

STATE OF NORTH CAROLINA
WAKE COUNTY

FILED

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
20 CVS _____

THE NEWS AND OBSERVER,
PUBLISHING COMPANY d/b/a THE
NEWS & OBSERVER; GRAY MEDIA
GROUP, INC. d/b/a WBTV and WECT;
CAPITOL BROADCASTING COMPANY,
INCORPORATED d/b/a WRAL-TV;
CAROLINA PUBLIC PRESS; THE
CHARLOTTE OBSERVER PUBLISHING
COMPANY d/b/a THE CHARLOTTE
OBSERVER; WUNC, LLC; GANNETT
CO., INC.; THE PILOT, LLC; THE NEW
YORK TIMES COMPANY; THE
ASSOCIATED PRESS; WTVD
TELEVISION, LLC d/b/a WTVD; NORTH
CAROLINA HEALTH NEWS, INC.;
NORTH CAROLINA JUSTICE CENTER
d/b/a NC POLICY WATCH; THE WILSON
TIMES;; and NEXSTAR MEDIA GROUP,
INC. d/b/a WNCN CBS 17,

Plaintiffs,

v.

ROY COOPER, in his capacity as
Governor of the State of North Carolina;
ERIK A. HOOKS, in his capacity as
Secretary of the North Carolina
Department of Public Safety; and MANDY
K. COHEN, M.D. in her capacity as
Secretary of the North Carolina
Department of Health and Human
Services,

Defendants.

**VERIFIED COMPLAINT
AND
REQUEST FOR MEDIATION PURSUANT TO
N.C. GEN. STAT. § 7A-38.3E**

Pursuant to Rules 3, 7, and 8 of the North Carolina Rules of Civil Procedure the plaintiff,
complaining of the defendants, alleges and says the following:

Introduction

This action is pursuant to the North Carolina Public Records Law, contained in Chapter 132 of the General Statutes. As described more specifically in the numbered allegations set out below, plaintiffs seek:

- (1) a preliminary order compelling defendants to appear and bring before the court the records that are the subject matter of this action;
- (2) an order compelling the defendants to permit the inspection and copying of public records pursuant to N.C. GEN. STAT. § 132-9(a) and otherwise;
- (3) an order in the nature of a writ of mandamus requiring the defendants to comply with the Public Records Law including, but not limited to, N.C. GEN. STAT. § 132-6(a); and
- (4) an order, pursuant to N.C. GEN. STAT. § 132-9(c)(1), awarding plaintiff reasonable attorneys' fees, to be charged against the operating expenses of the responsible agency or to be paid personally by any public employee or public official found by the court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of the Public Records Law.

The Plaintiffs

1. The News and Observer Publishing Company ("N&O") is a North Carolina corporation that maintains its principal place of business in Raleigh, Wake County, North Carolina. Among other things, the company publishes *The News & Observer*, a general interest newspaper that is published in Wake County and distributed throughout the surrounding area of North Carolina. The News & Observer also publishes an online edition at www.newsobserver.com.

2. Gray Media Group, Inc. d/b/a WBTV and WECT ("Gray Media") is a Delaware corporation that is authorized by the North Carolina Secretary of State to do business within the state and whose principal place of business is located in Charlotte, Mecklenburg County, North Carolina. WBTV covers news in Greater Charlotte and the surrounding areas of North Carolina

and South Carolina, and state-wide issues throughout North Carolina. WBTV also disseminates online coverage at www.wbtv.com. WECT covers news in and around Wilmington, North Carolina, including New Hanover, Brunswick, Pender, Bladen and Columbus counties and into Horry County, South Carolina. WECT also disseminates online coverage at www.wect.com.

3. Capitol Broadcasting Company, Incorporated ("WRAL") is a North Carolina corporation whose principal place of business is located in Raleigh, Wake County, North Carolina. Capitol Broadcasting is a diversified communications company which, among other things, owns and operates five television stations in North Carolina, including WRAL-TV in Raleigh which covers news in the Research Triangle and surrounding areas of Piedmont and Eastern North Carolina, including Wake County and its surrounds.

4. Carolina Public Press is an independent not-for-profit news organization dedicated to nonpartisan, in-depth and investigative news built upon the facts and context North Carolinians need to know. Founded in 2011 and originally established to focus on the issues, topics and challenges faced by Western North Carolina, the organization now covers all of North Carolina. CPP provides nonpartisan reporting on important issues facing North Carolina communities.

