Intersal, Inc. v. Wilson, 2024 NCBC Order 28.

STATE OF NORTH CAROLINA COUNTY OF WAKE	IN THE GENERAL COURT OF JUSTICE SUPERIOR COURT DIVISION 15 CVS 9995
INTERSAL, INC., Plaintiff, v. D. REID WILSON, Secretary, North Carolina Department of Natural and Cultural Resources; NORTH CAROLINA DEPARTMENT OF NATURAL AND CULTURAL RESOURCES; THE STATE OF NORTH CAROLINA; and FRIENDS OF QUEEN ANNE'S REVENGE, a Non-Profit Corporation, Defendants.	**ORDER ON DEFENDANTS' MOTION FOR PROTECTIVE ORDER**

1. **THIS MATTER** is before the Court on Defendants' Motion for Protective Order (the "Motion"), (ECF No. 299).

2. Having considered the Motion, the associated briefing, and the recordings at issue *in camera*, the Motion is hereby **GRANTED in part** and **DENIED in part**.

I. FACTUAL AND PROCEDURAL BACKGROUND

3. This case was originally set for trial on Monday, 19 February 2024. (Final Pretrial Order ¶ 10, ECF No. 271.) This trial date, however, was postponed following the discovery of previously undisclosed images and recordings from a meeting that occurred a decade ago involving representatives of Plaintiff, Defendants, and non-party Nautilus Productions, LLC ("Nautilus"). (Order on Pl.'s

Mot. Admit Evidence, Defs.' Mot. Sanctions and Reconsider Summ. Jdgmt. Ruling and Pl.'s Mot. Continue Trial ["Continuance Order"], ECF No. 294.)

4. On 3 February 2014, representatives and counsel for Plaintiff, Defendants, and Nautilus met in-person in Raleigh, North Carolina, to discuss issues arising from the 2013 Settlement Agreement signed on 15 October 2013 (the "2013 Agreement"). At the meeting, Plaintiff was represented by John Masters, the Chair of its Board of Directors, and its attorney, Ken McCotter. Nautilus was represented by its CEO, Rick Allen, and its attorney, Joe Poe. Defendants were represented by Karin Cochran, Chief Deputy Secretary, and Kevin Cherry, Deputy Secretary, of Defendant North Carolina Department of Natural and Cultural Resources ("DNCR"); Steve Claggett, a DNCR archaeologist; Cary Cox, DNCR's marketing director; and the State's attorney, Karen Blum. (Defs.' Br. Supp. Mot. Sanctions and Mot. Reconsider Pursuant to Rule 60 ["Defs.' Sanctions Br."], Ex. A ["DNCR Email"], ECF No. 279.1; Defs.' Sanctions Br., Ex. F ["Blum Aff."] ¶¶ 6-8, ECF No. 279.6; Aff. of John Masters ["Masters Aff."] ¶ 1-2, ECF No. 286.)

5. Without the knowledge or consent of the others attending the meeting, Rick Allen ("Allen") made an audio recording of the meeting in two parts using his laptop. (Defs.' Sanction Br. 2, 9; Blum Aff. ¶¶ 10-13; Masters Aff. ¶ 3; Aff. of Frederick L. Allen ["Allen Aff."] ¶ 3, ECF No. 285.)

6. At two points in the second recording Allen, Masters, and their respective counsel exited the meeting room to take breaks. DNCR employees and, at times, their counsel, Karen Blum, remained in the room. (Blum Aff. ¶¶ 9, 18-34.)

Defendants allege that during these breaks Blum discussed "strategies for the meeting, [and] interpretations of provisions of the 2013 Agreement, among other confidential matters." (Defs.' Br. Supp. Mot. Protective Order ["Defs.' Br."], Ex. D ["Cochran Aff."] ¶ 8, ECF No. 300.4.)

7. It is unclear what Allen did with these recordings in 2014 after the meeting was over. When asked to recollect, Allen first indicated that he had given them to David Harris,[1] Plaintiff's previous counsel of record, on a flash drive after Intersal initiated this action in 2014. However, after learning that the recordings were not located among Mr. Harris's files, Allen stated that he "may have been mistaken about what [he] provided to Mr. Harris and when."[2] (Allen Aff. ¶¶ 3-4, 6.)

8. It is clear, however, that on 1 February 2024, Allen provided Plaintiff's counsel with the two recordings from the same 3 February 2014 meeting. At first, Plaintiff's counsel believed they had received a copy of material already produced in discovery. After review, however, Plaintiff's counsel determined that the recordings had not been previously disclosed, and they forwarded the material to counsel for Defendants on 7 February 2024. Plaintiff contends that no one, not even Masters, knew of the existence of Allen's recordings prior to February 2024. (Pl.'s Resp.

[1] Mr. Harris has since passed away. (Order Granting Withdrawal, ECF No. 226; Aff. of Antonette Edwards ["Edwards Aff."] ¶ 1, ECF No. 284.)

[2] A subsequent search of both Mr. Harris's and Plaintiff's counsel's files revealed that neither Mr. Harris nor Plaintiff's counsel had either the images or the recordings prior to Allen's disclosure in February 2024. (Edwards Aff. ¶¶ 1-5; Aff. of Lynn Charbonneau ¶¶ 1-3, ECF No. 287.)

Defs.' Mot. Protective Order ["Pl.'s Resp."], Ex. 1, ECF No. 302.1; Masters Aff. ¶ 3.) At this point, trial was set to begin in twelve days.

9. Emphasizing that the recordings were not only made without their knowledge and while Allen was out of the room, but also that they contain attorney-client privileged communications, Defendants responded by moving for sanctions against Plaintiff and requesting that the Court reconsider its summary judgment ruling. (Defs.' Mot. Sanctions and Mot. Reconsider Pursuant to Rule 60, ECF No. 278.) After a status conference between the parties, (*see* ECF No. 277), full briefing on Defendants' motion, (*see* ECF No. 283), submission of the recordings *in camera* for the Court's review, and Plaintiff's submission of a Motion to Continue Trial for this and other reasons, (*see* ECF No. 289), the Court continued the trial. (Continuance Order ¶ 12.)

10. The Court further ordered that Plaintiff destroy and/or return all copies of the two recordings pending a determination of Defendants' concerns regarding violation of their attorney-client privilege. Defendants were ordered to provide for the Court's *in camera* review a certified transcript of any portions of the recordings that they contend are privileged. Defendants had until 26 February 2024 at 12:00 PM to file a motion for protective order on privilege grounds. Plaintiff had until 29 February 2024 at 5:00 PM to file its response. (Continuance Order ¶ 13.)

11. Consistent with the Court's Order, Plaintiff certified its destruction of all recordings in its possession, and Defendants provided by email to the Court's clerk a certified transcript of the portions of the recordings Defendants allege to be

privileged. (Pl.'s Certification of Destruction of Recordings, ECF No. 296; Defs.' Br., Ex. A, ECF No. 300.1.)

12. Defendants' Motion for Protective Order and Plaintiff's response were timely submitted. (ECF Nos. 299, 300, 302.) The Court permitted Defendants to file a reply addressing the interplay between North Carolina's Public Records Act and the attorney-client privilege by 6 March 2024. (Briefing Order, ECF No. 303.) After full briefing, a hearing on the Motion was held on 12 March 2024. (Not. of H'rg., ECF No. 305.)

13. The Court has reviewed the parties' briefs and supporting materials, as well as the arguments of counsel at the hearing, and has conducted an *in camera* review of the recordings and the certified transcript. The Motion is now ripe for resolution.

II. LEGAL STANDARD

14. Rule 26 of the North Carolina Rules of Civil Procedure (the "Rule(s)") allows parties to "obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action[.]" N.C. R. Civ. P. 26(b)(1). Evidence is relevant if it "appears reasonably calculated to lead to the discovery of admissible evidence." *Id.*

15. However, communications are subject to the attorney-client privilege and are shielded from discovery when:

> (1) the relation of attorney and client existed at the time the communication was made, (2) the communication was made in confidence, (3) the communication relates to a matter about which the attorney is being professionally consulted; (4) the communication was

> made in the course of giving or seeking legal advice for a proper purpose although litigation need not be contemplated; and (5) the client has not waived the privilege.

State v. Murvin, 304 N.C. 523, 531 (1981). The party claiming the attorney-client privilege bears the burden of establishing the privilege's existence. *See Evans v. United Servs. Auto. Ass'n*, 142 N.C. App. 18, 32 (2001); *Sessions v. Sloane*, 248 N.C. App. 370, 385 (2016).

16. "The public's interest in protecting the attorney-client privilege is no trivial consideration, as this protection for confidential communications is one of the oldest and most revered in law." *In re Investigation of the Death of Miller*, 357 N.C. 316, 328 (2003). Still, as an exception to discovery, the attorney-client privilege is construed strictly. *See Ford v. Jurgens*, 2021 NCBC LEXIS 89, at **8 (N.C. Super. Ct. Oct. 5, 2021) (citing *Evans*, 142 N.C. App. at 31 (2001) ("courts are obligated to strictly construe the privilege[.]")); *State v. Smith*, 138 N.C. 700, 703 (1905) ("As the rule of privilege has a tendency to prevent the full disclosure of the truth, it should be limited to cases which are strictly within the principle of the policy that gave birth to it.") (citation omitted).

17. "[T]he responsibility of determining whether the attorney-client privilege applies belongs to the trial court, not to the attorney asserting the privilege." *In re Investigation of the Death of Miller*, 357 N.C. at 336 (citing *Hughes v. Boone*, 102 N.C. 137, 160 (1889))

18. Here, Plaintiff contends that North Carolina's Public Records Act (the "Act") requires production of attorney-client communications. The Act mandates

that custodians of public records allow those records to be inspected, examined, and obtained by members of the public. N.C.G.S. § 132-6. Our courts have construed the Act liberally in favor of the general public's right of access. *See News & Observer Publ'g Co. v. State ex rel. Starling*, 312 N.C. 276, 281 (1984) ("[I]t is clear that the legislature intended to provide that, as a general rule, the public would have liberal access to public records."); *Advance Publ'n, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 506 (1981) ("good public policy is said to require liberality in the right to examine public records." (quoting 66 Am. Jur. 2D *Records and Recording Laws* § 12 (1973)) (cleaned up)); *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462 (1999) (stating that the Public Records Act "provides for liberal access to public records."); *Gray Media Grp., Inc. v. City of Charlotte*, 2023 N.C. App. LEXIS 566, at **2 (2023) ("The Act is intended to be liberally construed to ensure that governmental records be open and made available to the public, subject only to a few limited exceptions."). Therefore, "in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection." *News and Observer Publ'g Co., Inc. v. Poole*, 330 N.C. 465, 486 (1992).

19. The Act defines "public records" to include "all documents, papers, letters . . . *sound recordings*, magnetic or other tapes . . . 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.G.S. § 132-1(a) (emphasis added).

20. Prior to 3 October 2023, the Public Records Act exempted from the definition of public records:

> written communications (and copies thereof) to any public board, council, commission or other governmental body of the State . . . made within the scope of the attorney-client relationship *by any attorney-at-law* serving any such governmental body, concerning any claim against or on behalf of the governmental body . . . or concerning the prosecution, defense, settlement or litigation of any judicial action[.]

N.C.G.S. § 132-1.1(a) (2013) (amended 2023) (emphasis added). The statute further provided that such written communications were not subject to:

> public inspection, examination or copying unless specifically made public by the governmental body receiving [them]; provided, however, that such written communications and copies thereof *shall become public records as defined in G.S. 132-1 three years from the date such communication was received by such public board, council, commission or other governmental body*.

Id. (emphasis added).

21. By statute, then, written communications of a certain nature (a) from an attorney to a governmental body client, (b) that were made within the scope of the attorney-client relationship, and (c) that were received by the client within the last three years were exempted from the definition of public records and not subject to disclosure. *See Summers v. City of Charlotte*, No. 3:18-CV-000612-RJC-DSC, 2021 U.S. Dist. LEXIS 191597, at *2 (W.D.N.C. Oct. 5, 2021) ("The . . . Public Records Act provides that any attorney-client privilege available to a public entity expires three years after the communication was made.")

22. In contrast, written communications *from* a public agency to its attorneys were public records subject to disclosure regardless of when they occurred. *See McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 469 (2004) ("the statutory protection for privileged information is more narrow than the traditional common law attorney-client privilege.")

23. Effective 3 October 2023, the General Assembly amended the Public Records Act to eliminate from the public records exclusion both the requirement that the written communication be "by any attorney-at-law" and the three-year limitation. The Act now provides that any written communication to any governmental body of the State (or any county, municipality or other political subdivision or unit of government) that is "made within the scope of the attorney-client relationship" is not a public record, regardless of its age. N.C.G.S. § 132-1.1(a).

III. ANALYSIS

24. Defendants contend that certain excerpts from the two recordings at issue are protected by the attorney-client privilege because they contain confidential communications between DNCR employees and the attorney representing DNCR, Karen Blum, concerning legal strategies related to the 2013 Settlement Agreement. (Defs.' Br. 9-13.) They further argue that the Public Records Act does not except the identified recorded excerpts from the protections of the privilege because the recordings themselves are not public records. (Defs.' Reply Supp. Mot. Protective Order ["Defs.' Reply"] 2-5, ECF No. 304.)

25. In response, Plaintiff contends that the communications between the DNCR employees and Ms. Blum are not privileged because the Public Records Act in effect on 3 February 2014 limited any such protection to three years. Therefore, Plaintiff argues that the Public Records Act requires disclosure of the recordings in their entirety and defeats Defendants' claim of privilege. (Pl.'s Resp. 9-12.)

26. The Court concludes that the Public Records Act does not require disclosure of those portions of the recordings otherwise protected by the attorney-client privilege because the definition of "public records" in the Act does not encompass these recordings. While it is true that a public record may take the form of a recording, the statutory definition also requires that the recording be "*made or received pursuant to law or ordinance* in connection with the transaction of public business by any agency of North Carolina government[.]" N.C.G.S. § 132-1.1(a) (emphasis added).

27. Records are made "pursuant to law or ordinance" if "required by law" or "kept in carrying out lawful duties." *News & Observer Publ'g Co. v. Wake Cnty. Hosp. Sys., Inc.*, 55 N.C. App. 1, 13 (1981). Nothing in the record suggests that these recordings were either. To the contrary, Defendants have contended that Allen created the two recordings in violation of North Carolina's Electronic Surveillance Act, N.C.G.S. § 15A-286, *et seq*. (Defs.' Sanctions Br. 8-9, ECF No. 279.)

28. At the hearing, Plaintiff argued that the recordings were received by DNCR when it produced them pursuant to its legal obligations in this case. That

may be true; however, if that is so, then the recordings only became public records at the time they were lawfully produced to Defendants on 7 February 2024. By that date, the Act had been amended to eliminate the three-year limitation on attorney-client privileged communications, as well as the requirement that the written communication be made by an attorney-at-law serving DNCR. N.C.G.S. § 132-1.1(a) (2013) (amended 2023).[3]

29. The Court has reviewed *in camera* the two recordings in their entirety, as well as the certified transcript of portions of those recordings that Defendants contend are privileged. As a result of that review, the Court determines that portions of the recordings and transcript are protected by the attorney-client privilege and are not subject to disclosure pursuant to the Act.

30. Therefore, the Court hereby **ORDERS** that Defendants redact the following portions of the certified transcript, along with their corresponding sections in the audio recordings: 9:7-10:1; 10:3; 10:8-9; 10:12-15:23; 16:1-17:11; 18:3-19:13; 25:19-27:4; 27:15-30:23. Once redacted, Defendants are directed to produce the transcript and two recordings, in redacted form, to Plaintiff. This redaction and production shall be completed by 22 March 2024 at 5:00 PM.

31. The Court declines to rule on other grounds for the exclusion of the two recordings or Allen's testimony until the parties have had an opportunity to conduct

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[3] The parties do not address whether the recordings are "written communications." Therefore, the Court declines to address this aspect of the Act. *See MCI Constr., LLC v. Hazen & Sawyer, P.C.*, 213 F.R.D. 268, 272 (M.D.N.C. 2003) (declining to address the definition of written communications because the parties agreed that the Public Records Act's exemptions applied and only disputed whether the three-year limitation in Section 132-1.1(a) was permissible).

the discovery and engage in any motion practice contemplated in the Amended Case Management Order, (ECF No. 298).

IV. CONCLUSION

32. **WHEREFORE**, the Court hereby **ORDERS** as follows:

a. The Defendants' Motion is **GRANTED** with respect to the following portions of the certified transcript, along with their corresponding sections in the audio recordings: 9:7-10:1; 10:3; 10:8-9; 10:12-15:23; 16:1-17:11; 18:3-19:13; 25:19-27:4; 27:15-30:23. Defendants shall redact the recordings and produce to Plaintiff a version of the two recordings consistent with this Order by 22 March 2024 at 5:00 PM.

b. In all other respects, the Defendants' Motion is **DENIED**, without prejudice to either parties' ability to file a motion in accordance with the provisions of the Amended Case Management Order, (ECF No. 298).

IT IS SO ORDERED, this the 15th day of March, 2024.

/s/ Julianna Theall Earp

Julianna Theall Earp
Special Superior Court Judge
for Complex Business Cases