. THE CITY'S RESTRICTIVE INTERPRETATION OF THE ACT STYMIES REPORTING ON MATTERS OF PUBLIC CONCERN.

In enacting the Public Records Act, the North Carolina legislature codified a “mandate for open government.” *News & Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). The Act “provide[s] a means for fostering openness and transparency in government,” out of a recognition that “an informed citizenry [is] vital to the functioning of a democratic society.” *State Emps. Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 210–11, 695 S.E.2d 91, 95 (2010) (quoting *NLRB v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 242 (1978)). In keeping with these principles, the Act is to be liberally construed in favor of public access. *Advance Publ'ns, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70 (1981); *see also Poole*, 330 N.C. at 475, 412 S.E.2d at 13 (“[T]he legislature intended to provide that, as a general rule, the public would have liberal access to public records.” (citation omitted)); *Maready v. City of Winston-Salem*, 342 N.C. 708, 730, 467 S.E.2d 615, 629 (1996) (“Those seeking exemption have the burden of establishing that an exception embraces their action. Such exceptions should be strictly construed.” (internal citation omitted)).

Government agencies often contract with third parties to perform or provide services on their behalf, from purchasing basic supplies to outsourcing services that an agency would otherwise provide directly. When, as here, a government agency has outsourced one of its functions to a third party, records of that agency and its activities may, as a result, be in the physical possession of that private entity rather than with the agency. Under the City's narrow reading of the Public Records Act, these records would fall outside of the Act's disclosure requirements even when, as here, the agency retains control over the documents. Such an absurd result is not only squarely at odds with the Act, but also threatens to impede—or, in some cases, render impossible—reporting on matters of public concern and vital importance to North Carolinians.

For example, NC Policy Watch, the news outlet of the North Carolina Justice Center, utilized information contained in public records in its ongoing investigative series examining North Carolina's faltering recovery from Hurricane Matthew in 2016. *See, e.g.,* Lisa Sorg, *ReBuild NC's modular home program still faltering; hurricane survivors now receiving different housing types*, NC Policy Watch (Feb. 22, 2023), <https://perma.cc/R9RH-3MVA> (collecting stories from throughout investigative series). Policy Watch obtained hundreds of public records which showed that—despite millions of dollars awarded over the past six years to rebuild damaged homes—hundreds of households are still living in motels or dilapidated houses. *Id.* As the reporting revealed, the state awarded \$80 million in contracts to Rescue Construction Solutions, a Raleigh-based construction company, despite the

company's track record of repeatedly missing deadlines and hundreds of homeowner complaints regarding its work. *Id.* In fact, the state retroactively increased Rescue's bids to award the company even more money, and tweaked procurement rules in ways that favored the company. *Id.* Policy Watch's findings spurred a governor-ordered investigation, hearings before a joint legislative subcommittee, and the hiring of a senior advisor to get the recovery effort back on track. Lisa Sorg, *Frustration, disbelief and a call for resignation: Lawmakers grill hurricane recovery official at oversight hearing*, NC Policy Watch (Dec. 16, 2022), <https://perma.cc/P42M-WG3F>. Yet under the City's interpretation of the Public Records Act, Policy Watch's ability to investigate and inform the public about the hurricane recovery program would have turned on whether the given records were located in a government filing cabinet or on a contractor's computer. The public's access to information about matters of such vital public importance should not—and does not—turn on this kind of happenstance.

Similarly, last year WBTV sought and obtained records under the Act to investigate chronic issues plaguing Charlotte's public bus system, including unreliable service. As WBTV reported, the bus system is managed by RATP Dev, a private contractor—an arrangement that was unknown to even some members of the City Council. David Hodges, *A private company runs CATS bus operations. Charlotte leaders didn't know that until this story*, WBTV (July 14, 2022), <https://perma.cc/T9F3-VFFF>. An internal audit indicated that RATP Dev was not being adequately monitored, which resulted in “policy violations.” *Id.* The

Charlotte Area Transit System released warning letters sent to RATP Dev in early 2022 regarding its deficient performance. David Hodges, *Charlotte's bus system didn't hold contractor accountable for poor performance, records show*, WBTV (Nov. 10, 2022), <https://perma.cc/YE4R-NM8H>. Following WBTV's reporting, the City announced an investigation and assessed liquidated damages against RATP Dev. *Id.*

These are just two examples of the kinds of news reporting that would be jeopardized if the Public Records Act were interpreted as the City proposes. Under such a narrow reading, an agency facing scrutiny from the press and public could simply transfer possession of records to a private party in an effort to avoid its disclosure obligations under the Act. Such a result is antithetical both to the spirit and purpose of the Public Records Act and would threaten North Carolinians' access to essential information about the functioning of their government. *See Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*, 181 N.C. App. 1, 639 S.E.2d 96 (2007).