5. The Charlotte Observer Publishing Company (the "*Charlotte Observer*") is a Delaware corporation that maintains its principal place of business in Mecklenburg County, North Carolina. Among other things, the company publishes *The Charlotte Observer*, a general interest newspaper that is published in Mecklenburg County and distributed throughout the surrounding areas of North Carolina and South Carolina. The Observer also publishes news online at www.charlotteobserver.com.

6. WUNC, LLC, is a North Carolina not-for-profit corporation located in Orange County. WUNC operates North Carolina Public Radio, an affiliate of National Public Radio, at 91.5 FM from Chapel Hill; at 88.9 FM from Manteo; at 91.9 from Fayetteville; at 91.1 from Welcome; and at 90.9 FM from Rocky Mount. The station, which also streams online 24 hours a

day, provides extensive national and local news coverage, including information about courts throughout North Carolina.

7. Gannett Co., Inc., parent company of *Asheville Citizen Times*, *Wilmington StarNews*, *Fayetteville Observer* and nine other daily newspapers in North Carolina, is an innovative, digitally focused media and marketing solutions company committed to strengthening communities across our network. Gannett touches the lives of nearly 140 million people monthly with our Pulitzer-Prize winning content, consumer experiences and benefits, and advertiser products and services. Gannett brands include the USA TODAY and more than 260 daily local newspapers. To connect with us, visit www.gannett.com.

8. The Pilot LLC is a North Carolina limited liability company that maintains its principal place of business in Southern Pines, Moore County, North Carolina. Among other things, the company publishes *The Pilot*, a 100-year-old twice-weekly general-interest newspaper printed and distributed throughout Moore County. The company also publishes an online edition at www.thepilot.com.

9. The New York Times Company is the publisher of *The New York Times* and *The International New York Times* and operates the news websites nytimes.com and related properties.

10. The Associated Press ("AP") is a news cooperative organized under the Not-for-Profit Corporation Law of New York, with more than 1,300 U.S. newspaper members. The AP's members and subscribers include the nation's newspapers, magazines, broadcasters, cable news services and Internet content providers. On any given day, AP's content can reach more than half of the world's population. AP has no parents, subsidiaries or affiliates that have any outstanding securities in the hands of the public. The AP's North Carolina bureau regularly covers news of interest in all 100 counties of North Carolina, including news about state government and public policy.

11. WTVD Television, LLC ("WTVD") is a Delaware corporation with its principal place of business in Durham, North Carolina. It owns and operates the television station WTVD ABC 11 in Raleigh-Durham, North Carolina. WTVD gathers and disseminates news to the public, serving a twenty-three county viewing area in central and eastern North Carolina and disseminates its news coverage online at www.abc11.com.

12. North Carolina Health News, Inc. is an independent not-for-profit news organization dedicated to covering health care in North Carolina employing the highest journalistic standards of fairness, accuracy and extensive research. It was founded in 2011 pursuant to the belief that to make the best decisions about their health care and about the state's health care system, the citizens of North Carolina need the best information possible.

13. The North Carolina Justice Center ("Justice Center") is a § 501(c) not-for-profit North Carolina organization located in Raleigh, North Carolina. NC Policy Watch, which is a project of the Justice Center, is a news and commentary outlet dedicated to informing the public, including elected officials as they debate important issues, and to improving the quality of life for all North Carolinians. NC Policy Watch is published online at <http://www.ncpolicywatch.com>.

14. The Wilson Times is a fifth-generation family-owned newspaper based in Wilson, North Carolina, providing daily coverage of local news through its print and online editions. Founded in 1896, the Times serves as the newspaper of record for Wilson County.

15. WNCN-TV is owned and operated by Nexstar Broadcasting, Inc located at 545 E. John Carpenter Freeway Suite 700, Irving, TX 75062. The Federal Communications Commission Community of License is Goldsboro, North Carolina, with principal place of business located at 1205 Front St, Raleigh, North Carolina 27609. WNCN, licensed to Virtual Channel 17, covers news in the Raleigh, Durham, and Fayetteville areas and its surrounds. WNCN also disseminates its news coverage online at www.cbs17.com.

