

FILED

STATE OF NORTH CAROLINA
GUILFORD COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

2022 FEB 22 P 2:25 20-CVS-6454

GAIL DUNHAM,

Plaintiff,

GUILFORD CO., C.S.C.

BY *AM*

v.

SCOTT WHITAKER, in his
Capacity as the Manager of
the TOWN OF
SUMMERFIELD, NORTH
CAROLINA,

Defendant.

ORDER

THIS MATTER came on for hearing on February 10, 2022, pursuant to the Plaintiff's filing of her Complaint ("Cmplt.") for immediate relief pursuant to N.C. GEN. STAT. § 132-9 for access to Public Records from Scott Whitaker in his capacity as Town Manager for the Town of Summerfield. All parties were present through counsel. C. Amanda Martin and Elizabeth J. Soja of Stevens Martin Vaughn & Tadych, PLLC and James T. Crouse of Crouse Law Offices appeared for Plaintiff. Robert Hornik of The Brough Law Firm, PLLC appeared for Defendant.

The parties' agreed-upon Stipulations ("Stip.") were made a part of the record by filing on February 2, 2022. After considering the pleadings, the stipulations, the testimony of witnesses, the exhibits and the oral arguments of the parties, the Court finds as follows:

This lawsuit was brought by Plaintiff Gail Dunham, an individual resident of the Town of Summerfield, seeking two categories of public records from Defendant

Scott Whitaker, Town of Summerfield Town Manager. On November 19, 2019, the Plaintiff requested:

Electronic copies of all emails, sent or received, relating to the Town of Summerfield, whether sent or received on governmental, professional or personal email accounts/servers, sent to or received from any individual, group or entity, from October 1, 2017 to the present, November 19, 2019.

Stip. 14 and

Electronic copies of all emails, sent or received, relating to the Town of Summerfield, whether sent or received on governmental, professional or personal email accounts/servers, sent to or received from any individual, group or entity, from October 1, 2017 to present, November 19, 2019. The requested items include, but are not limited to: All emails related directly or indirectly to the Town of Summerfield or legal actions concerning the town sent or received, to or from individuals or any group or entity form the period October 1, 2017 until November 19, 2019.

Stip. 15.

On November 27, 2019, Plaintiff's counsel clarified the request sought Mr. Whitaker's emails maintained on governmental, professional or personal email accounts and servers. Cmplt. Ex. C; Stip. 16. On December 4, 2019, Plaintiff's counsel further clarified the request as applying to three email addresses that were or had been used by Mr. Whitaker. Cmplt. Ex. E; Stip. 17.

On January 3, 2020, Mr. Whitaker's counsel informed Ms. Dunham's counsel that the Town intended to charge a "special service charge" pursuant to N.C. GEN. STAT. § 132-6.2(b), which was estimated to be \$9400. Cmplt. Ex. F; Stip. 18. The basis for the special service charge was based on three components: the cost of the outside IT consultant to locate the requested documents (estimated to be \$293.56 for both requests), the time it would take the Town Manager to review the records and remove personnel records or privileged legal advice (estimated to be valued at

confidentiality. Mr. Whitaker testified that he does flag some outgoing emails with a denotation of asterisk and the word "Confidential," but that such designation is not necessarily a denotation of legal confidentiality or exemption from the Public Records Law.

Mr. Whitaker testified that he was told that compliance with Ms. Dunham's request would include approximately 13,000 emails, comprising approximately 44,000 pages. Mr. Whitaker stated that the existing Town of Summerfield Public Records Policy allows him discretion to assess a special service fee when he deems it appropriate, but he did not provide any objective parameters for when he would charge such a fee. Mr. Whitaker testified that some requesters, upon receiving an estimate of fees to be assessed, abandon their requests. Mr. Whitaker testified that he was aware of a request made by Beth Kaplan in 2018. Mr. Whitaker confirmed the authenticity of Exhibit 14, which reflects that the Town attorney (then William Hill) reviewed 8,000 emails in response to Ms. Kaplan's request and that the Town did not assess a special service fee for that work. Mr. Whitaker testified that Ms. Kaplan ultimately paid for Mr. Hill's time, two years after the fact and following a public controversy regarding the issue. Mr. Whitaker did not testify that the Town ever sought payment from Ms. Kaplan.

Stone PC Works! is the independent contractor that provides IT services to the Town of Summerfield. William Stone, the company's principal, testified that he received a request from the Town for an estimate of costs to produce the records requested by Ms. Dunham. Mr. Stone testified that the Town requested that he

\$7,900 for both requests) and the time it would take the outside counsel to assure privileged legal records had been removed (estimated to cost \$1,200). Stip.19.

After receiving the cost estimate of \$9,400 and prior to instituting litigation, Plaintiff's counsel wrote to Defense counsel on at least four occasions challenging the Town Manager's legal basis for asserting a special service fee. Cmplt. Exs. G, H, I and K.

More than eight months after her original public records requests were made, the Plaintiff filed this lawsuit. On November 18, 2021, the Plaintiff paid under protest the Town's estimated fee for IT Consultation (\$293.56) to gather the records that were responsive to the Plaintiff's requests. Stip. 27. The IT contractor did in fact identify and gather the responsive records. Stip. 28.

The parties stipulated that except for records specifically exempted from the public records law by statute or other law, the records sought are public records as defined by North Carolina Public Records Law, N.C. GEN. STAT. § 132-1 *et seq.* The parties stipulate and the Court agrees that the sole question for determination by the Court is whether the Town may charge for the time of the Town Manager and Town Attorney to review the requested emails and remove those portions of the requested records that contain either confidential personnel information or privileged attorney-client communications. Stip. 37, 39.

Mr. Whitaker testified that he is a salaried employee who is not paid overtime if he works beyond 40 hours per week. Mr. Whitaker testified that he does not sort his emails into folders, because an email might relate to more than one issue. He testified that he does not flag incoming emails in any way with regard to

identify and retrieve the requested records and convert them to a PDF format. Mr. Stone testified that the initial identification and download of the requested records in “.pst” format took approximately two to three hours and that the conversion to PDF process took approximately 17 to 18 hours. Mr. Stone testified that he has asked the Town about producing records more efficiently, such as in the .pst format, and that he received no response from the Town.

North Carolina’s Public Records Law declares that the public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. N.C. GEN. STAT. § 132-1(b). The law does not place a limit on the size request a citizen may make or permit a public agency to alter its response based on the reasons an individual requests a record.

At the time Mr. Whitaker began as Town Manager for the Town of Summerfield, there was Town Public Records Policy, POL 2012-002. That 2012 Policy was replaced in 2018 with a new Public Records Policy, POL 2018-001. When Mr. Whitaker accepted the job as Town Manager, he knew he was going to be a public official and that part of his job would be to fulfill public records requests. Mr. Whitaker testified that at the time he took the job, he knew there was a backlog of public records requests.

Mr. Whitaker’s testimony demonstrates that he is exercising unfettered discretion to assess a special service charge in an amount he decides using a formula he decides to charge certain citizens to get public records they request while not charging others. Mr. Whitaker testified that part of the reason he and

counsel would not meet with Ms. Dunham to discuss her request was because she was an “unforgiving client” and because she was one of the Town’s most frequent requesters of public records. Any system that allows such discretion affords no consistency or fairness.

N.C. GEN. STAT. § 132-6(c) provides, “If it is necessary to separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of the public records, the public agency shall bear the cost of such separation.” Mr. Whitaker has argued that N.C. GEN. STAT. § 132-6.2(b) permits the levy of a “special service charge” in the event a request requires extraordinary time be spent by the Town Manager or Town Attorney and that Section 6(c) and Section 6.2(b) are in conflict.

The Court finds no conflict between N.C. GEN. STAT. § 132-6(c) and § 132-6.2(b). In interpreting any statutes, the Court must give words their plain meaning, *Wilkie v. City of Boiling Spring Lakes*, 370 N.C. 540, 547, 809 S.E.2d 853, 858 (2018), and the Court must be guided by legislative intent. *LexisNexis Risk Data Mgmt. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 187, 775 S.E.2d 651, 656, (2015). The clear intent of the legislature is that the records at issue are the property of the people; they are to be made accessible to the people upon request; and copies shall be provided free or at minimal costs. N.C. GEN. STAT. § 132-1(b). *See also DTH Media Corp. v. Folt*, 374 N.C. 292, 300-01 (2020).

The testimony suggests the Town Manager has created an added burden on himself by deciding not to utilize a system to flag or sort confidential records. The

Town Manager has chosen not to use any system that is conducive to the fact that he is a public official who will get public records requests and will be called upon to withhold those records that are legally confidential. Having chosen to keep his emails in such a fashion, he is not entitled to assess the public a special service fee for the time it takes him to comply with the public records law.

No public agency or public official is entitled to assess an extra fee for identifying confidential records to be withheld from public inspection and producing those that are not confidential. The "special service fee" described in N.C. GEN. STAT. § 132-6.2(b) "cannot be charged to recover fees for time spent examining or removing confidential information from records." North Carolina Department of Justice Open Government Guide, <https://ncdoj.gov/public-protection/open-government/>. Likewise, a public agency may not pass to the public attorney fees for the review of what records must be produced under the Public Records Law and what records may or must be withheld.

Under the public records law, no public official may charge an extra fee or "special service charge" for performing the duties inherent to his or her position. The fact that the defendant has made those duties more complicated by his own practices does not justify assessing a special service charge to the Plaintiff.

The Defendant's refusal to produce to the Plaintiff the public records she requested unless she paid a special service fee was tantamount to a denial of her request and was a violation of the North Carolina Public Records Law. The Plaintiff is the prevailing party in this matter. In demanding the Plaintiff's payment of an

unjustified fee, the Defendant did not rely on a judgment or an order of a court applicable to the governmental unit or governmental body; the published opinion of an appellate court, an order of the North Carolina Business Court, or a final order of the Trial Division of the General Court of Justice; or a written opinion, decision, or letter of the Attorney General. Accordingly, the Plaintiff is entitled to a recovery of her reasonable attorney fees pursuant to N.C. GEN. STAT. § 132-9(c).

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

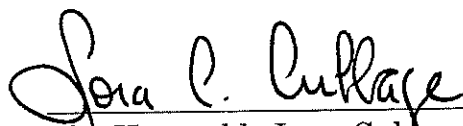
The Court grants judgment for the Plaintiff with respect to all issues;

The Court orders all responsive records to be produced to Plaintiff no later than 5:00 p.m. on February 18, 2022, at no cost to the Plaintiff; and

The Court awards attorney fees and costs to the Plaintiff in the amount of \$69,829.46.

IT IS SO ORDERED.

This the 10th day of February 2022.



The Honorable Lora Cabbage
Superior Court Judge Presiding