## II. JURISDICTIONS AROUND THE COUNTRY HAVE FOUND DOCUMENTS ARE PUBLIC RECORDS IF THEY ARE WITHIN A GOVERNMENT AGENCY'S CONSTRUCTIVE CONTROL.

The General Assembly “has clearly expressed its intent through the Public Records Act to make public records readily accessible as ‘the property of the people.’” *DTH Media Corp. v. Folt*, 374 N.C. 292, 300, 841 S.E.2d 251, 257 (2020) (quoting N.C. Gen. Stat. § 132-1(b)). The Public Records Act defines “public record” expansively to include “all documents . . . 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.” N.C. Gen. Stat. § 132-1(a). As Judge Elmore explained in dissent in *State Employees Association*, “whether a particular record is ‘public’ is based in the purpose of the record’s creation.” *State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 200 N.C. App. 722, 729, 685 S.E.2d 516, 520 (2009). The statute requires “[e]very custodian of public records” to permit access to “any record in the custodian’s custody.” N.C. Gen. Stat. § 132-6(a).

North Carolina appellate courts have not squarely addressed when records in the physical possession of a non-government third party are subject to disclosure under the Public Records Act. Courts have, however, noted that key provisions of the Public Records Act, including § 132-6(a) and § 132-9(a), which provides civil remedies, make no mention of any actual possession requirement. *See State Emps. Ass’n of N.C., Inc.*, 364 N.C. at 213, 695 S.E.2d at 97 (holding agency possession was not a necessary element of a cause of action under § 132-9(a)); *State Emps. Ass’n of N.C., Inc.*, 200 N.C. App. at 729, 685 S.E.2d at 520 (Elmore, J., dissenting) (observing “the definition of ‘public records’ does not include a ‘possession’ requirement” (citing N.C. Gen. Stat. § 132-1)).

Courts in other jurisdictions with similar statutes have addressed this question and found that agencies cannot simply disclaim obligations to produce records about government activity because a third party possesses them. *See News & Observer Publ’g Co. v. State ex rel. Starling*, 312 N.C. 276, 285, 322 S.E.2d 133, 139 (1984) (looking to other states’ caselaw regarding access to government

documents); *News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 9–11, 284 S.E.2d 542, 547–48 (1981) (same).

Florida is a particularly helpful reference point given the similarities between its statute and the Public Records Act. For decades, Florida courts have consistently found the Florida Public Records Act applies regardless of whether records are in the physical possession of a government agency or a third party. “If that were not the case, a party could easily circumvent the public records laws.” *Nat'l Collegiate Athletic Ass'n v. Associated Press*, 18 So. 3d 1201, 1207 (Fla. Dist. Ct. App. 2009), *review denied*, 37 So. 3d 848 (Fla. 2010). Florida and North Carolina share nearly identical definitions of “public record”: under Florida law, “public records” means “all documents . . . made or received pursuant to law or ordinance or in connection with the transaction of official business by any agency.” Fla. Stat. § 119.011(12); *compare* N.C. Gen. Stat. § 132-1(a) (defining “public records” as “all documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business by any agency”). Similarly, the Florida Public Records Act requires that “[e]very person who has custody of a public record” must “permit the record to be inspected and copied.” Fla. Stat. § 119.07(1)(a); *compare* N.C. Gen. Stat. § 132-6(a) (requiring “[e]very custodian of public records shall permit any record in the custodian’s custody to be inspected and examined at reasonable times” and to “furnish copies thereof”). In *National Collegiate Athletic Association*, a Florida court found that records that were reviewed and used by state officials were public records despite being stored on a

private entity's secure website. *Nat'l Collegiate Athletic Ass'n*, 18 So. 3d at 1207 (“Although these documents were prepared and maintained by a private organization, they were ‘received’ by agents of a public agency and used in connection with public business.”); *see also Times Publ'g Co. v. City of St. Petersburg*, 558 So. 2d 487, 492–93 (Fla. Dist. Ct. App. 1990) (an agency cannot “improperly delegate[] its record keeping functions” to a private party by not taking possession of documents; by doing so, officials “evade[d] the broad policy of open government”); *Wisner v. City of Tampa Police Dep't*, 601 So. 2d 296, 298 (Fla. Dist. Ct. App. 1992) (“The City may not allow a private entity to maintain physical custody of public records to circumvent the [Florida Public Records Act].”).

