IN THE COURT OF APPEALS OF NORTH CAROLINA

No. COA18-1126

Filed: 19 November 2019

Wake County, No. 16 CVS 15006

NICHOLAS A. OCHSNER, Plaintiff,

v.

N.C. DEPARTMENT OF REVENUE, Defendant.

Appeal by plaintiff from order entered 4 June 2018 by Judge R. Allen Baddour, Jr. in Superior Court, Wake County. Heard in the Court of Appeals 8 May 2019.

Whitley Law Firm, by Ann C. Ochsner, for plaintiff-appellant.

Attorney General Joshua H. Stein, by Assistant Solicitor General Kenzie M. Rakes and Deputy General Counsel Blake W. Thomas, for defendant-appellee.

STROUD, Judge.

Nicholas Ochsner ("Plaintiff") appeals from the trial court's order granting the North Carolina Department of Revenue's ("NCDOR" or "Defendant") motion to enforce a mediated settlement agreement and dismissing the action as moot. After Defendant produced over 13,000 pages of responsive documents, conducted searches of its employees and other persons identified as having potentially responsive records, and provided sworn statements that it had conducted the searches and produced all records discovered, the trial court properly determined Defendant had completed its obligations under the parties' Memorandum of Understanding and thus denied Plaintiff's motion for enforcement and dismissed the action as moot. In addition, the

trial court properly exercised its judicial oversight function under the Public Records Act. We therefore affirm.

I. Factual and Procedural Background

On 7 December 2016, Plaintiff filed a "Complaint and Motion for Order to Show Cause" arising out of his request for production of public records from Defendant. Plaintiff alleged that on 8 June 2016, he requested production of public records from Defendant. He alleged that he filed this request "in his capacity as an investigative reporter for WBTV, the CBS affiliate serving the Charlotte, North Carolina market." He alleged in "late 2015 and early 2016" he "reported multiple stories pertaining to government officials, including members of the General Assembly and Governor Pat McCrory." In February, March, and June of 2016, he received notices from Defendant regarding "alleged taxes owed for tax year 2011." Plaintiff had requested production under the North Carolina Public Records Act, of these records:

> -All written communication, including but not limited to email, text messages, letters or memos sent and received between NCDOR employees and any member of the North Carolina General Assembly, including but not limited to the Office of Speaker Tim Moore, their staff and other representatives between September 1, 2015 and June 1, 2016 containing the following words: "Oschner", "Reporter", "WBTV", "Charlotte", "2011", "audit", or "taxes"
>
> -All written communication, including but not limited to emails, text messages, letters or memos, sent and received between NCDOR employees of the Office of the Governor between September 1, 2015 and June 1, 2016 containing the following words: "Oschner", "Reporter", "WBTV",

> "Charlotte", "2011", "audit", or "taxes"
>
> -All notices of unpaid taxes, collection notices and other letters regarding unpaid taxes for the 2011 tax year sent by NCDOR between September 1, 2015 and June 1, 2016.
>
> -The entire file and any and all documents related to the tax account of Nicholas A. Ochsner

Defendant 's first response was an email on 9 June 2016, stating that a search would be initiated and the records would be provided as soon as possible. On 14 July, 2016, Defendant provided its initial response which included eight pages of internal documents related to Plaintiff's tax account. Plaintiff then "replied to NCDOR to address the deficiencies in" the response. On 8 August 2016, Defendant responded to several questions posed by Plaintiff and provided additional documents to Plaintiff. Defendant noted that it had narrowed the search due to the overly-broad search terms "taxes, audit, and Charlotte" to find email "which might conceivably pertain to your *particular* tax situation." Defendant also certified that it had confirmed no private email addresses and "non-state issued phones" were used in handling his tax matter. Defendant described the various divisions within the NCDOR which may have been involved with the "resolution of your tax matter" and efforts made to search for additional responsive documents and provided six additional documents and Plaintiff's previous state tax returns and corresponding payment information.[1]

[1] Under North Carolina General Statute § 132-6, "[n]o person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request."

