

STATE OF NORTH CAROLINA
COUNTY OF GUILFORD

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 08-CVS-

ROCH SMITH JR;)
SAMUEL S. SPAGNOLA)
)
 Plaintiffs,)
)
 vs.)
)
CITY OF GREENSBORO)
)
 Defendant.)

COMPLAINT

NOW COMES the Plaintiff, complaining of the Defendant, and alleges:

JURISDICTION AND PARTIES

1. Plaintiff Roch Smith Jr. is a citizen and resident of Greensboro, North Carolina.
2. Plaintiff Samuel S. Spagnola is a citizen and resident of Oak Ridge, North Carolina, with a principal business, The Spagnola Law Firm, P.L.L.C., located in Greensboro, North Carolina.
3. Plaintiff's live and/or regularly conduct business within the City of Greensboro and are entitled to a determination of the matters in controversy as set forth in this complaint.
4. The Defendant City of Greensboro is a governmental unit of the State of North Carolina as defined by N.C.G.S. § 132-1.
5. This is an action pursuant to N.C.G.S. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure seeking a declaratory judgment that the Defendant is in violation of the North Carolina Public Records Act., N.C.G.S. § 132-1, *et seq.* by refusing to disclose and make available to the public in general and Plaintiff's in particular certain documents and information as set forth below.
6. The Plaintiff's seek an order from this Court declaring that the documents and information sought from the Defendant are public records and compelling the Defendant to make said documents and information immediately available to the Plaintiff and the public.
7. Additionally, Plaintiff seeks to recover reasonable attorney's fee based on the normal hourly rate for counsel pursuant to N.C.G.S. § 132-9(c).

FACTS

8. The allegations contained in Paragraphs 1 through 7, *supra*, are incorporated by reference.

9. That during the Fall of 2005, the Defendant (the "City") contracted with Risk Management Associates ("RMA") to conduct an investigation of the Greensboro Police Department under the leadership of then police chief David Wray ("Wray"). Some of the main complaints against Wray were from various police officers who claimed that Wray and some members of his top command engaged in racially discriminatory practices against black officers, including the use of a "black book" as described in Paragraph 19, *infra*. The City Manager's office began an investigation of the allegations. Upon information and belief, RMA was brought in to "to provide a continuous objective oversight of the investigative process to ensure that it remained unbiased and that it followed accepted investigative practices."

10. The in a letter to the City Staff from City Manager Mitchell Johnson ("Johnson"), Johnson explains that he hired RMA for the "purpose of seeking third-party expertise...to understand what was appropriate and was not appropriate in the normal course of Police administration, and more specifically in the investigations of officers."

11. That RMA is not, nor have they ever been, employees of the City and are not a governmental agency.

12. That during the course of the RMA investigation, certain personnel information that may have been exempt from public disclosure pursuant to N.C.G.S. § 160A-168 was made available to RMA.

13. That RMA completed their report ("RMA report") in the late Fall of 2005 and delivered it to Johnson some time thereafter.

14. That based in part on the conclusions of the RMA report, Wray resigned when it became clear to him that the City intended to terminate Wray's employment.

15. On November 6, 2007, Plaintiff's sent a letter to the City asking that the RMA report be made available to them as a public record.

16. On January 23, 2008, the Plaintiff's received a response from the City wherein the City refused to release the RMA report on the basis that the report was a personnel record and therefore protected from disclosure pursuant to N.C. G. S. § 160A-168.

17. On January 30, 2008, the Plaintiff's responded to the City and asked that the City name the employee files that contained the RMA report as a "personnel record" so that the Plaintiff's could seek the release of that portion of the employees record pursuant to N.C.G.S. § 160A-168 (C)(1) if it was determined that the RMA report was in fact a personnel record. The City did not respond to this request.

18. Also included in the Plaintiffs letter of November 6, 2007 was a request that a certain photo lineup commonly referred to as the "black book" be released to the Plaintiff's. This "black book" was allegedly used for illegitimate purposes by some of Wray's top commanders to discriminate against black police officers. The Plaintiff's requested that the "black book and all related documents" be released to them under the public records laws of North Carolina.

19. In their January 23, 2008 response to the Plaintiff's request, the City claimed that the "black book" was not a public record because it was a record of a criminal investigation pursuant to N.C.G.S. § 132-1.4 and denied the Plaintiff's request.

20. In the January 30, 2008 response to the Defendant's January 23, 2008 letter, the Plaintiffs asked for clarification as to the nature of the criminal investigation that the City was relying on to invoke the exception under N.C.G.S. § 132-1.4. The City did not respond to this request.