Nebraska courts, similarly, have held that “the public’s right of access should not depend on where the records are physically located.” *Frederick v. City of Falls City*, 289 Neb. 864, 872, 857 N.W.2d 569, 575 (2015) (citing *Evertson v. City of Kimball*, 278 Neb. 1, 9, 767 N.W.2d 751, 759 (2009)). Like North Carolina, Nebraska defines “public records” broadly and without any actual possession requirement. The Nebraska Public Records Statutes afford access to any record “of or belonging to” a government agency. Neb. Rev. Stat. § 84-712.01(1). The Supreme Court of Nebraska found this broad definition “does not require a citizen to show that a public body has actual possession of a requested record,” but instead “includes any documents or records that a public body is entitled to possess— regardless of whether the public body takes possession.” *Evertson*, 278 Neb. at 5, 9 (holding report in possession of a private third party was still a public record where



an agency paid for it, received the information, and knew that the document existed).

Notably, even when interpreting public records statutes that explicitly include a possession element, many courts have found constructive possession suffices. For example, the Supreme Court of California has held “records related to public business are subject to disclosure if they are in an agency’s actual *or constructive* possession.” *City of San Jose v. Superior Court*, 2 Cal. 5th 608, 623, 389 P.3d 848, 857 (2017) (emphasis in original) (construing Cal. Gov’t Code § 6253(c), recently recodified at Cal. Gov’t Code § 7922.535, which establishes right of access to “copies of disclosable public records in the possession of the agency”). Under the California Public Records Act (“CPRA”), a “document’s status as public or confidential does not turn on the arbitrary circumstance of where the document is located.” *Id.* at 624. Rather, “an agency has constructive possession of records”—and thus the records are public under the CPRA—if the agency “has the right to control the records, either directly or through another person.” *Consol. Irrigation Dist. v. Superior Court*, 205 Cal. App. 4th 697, 710, 140 Cal. Rptr. 3d 622, 632 (2012), *as modified on denial of reh’g* (May 23, 2012).

Similarly, Pennsylvania courts have recognized constructive possession under the Commonwealth’s Right-to-Know Law (“RTKL”), so that “agencies cannot frustrate the purposes of the RTKL by placing their records in the hands of third parties to avoid disclosure.” *Dental Benefit Providers, Inc. v. Eiseman*, 86 A.3d 932, 938 (Pa. Commw. Ct. 2014), *aff’d*, 633 Pa. 205, 124 A.3d 1214 (2015). The Supreme

Court of Pennsylvania thus found “lack of possession of an existing writing by the public entity at the time of a request . . . is not, by itself, determinative of the question of whether the writing is a ‘public record’ subject to disclosure” under the RTKL. *Trib.-Rev. Publ’g Co. v. Westmoreland Cnty. Hous. Auth.*, 574 Pa. 661, 671, 833 A.2d 112, 118 (2003). Rather, “[t]he true inquiry is whether the document is subject to the control of the agency. In other words, constructive possession qualifies as possession under the RTKL to presume that a record is a *public* record[.]” *Barkeyville Borough v. Stearns*, 35 A.3d 91, 96 (Pa. Commw. Ct. 2012) (emphasis in original) (construing 65 Pa. Stat. § 67.305, which affords a presumption of access to “[a] record in the possession of a Commonwealth agency or local agency”). If “only documents within an agency’s actual physical possession were subject to disclosure” under the RTKL, agencies would have a gaping loophole “to conceal otherwise public records from public view” simply by “placing them in the hands of third parties.” *Honaman v. Twp. of Lower Merion*, 13 A.3d 1014, 1021 (Pa. Commw. Ct. 2011).

In addition to these examples, numerous state appellate courts have come to similar conclusions on a variety of statutory interpretation grounds. *See, e.g.*, *Hurlbert v. Matkovich*, 233 W. Va. 583, 590, 760 S.E.2d 152, 159 (2014) (“[The] liberal construction of ‘custodian’ . . . has been extended to require disclosure of documents over which the public body does not possess, but merely exercises control.”); *Comstock Residents Ass’n v. Lyon Cnty. Bd. of Comm’rs*, 134 Nev. 142, 145, 414 P.3d 318, 321 (2018) (Nevada Public Records Act “cannot be read as

limiting public records to those that are physically maintained at a government location or on a government server”); *Swaney v. Tilford*, 320 Ark. 652, 653, 898 S.W.2d 462, 464 (1995) (agency’s actual “possession of documents subject to disclosure under the [Arkansas FOIA is] not determinative”); *Journal/Sentinel, Inc. v. Sch. Bd. of Sch. Dist. of Shorewood*, 186 Wis. 2d 443, 452–53, 521 N.W.2d 165, 170 (Wis. Ct. App. 1994) (public bodies may not “avoid the public access mandated by the [Wisconsin] public-records law by delegating both the record’s creation and custody to an agent”); *Times-Picayune Publ’g Co. v. Johnson*, 94-0790 (La. App. 4 Cir. 10/3/94), 645 So. 2d 1174, 1176, *writ not considered*, 95-0212 (La. 3/17/95), 651 So. 2d 259, *and writ denied*, 95-0083 (La. 3/17/95), 651 So. 2d 260 (holding that the meaning of “custodian” under the Louisiana Public Records Act “is not limited to those persons or institutions that have physical custody” and that agencies cannot “avoid their responsibility to *control* their public records merely by transferring physical custody” (emphasis in original)); *Fann v. Kemp*, No. 1 CA-SA 21-0141, 2021 WL 3674157, at \*4 (Ariz. Ct. App. Aug. 19, 2021), *review denied* (Sept. 14, 2021) (“The requested records are no less public records simply because they are in the possession of a third party[.]”).

Courts around the country have refused to adopt narrow readings of public records statutes—like the one proposed here by the City—that would require government agencies to have actual possession of records in order for those records to be subject to disclosure. These decisions are in keeping with this Court’s holding that “the Public Records Act may not be interpreted in a way that allows” agencies

to “skirt [] the public records disclosure requirements’ by lodging public records ‘that municipalities and agencies [choose] to shield from public scrutiny’ in a particular location not generally subject to disclosure.” *News Rep. Co.*, 184 N.C. App. at 516, 646 S.E.2d at 394 (quoting *Womack Newspapers, Inc.*, 181 N.C. App. at 14, 639 S.E.2d at 105). Adopting the City’s interpretation of the Public Records Act would not only contradict the General Assembly’s legislative intent, but also would make North Carolina an outlier among states with similar public records laws. This Court should reject the City’s interpretation of the Act.

### CONCLUSION

For the reasons set forth above, amici respectfully urge this Court to find that the Requested Records were at all times public records subject to disclosure under the Public Records Act and reverse the District Court’s order denying WBTV’s motion for summary judgment.

Respectfully submitted, this 23rd day of March, 2023.

**STEVENS MARTIN VAUGHN & TADYCH, PLLC**

/s/ Elizabeth J. Soja  
Elizabeth J. Soja  
State Bar No. 36292  
Email: beth@smvt.com  
Michael J. Tadych  
State Bar No. 24556  
mike@smvt.com  
6300 Creedmoor Road  
Suite 170-370  
Raleigh, NC 27612  
Telephone: (919) 582-2322  
Facsimile: (866) 593-7695

*Counsel of Record for Amici Curiae*

CERTIFICATE OF COMPLIANCE

Pursuant to N.C. R. App. P. 28(j)(2), the undersigned counsel certifies that this Amici Curiae Brief complies with the typeface limitations of N.C. R. App. P. 26(g)(1) and the word-count limitations of N.C. R. App. P. 28(j).

1. Exclusive of the exempted portions under N.C. R. App. P. 28(j)(1), the Brief contains 3,699 words.
2. The Brief has been prepared in proportionally spaced font with serifs using Century Schoolbook, 12-point font.

