Coates' Canons Blog: Is That All There Is? Strategies for Proving a Negative When a Person Alleges That Their Request for Records Has Not Been Fulfilled

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The breadth of the North Carolina Public Records Law and the explosion of digital public records have resulted in frequent and voluminous requests for public records. Such requests are time-consuming and often include records that exist only on the personal devices of individual employees and officials. In these situations, the agency must rely on those individuals to search for records and provide access to those records that are responsive to the request. Even after an agency spends extensive time and effort in collecting the records, the requesters may doubt that the agency has actually provided all there is. This issue may end up in litigation with the requester alleging that they have been denied access to public records that they believe exist but that have not been provided. How can the agency prove that the records provided are really are all there is? And how can the requester prove that the agency has not provided records the agency says they don't have? A North Carolina Court of Appeals case, Ochsner v. N.C. Dept. Revenue, addresses these questions and endorses some strategies that can help break this potential stalemate.

The Public Records Act requires custodians of records to provide access to public records. As I described in an earlier blog post, the definition of "custodian" is a bit out of date.

> Custodian designated: The public official in charge of an office having public records shall be the custodian thereof. GS 132-2.

Many public records do not exist in offices. They might exist on mobile devices, in private homes, on servers, in the cloud, and in other places in which there is no public official in charge. The law does, however, hold individuals who have physical custody of public records responsible for providing access to access to them if they are responsive to a request.

> [T]he court may order that all or any portion of any attorneys' fees so assessed 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 this Article. GS 132-9(c)(emphasis added).

A Hypothetical Example: A developer has applied for a special use permit in order to build a shopping center in the Park District of the city. It's a large, controversial development and an organization of citizens – Green Alliance to Save the Park (GASP) – is concerned that the developer may be using back channels to garner support for the permit. GASP wants to see whether there has been communication between the developer and members of the city council. GASP submits the following request:

> Copies of all written communication, including but not limited to email, text messages, letters and memos, sent or received regarding the pending special use permit application for the new shopping center in the park district. Also, all written communication, including but not limited to email, text messages, letters or memos, sent or received containing the following words: "Southern Developers, Inc" (the company applying for the permit).; "Peggy Lee" (CEO of the developer); "Green Alliance to Save the Park"; and "GASP".

The city searches for paper records in the city offices and for digital records stored in their computers and servers. They also ask all employees, council members, and appointed board members to search for records responsive to the request, including records that exist on their privately-owned devices or accounts. The city reviews the records, compiles the records that can be released, and turns them over. After reviewing the records GASP responds that some records have been left out. For example, they note that some of the records that GASP has sent to the board members are not included. And the mayor responded that she had no records at all on any private devices or accounts. GASP has heard that the CEO Peggy Lee is a golfing buddy of the mayor and that she has been communicating with the mayor about the

development. The city replies that they have reviewed everything and that's all there is. GASP is not satisfied and files a lawsuit under GS 132-9:

> Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A-38.3E [mediation].

In order to have standing to sue, the plaintiffs must be able to demonstrate that they have been denied access to public records. To meet that standard, GASP lists their suspicions about records they believe exist. To prevail in the lawsuit, the city has to prove that they have provided all the records that are responsive, and that there are no other records that are responsive to the GASP's request. This sets up a situation in which each party has a burden to prove a negative.

A Real Case: Just this situation was addressed in *Ochsner v. N.C. Dep't of Revenue.* Nicholas Ochsner, an investigative reporter, requested copies of records related to his taxes. The department provided over 13,000 records and asserted that those were all of the records that were responsive within the scope of the request. In addition, the department provided sworn statements from agency employees setting forth the process they undertook, including a certification from its public affairs director, who oversees public records requests, stating that the search was full and complete. The plaintiff alleged that the department did not provide all of the records that exist, and requested that he be allowed to engage in additional discovery. Recognizing the standoff presented by the parties, the court noted:

> We appreciate the difficulty to both Plaintiff and Defendant. The law generally does not require a party to prove the negative, but here, both sides are placed in this position. Defendant has certified that certain personal text messages or emails do not exist, and Plaintiff asks Defendant to prove the negative: that certain personal text messages or emails do not exist. If they do not exist, as Defendant has certified under oath, Defendant cannot produce anything more to prove their nonexistence. On the other side, Plaintiff contends that Defendant did not do a full, good faith search of all of the information in the possession or control of Defendant's employees or other individuals, as the request may apply to personal email accounts, computers, or phones. Since he cannot have direct access to those sources to ensure that every person's accounts and information have in fact been properly searched, Plaintiff is attempting to prove that Defendant did not do what it claims it did. *Ochsner*, slip op 29.

Court Sanctioned Legal Standards: In *Ochsner* the court sanctions two standards, one for each party, that can be used to support their respective competing postions. For the defendant, the court accepted the agency's certification and sworn statements, which set out how the department responded to the request, relying on a standard articulated here:

> Where plaintiffs have sought public records and the agency determines those records do not exist, the agency may show *"the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts." Ochsner,* slip op at 26, citing *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006)(emphasis added).

In *Ochsner*, the department's public affairs director met with the directors of each of the agency's twenty-four departments and instructed every employee to search personal and work email and text accounts for communications from the identified individuals. The directors of each department then certified that the searches in their departments were completed and reported the results of the searches. The court determined that the defendant's sworn declarations were sufficient to show that agency had conducted a reasonable search.

For the plaintiff, the court accepted a standard set out in a North Carolina Supreme Court case. In *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205 (2010), the Court held that for a plaintiff to obtain an order requiring the agency to search for more records, the plaintiff must show a "reasonable inference" that some responsive documents had not been provided. In the *State Employees* case, the plaintiff identified *specific reasons* supporting the belief that additional public records existed but had not been provided. The plaintiff noted, for example, that some documents that were provided contained enclosures that were not provided, and that some documents that were referred to in other records, were not provided. The plaintiff in that case also pointed to the size of the fee paid to the retained law firm and the number of hours that the firm must have worked on this issue. The plaintiff suggested that there must have been electronic or written correspondence between the department and the law firm regarding the public information request, yet, no copies of any such correspondence were produced. Because the plaintiff could identify records that

existed the court concluded that the agency had not meet their obligation under the statute. In *Ochsner*, however, since the plaintiff cited only *his disbelief* that the agency had produced all the records, the court held that he had not met the standard necessary to prove that he had been denied access to public records.

The point here is that it's not enough for the plaintiff to say, "I think there's more." But if there is a reasonable inference that there is more, a plaintiff may be able to meet the standard for alleging that she has been denied access to public records. In *Ochsner*, the court concluded:

> Defendant produced over 13,000 pages of information to Plaintiff, but Plaintiff has not identified anything from those documents which might lead to a "reasonable inference" that other responsive documents exist. Plaintiff has identified no "specific reasons why plaintiff believed that additional public records implicated by its initial requests existed, but had not been provided. *Ochsner*, slip op. at 32 (citing *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer)*.

Back to Our Hypothetical Example: In light of the ruling in *Ocshner*, how should GASP fare with their allegations regarding their records request?

GASP notes that some of the emails that GASP itself had sent to the board members were not included. This might not be very persuasive. Depending upon the content of those records, board members might simply not have saved them. Record retention schedules allow the destruction of records that do not have administrative or historical value.

The mayor responded that she had no records on any private devices or accounts. In *Ochsner*, the plaintiff simply did not believe that this could be true. But as with emails, many text messages have no lasting value and are not retained. More importantly, the court held that it's not enough to question whether the response in insufficient. There must some reasonable basis to suspect that records exist and were not provided.

GASP had heard that CEO Peggy Lee is a golfing buddy of the mayor and that she had been communicating with the mayor about the development. Given the standard set out in the case law, it seems clear that a supposition such as this is insufficient make a case of denial of the records.

Advice for public agencies: Document the process you undertook, and have individuals certify, under oath, that they have searched all public and private devices and accounts, especially if they found no records that were responsive.

Advice for plaintiffs: It's not enough just to be skeptical. You need to have a reasonable inference that records that exist have not been provided.

Links

- www.nccourts.gov/documents/appellate-court-opinions/ochsner-v-nc-dept-of-revenue
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_132.html