21. In addition to the request for the RMA report and the "black book", the Plaintiff's also requested in their November 6, 2007 letter to the City the following:

"All City Council correspondence, notes, documents, transcripts or recordings in any form regarding the investigation of the Greensboro Police Department under the administration of David Wray.

INCLUDING:

- a) Correspondence in any form, including notes, transcripts and recordings of oral communications, between City Manager Mitch Johnson and any City Council member or members.
- b) Correspondence in any form, including notes, transcripts and recordings of oral communications, between David Wray and any City Council member or members.
- c) Correspondence in any form, including notes, transcripts and recordings of oral communications, between Risk Management Associates and any City Council member or members.
- d) Correspondence in any form, including notes, transcripts and recordings of oral communications, between any City Council member or members and any other City Council member or members.
- e) Correspondence in any form, including notes, transcripts and recordings of oral communications, between any City Council member or members and any city staff person not in the City Attorney's office.
- f) Correspondence in any form, including notes, transcripts and recordings of oral communications, between any City Council member or members and any law enforcement or investigative agency.

City Manager correspondence, notes, documents, transcripts or recordings in any form regarding the investigation of the Greensboro Police Department under the administration of David Wray.

INCLUDING:

- a) Correspondence in any form, including notes, transcripts and recordings of oral communications, between City Manager Mitch Johnson and City Council.
- b) Correspondence in any form, including notes, transcripts and recordings of oral communications, between David Wray and Mitch Johnson.
- c) Correspondence in any form, including notes transcripts and recordings of oral conversations, between City Manager Mitch Johnson and Risk Management Associates.
- d) Correspondence in any form, including notes transcripts and recordings of oral conversations, between City Manager Mitch Johnson and city staff not in the City Attorney's office.

e) Correspondence in any form, including notes, transcripts and recordings of oral communications, between City Manager Mitch Johnson and any law enforcement or investigative agency....

... All correspondence, notes, documents, case files, transcripts and recordings, in any form, received by City Council, any city staff or department from any law enforcement, investigative or accrediting agency relating to the Greensboro Police Department under the command of former chief David Wary.

INCLUDING:

...Reports or communications relating to the accreditation of the Greensboro Police Department being in jeopardy.

...Any documents collected from former police chief David Wray's office.

INCLUDING

A file containing information about Project Homestead, reported to have been among items removed from former police chief David Wray's office by city officials but absent from items returned to him.

...All notes, reports, documents and correspondence in any form reporting the results of a polygraph test taken by eight city council members and administered by Risk Management Associates of Raleigh.

...All minutes, notes, transcripts, list of attendees and recordings in any form from a meeting of city staff with members of the community held at Genesis Baptist Church on or about April 20, 2006 and all correspondence in any form to or from city staff and city council relating to this meeting prior or subsequent to this meeting.

...All correspondence, notes, documents, transcripts and recordings in the possession of the city legal staff regarding Project Homestead that are older than three years as required by law.

INCLUDING:

a) Correspondence in any form, including notes, transcripts and recordings of oral communications, between any City Legal staff and any party regarding Project Homestead.

b) Notes or any other record of any City Council member seeking advice for funding for Project Homestead.

22. The City has provided some heavily redacted minutes from City Council closed sessions between January 2006 and October 2007.

23. To date the City has refused to release all of the records listed in Paragraphs 21 and 22, nor offered any legal excuse for the refusal.

**FIRST CLAIM FOR RELIEF
DECLARATORY JUDGMENT**

24. The allegations contained in Paragraphs 1 through 23, *supra*, are incorporated by reference.

25. Subject to certain exceptions, all “public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people”. N.C.G.S. § 132-1.

26. The Defendants refusal to release the RMA report under the claim that it is a personnel record pursuant to N.C.G.S. § 160A-168 is rejected by the ruling in News and Observer Publishing Company, Inc. v. Poole, 350 N.C. 465 (1992). In Poole, the Court held that under a similar statute, information gathered by a third party as part of an investigation is not a personnel record unless the information was first gathered by the employing state agency. Poole, 350 N.C. at 475. RMA was a third party by the own admission of Greensboro City Manager Mitchell Johnson, hired to conduct an investigation by the Defendant, and was not the employer of any subject investigated. Information gathered by RMA as a result of their third party investigation cannot be protected from public disclosure pursuant to the rule in Poole.

27. The Defendant’s refusal to release the “black book” under the claim that it is exempt from public disclosure pursuant to N.C.G.S. § 132-1.4 is rejected because that statute refers to records of “criminal investigations”. “Records of criminal investigations” means all records or any information that pertains to a person or group of persons that is compiled by public law enforcement agencies for the purpose of attempting to prevent or solve violations of the law...” N.C.G.S. §132-1.4(b)(1). However, the Defendant has claimed that the “black book” was not “compiled” for the purpose of attempting to prevent or solve violations of the law. Instead, the City Manager Johnson has publicly claimed that black officers who appeared in the book should feel “uncomfortable” and “targeted” and the Defendant has never admitted that there was ever any lawful purpose of attempting to prevent or solve a violation of the law associated with the compilation of the “black book” to bring the document within the protection of N.C.G.S. § 132-1.4(b)(1), nor has the Defendant informed the Plaintiff of what violation of the law the Defendant was “attempting to prevent or solve” when the “black book’ was created.