**STEVENS MARTIN VAUGHN & TADYCH, PLLC**

/s/Elizabeth J. Soja

Elizabeth J. Soja

State Bar No. 36292

Email: beth@smvt.com

6300 Creedmoor Road

Suite 170-370

Raleigh, NC 27612

Telephone: (919) 582-2322

Facsimile: (866) 593-7695

CERTIFICATE OF SERVICE

I certify that I served the attached Amici Curiae Brief on the following counsel of record by regular U.S. Mail, first-class, postage prepaid, and by electronic mail, addressed as follows:

Lauren P. Russell  
Kaitlin M. Gurney  
Ballard Spahr LLP  
1909 K Street NW, 12th Floor  
Washington, DC 20006  
russelll@ballardspahr.com  
gurneyk@ballardspahr.com

Elizabeth F. Greene  
Flannery Georgalis LLC  
227 W. Trade St., Suite 950  
Charlotte, NC 28202  
egreene@flannerygeorgalis.com

Claire Ferguson  
4370 Peachtree Road NE, Suite 400  
Atlanta, GA 30319

*Counsel for Plaintiff-Appellant  
Gray Media Group, Inc., d/b/a WBTV*

Daniel Edward Peterson  
Parker Poe Adams & Bernstein LLP  
620 South Tryon Street, Suite 800  
Charlotte, NC 28202  
danielpeterson@parkerpoe.com

*Counsel for Defendant-Appellee  
City of Charlotte*

This the 23rd day of March, 2023.

**STEVENS MARTIN VAUGHN & TADYCH, PLLC**

/s/ Elizabeth J. Soja  
Elizabeth J. Soja  
State Bar No. 36292  
Email: beth@smvt.com  
6300 Creedmoor Road  
Suite 170-370  
Raleigh NC 27612  
Telephone: (919) 582-2322  
Facsimile: (866) 593-7695

**STATEMENTS OF INTEREST OF AMICI CURIAE**

**The Reporters Committee for Freedom of the Press** is an unincorporated nonprofit association. The Reporters Committee was founded by journalists and media lawyers in 1970, when the nation's press faced an unprecedented wave of government subpoenas forcing reporters to name confidential sources. Today, its attorneys provide pro bono legal representation, amicus curiae support, and other legal resources to protect First Amendment freedoms and the newsgathering rights of journalists.

**The Center for Investigative Reporting (d/b/a Reveal)**, founded in 1977, is the nation's oldest nonprofit investigative newsroom. Reveal produces investigative journalism for its website <https://www.revealnews.org/>, the Reveal national public radio show and podcast, and various documentary projects. Reveal often works in collaboration with other newsrooms across the country.

**The Committee to Protect Journalists** is an independent, nonprofit organization that promotes press freedom worldwide. We defend the right of journalists to report the news without fear of reprisal. CPJ is made up of about 40 experts around the world, with headquarters in New York City. A board of prominent journalists from around the world helps guide CPJ's activities.

**Freedom of the Press Foundation (FPF)** is a non-profit organization that supports and defends public-interest journalism in the 21st century. FPF works to preserve and strengthen First and Fourth Amendment rights guaranteed to the press through a variety of avenues, including building privacy-

preserving technology, promoting the use of digital security tools, and engaging in public and legal advocacy.

**Gannett** is the largest local newspaper company in the United States. Our 260 local daily brands in 46 states, including North Carolina's The Fayetteville Observer and Asheville Citizen-Times — together with the iconic USA TODAY — reach an estimated digital audience of 140 million each month.

**The International Documentary Association (IDA)** is dedicated to building and serving the needs of a thriving documentary culture. Through its programs, the IDA provides resources, creates community, and defends rights and freedoms for documentary artists, activists, and journalists.

**The McClatchy Company, LLC** is a publisher of iconic brands such as *The Charlotte Observer*, *The (Raleigh) News & Observer*, *The (Durham) Herald Sun*, *the Miami Herald*, *The Kansas City Star*, *The Sacramento Bee*, and the *Fort Worth Star-Telegram*. McClatchy operates media companies in 30 U.S. markets in 16 states, providing each of its communities with high-quality news and advertising services in a wide array of digital and print formats. McClatchy is headquartered in Sacramento, California.

**The Media Institute** is a nonprofit foundation specializing in communications policy issues founded in 1979. The Media Institute exists to foster three goals: freedom of speech, a competitive media and communications industry, and excellence in journalism. Its program agenda encompasses all



sectors of the media, from print and broadcast outlets to cable, satellite, and online services.

**The National Association of Black Journalists (NABJ)** is an organization of journalists, students and media-related professionals that provides quality programs and services to and advocates on behalf of black journalists worldwide. Founded by 44 men and women on December 12, 1975 in Washington, D.C., NABJ is the largest organization of journalists of color in the nation.

**The National Freedom of Information Coalition** is a national nonprofit, nonpartisan organization of state and regional affiliates representing 45 states and the District of Columbia. Through its programs and services and national member network, NFOIC promotes press freedom, litigation and legislative and administrative reforms that ensure open, transparent and accessible state and local governments and public institutions.

