

STATE OF NORTH CAROLINA
WAKE COUNTY

IN THE GENERAL COURT OF
JUSTICE
SUPERIOR COURT DIVISION
FILE NO. 19 CVS ____

SOUTHERN ENVIRONMENTAL
LAW CENTER,

Plaintiff,

v.

SCOTT M. SAYLOR, in his official
capacity as President of the North
Carolina Railroad Company,

The NORTH CAROLINA RAILROAD
COMPANY,

and

MICHAEL WALTERS, JACOB F.
ALEXANDER III, WILLIAM V. BELL,
MARTIN BRACKETT, LIZ CRABILL,
WILLIAM H. KINCHELOE, JAMES
E. NANCE, JOHN M. PIKE, GEORGE
ROUNTREE III, FRANKLIN ROUSE,
DOUGLAS STAFFORD, NINA
SZLOSBERG-LANDIS, and MICHAEL
L. WEISEL, in their official capacities
as members of the Board of Directors
of the North Carolina Railroad
Company,

Defendants.

COMPLAINT
[COMP]

Pursuant to Rules 3, 7, and 8 of the North Carolina Rules of Civil Procedure, Plaintiff, the Southern Environmental Law Center, complaining of Defendants Scott Saylor, in his official capacity as President of the North Carolina Railroad Company; the North Carolina Railroad Company; and Michael Walters, Jacob F.

Alexander III, William V. Bell, Martin Brackett, Liz Crabill, William H. Kincheloe, James E. Nance, John M. Pike, George Rountree III, Franklin Rouse, Douglas Stafford, Nina Szlosberg-Landis, and Michael L. Weisel, in their official capacities as members of the Board of Directors of the North Carolina Railroad Company, alleges and says:

Introduction

This is an action pursuant to the North Carolina Public Records Act, Chapter 132 of the General Statutes, and the Declaratory Judgment Act, N.C. GEN. STAT. § 1-253. As described more specifically in the numbered allegations set out below, Plaintiff seeks (1) an order declaring that the North Carolina Railroad Company is an “agency” for purposes of the North Carolina Public Records Act; (2) an order declaring that the documents requested by Plaintiff are public documents subject to disclosure under the North Carolina Public Records Act; (3) an order compelling Defendants to permit the inspection of public records pursuant to N. C. GEN. STAT. § 132-9(a); and (4) an order awarding Plaintiff its reasonable attorney’s fees pursuant to N.C. GEN. STAT. § 132-9(c)(1).

Parties

1. Plaintiff the Southern Environmental Law Center (“SELC”) is a § 501(c)(3) not-for-profit organization chartered as a North Carolina non-profit corporation. SELC’s principal place of business is in Charlottesville, Albemarle County, Virginia. It maintains registered offices in Chapel Hill, Orange County, North Carolina and in Asheville, Buncombe County, North Carolina. SELC works

to protect the environment in North Carolina and other Southeastern states by representing partner groups on issues related to climate change and energy; air and water quality; the coasts and wetlands; forests; transportation; and land use. SELC also researches and analyzes environmental issues and policies in order to educate the public and advocate for environmental protection.

2. SELC was significantly involved in advocating for the Durham-Orange Light Rail transit project,¹ including working to obtain information about the project and sharing that information with partner groups.

3. Defendant Scott M. Saylor is the President of the North Carolina Railroad Company (“NCR”) and a custodian of its public records, and is sued in that capacity.

4. Defendant NCR is a North Carolina corporation whose principal place of business is in Raleigh, Wake County, North Carolina. NCR owns and operates a 317-mile rail corridor from Charlotte to the Port of Morehead City “for the good of the people of North Carolina.”

5. Defendant Michael Walters is the Chairman of the NCR Board of Directors and custodian of public records of NCR, and is sued in that capacity.

6. Defendant Jacob F. Alexander III is a member of the NCR Board of Directors and custodian of public records of NCR, and is sued in that capacity.

¹ The Durham-Orange Light Rail transit project was a planned 17.7 mile light rail line linking Durham and Chapel Hill, North Carolina. NCR owns some of the existing tracks the light rail would have traveled alongside through downtown Durham. NCR refused to sign a cooperative agreement with other project partners and created an obstacle to the project moving forward. As of April 2019, the project has been discontinued.

7. Defendant William V. Bell is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

8. Defendant Martin Brackett is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

9. Defendant Liz Crabill is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

10. Defendant William H. Kincheloe is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

11. Defendant James E. Nance is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

12. Defendant John M. Pike is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

13. Defendant George Rountree III is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

14. Defendant Franklin Rouse is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

15. Defendant Douglas Stafford is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

16. Defendant Nina Szlosberg-Landis is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

17. Defendant Michael L. Weisel is a member of the NCRR Board of Directors and custodian of public records of NCRR, and is sued in that capacity.

Jurisdiction and Venue

18. The Superior Court has jurisdiction over this action pursuant to the North Carolina Declaratory Judgment Act, N.C. GEN. STAT. § 1-253 *et. seq.*, and the N.C. Public Records Act, N.C. GEN. STAT. § 132- et seq.

19. This Court has the power, pursuant to N.C. GEN. STAT. § 1-253, to “declare rights, status, and other legal relations, whether or not further relief is or could be claimed,” and such declaration shall have the force and effect of a final judgment or decree.

20. An action under the Declaratory Judgment Act is appropriate here as it will clarify that NCRR is an agency for purposes of the N.C. Public Records Act, that documents requested by Plaintiff are public records subject to disclosure under the N.C. Public Records Act, and will provide relief from the uncertainty, insecurity, and controversy that gives rise to this proceeding.

21. This Court has the power, pursuant to N.C. GEN. STAT. § 132-9, to issue an order compelling disclosure of public records by the custodian thereof.

22. Venue for this action is proper in Wake County pursuant to N.C. GEN. STAT. § 1-77(2), because the Defendants named herein are sued in their official capacity, because the NCRR is headquartered in Wake County, and because the causes of action asserted herein arose from official acts of Defendants occurring primarily in Wake County, North Carolina, where, upon information and belief, the majority of the documents Plaintiff seeks to inspect are located.

Statutory and Legal Background

23. The N.C. Public Records Act (“the Public Records Act”) is codified at N.C. GEN. STAT. §§ 132-1 through 132-10. The public policy underlying the Public Records Act 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.

24. The Public Records Act provides, in N.C. GEN. STAT. § 132-1(a), 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.

25. The law provides for prompt disclosure of public records: “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).

26. The North Carolina Court of Appeals, in *News and Observer Publishing Company v. Wake County Hospital System, Inc.*, 55 N.C. App. 1 (1981), held that a private corporation will be considered an “agency” of North Carolina for purposes of the Public Records Act when the government exercises “supervisory

responsibilities and control” over the corporation. The Court listed nine factors to consider when making this determination, including:

- a. Transfer of assets to government upon dissolution;
- b. Vacancies on Board of Directors subject to government approval;
- c. Free or nominal leasing of real estate from the government;
- d. Review and approval of the annual budget by the government;
- e. Auditing of books and records by the government;
- f. Reporting rates and charges to the government;
- g. Financing through government means;
- h. Revenue of corporation considered revenue of the government; and
- i. Government consent required to amend articles of incorporation.

Id.

27. The North Carolina Court of Appeals has held that documents made “pursuant to law or ordinance in connection with the transaction of public business” for purposes of the Public Records Act, includes, in addition to records *required* by law, “those records that are kept in carrying out lawful duties.” *News and Observer Pub. Co. v. Wake County Hospital System, Inc.*, 55 N.C. App. 1 (1982).

28. N.C. GEN. STAT. § 132-9(a) provides: “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”

29. The law also provides for attorney’s fees for parties bringing actions compelling the disclosure of public records: “In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court shall allow a party seeking disclosure of public records who substantially prevails to recover its reasonable attorneys’ fees” N.C. GEN. STAT. § 132-9.

30. Finally, the law provides for expedited resolution of these matters, stating that actions brought pursuant to § 132-9(a) “shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the [court].” *See also Times News Pub. Co. v. Alamance-Burlington Bd. of Educ.* 774 S.E.2d 922, 927 n.2 (N.C. Ct. App. 2015) (“The General Assembly has instructed that these actions ‘shall be accorded priority by the trial and appellate courts’”).

Facts

The North Carolina Railroad Company

31. The stated mission of NCRR is “[p]utting the North Carolina Railroad Company to work for the good of the people of North Carolina.” (Emphasis added).

32. In its mission statement, NCRR proclaims that “[t]he railroad corridor is a rich asset, which [the NCRR] proudly protect[s] and manage[s] for the benefit of North Carolina’s citizens.”

33. On its website, NCRR states that it “act[s] with integrity as stewards for the state of North Carolina.”

34. In an October 9, 2012, letter to the General Assembly, NCRR stated that it views its mission as being to “continue to increase the value of the Company

to the people of the state . . . both in economic development and financial terms, whether the Company is retained or sold.”

35. All members of the NCRB Board of Directors are appointed by the Governor of North Carolina and the North Carolina General Assembly. The Board of Directors is responsible for governance and oversight of NCRB’s activities, and responsible for setting company policy, hiring and then evaluating the performance of the NCRB president, selecting and retaining an outside auditor, and approving all lease agreements.

36. NCRB was incorporated by an Act of the General Assembly in 1849. N.C. GEN. STAT. 1848-49. The Act established the charter for the NCRB.

37. The State of North Carolina paid an initial \$2 million to become the majority shareholder of NCRB. Later, the State invested an additional \$1 million to complete the first railroad between Goldsboro and Charlotte.

38. In 1998, the State of North Carolina bought out the remaining privately-held NCRB shares for \$70.8 million and become the sole shareholder of the NCRB.

39. As part of this buyout, NCRB assumed a \$61 million loan from the State Treasurer. In 2000, the General Assembly passed legislation that converted this debt and forgave \$6.7 million in accrued interest in exchange for dividend payments to the State for capital improvements on the railroad corridor. The State’s conversion of debt and accrued interest amounts to a \$67.7 million capital contribution to NCRB.

40. Between 1998 and 2006 NCRRC paid \$95 million in dividends to the State. The State has returned \$57.1 million to NCRRC to fund future capital improvement projects.

41. Since the buyout in 1998, the State has paid for \$71.5 million in capital improvements for tracks, signals, and bridges on NCRRC's corridor.

42. All told, NCRRC has received at least \$196.3 million in capital contributions from the State, in addition to payment for shares.

43. North Carolina law requires NCRRC to provide annual reports to the General Assembly; in addition, the Governor and committees of the General Assembly have the authority to request "all additional information or data within [NCRRC's] possession or ascertainable from [NCRRC's] records." N.C. GEN. STAT. § 124-17.

44. Legislation passed in 2011 requiring an evaluation of NCRRC describes the Railroad as "a discretely reported component unit of the State" N.C. Sess. Law, 2011-145, Section 28.12A, as amended.

45. The legislation further states that "[f]or the purposes of this evaluation, the terms 'State agency' or 'agency' as used under Article 7C of Chapter 120 of the General Statutes shall include the North Carolina Railroad Company." *Id.*

46. For the purposes of the evaluation, the General Assembly granted the Program Evaluation Division of the Legislative Services Office authority to "inspect

the corporate books and records of the North Carolina Railroad Company on behalf of the State.” *Id.*

47. In the subsequent evaluation report, it was noted that “NCRRC has benefitted from its unique relationship with the State of North Carolina.” The report set out a number of supervisory actions which the General Assembly could take so that the people of North Carolina might better profit from NCRRC. Report 2012-10.

48. After the evaluation report was published, in 2013 the General Assembly passed legislation establishing enhanced reporting requirements above and beyond what would otherwise be required for a private corporation. N.C. GEN. STAT. § 124-17(a).

49. The North Carolina Railroad Company has eminent domain powers, above and beyond that of private railroads. N.C. GEN. STAT. § 40A-3(a)(5).

50. Because of its relationship with the state, NCRRC is exempt from Federal and State income taxes.

Plaintiff’s Public Records Request

51. Plaintiff submitted a request to NCRRC President Scott M. Saylor on May 23, 2019, in which it sought to inspect all records in the possession or control of NCRRC related to the Durham-Orange Light Rail transit project generated since January 1, 2018, including, without limitation: (a) all internal and external communications to or from Board Members regarding the Durham-Orange Light Rail Transit Project, (b) all internal and external communications to or from staff

regarding the Durham-Orange Light Rail Transit Project, and (c) all minutes from Board of Directors meetings. Exhibit A.

52. One month after Plaintiff sent the request, on June 25, 2019, Jim Cooney, an attorney retained by NCRR, stated in a letter addressed to counsel for Plaintiff that “because NCRR is not subject to the [Public Records] Act, it will not be producing materials in response to your request of May 23, 2019.” Exhibit B.

53. In its response to Plaintiff, NCRR admits that private corporations can be subject to the Public Records Act. Exhibit B.

54. In its response to Plaintiff, NCRR admits that the N.C. Court of Appeals in *News and Observer Pub. Co. v. Wake County Hospital System, Inc.*, 55 N.C. App. 1 (1982) established factors to consider when determining if a private corporation is subject to the Public Records Act. *Id.*

55. In its response to Plaintiff, NCRR reserves the right to make further determinations as to whether any documents included in Plaintiff’s request should be excluded from production if a final judicial determination is made that NCRR is subject to the Public Records Act. *Id.*

Claim for Relief

56. Because the State of North Carolina exercises significant “supervisory responsibilities and control” over NCRR, NCRR is an agency of North Carolina government for purposes of the Public Records Act. N.C. GEN. STAT. § 132-1(a). *News and Observer Pub. Co. v. Wake County Hospital System, Inc.*, 55 N.C. App. 1 (1982).

57. Defendants Scott M. Saylor, President of NCRR, and the members of the NCRR Board of Directors are custodians of records that are subject to disclosure under the Public Records Act.

58. The following seven factors set out in *News and Observer* demonstrate NCRR's status as an "agency" subject to the Public Records Act:

- a. Transfer of Assets to Government Upon Dissolution: The State of North Carolina is the owner of 100% of the common stock of NCRR. Upon dissolution, all remaining assets of NCRR after payment of creditors will be transferred to the State of North Carolina.
- b. All Vacancies on Board of Directors Subject to Government Approval: The Governor of North Carolina and the General Assembly appoint all members of the NCRR Board of Directors. The Board of Directors is responsible for governance and oversight of the corporation's activities, and responsible for setting company policy, hiring and then evaluating the performance of the NCRR president, selecting and retaining an outside auditor, and approving all lease agreements.
- c. Auditing of Books and Records: North Carolina law requires NCRR to provide annual reports to the legislature, and the Governor and any committee of the General Assembly have the authority to request "all additional information or data within [NCRR's] possession or ascertainable from [NCRR's] records." N.C. GEN. STAT. § 124-17. As

such, the State of North Carolina has the authority to audit NCRR's books and records.

- d. Reporting NCRR Rates and Charges to the Government: As noted above, NCRR must provide annual reports and all other information and data requested by the Governor or a committee of the General Assembly. As such, the State of North Carolina has access to NCRR reports regarding rates and charges.
- e. Financing of NCRR Through Government Means: The State of North Carolina originally paid NCRR \$2,000,000 for 75% of the common stock of NCRR and an additional \$1,000,000 for preferred stock of NCRR. More recently, the State made over \$193 million in capital contributions to NCRR, including allowing NCRR a loan of \$61 million from the State Treasurer, allowing NCRR to invest in railroad capital improvements in lieu of repaying the \$61 million of debt, and forgiving \$6.7 million of interest owed by NCRR to the State of North Carolina. The State of North Carolina thus provides significant government financing assistance to NCRR.
- f. Revenue of corporation considered revenue of the government: All dividends from NCRR are deposited into the Freight Rail & Rail Crossing Safety Improvement Fund within the Highway Fund and administered by the Rail Division of the Department of

Transportation. N.C. Gen Stat. § 124-5.1 As a result, revenue of NCRR is considered revenue of the government.

- g. Government Consent Required to Amend Articles of Incorporation: As the sole owner of the common stock of NCRR, all substantive amendments to the NCRR Articles of Incorporation require the approval of the State of North Carolina.

59. Other factors not specifically analyzed in *News and Observer* demonstrate that the State has significant supervisory control over NCRR and that there is a close-knit relationship between NCRR and the State, including, but not limited to, the following:

- a) the requirement that NCRR must annually provide the State with a copy of its strategic plan and capital investment plan required under N.C. GEN. STAT. 124-16;
- b) the requirement that NCRR must annually provide the State with explanations for any failures to meet strategic objectives and inform the State what corrective actions were taken;
- c) the requirement that NCRR must annually provide the State with anticipated dividends for the next three fiscal years;
- d) the requirement that NCRR must annually provide the State with a description of the State-owned railroad company's business, subsidiaries, and markets in which it operates;

- e) the requirement that NCRR must annually provide the State with a list of the properties owned by the State-owned railroad company;
- f) the requirement that NCRR must annually provide the State with a list of the directors and executive officers of NCRR and a description of the background and experience of each;
- g) the requirement that NCRR must annually provide the State with a description of the State-owned railroad company's code of ethics and conflicts of interest policy;
- h) the requirement that NCRR must annually provide the State with a summary of the fees paid to an accounting firm during the year;
- i) the requirement that NCRR must annually provide the State with a list of the compensation paid to directors and officers of the State-owned railroad company;
- j) the requirement that NCRR must annually provide the State with a description of its disagreements with its accountants if there has been a change in accountants;
- k) the requirement that NCRR must annually provide the State with a description of any transactions between NCRR and its directors, officers, and their family members;
- l) the fact that the State of North Carolina produces a Comprehensive State Rail Plan every 5 years that sets out recommendations for NCRR investment;

- m) the fact that NCRR employees qualify for insurance coverage through the Public Officers and Employees Liability Insurance Commission; and
- n) the fact that, upon information and belief, President Saylor and NCRR staff are in frequent communication with officers and employees of the State of North Carolina and take direction from the State.

60. The records requested by Plaintiff are public records under N.C. GEN. STAT. § 132-1(a), as they are “documents . . . made or received pursuant to law or ordinance in connection with the transaction of public business by an[] agency of North Carolina government”

61. The North Carolina Court of Appeals has held that the phrase “pursuant to law or ordinance in connection with the transaction of public business” includes, in addition to records required by law, “those records that are kept in carrying out lawful duties.” *News and Observer Pub. Co. v. Wake County Hospital System, Inc.*, 55 N.C. App. 1 (1982).

62. Communications within, to, and from a public agency regarding a proposed public transit project, as well as minutes of meetings of the governing body of the agency relating to those public projects, are all documents that are kept in the course of carrying out NCRR’s lawful duties of managing its railroad corridor for the benefit of North Carolina’s citizens. Therefore, the internal and external communications and minutes of meetings of the Board of Directors relating to the Durham-Orange Light Rail Transit Project are “public records” under the Public Records Act.

63. By failing to provide Plaintiff with the records it requested, Defendants have violated their obligations under N.C. GEN. STAT. § 132-6(a).

64. Plaintiff is harmed by Defendants' refusal to fulfill their legal obligation to provide the requested public records. Defendants' failure to provide access to public records prevents Plaintiff from accessing key information regarding the Durham-Orange Light Rail project and the circumstances surrounding this project's demise. Defendants' failure to provide access to these documents limits Plaintiff's ability to engage in administrative, judicial, and legislative processes and prevents Plaintiff from carrying out its purpose of educating the public and advocating for environmentally-responsible public transit.

WHEREFORE, Plaintiff respectfully prays that the Court:

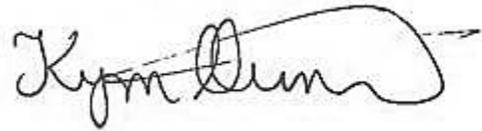
1. Allow Plaintiff to conduct reasonable discovery;
2. Subsequent to discovery, set the matter down for an immediate hearing pursuant to N.C. GEN. STAT. § 132-9(a);
3. Enter an order declaring that the NCRRTA is an agency of North Carolina for purposes of the Public Records Act, N.C. GEN. STAT. § 132-1(a);
4. Enter an order declaring that the documents requested by Plaintiff are public records, subject to disclosure pursuant to the Public Records Act, N.C. GEN. STAT. § 132-1(a);
5. Enter an order pursuant to N.C. GEN. STAT. § 132-9(a) compelling Defendants to make available for inspection all public records requested by Plaintiff

within Defendants' custody or control that have not been previously made available for inspection in compliance with N. C. GEN. STAT. § 132-6; and

6. Enter an order awarding Plaintiff its reasonable attorney fees pursuant to N. C. GEN. STAT. § 132-9(c)(1).

Plaintiff further prays that the Court provide it with such further and additional relief as the Court shall deem to be just, proper and authorized by law, and that the costs of this action be taxed against Defendants.

Respectfully submitted this 1st day of July, 2019.



Kimberley Hunter
N.C. State Bar No. 41333
khunter@selcnc.org
Ramona McGee
N.C. State Bar No. 47935
rmcgee@selcnc.org
601 W. Rosemary St., Suite 220
Chapel Hill, NC 27516
Attorneys for Plaintiff,
Southern Environmental Law Center