The Defendants

16. Roy Cooper is the duly elected and serving governor of the State of North Carolina and is sued in that official capacity. As the Governor, defendant Cooper is a public agency of the North Carolina government as defined by N.C. GEN. STAT. § 132-1(a) and is custodian of records that are public under Public Records Law.

17. Erik A. Hooks was duly appointed by defendant Cooper and unanimously confirmed by the North Carolina Senate to serve as Secretary of the Department of Public Safety ("DPS") and is sued in that official capacity. As Secretary of the DPS, defendant Hooks oversees North Carolina's Department of Emergency Management and is an "agency of North Carolina government" as defined by N.C. GEN. STAT. § 132-1(a) and is the custodian of records that are public under the Public Records Act. N.C. GEN. STAT. § 132-2. DPS' website lists 14 staffers in its Communications Office.

18. Mandy K. Cohen, M.D. was duly appointed by defendant Cooper and unanimously confirmed by the North Carolina Senate to serve as Secretary of the North Carolina Department of Health and Human Services ("DHHS") and is sued in that official capacity. As Secretary of DHHS, defendant Cohen is an "agency of North Carolina government" as defined by N.C. GEN. STAT. § 132-1(a) and is the custodian of records that are public under the Public Records Act. N.C. GEN. STAT. § 132-2. Upon information and belief, DHHS has more than 15 staffers in its Office of Communications.

Jurisdiction, Venue and Conditions Precedent

19. This Court has subject matter jurisdiction over the issues raised herein pursuant to N.C. GEN. STAT. § 132-9 and otherwise.

20. This Court has personal jurisdiction over all the parties pursuant to N.C. GEN. STAT. § 1-75.4(1).

21. Venue for this action is proper in the Superior Court of Wake County pursuant to N.C. GEN. STAT. §§ 1-77 and 1-82.

22. The North Carolina General Assembly has waived sovereign immunity for plaintiffs' claims by enactment of the North Carolina Public Records Law and otherwise.

23. Plaintiffs respectfully request the initiation of mediation of this dispute pursuant to N.C. GEN. STAT. § 7A-38.3E. *Accord, Tillett v. Town of Kill Devil Hills*, 89 S.E.2d 145 (2017).

North Carolina Law

24. The North Carolina Public Records Law ("the Public Records Law") is codified at N.C. GEN. STAT. §§ 132-1 through 132-11. The public policy underlying the Public Records Law is set out in N.C. GEN. STAT. § 132-1(b), which provides:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, 'minimal cost' shall mean the actual cost of reproducing the public record or public information.

25. The Public Records Law provides that public records are defined 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.

N.C. GEN. STAT. § 132-1(a) (emphasis supplied)

26. The Public Records Law further provides that "Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law." N.C. GEN. STAT. §132-6(a).

27. By statute, and as applied by North Carolina's appellate courts at least nine times, only specific statutory exemptions from the Public Records Law can authorize the withholding of documents that otherwise meet the definition of public records. N.C. GEN. STAT. §132-1. *Accord, News & Observer Pub. Co. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19

(1992)

28. North Carolina's appellate courts have held no fewer than 22 times that in considering requests for public access, the right of access is to be liberally construed and exemptions narrowly construed.

29. The failure to provide access to or copies of public records "as promptly as possible" upon request pursuant to N.C. GEN. STAT. § 132-6(a) is tantamount to denial.

History and Background

30. North Carolina, like the rest of the world, has struggled to understand and respond to the global pandemic and the novel coronavirus which cause COVID-19. Information from multiple and varying sources has been varied, inconsistent and incomplete.

31. From the outset, the portions of our population thought to be at highest risk for susceptibility and most negative consequences of COVID-19 are our elderly populations and those already afflicted with chronic medical issues.

32. Not surprisingly, the confluence of high susceptibility and congregate living arrangements (nursing homes, residential care facilities, correctional facilities, etc.) appears to warrant magnified concern and attention.

33. As of 28 May 2020, North Carolina's Department of Health and Human Services was reporting 17 ongoing outbreaks in correctional facilities in North Carolina (federal and state prisons, local jails) in 15 of North Carolina's 100 counties including 1,181 cases and deaths 16 COVID-19-related deaths. See <https://covid19.ncdhhs.gov/dashboard/congregate-living-settings>.