**National Newspaper Association** is a 2,000 member organization of community newspapers founded in 1885. Its members include weekly and small daily newspapers across the United States. It is based in Pensacola, FL.

**The National Press Club** is the world's leading professional organization for journalists. Founded in 1908, the Club has 3,100 members representing most major news organizations. The Club defends a free press worldwide. Each year, the Club holds over 2,000 events, including news conferences, luncheons and panels, and more than 250,000 guests come through its doors.

**The National Press Club Journalism Institute** is the non-profit affiliate of the National Press Club, founded to advance journalistic excellence for a transparent society. A free and independent press is the cornerstone of public life, empowering engaged citizens to shape democracy. The Institute promotes and defends press freedom worldwide, while training journalists in best practices, professional standards and ethical conduct to foster credibility and integrity.

**The National Press Photographers Association** (“NPPA”) is a 501(c)(6) non-profit organization dedicated to the advancement of visual journalism in its creation, editing and distribution. NPPA’s members include television and still photographers, editors, students and representatives of businesses that serve the visual journalism industry. Since its founding in 1946, the NPPA has vigorously promoted the constitutional rights of journalists as well as freedom of the press in all its forms, especially as it relates to visual journalism. The submission of this brief was duly authorized by Mickey H. Osterreicher, its General Counsel.

**The News/Media Alliance** represents news and media publishers, including nearly 2,000 diverse news and magazine publishers in the United States—from the largest news publishers and international outlets to hyperlocal news sources, from digital-only and digital-first to print news. Alliance members account for nearly 90% of the daily newspaper’s circulation in the United States. Since 2022, the Alliance is also the industry association for magazine media. It represents the interests of close to 100 magazine media companies with more than 500 individual magazine brands, on topics that include news, culture,

sports, lifestyle and virtually every other interest, avocation or pastime enjoyed by Americans. The Alliance diligently advocates for news organizations and magazine publishers on issues that affect them today.

**The North Carolina Open Government Coalition** unites organizations interested in ensuring and enhancing the public's access to government activity, records and meetings. The nonpartisan coalition educates people about their rights to gain access to records and meetings that are considered public under North Carolina law. Through educational programming and public service, the coalition advocates for the principles and benefits of open government at all levels.

**The North Carolina Press Association** is a trade association of 150 daily and weekly newspapers across the state. Since 1873 NCPA has supported North Carolina newspapers, readership and advertising. NCPA works to protect the public's right to know through the defense of open government and First Amendment freedoms, and NCPA helps maintain the public's access to local, state and federal governments.

**Radio Television Digital News Association** ("RTDNA") is the world's largest and only professional organization devoted exclusively to electronic journalism. RTDNA is made up of news directors, news associates, educators and students in radio, television, cable and electronic media in more than 30 countries. RTDNA is committed to encouraging excellence in the electronic journalism industry and upholding First Amendment freedoms.

**Sinclair Broadcast Group, Inc.** is a diversified media company and leading provider of local news and sports. The Company owns, operates and/or provides services to 185 television stations in 86 markets; is a leading local news provider in the country; owns multiple national networks; and has TV stations affiliated with all the major broadcast networks and owns and/or operates 21 RSN brands. Sinclair's content is delivered via multiple-platforms, including over-the-air, multi-channel video program distributors, and digital and streaming platforms.

**The Society of Environmental Journalists** is the only North-American membership association of professional journalists dedicated to more and better coverage of environment-related issues.

**Society of Professional Journalists** ("SPJ") is dedicated to improving and protecting journalism. It is the nation's largest and most broad-based journalism organization, dedicated to encouraging the free practice of journalism and stimulating high standards of ethical behavior. Founded in 1909 as Sigma Delta Chi, SPJ promotes the free flow of information vital to a well-informed citizenry, works to inspire and educate the next generation of journalists and protects First Amendment guarantees of freedom of speech and press.

**Student Press Law Center** ("SPLC") is a nonprofit, nonpartisan organization which, since 1974, has been the nation's only legal assistance agency devoted exclusively to educating high school and college journalists about the rights and responsibilities embodied in the First Amendment to the Constitution

of the United States. SPLC provides free legal assistance, information and educational materials for student journalists on a variety of legal topics.

**WRAL-TV** provides broadcast and online coverage of news about Raleigh and the surrounding area. It is owned by Capitol Broadcasting Company, Incorporated (“CBC”), a North Carolina corporation located in Wake County.