Plaintiff's complaint included attachments of additional correspondence by email and letter between Plaintiff, his counsel, and Defendant, seeking to address Plaintiff's questions regarding the scope of Defendant's search and his allegations of non-compliance with his request.

On 9 December 2016, the Senior Resident Superior Court Judge entered an order assigning this case under Local Rules For Civil Superior Court, Tenth Judicial District, Rule 2.2 to the Honorable R. Allen Baddour, Jr. Plaintiff did not request mediation and his counsel informed Defendant by email that Plaintiff believed "mediation is not likely to yield a different result and would not be fruitful." Defendant responded that mediation was required by North Carolina General Statute § 7A-38.3E.[2] On 28 December 2016, the trial court *sua sponte* issued a Litigation Hold Order requiring the parties to preserve all potentially relevant records, both paper and electronic, pending resolution of the action. On 12 January 2017, the trial court issued an order requiring the parties to select a mediator and participate in a mediated settlement conference on or before 10 February 2017.

N.C. Gen. Stat. § 132-6(b) (2017). Although Plaintiff was not required to disclose the purpose of his request, his complaint includes allegations regarding the purpose of his request. We note this purpose only because Plaintiff identified the purpose and correspondence between the parties both before and after the filing of the complaint addressed this purpose in seeking to identify all responsive documents.

[2] Defendant was correct. This Court held in *Tillett v. Town of Kill Devil Hills*, that "in order to confer jurisdiction upon the trial court in a Public Records Act suit, the plaintiff must initiate mediation within 30 days of the filing of the responsive pleading as required by N.C. Gen. Stat. § 7A-38.3E(b)." ___ N.C. App. ___, ___, 809 S.E.2d 145, 148 (2017). Here, mediation was initiated and completed within 30 days of Defendant's answer being filed.

On 24 January 2017, Defendant filed its answer to the complaint, denying the material allegations of the complaint and alleging that it had undertaken a reasonable search of its records and responded "fully and in good faith" to Plaintiff's request. Defendant also raised various affirmative defenses and moved to dismiss the action. Defendant also responded to Plaintiff's first set of interrogatories and request for production of documents.

On 10 February 2017, the parties attended mediation and entered into a Memorandum of Understanding ("MOU"). In the MOU, Plaintiff agreed to limit the time scope of his request to 1 November 2015 to 1 June 2016. Defendant agreed to "identify staff members" of six specific members of the North Carolina House of Representatives and one State Senator within 14 days. Defendant also identified in the MOU seven other people who had a "professional association or connection with the legislature" and agreed to provide "information available to it pertaining" to those individuals within 14 days. Defendant agreed to "conduct a search of everyone in the department" of emails sent and received from personal and business email accounts; text messages sent or received on NCDOR issued phones; text messages sent or received on personal phones; to search for logs pertaining to instant messages or in the absence of such logs to provide the policy in effect for NCDOR employees at the relevant times; and to search "[a]ny and all other forms of written communication." The "goal of the parties" was to complete the searches within 30 days but it was

anticipated that production of records may occur after that time, on a rolling basis and as the parties may agree. The MOU included essentially the same requirements as to the Office of the Governor, for the same time period. Within 30 days, Defendant was also required to certify the "number of notices issued, the date(s) of printing, and the date(s) of mailing" for all "notices of unpaid taxes, collection notices, and other letters regarding unpaid taxes for the 2011 tax year sent by NCDOR between January 1, 2016 and March 1, 2016." Defendant was to provide "[t]he entire file and any and all documents related to the tax account of Nicholas A. Ochsner[,]" including "IRMF data received on or about 31 May 2013 from the IRS;" a "statement regarding its ability to identify, define, access, retrieve or otherwise provide the computer-related data connected to the IRMF file" and any notes regarding Plaintiff's tax file.[3]

On 20 April 2017, the trial court held a status review hearing regarding the ongoing production of the requested records. Plaintiff's counsel expressed concern regarding the accuracy and completeness of the information Defendant produced. Plaintiff's questions arose primarily from the methods of electronic data processing