34. As of 26 May 2020, North Carolina's Department of Health and Human Services was reporting 83 ongoing outbreaks in congregate living settings in 45 of North Carolina's 100 counties including 3,577 cases and 480 COVID-19-related deaths. See <https://files.nc.gov/ncdhhs/documents/files/covid-19/Weekly-COVID19-Ongoing-Outbreaks.pdf>.

35. Plaintiffs, on behalf of themselves and the coalition, have made the following public records requests on DPS seeking records containing information about these outbreaks and other public information:

17 March 2020	Any email sent by Will Polk to members of the Council of State on March 17, 2020. Any response to the above-referenced email.	Pamela.Walker@ncdps.gov; Will.Polk@ncdps.gov	Acknowledged (3/18); first production of responsive records (5/28).
7 April 2020	All resource requests submitted to NCSPARTA/WebEOC related to COVID-19. All "significant events" and "general announcements" posted to NCSPARTA/WebEOC related to COVID-19.	keith.acree@ncdps.gov	Acknowledged (4/9); partial production (5/22); unfulfilled.
10 April 2020	Index of forms, also called a system of records, for DPS.	john.bull@ncdps.gov	Acknowledged (4/13) John Bull: "Jordan, You asked these questions on a state holiday, last Friday. I have asked someone who is only substantially buried to look into it. I don't have answers for you yet. I likely will take some time."; further response (5/19) "Hi Jordan, DPS does not have an "index of forms" or a "systems of records" as you described; unfulfilled.
4 May 2020	Emails between UNC doctors and DPS staff on key dates.	john.bull@ncdps.gov	Acknowledged (5/5) John Bull: "I have received your amended information request. Please be aware that the fulfillment of your request may be delayed due to the unprecedented workload associated with ensuring the health, safety and security of staff members and individuals who are incarcerated during this time of pandemic."; unfulfilled.
7 May 2020	Request for records on prison inspections since April 1.	john.bull@ncdps.gov	Acknowledged (5/13) John Bull: "information pertaining to security plans, patterns or practices in prisons is not a public record under N.C. Gen. Stat. § 132 1.7(a1). § 132-1.7. Sensitive public security information. (a1) Public records, as defined in G.S. 132-1, shall not include specific security information or detailed plans, patterns, or practices associated with prison operations. (previous response on 5/11 did not list statutory reasons for denying records)"; Denied.
13 May 2020	Records reflecting: • The location (correctional facility released from), charges and names of the inmates who qualified to be placed on ELC.	Pamela.walker@ncdps.gov - covid19offenderinfo@ncdps.gov -	Acknowledged (5/13); unfulfilled.

	<ul style="list-style-type: none"> • The number of inmates granted early release since March 1, 2020. • If possible, could you also make available the names, charges and facility linked to each inmate granted early release. • Statistics on how many inmates were released due to underlying health conditions, pregnancy or who are at high-risk for the virus. (For example 20% were pregnant, 10% labelled as high risk, etc.) • The number of non-violent juveniles who have been released from detention while awaiting trial since March 1, 2020. 		
18 May 2020	<p>Any record of communication—including but not limited to text messages, emails, instant messages, letters, and memos—sent or received by Doris Daye, Pam Cashwell, Todd Ishee, and/or Tim Moose since April 1, 2020 regarding any of the following topics:</p> <ol style="list-style-type: none"> 1) Testing for employees at Caswell Correctional Center 2) COVID-19 cases at Caswell Correctional Center 3) Transfer of inmates from Caswell Correctional Center 4) Barbara Stewart 	john.bull@ncdps.gov	<p>Acknowledged (5/22); On 5/22, in part: "We have pulled the initial email batches between each of the seven parties you requested between March 12, 2020 and April 30, 2020 resulting in more than 900 emails which must now be reviewed to determine if all the information contained in them is public." Asked for search terms to limit the results.</p> <p>On 5/28, in part: "Thanks for your follow up. Let's try using the search terms "COVID," "staff illness," "symptoms," and "inmate death" on the results so far and see if that reduces the number of emails. Sound good?"</p> <p>If that doesn't reduce it significantly, then you can give me search terms for the individual dates." I requested some modifications and expansions to the search to capture staff death/hospitalization, inmate illness/hospitalization, and the use of offender as interchangeable with inmate"; unfulfilled.</p>
22 May 2020	Copy of PRA log since March 1, 2020	susan.m.smith@ncdps.gov, Pamela.Walker@ncdps.gov	No response; unfulfilled.
27 May 2020	<ol style="list-style-type: none"> 1. All DCR-1A death in custody forms submitted to the Governor's Crime Commission either by mail or email (as described on the DPS website) since March 1, 2020. 2. All DC-135 Notice of Inmate Death reports since March 1, 2020. 3. All annual death in custody reports sent to the Bureau of Justice Statistics (BJS) since 2015. 4. All death in custody reports sent to the BJS or reported to any federal agency since March 1, 2020. 5. All incident reports associated with any 	margaret.ekam@ncdps.gov	Acknowledged (5/27); unfulfilled.

	<p>deaths in custody since March 1, 2020. 6. Blank copies of Investigator Cover Sheet, Incident, DC-135, DC-138B, DC-230, and Inmate Death reports, in addition to blank versions of any further documentation required in the case of inmate death.</p>		
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36. Plaintiffs, on behalf of themselves and the coalition, have made the following public records requests on DHHS seeking records containing information about these outbreaks and other public information:

<p>Fall 2019</p>	<ul style="list-style-type: none"> • Copies of any regular reports, summaries, calculations of percentages of total provider sign-ups for Medicaid managed care created by or received by DHHS from 10/15/19 to 12/19/2019. • Copies of any and all communications sent or received by the following individuals with the key words "Medicaid," "managed care," "delay," "suspend" suspension," "Medicaid managed care," "transformation" or "budget" from 11/1/19 to present. This request includes emails, text messages and communications that may be contained in other platforms (Twitter DMs, any internal messaging systems that may exist, communications of private email addresses that involve conducting public business, etc). The individuals are Sec. Mandy Cohen, Medicaid Director Dave Richard, Dep. Secs. Susan Perry, Kody Kinsley, Ben Money, Mark Benton, Matt Gross, Walker Wilson and Shannon Dowler. <ul style="list-style-type: none"> o If a communication with one of those key words is in a thread of various communications, I would request the entire thread be provided. o There is no need to provide access to duplicates (if several of the mentioned individuals are on the same email thread, for example). o There is no need to include forwards of news articles or newsletters these individuals receive UNLESS there is some type of original comment included on the communication (an example would be if a news article is forwarded to a group, and one individual makes a comment specific to Medicaid managed care. I would like that, but I do not need copies of the Insider, or N.C. Health News articles, that these individuals receive in the regular course of business, for example) • Any and all communication between the 	<p>emily.kirby@dhhs.nc.gov; public.records@dhhs.nc.gov</p>	<p>Acknowledged (12/20/19); unfulfilled.</p>
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	<p>above individuals Sec. Mandy Cohen, Medicaid Director Dave Richard, Dep. Secs. Susan Perry, Kody Kinsley, Ben Money, Mark Benton, Matt Gross, Walker Wilson and Shannon Dowler.) and the governor's office and legislative leaders (offices of State Sen. Phil Berger, State Rep Tim Moore, state sen. Ralph Hise, state Rep, Donny Lambeth and state Rep. Josh Dobson),</p> <ul style="list-style-type: none"> • Any and all communications between representatives of Maximus and DHHS representatives regarding the enrollment portal, 9/1/19 to present, and including any and all status reports, or reports regarding issues with the portal. 		
20 March 2020	Any and all databases tracking the sampling and/or testing of patients suspected of having contracted novel coronavirus (COVID-19) and all PUI forms, anonymized	news@dhhs.nc.gov; Betsey Tilson; public.records@dhhs.nc.gov; charles.epstein@dhhs.nc.gov	<p>Charles Epstein on 3/30: "Tyler, Hope you are well. I apologize for not responding back earlier. We have been quite busy the past month and have received a very large volume of requests. I want to assure you that we have not forgotten about your request, and I hope to provide you with a more detailed update soon. Thank you,"</p> <p>Charles Epstein on 4/7: "Tyler, We are still working on this request and are hoping to have a portion ready for you this week. Thank you,"</p> <p>Charles Epstein on 4/10: "Good afternoon, Tyler, I am contacting you in reference to your public records request #2020032002 to the North Carolina Department of Health and Human Services. Attached, please find the public records staff identified as responsive to your request for 'any and all data dictionaries and/or field layouts.' Your additional requests for 'any and all databases tracking the sampling and/or testing of patients suspected of having contracted novel coronavirus (COVID-19),' and 'any and all "Human Infection with 2019 Novel Coronavirus Person Under Investigation (PUI) and Case Report Forms" collected by your agency,' are for confidential health information that is protected under North Carolina General Statute 130A. Dr. Betsy Tilson elaborates on this issue further in the attached letter that</p>