28. Upon information and belief, there exist additional documents associated with the “black book” that may explain its lawful purpose as an “attempt to prevent or solve violations of the law” but the Defendant has refused to provide those documents to the Plaintiff or the public.

29. The Defendant has offered no explanation or legal justification for their refusal to release the documents contained in Paragraphs 21 and 22, *supra*.

30. The refusal of the Defendant to release the documents requested violates N.C.G.S. 132-1 *et seq*.

31. That a controversy exists between the parties regarding the interpretation of N.C.G.S. § 132-1; N.C.G.S. § 132.1.4 and N.C.G.S. § 160A-168. Said controversy is immediate in nature and justifies the issuance of a judgment pursuant to the Declaratory Judgment Act.

32. That the issuance of a declaratory judgment by the Court will resolve some or all matters of controversy existing between the Plaintiff’s and Defendant.

33. Pursuant to N.C.G.S. § 1-253 and Rule 57 of the North Carolina Rules of Civil Procedure, the Plaintiff’s are entitled to a declaratory judgment that the documents requested from the Defendant are public records as defined by N.C.G.S. § 132-1 *et seq*. and that Defendant’s refusal to provide the documents as requested by the Plaintiff violates N.C.G.S. § 132-1 *et seq*.

34. The Plaintiff is entitled to an order compelling the Defendant to release the documents in question to the Plaintiff pursuant to N.C.G.S. § 132.9.

**SECOND CLAIM FOR RELIEF
ATTORNEYS FEES**

35. The allegations contained in Paragraphs 1 through 23, *supra*, are incorporated by reference.

36. Should the Plaintiff prevail in this action and the Court declares that some or all of the documents requested by the Plaintiff be released to the Plaintiff, the Plaintiff is entitled to recover from the Defendant their reasonable attorney's fees pursuant to N.C.G.S. § 132-9(c).

WHEREFORE, Plaintiff prays the Court grant the relief requested as follows:

1. That the Court schedule this matter for a hearing as soon as is practicable as required by N.C.G.S. § 132-9(a).
2. In addition to the documents contained in Paragraphs 21 and 22, *supra*, the Plaintiff's ask that the Court declare all contracts between the City of Greensboro and Risk Management Associates to be public records and that they be produced immediately to the Plaintiff's.
3. That the Court conduct an in camera review of the documents described in Paragraph 22, *supra*, to determine whether the redactions by the City are justified under the public records laws of North Carolina.
4. That the Court issue an order declaring that the documents requested by the Plaintiff are public records as defined by N.C.G.S. 132-1 et seq.
5. That the Court issue an order compelling the Defendant to provide the requested documents to the Plaintiff.
6. That the costs of this action as well as reasonable attorney's fees incurred by the Plaintiff's be taxed to the Defendant.pursuant to N.C.G.S. § 132-9(c).
7. For any such further relief that the Court deems appropriate.

This the _____ Day of _____, 2008.

Samuel S. Spagnola
Attorney pro se & for Plaintiff Roch Smith Jr.
100 S. Elm Street, Suite 430
Greensboro, NC 27401
336-373-8469
NC Bar# 25671

**COUNTY OF GUILFORD
STATE OF NORTH CAROLINA**

VERIFICATION

ROCH SMITH JR., being first duly sworn, deposes and says that he is the Plaintiff in the above entitled action. That he has read the foregoing Complaint and knows the contents thereof, and that said contents are true of his own knowledge, save and except for those matters and things stated therein upon information and belief, as to such matters and things, he believes said contents to be true.

ROCH SMITH Jr.

Sworn to and subscribed to before me

this the _____ day of _____, 2008.

NOTARY PUBLIC

My commission expires:

**COUNTY OF GUILFORD
STATE OF NORTH CAROLINA**

VERIFICATION

SAMUEL S. SPAGNOLA, being first duly sworn, deposes and says that he is the Plaintiff in the above entitled action. That he has read the foregoing Complaint and knows the contents thereof, and that said contents are true of his own knowledge, save and except for those matters and things stated therein upon information and belief, as to such matters and things, he believes said contents to be true.

SAMUEL S. SPAGNOLA

Sworn to and subscribed to before me

this the _____ day of _____, 2008.

NOTARY PUBLIC

My commission expires: