STATE OF NORTH CAROLINA COUNTY OF GASTON	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15-CVS-3203
DAN DEITZ and ELLEN DEITZ TUCKER, Plaintiffs, v. CITY OF BELMONT, BARRY WEBB, in his official capacity as City Manager for the City of Belmont, Defendants.	**MEMORANDUM IN SUPPORT OF DEFENDANTS' MOTION TO DISMISS AND IN OPPOSITION TO PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT**

COME NOW the Defendants, the City of Belmont (the "City") and Barry Webb ("Webb"), by and through their undersigned counsel and pursuant to Rules 12 and 56 of the North Carolina Rules of Civil Procedure, and respectfully submit the following Memorandum in Support of their requests that the Court GRANT Defendants' Motion to Dismiss Plaintiffs' Complaint for failure to state a claim upon which relief may be granted and DENY Plaintiffs' Motion for Summary Judgment.

ISSUES PRESENTED

I. **SHOULD THE CLAIMS AGAINST THE CITY MANAGER IN HIS OFFICIAL CAPACITY BE DISMISSED AS DUPLICATIVE OF THE CLAIMS AGAINST THE CITY?**

II. **ARE DEFENDANTS ENTITLED TO DISMISSAL OF PLAINTIFFS' COMPLAINT FOR FAILURE TO STATE A CLAIM UNDER THE PUBLIC RECORDS ACT?**

III. **SHOULD PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT BE DENIED FOR FAILING TO DEMONSTRATE AS A MATTER OF LAW THAT THE ISS REPORT IS NOT PROTECTED AS A PERSONNEL RECORD SUBJECT TO DISCLOSURE ONLY AS PERMITTED BY N.C. GEN. STAT. § 160A-168?**

STATEMENT OF FACTS

Plaintiffs, Dan Deitz and Ellen Deitz Tucker, are North Carolina residents. (Compl. ¶¶ 11-12.) They submitted a public records request to the City of Belmont on July 8, 2015, which request and response are attached in full to the Complaint. (Compl. ¶¶ 11-12.) The City of Belmont is a North Carolina municipal corporation. (Compl. ¶ 14.)

Upon deciding to conduct an "internal personnel investigation," into "allegations of misconduct and mismanagement within the Belmont Police Department," the City retained the U.S. ISS Agency, LLC ("ISS"). (Compl. ¶¶ 25-26.) ISS did conduct the "internal personnel investigation" and released a report detailing misconduct by Belmont PD officers to the City. (*hereinafter*, "ISS Report"). (Compl. ¶¶ 29-33.) As a result of the Report, the City terminated the employment of Chief of Police Charlie Franklin, which Notice of Termination was attached to the Plaintiffs' Complaint. (Compl. ¶¶ 33-34, Ex. C.)

Plaintiffs requested a complete copy of the ISS Report through a private investigator on June 4, 2015 and through counsel on July 8, 2015. (Compl. ¶¶ 35-36.) These requests were denied pursuant to N.C. Gen. Stat. § 160A-168, which protects the privacy of city employees' personnel records. (Compl. ¶¶ 35-37.)

According to Barry Webb, who was the City Manager at the time the ISS Report was gathered by the City, ISS investigated allegations of mismanagement and misconduct, with respect to other employees and resources of the Belmont PD, by three specific Belmont PD employees.(Aff. of Barry Webb in Opp. to Pls.' Mot. for Summ. J., May 10, 2016, ¶¶ 4-6.) Webb gave information regarding the alleged misconduct to ISS and directed their search for information. (Webb Aff. ¶ 7.) ISS was retained because the City did not have sufficient resources available to conduct the type of investigation needed. (Webb Aff. ¶ 8.) To conduct the

investigation, ISS interviewed many employees of the Belmont PD, who were instructed that: the same policies applied to the interviews as if they were conducted by the city, that the interviewee had the same rights and waivers of rights as if the interviews were conducted by City officials, and that interviewees were expected to give the same level of cooperation during the interviews as if they were conducted by City officials. (Webb Aff. ¶¶ 9-12, Exs. A-B.)

The scope of the investigation included only internal administrative and personnel topics, based upon the allegations of misconduct against three specific individuals. (Webb Aff. ¶¶ 13-14.) The final ISS Report served as the basis for decisions to take disciplinary action against the three individuals investigated; however, two of the individuals left the Belmont PD before the actions could be taken. (Webb Aff. ¶¶ 14-15.) One individual, however, was terminated as a result of the ISS Report. (Webb Aff. ¶ 15.)

ARGUMENT

Plaintiffs' Complaint and Motion for Summary Judgment, although evaluated upon differing legal standards and evidence, both fail to disprove the City's original reason for refusing to disclose the ISS Report: that it is a personnel record protected under N.C. Gen. Stat. § 160A-168. Thus, Plaintiffs' Complaint should be dismissed for failure to state a claim, because the facts as pled by Plaintiffs show that Plaintiffs have requested a document that is not a public record. Dismissal is warranted if an examination of the complaint reveals that no law supports the claim, or that sufficient facts to make a good claim are absent, or that facts are disclosed which necessarily defeat the claim. *Wood v. Guilford Cnty.*, 355 N.C. 161, 166, 558 S.E.2d 490, 494 (2002) (citation omitted). "In ruling on a Rule 12(b)(6) motion to dismiss, the trial court regards all factual allegations of the complaint as true… . [l]egal conclusions, however, are not entitled to a presumption of truth." *Walker v. Sloan*, 137 N.C. App. 387, 392, 529 S.E.2d 236,

241 (2000) (internal citations omitted). Further, the Court is "not required ... to accept as true allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences." *Izydore v. Tokuta*, __ N.C. App. __, 775 S.E.2d 341, 345 (2015) (*citing Strickland v. Hedrick*, 194 N.C. App. 1, 20, 669 S.E.2d 61, 73 (2008)).

Plaintiffs have pled that the ISS Report documents an internal investigation into misconduct by Chief Franklin and served as the basis for Franklin's dismissal, with his termination letter attached to the Complaint. Plaintiffs' legal allegations that the conduct of interviews and drafting of the ISS Report by U.S. ISS Agency do not constitute "gathered by the City" and that, upon information and belief, the ISS Report is not "with respect to" individual employees, are not entitled to the Court's deference and not supported by the law. The well-pled facts of Plaintiffs' Complaint show that Plaintiffs are not entitled to disclosure of the ISS Report, because it is a protected personnel record under N.C. Gen. Stat. § 160A-168; therefore, Plaintiff's Complaint should be dismissed for failure to state claim upon which relief may be granted.

Even if Plaintiffs' Complaint is determined to state a claim for relief, Plaintiffs are not entitled to summary judgment on their claim for disclosure of the ISS Report, because the evidence available from the "pleadings, depositions, answers to interrogatories, and admissions on file" show that Plaintiffs have not met the standard for summary judgment: "that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. R. Civ. P. 56(c) (2015). Aside from the admissions and answers to interrogatories obtained from Defendants, Plaintiffs have submitted no other evidence for the Court's consideration in reviewing their Motion. Further, "[t]he evidence forecast by the party against whom summary judgment is contemplated is to be indulgently regarded, while that of the party

to benefit from summary judgment must be carefully scrutinized." *Bird v. Bird*, 363 N.C. 774, 777, 688 S.E.2d 420, 422 (2010). As cited above, Defendants have submitted the Affidavit of Barry Webb in opposition to Plaintiffs' Motion for Summary Judgment, pursuant to Rule 56(e). Viewing the Webb Affidavit and the admissions and answers to interrogatories by Defendants in the light most favorable to Defendants, Plaintiffs have failed to establish that they are entitled as a matter of law to the disclosure of the ISS Report and their Motion for Summary Judgment should be denied.

I. PLAINTIFFS' CLAIMS AGAINST THE CITY MANAGER IN HIS OFFICIAL CAPACITY SHOULD BE DISMISSED AS A MATTER OF LAW AS DUPLICATIVE OF THE CLAIMS AGAINST THE CITY, WHICH IS NAMED AS A DEFENDANT TO THIS ACTION.

The claims against Barry Webb, and later changed to refer to Adrian Miller, limited to their official capacity as City Manager, should be dismissed as duplicative, because official-capacity claims are treated as claims against the municipality and Plaintiffs have already asserted the same claims against the City of Belmont. North Carolina state courts have held that when governmental employees are sued in their official capacities, "the claim is against the office the employee holds rather than the particular individual who occupies the office." *May v. City of Durham*, 136 N.C. App. 578, 584, 525 S.E.2d 223, 229 (2000) (*citing Kentucky v. Graham*, 473 U.S. 159 (1985)). "Therefore, in a suit where the plaintiff asserts a claim against a governmental entity, a suit against those individuals working in their official capacity for this governmental entity is redundant." *Id.* (*citing Moore v. City of Creedmoor*, 345 N.C. 356, 367, 481 S.E.2d 14, 21 (1997)). The City is already a Defendant to this action; thus, the claims against Barry Webb or Adrian Miller, each in his official capacity as City Manager, should be dismissed as duplicative, redundant, and unnecessary.

II. PLAINTIFFS' COMPLAINT SHOULD BE DISMISSED FOR FAILING TO STATE A CLAIM FOR RELIEF UNDER THE PUBLIC RECORDS ACT.

In North Carolina, "public records" are "all documents, papers, letters... 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). Public records should be made available for inspection or copying by their custodians, and a request to obtain public records may not be denied on the basis that the private information is commingled with the public information. N.C. Gen. Stat. § 132-6(a), (c) (2015). The Public Records Act supplies a cause of action when any government agency or subdivision denies rights provided by that statute. N.C. Gen. Stat. § 132-9(a) (2015). Based upon a plain reading of the statute, three elements are required to state a prima facie case: (1) a person requests access to or copies of public records from a government agency or subdivision, (2) for the purpose of inspection and examination, and (3) access to or copies of the requested public records are denied. *State Employees Ass'n of N. Carolina, Inc. v. N. Carolina Dep't of State Treasurer*, 364 N.C. 205, 211, 695 S.E.2d 91, 95 (2010). For the purposes of the subject motions, Defendants allow that Plaintiffs requested the ISS Report from the City and that the City refused to give Plaintiffs access to or a copy of the ISS Report; however, Defendants deny that the ISS Report is subject to disclosure under the Public Records Act.

Based upon the facts pled in the Complaint, Plaintiffs have failed to state a claim for relief under the Public Records Act. Plaintiffs pled that they requested the ISS Report and that the request was denied, but the facts as presented by Plaintiffs in the Complaint show that the ISS Report is a personnel record. Personnel records are not included in the definition of "public records" under N.C. Gen. Stat. §§ 132-1 *et seq.*, because the personnel records of City employees

are protected from Public Records Act disclosure. Access by the public to "personnel files" of municipal employees is restricted, "[n]otwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records." N.C. Gen. Stat. § 160A-168(a) (2015). As defined by N.C. Gen. Stat. § 160A-168, which is titled "Privacy of employee personnel records:"

> ... an employee's personnel file consists of any information in any form gathered by the city with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the city.

N.C. Gen. Stat. § 160A-168(a). Certain general information about an employee, such as name, age, date of employment, title, salary, and so forth, is enumerated as an exception to rule that the personnel file is not a public record. N.C. Gen. Stat. § 160A-168(b). The statute also provides strong penalties for unauthorized disclosure of employee personnel files. N.C. Gen. Stat. § 160A-168(e)-(f). Personnel files are a clear exception to the disclosure provisions of the Public Records Act and may only be disclosed subject to the provisions of N.C. Gen. Stat. § 160A-168. *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 490, 616 S.E.2d 602, 605 (2005) (holding that identical language in another statute "clearly and unambiguously limits what and when information ... can be disclosed publicly, notwithstanding the Public Records Act").

In the Complaint, Plaintiffs' only support for their contention that the ISS Report is not part of a "personnel file," are the following unwarranted deductions and "allegations upon information and belief:" (1) that the ISS Report cannot be directed only toward individual misconduct, because Plaintiffs' reading of Chief Franklin's termination letter leads Plaintiffs to the deduction that the ISS Report must "touch on" broader issues, and (2) that the fact that interviews of City employees were conducted and the actual ISS Report prepared by the

investigators of U.S. ISS Agency, rather than employees of the City, meant that the ISS Report was not "gathered by the city" and cannot be part of the exception for employees' personnel files. Plaintiffs alleged that the report was the basis for the City to terminate Chief Franklin and attached his letter of termination to the Complaint. (Compl. ¶ 57-58.)

In the Complaint, Plaintiffs' conclusory allegations or allegations "upon information and belief" are not entitled to deference from the Court. The Court is not required to accept as true the Plaintiff's recitation "upon information and belief" that the ISS report is not "with respect to" a specific City employee or employees. (Compl. ¶ 55.) Plaintiff's conclusory statement that the ISS Report "must in some part touch on broader questions that go beyond personnel issues" is also not entitled to an assumption of truth. (Compl. ¶ 58.) Likewise, Plaintiffs' numerous legal allegations are not entitled to any deference, to the extent that Plaintiffs interpret or apply the law to the facts alleged, or contend that the Order of Judge Craig in *Roch Smith v. City of Greensboro* is applicable to the request at issue.

Without Plaintiffs' conclusory statements, unwarranted deductions, and legal allegations, the facts pled by Plaintiffs do not support any conclusion other than that the ISS Report is a personnel record that documents an investigation into individual misconduct by Chief Franklin. Other evidence beyond the pleadings also shows that two other individuals were investigated as part of the creation of the ISS Report. However, Plaintiffs speculation that the ISS Report *might* contain other matters is insufficient as a matter of to sustain their claim for disclosure of the ISS report under the Public Records Act, and their Complaint should be dismissed.

III. PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED FOR FAILING TO DEMONSTRATE AS A MATTER OF LAW THAT THE ISS REPORT IS NOT PROTECTED AS A PERSONNEL RECORD SUBJECT TO DISCLOSURE ONLY AS PERMITTED BY N.C. GEN. STAT. § 160A-168.

Plaintiffs have not established as a matter of law that they are entitled to disclosure of the

ISS Report, because they have failed to establish or forecast evidence that ISS Report is not subject to the protections of N.C. Gen. Stat. § 160A-168 as "any information in any form gathered by the city with respect to that employee."

A. THE ISS REPORT WAS "GATHERED BY" THE CITY OF BELMONT FOR THE PURPOSES OF THE STATUTORY SCHEME PROTECTING THE PRIVACY OF EMPLOYEE PERSONNEL RECORDS.

1. Basic principles of statutory interpretation support an interpretation of "gather" that includes materials created by agents of the city or "third-party actors."

To the extent that "gathered by the city" can be considered to be ambiguous, the Court should look to the "plain language of the statute" to determine the intention of the legislature. "The primary rule of statutory construction is that the intent of the legislature controls the interpretation of a statute." *Stevenson v. Durham*, 281 N.C. 300, 303, 188 S.E.2d 281, 283 (1972); *see also Sutton v. Aetna Cas. & Surety Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989) (the cardinal rule of statutory construction is that legislation must be construed to accomplish the General Assembly's intent).The statute does not employ any of the words that would support Plaintiffs' reading, such as "created," "investigated," "assembled," or "generated."

Generally, "gather" is defined as to "bring together and take in from scattered places or sources." Oxford University Press, Oxford American English Dictionary, *available at*: http://www.oxforddictionaries.com/us/definition/american_english/gather (last accessed 11 May 2016). Although the immediate prepositional phrase following "gather" is "by the City," "gathered" modifies "any information in any form," an expansive collection of materials. With respect to a personnel file, which contains information from many sources, the materials in the personnel file will logically have been "created" by a diverse array of actors, not all of whom are employed by the public entity: transcripts and certifications by the institutes of higher learning

attended by the employee, physical health and immunization information by the employee's physician, employment verifications and letters of reference from the employee's prior employers, and so forth. However, importantly, these materials from diverse sources are "gathered by" the public entity with respect to that employee, because the public entity needs the subject information to make personnel decisions.

The North Carolina Court of Appeals has evaluated whether documents were "gathered" into a public hospital personnel file, under the definition in the corresponding statute protecting the privacy of personnel records of public hospital personnel, N.C. Gen. Stat. § 131E-257.2. *Knight Publ'g Co.*, 172 N.C. App. at 491-92, 616 S.E.2d at 606. The North Carolina Court of Appeals held in *Knight Publ'g Co.* that the narrow definition of "gathered" urged by Plaintiffs was not consistent with the rules of statutory construction, and that "gathered" made more sense for documents "amassed or assembled in an employee's personnel file. *Id.* (discussing *Elkin Tribune, Inc. v. Yadkin Cnty. Bd. of Comm'rs*, 331 N.C. 735, 737, 417 S.E.2d 465, 466 (1992), which allowed the protections of N.C. Gen. Stat. §153A-98 for county employee personnel files to apply to applications prepared by potential employees and sent to the city). As the ISS Report was sent to the City by U.S. ISS Agency, used for personnel decisions, and ultimately became part of the personnel file of the employees investigated, the ISS Report should be included in the understanding of "gathered by the City" in the context in which personnel files are normally understood. The Plaintiffs' urging of a narrow construction for "gathered" and their argument that the ISS Report was not "gathered" by the City contradicts prior decisions of the North Carolina Court of Appeals and the North Carolina Supreme Court.

2. Prior interpretations of N.C. Gen. Stat .§ 160A-168 support expansive privacy protection for personnel records created by agents of municipalities.

Written attorney-client communications delivered to a city by the city's private attorney

which address personnel issues are considered to be part of an individual's "personnel file" and are subject to the protections of N.C. Gen. Stat. § 160A-168, rather than the three-year confidentiality limit found in the Public Records Act. Office of the Atty. Gen., *Mr. Grady Joseph Wheeler, Jr., Esq*, Re: Advisory Op.; Auth. of the City of Graham to disclose atty.-client communications concerning employee personnel matters, 2001 WL 729556 (N.C.A.G. May 30, 2001). The North Carolina Attorney General advised the attorney for the City of Graham, upon receiving a public records request from the editor of The Alamance News for all attorney-client communications preceding the three-year threshold, that N.C. Gen. Stat. § 160A-168 forbade the disclosure of his communications concerning personnel matters. *Id.* ("The fact that personnel information made confidential by N.C. Gen. Stat. § 160A-168 is contained in the files of the city's attorney rather than the files of the city s personnel officer is of no legal consequence.") Further, the fact that information was gathered by an independent contractor of the City is insufficient to prevent the records it creates for the City from becoming part of the City's records. *Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*, 181 N.C. App. 1, 12-13, 639 S.E.2d 96, 103-104 (2007) (holding that records related to the engineering, surveying and other professional services rendered in connection with the Town's pending oceanfront condemnation litigation must be produced by the law firm for Kitty Hawk.)

Here, similar to an attorney or another agent providing professional services to a city, the U.S. ISS Agency created documents that recorded their personnel interviews of City employees and advised the City on personnel matters. The ISS Report, created for and at the direction of the City, became part of the personnel file of the employees investigated. Although Plaintiff urges that the U.S. ISS Agency does not "become the city" for the purposes of public records law, the relevant question is actually whether U.S. ISS Agency can create documents that

become part of public employees' confidential personnel files once "gathered by" the City that are subject to protection under N.C. Gen. Stat. § 160A-168, and the answer is, logically, "yes."

3. *News & Observer Pub. Co., Inc. v. Poole* does not hold that all records created or passing through the hands of a third party on the way to a municipality's personnel file are public records.

In *News & Observer Pub. Co., Inc. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), North Carolina State University employees were investigated by a group of independent persons appointed to a commission by the president of the University of North Carolina system. 330 N.C. at 469, 412 S.E.2d at 10. The North Carolina Supreme Court remarked that the Commission was an independent public agency and was not the employer of those investigated; therefore, materials that they gathered from their own sources and their meeting minutes were public records, by virtue of being in the custody of the Commission, and did not meet the definition of "personnel" materials subject to protection under the statute, unless they had been already subject to that protection when collected by the Commission. *Id.* at 469-470, 412 S.E.2d at 14.

The interpretation of *Poole* urged by Plaintiffs confuses the actors and sequence of events underlying the holding. First, the employer in *Poole*, NCSU, was not directing the investigation – they were being investigated for misconduct. Here, the City directed the investigation of individuals that the City employed. Secondly, the collection of the materials by the Commission, a public agency, made the materials and discussion of them subject to disclosure under the Public Records Act. Here, the U.S. ISS Agency is a private actor, under the direction and control of the City, and not a public agency that would have an obligation to disclose records independent of the City's obligation, as the Commission did in *Poole*. The holding in *Poole* does not make public all records created or passing through the hands of a third party on the way to a municipality's personnel file and does not apply to the relationship at issue between U.S. ISS

Agency and the City.

B. THE ISS REPORT WAS GATHERED "WITH RESPECT TO" EMPLOYEES OF THE BELMONT POLICE DEPARTMENT.

The General Assembly broadly defined "personnel file" in N.C. Gen. Stat. § 160A-168 and it is Plaintiffs' narrow interpretation, not Defendants' position, that is unsupported by North Carolina cases. As reasoned by the North Carolina Court of Appeals:

> ...according to the express language of [N.C. Gen. Stat. § 160A-168], the information in a city employee's personnel file also concerns "nonselection," "performance," "evaluation forms," as well as other information "in any form gathered by the city with respect to that employee." See id. In fact, the General Assembly expressly declines to limit what form the information included in an employee's personnel file may take, by providing a list of examples of information that it specifies is offered "by way of illustration but not limitation."

Wind v. City of Gastonia, 226 N.C. App. 180, 188, 738 S.E.2d 780, 785, *aff'd*, 367 N.C. 184, 751 S.E.2d 611 (2013). In *Wind*, the Court of Appeals held that documents created as part of two investigations into complaints against an officer of the Gastonia Police Department were part of the officer's "personnel file" and that N.C. Gen. Stat. § 160A-168 governed their disclosure. *Id.* To reach this decision, the Court of Appeals reasoned that the extreme breadth of the definition of "personnel file" justified the broad interpretation of other terms in the statute, including the term "official personnel decision." *Id.* at 187-88, 738 S.E.2d at 784.

Applying the protections of N.C. Gen. Stat. § 160A-168 to the ISS Report is also justified by *Wind* as protecting an investigation with respect to individual police officers. The holding in *Wind* supports the conclusion that the investigation materials are part of the officers' personnel files and that "with respect to that employee" should be read as the broadest possible protection for the employee's personnel records.

Plaintiffs' speculation upon what broader issues might be mentioned within the ISS Report, and thus not "with respect to" individual Belmont PD officers, is an insufficient basis for

granting summary judgment in their favor. Defendants have submitted evidence showing that the investigation was focused on individual misconduct. (*See generally* Webb Aff.) To a certain extent, any misconduct by a police officer would be a matter of public policy concern; however, members of the public are not invited to thumb through police officers' personnel files to find information that "touches on" broader policy issues in which they are interested.

Further, Defendants do not ask the Court to regard the investigation and creation of the ISS Report as focused on misconduct by individuals "merely because Defendants say so;" rather, Defendants have offered an affidavit in opposition, which must be regarded indulgently, specifically stating that the investigation was directed toward individual misconduct. Plaintiffs could have taken depositions of City Manager Webb or the persons who prepared the ISS Report, rather than "assuming" what might be in the ISS Report, but Plaintiffs have not conducted such discovery. Plaintiffs cannot now ask the Court to make inferences in their favor, where Plaintiffs have not collected or presented sufficient evidence to support their Motion.

Further, Plaintiffs' urging of partial disclosure of the ISS Report, in reliance upon the Superior Court decision in *Roch Smith v. City of Greensboro*, is misplaced, because the RMA Report at issue in *Roch Smith* documented an investigation into the operations of an internal unit of the Greensboro Police Department and its interactions with the public and other law enforcement agencies. In contrast, the ISS Report at issue in this case was limited solely to personnel matters internal to the Belmont PD. The decision in *Roch Smith*, attached by Plaintiffs to the Complaint, ordered a redacted copy of the Executive Summary, a redacted copy of the Introduction, and various newspaper articles, press statements, Greensboro PD organizational charts, and reports regarding a complaint from a member of the public. (Ex. H. to Compl., at 3.) Although no copies of the leaked RMA Report are available online in full, contemporaneous

news articles by journalists in possession of the RMA Report highlight it as follows:

> The consultants at Risk Management Associates appear to have gone straight to the heart of Wray's suspicions about Hinson, and found no evidence to support the former chief's contention, as reportedly conveyed to the city manager, deputy city manager and city attorney, "that Lieutenant Hinson was suspected for an extended period of time of being associated with the activities of a narcotics smuggling organization in Greensboro...Hinson's associations with the drug dealer Elton Turnbull have been widely reported. As the document prepared by Risk Management Associates details: "The facts and circumstances confirm that Hinson owned rental property that he and his wife at the time rented to [Toshia] Withers. Withers was a girlfriend and co-conspirator of Turnbull. Hinson began an intimate relationship with Withers and eventually sold this rental property to Turnbull. There was no evidence that Hinson knew or should have known about Turnbull's illegal activity uncovered by this investigation. In fact, the Drug Enforcement Agency did not learn of Turnbull's drug trafficking until 2000. More importantly, if Hinson was involved and Turnbull confirmed that fact, it would have helped Turnbull with his sentence. Turnbull stated repeatedly that Hinson was not involved in his drug cartel and would have had no reason to know of them....
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> Wagoner also made mention of "the Nicole Pettiford case," referring to a Greensboro woman described in the Risk Management Associates report as a former hotel night clerk, who was questioned by Sanders for more than six hours at a hotel room one time with US Attorney Cliff Barrett in attendance. While investigating a drug dealer, the Risk Management Associates consultants found, Sanders learned that Pettiford had bragged that she knew police officers who would sell her confidential information.
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> Apparently under pressure from Sanders, Pettiford cooperated in an effort to test black police officers. The report details extensive efforts by Pettiford to enlist assistance from two black police officers for allegedly criminal purposes through phone calls facilitated by Sanders. In both cases, criminal investigations were opened and the officers were ultimately cleared of wrongdoing. The report takes pains to note that - in contrast to other departmental investigations undertaken against black officers - Pettiford's calls may have been part of "a larger legitimate federal criminal investigation."
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> Lt. Brian James, formerly the spokesman for David Wray and currently assigned to the criminal investigations division, became one of the targets. James became acquainted with Pettiford when she was a night clerk at the Ramada Inn and he worked there off duty, the report states. Pettiford reportedly attempted to contact James numerous times by phone between April and October 2004, after she left the job. He rarely called her back. In one of the last calls, she asked him if he would help her, but the report states that before she could tell him what she wanted, James interrupted: "Why would I help you?" They last saw each other in the parking lot of the Sam's Club on Wendover Avenue in October 2004. According to the report, Sanders was keeping Pettiford under surveillance and took pictures of her with Lt. James. James reported directly to Wray, and rather

> than counsel James to stay away from Pettiford - as was reportedly the practice with white officers - the Risk Management Associates report found that that special intelligence continued to monitor James and "questioned him from a criminal perspective."

Jordan Green, "RMA Report: Wray 'crippled" GSO Police Department," YES!Weekly (Oct. 16, 2006), *available at*: http://yesweekly.com/article-2946-rma-report-wray-crippled-gso-police-department.html (last accessed 10 May 2016). From the contemporary description, it appears that the RMA Report and investigation addressed operational concerns of the Greensboro Police Department, the activities of an entire "special intelligence unit" within the Greensboro Police Department, and the Greensboro Police Department's activities in cooperation with other law enforcement agencies.

However, the scope of the ISS Report is far narrower than the RMA Report to which the Plaintiffs urge comparison. In compiling the ISS Report, investigators specifically did not address Belmont PD operations. All complaints investigated were internal and not sourced from members of the public. Plaintiffs' comparison to the leaked RMA Report is inapposite. The evidence submitted by Defendants in opposition to Plaintiffs' Motion for Summary Judgment shows that, even if the never-reviewed Order by Judge Craig to disclose limited portions of the RMA Report had been proper in *Roch Smith*, the scope of the ISS Report is far narrower and it should be regarded as a personnel record protected by N.C. Gen. Stat. § 160A-168.

C. KEEPING THE ISS REPORT PART OF THE CONFIDENTIAL PERSONNEL FILES OF THE EMPLOYEES WHOSE MISCONDUCT WAS INVESTIGATED AND PROTECTING IT FROM DISCLOSURE TO PLAINTIFFS SERVES THE LEGISLATIVE INTENT OF N.C. GEN. STAT. § 160A-168.

North Carolina appellate courts have held that the legislature has expressed a clear policy of keeping city employees' personnel files confidential. The Court of Appeals has previously stated that the "legislative intent behind N.C. Gen. Stat. § 160A-168" is "**to keep a city**

employee's personnel file confidential except under **limited** circumstances." *In re Release of Silk Plant Forest Citizen Rev. Comms. Report & Append.*, 216 N.C. App. 268, 272, 719 S.E.2d 54, 58 (2011) (citing *In re Brooks*, 143 N.C. App. 601, 606, 548 S.E.2d 748, 752 (2001)) (emphasis added). The Fourth Circuit has also recognized the importance of the legislative intent of N.C. Gen. Stat. § 160A-168, "keep[ing] a city employee's personnel file confidential except under limited circumstances", in the context of one officer providing information about another officer. *In re Release of Silk*, 719 S.E.2d at 59; *see also In re Grand Jury, John Doe, No. GJ 2005–2*, 478 F.3d 581 (4th Cir. 2007).

The Court of Appeals has interpreted the statutes protecting the confidentiality of public employee personnel records to be exempt from the principle of broad public access, due to the importance of the privacy interests at stake. When interpreting the statute exempting the disclosure of total salary information for hospital personnel to uphold the confidentiality of records requested by the Charlotte Observer, the Court of Appeals reasoned that disclosure was not required by the otherwise liberally-interpreted Public Records Act, because "the language employed by the General Assembly shows that it was concerned about protecting the confidentiality of public hospital personnel information, thereby specifically exempting this information from broad public access." *Knight Publ'g. Co.*, 172 N.C. App. at 495-96, 616 S.E.2d at 609 (2005) (citing *Virmani v. Presbyterian Health Services Corp.*, 350 N.C. 449, 477, 515 S.E.2d 675, 693 (1999) (discussing N.C. Gen. Stat. § 131E–95 and stating "the legislature has determined that this right of access is outweighed by the compelling countervailing governmental interest in protecting the confidentiality of the medical peer review process"). Plaintiffs' arguments in favor of the broad public access allowed under the Public Records Act are unavailing, because the General Assembly also sought, for good reason, to protect the

privacy rights of public employees in enacting N.C. Gen. Stat. § 160A-168.

It is not only important to protect the confidentiality of the individuals accused of misconduct; but also, it is important to protect the confidentiality **promised** to fellow officers interviewed in the course of investigating the allegations. The Fourth Circuit has recognized the importance of the legislative intent of N.C. Gen. Stat. § 160A-168, "keep[ing] a city employee's personnel file confidential except under limited circumstances", in the context of one officer providing information about another officer. *In re Release of Silk*, 719 S.E.2d at 59; *see, In re Grand Jury,* 478 F.3d at 582. In *In re Grand Jury,* 478 F.3d at 582, the Fourth Circuit reviewed a district court's grant of a City's motion to quash a subpoena duces tecum issued by a federal grand jury "to obtain the records of the [Police] Department's internal investigation into a complaint filed against an officer." An individual who had been arrested filed a complaint with the City Police Department alleging excessive force used by an officer in an arrest, and during the course of the internal investigation, several officers were interviewed. *Id.* at 583. As explained by the Fourth Circuit:

> Officers who report misconduct are ostracized and harassed; become targets of complaints and even physical threats; and are made to fear that they will be left alone on the streets in a time of crisis. In such a setting, the confidentiality of internal investigations may be not only desirable but essential. The district court was permitted to recognize that handing the statements over to an outside party or agency, including one involved in criminal investigations, would be perceived by cooperating officers as a serious compromise of confidentiality...such investigations face an uphill battle due to the so-called "blue wall," the tendency of law enforcement officers to place solidarity above all else and to be less than fully cooperative with investigations of fellow officers.

Id. at 586. Contrary to Plaintiffs' assertion, there are cases to support the use of N.C. Gen. Stat. § 160A-168 to protect internal investigations into misconduct by police officers.

Preventing the disclosure of the ISS Report to Plaintiffs protects the privacy of the personnel who were investigated and allows internal, confidential investigations to remain a

useful tool to discover and root out misconduct in police departments. Fellow officers who were assured that the investigation was a confidential, internal tool to address administrative and personnel issues, should not now have to fear retaliation and censure for providing the City the information that it needed to root out bad actors in the Belmont PD. North Carolina state courts and federal courts have recognized both the importance of this policy interest in confidentiality of police investigations and that N.C. Gen. Stat. § 160A-168 was enacted to protect this interest. Defendants respectfully request that the Court also act to protect the confidentiality of the personnel records of the Belmont PD officers, as documented in the ISS Report.

CONCLUSION

For the above-stated reasons, Defendants respectfully request that the Court GRANT their Motion to Dismiss and DENY Plaintiffs' Motion for Summary Judgment.

This the 11th day of May, 2016.

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CERTIFICATE OF SERVICE

This is to certify that the undersigned has this day served the attached *Memorandum in Support of Defendants' Motion to Dismiss and in Opposition to Plaintiffs' Motion for Summary Judgment* on all parties to this cause by:

____ Hand delivering a copy hereof to the attorney for each said party addressed as follows:

____ Depositing a copy hereof, postage prepaid, in the United States Mail, addressed to the attorney for each said party as follows:

__X__ Sending a copy via electronic mail to the attorney for each said party as follows:

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This the 11th day of May, 2016.

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