			<p>she sent to Mike Tadych last week. We would encourage you to examine the updated Dashboard website (https://www.ncdhhs.gov/divisions/public-health/covid19/covid-19-nc-case-count) for publicly available information.</p> <p>If you disagree with our assessment and still believe you are legally entitled to the records you requested, please do not hesitate to let us know. To help us resolve your concerns and improve the way we serve you, please include the reason(s) you disagree with our determination along with the specific legal authority supportive of your view(s), and we will share your concerns with appropriate staff for additional consideration. If there is any change in our position, we will be update you as promptly as possible.</p> <p>Thank you for your public records request to NC DHHS. Please contact us if we can help you further."</p> <p>[Tilson letter, Blank sample form and data dictionary attached]; largely unfulfilled.</p>
24 March 2020	Copies of any memos, reports or other written material discussing possible changes to the emergency-preparedness regulations for adult care homes since Jan. 1, 2019.	news@dhhs.nc.gov	Acknowledged (3/24); unfulfilled.
26 March 2020	Copies of all written notifications sent to the CMS RO regarding a presumptive or confirmed positive test for COVID-19 involving a nursing home resident.	news@dhhs.nc.gov	Acknowledged (3/27); denied multiple times.
7 April 2020	Copies of: 1. The actual cost reports submitted by Pine Forest Rest Home in Woodland since Jan. 1, 2016; 2. All DHSR reviews of the Northampton DSS since Jan. 1, 2017; 3. All correspondence to/from DHSR relating to Pine Forest Rest Home since March 14, 2020.	news@dhhs.nc.gov	Acknowledged (4/7); said DHHS doesn't do reviews of county DSS offices, but the rest of the requests would be processed; unfulfilled.
10 April 2020	Copies of Nurse Aide 1 registry.	news@dhhs.nc.gov	Acknowledged (4/10); unfulfilled.
10 April 2020	Copies of: 1. All emails to and from Mandy Cohen that include the keyword "covid" or "coronavirus" since Jan. 1, including any attachments to those emails; 2. All emails to and from Megan Lamphere that include the keyword "covid" or "coronavirus" since Jan. 1, including any attachments to those emails; 3. All emails to and from Becky Wertz that include the keyword "covid" or "coronavirus" since Jan. 1, including any	news@dhhs.nc.gov	Acknowledged (4/10); further response (5/21) "working on it;" unfulfilled.

	attachments to those emails.		
12 April 2020	Copies of any documents (databases, email, memo, text message, or other communication) that contain the name of any congregate care facility in North Carolina at which a resident has been identified as COVID-positive. If, rather than provide public records it is easier to simply provide the names of such facilities via email, that is fine.	public.records@dhhs.nc.gov	Acknowledged (4/13); unfulfilled.
21 April 2020	<p>Copies of records showing:</p> <ul style="list-style-type: none"> -The total number of COVID-19 patients who have been or currently are in the ICU. -The total number of COVID-19 patients on ventilators. -The number of COVID-19 patients hospitalized each day between March 3, 2020 and present. -Any and all underlying data, documents or records that is used to update the COVID-19 North Carolina Dashboard, found at this web address: https://www.ncdhhs.gov/divisions/public-health/covid19/covid-19-nc-case-count#by-counties, including but not limited to: <ul style="list-style-type: none"> -Data, documents or records showing the number of positive COVID-19 tests in each county -Data, documents or records reflecting demographics of those who have tested positive for COVID-19 -Data, documents or records reflecting the dates of when specimens for COVID-19 tests were collected -Data, documents or records that show the number of inpatient hospital beds and ventilators at each hospital overtime (every day from March 1 to present). -Records that reflect which hospitals are reporting COVID-19-related information to the department OR data that the department is publishing on it's COVID-19 dashboard. -Records that reflect which laboratories are reporting both negative and positive COVID-19 tests to the department -Data, documents or records reflecting PPE requested and received from the Strategic National Stockpile overtime (every day from March 1 to present) -Data, documents or records reflecting positive COVID-19 cases, COVID-19-related deaths and COVID-19 outbreaks in congregate living settings reported to the department. 	Kelly.Haight@dhhs.nc.gov, Amy.Ellis@dhhs.nc.gov	Acknowledged (4/21); unfulfilled.
20 April 2020	Copies of records that show which long term care facilities have outbreaks	news@dhhs.nc.gov	Acknowledged (4/21); denied (5/12); unfulfilled.
27 April 2020	Copy of guidance to counties regarding withholding names of nursing homes, etc.	public.records@dhhs.nc.gov	Acknowledged (4/27); response to request for update (5/22);

			unfulfilled.
28 April 2020	Records reflecting the number of positive COVID-19 cases at the Wilson County Smithfield facility.	Peel, SarahLewis E" <sarahlewis.peel@dhhs.nc.gov>, "Haight, Kelly" <Kelly.Haight@dhhs.nc.gov>, "Ellis, Amy" <Amy.Ellis@dhhs.nc.gov	
30 April 2020	Records reflecting the number of COVID-19 tests by N.C. county. If a day to day data exists that will be preferred, if not I will settle for the most up to date total on hand when this request is fulfilled. Again, I would like COVID-19 tests broken down by county. I would prefer to receive this information electronically and ideally in an EXCEL format.	Charles.Epstein@dhhs.nc.gov	Acknowledged (4/30); unfulfilled.
1 May 2020	Correspondence between and among DHHS and long term care lobbyists/employees/PIOs	public.records@dhhs.nc.gov	Acknowledged (5/1); unfulfilled.
8 May 2020	Database of all open public records requests at DHHS, another of all requests regardless of status filed since March 1.	public.records@dhhs.nc.gov	Acknowledged (?); unfulfilled.
8 May 2020	Records of inmates hospitalized and in ICU.	news@dhhs.nc.gov	Acknowledged (5/8), tried to transfer to DPS (5/22); requester clarified request was to DHHS; unfulfilled.
15 May 2020	Records or portions thereof pertaining to COVID-19 testing data for zip codes. From the North Carolina Department of Health and Human Services, I would like to request the number of COVID-19 virus detection tests performed in each North Carolina zip code for which data is available. If data are incomplete due to laboratories not reporting to NC EDSS, I would like to request the NC State Laboratory of Public Health and/or county health department tests reported in NC EDSS for each North Carolina zip code.	public.records@dhhs.nc.gov; Kelly.Haight@dhhs.nc.gov	Acknowledged (5/15); Further response (5/27): "We appreciate your patience on this matter. Staff has been in communication with DPH, and they have informed us that DPH neither receives nor maintains COVID-19 test results broken down by zip code. Therefore, we have been unable to locate any records responsive to your request. Again, we thank you for your request and your patience, and consider this request closed."; unfulfilled.

37. Plaintiffs are not seeking confidential information or records. Plaintiffs have not requested any information about specific individuals or patients. Rather, plaintiffs have requested records reflecting only aggregated, non-patient information.

38. Further, NC DHHS' blanket refusal to produce records containing the information sought cannot be reconciled with North Carolina law.

39. The UNC School of Government confirms that, “[b]oth HIPAA and the state CD confidentiality law allow disclosure of communicable disease information that doesn’t identify individuals.” <https://canons.sog.unc.edu/keeping-the-public-informed-about-communicable-diseases/>

40. HIPAA has no role vis-à-vis non-covered entities, and even covered entities must disclose information if state law so provides. 45 CFR 164.512(a).

If a state agency is not a “covered entity”, as that term is defined at 45 CFR 160.103, it is not required to comply with the HIPAA Privacy Rule and, thus, any disclosure of information by the state agency pursuant to its state public records law would not be subject to the Privacy Rule.

If a state agency is a covered entity, however, the Privacy Rule applies to its disclosures of protected health information. The Privacy Rule permits a covered entity to use and disclose protected health information as required by other law, including state law. See 45 CFR 164.512(a). Thus, where a state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law.

<https://www.hhs.gov/hipaa/for-professionals/faq/506/how-does-the-hipaa-rule-relate-to-freedom-of-information-laws/index.html>

41. Moreover, the federal regulations’ definition of individually identifiable health information makes clear that the information plaintiffs seek is not confidential:

Individually identifiable health information is information collected from an individual that (1) is created or received by a health care provider, health plan, employer, or health care clearinghouse; and (2) relates to the past, present, or future physical or mental health or condition of an individual; the provision of health care to an individual; or the past, present, or future payment for the provision of health care to an individual; and (i) that identifies the individual; or (ii) with respect to which there is a reasonable basis to believe the information can be used to identify the individual.

45 C.F.R. 160.103.

47. The information plaintiffs have requested does not implicate individually identifiable health information, and North Carolina’s law therefore compels its disclosure upon request.

48. Additionally, both North Carolina's statute on the general confidentiality of medical information and the specific statute regarding communicable diseases speak to the confidentiality of individual information.

All records containing privileged **patient medical information**, information protected under 45 Code of Federal Regulations Parts 160 and 164, and information collected under the authority of Part 4 of Article 5 of this Chapter that are in the possession of the Department of Health and Human Services or local health departments shall be confidential and shall not be public records pursuant to G.S. 132-1.

N.C. GEN. STAT. § 130A-12 (emphasis supplied).

49. The incorporation of 45 C.F.R. 160 into the state law provides clarity that non-patient-specific information is not confidential. The same parameters exist in the communicable disease statute.

All information and records, whether publicly or privately maintained, that **identify a person** who has AIDS virus infection or who has or may have a disease or condition required to be reported pursuant to the provisions of this Article shall be strictly confidential.

N.C. GEN. STAT. § 130A-143 (emphasis supplied).

50. Plaintiffs have asked for, among other things, the identity of facilities with COVID-19 outbreaks, not of individuals.

51. For the same reasons, plaintiffs are informed and believe that the defendants are knowingly and intentionally violating the Public Records Law.

52. Defendants' failure to provide the requested records "as promptly as possible" is tantamount to a denial of plaintiffs' requests.

WHEREFORE, plaintiffs respectfully pray the court:

1. Accord this matter priority and set it down for an immediate hearing pursuant to N.C. GEN. STAT. § 132-9(1);

2. Enter a preliminary order requiring the defendants (a) to bring the requested records before the court for *in camera* review and (b) show cause, if any, why the plaintiffs are not entitled to obtain the requested records;

3. Enter an order declaring the requested records are public records pursuant to the Public Records Law and requiring the defendants to provide plaintiffs with copies of the same or electronic access to databases and public data, where available, immediately;

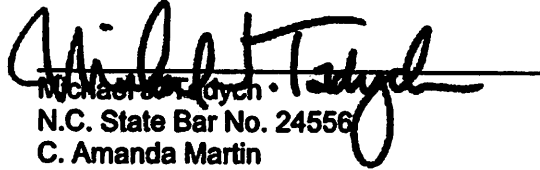
4. Enter an order requiring defendants provide plaintiffs with prompt access to comparable information, records and data requested in the future and in any event no more than ten (10) days after a request is made unless there is a specific statutory exemption from disclosure which defendants shall identify to plaintiffs within that time period;

5. Enter an order awarding plaintiffs their reasonable attorney fees pursuant to N.C. GEN. STAT. § 132-9(c); and

6. Provide plaintiffs with such further and additional relief as the court shall deem just, proper and authorized by law, and that the costs of this action be taxed against the defendants.

Respectfully submitted this the 28th day of May, 2020.

STEVENS MARTIN VAUGHN & TADYCH, PLLC

A handwritten signature in black ink, appearing to read "Michael J. Tadych", is written over a horizontal line. The signature is fluid and cursive.

Michael J. Tadych
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C. Amanda Martin
N.C. State Bar No. 21186
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VERIFICATION OF COMPLAINT

The undersigned Nicholas A. Ochsner, affirming under the penalties for perjury, that he has read the foregoing Complaint and that the allegations of fact made therein are true of his own knowledge, except as to the matters alleged upon information and belief, which allegations he is informed and believes to be true.

This 28th day of May, 2020.

Signature: 

Printed Name: NICHOLAS A. OCHSNER