[3] IRMF data refers to information produced by the IRS Information Returns Master File system. As part of the information produced to Plaintiff, Alan Woodard, Director of Examination for NCDOR, described IRMF as follows: "The Information Returns Master File (IRMF) program is an automated process utilized by the NCDOR's Examination Division to identify taxpayers who have sources of income in North Carolina for a tax year but did not file an income tax return. This data is provided by the Internal Revenue Service and is used to generate notices of intent to assess issued by the NCDOR. As referenced, this is an automated process which does not involve or require NCDR employee involvement until communication is received from a taxpayer or a taxpayer's representative regarding inquisition or resolution of the matter."

systems of NCDOR and the "electronic footprint" and metadata showing who accessed Plaintiff's information and when. Defendant's counsel argued that Plaintiff's request was "getting beyond a question of access to records. We're getting into an issue of access to information about computer systems" which is protected by North Carolina General Statute § 132-6.1.[4] As to progress on searching for communications between the Governor's Office and Defendant, Defendant's counsel reported that "we're kind of just working through" the "109 names between the General Assembly folks and the office of the Governor." She noted NCDOR had hired additional help to assist and should be able to produce "in accordance with the schedule."

On 8 May 2017, while the "rolling productions" contemplated by the MOU were still ongoing, Plaintiff served Defendant with a second set of discovery requests, including interrogatories, requests for production, and requests for admissions. In a letter dated 31 May 2017, Defendant informed Plaintiff that it "has met all of its obligations under the MOU." This included producing over 13,000 pages of responsive documents and providing sworn and certified statements regarding the searches performed to find the information requested as stated in the MOU. Defendant certified that the searches required by the MOU were performed for every

[4] "Nothing in this section shall require a public agency to create a computer database that the public agency has not otherwise created or is not otherwise required to be created. Nothing in this section requires a public agency to disclose security features of its electronic data processing systems, information technology systems, telecommunications networks, or electronic security systems, including hardware or software security, passwords, or security standards, procedures, processes, configurations, software, and codes." N.C. Gen. Stat. § 132-6.1(c) (2017).

employee of NCDOR, the Governor's office, and the legislative staff members identified under the MOU and the responsive documents were produced.

On or about 22 June 2017, Plaintiff served Defendant with a notice of deposition under Rule 30(b)(6) of the North Carolina Rules of Civil Procedure, seeking substantially the same information as the second discovery requests. On or about 7 July 2017, Plaintiff filed a motion under North Carolina General Statute § 132-1.9(d)(1) requesting entry of an order allowing access to records. In this motion, Plaintiff alleged he made a "second, unrelated request for public records" on 4 April 2017, in which he requested:

> 1) All communication—including but not limited to email, text message, iMessage, Slack message, letter or memo—sent or received between January 1, 2017 and April 4, 2017
>
> a. by the following employees: N.C. Janke, Schorr Johnson, Alan Woodard, Jocelyn Andrews, Ronald Penny, Ken Wright, and Anthony Edwards
>
> b. Containing the following key words: "Nicholas", "Nick", "Ochsner", "Audit", "2014", "lawsuit", "case", "Speaker", "Tim", "Moore", or "Tenisha",
>
> 2) All calendar entries maintained between March 1, 2017 and April 4, 2017 for the following individuals: N.C. Janke, Alan Woodard, Jocelyn Andrews, Ronald Penny, Jocelyn Andrews, and Anthony Edwards.
>
> 3) The entire file: and any and all documents related to the tax account of Nicholas A. Ochsner created or received between April 1, 2015 and April 4, 2017.[5]

[5] Tenisha S. Jacobs is a Special Deputy Attorney General and was counsel of record for Defendant.

Defendant sent a "letter and disc" to Plaintiff on or about 30 June 2017 including its first production of documents responsive to the request of 4 April 2017, but many of the documents were redacted with notations to North Carolina General Statute § 132-1.9, or 1A-1.[6]

On 14 July 2017, Defendant filed a motion for protective order as to the second set of discovery, notice of deposition, and first set of requests for admission, alleging that Plaintiff was seeking information outside the scope of the MOU and the Public Records Act. Defendant also filed a renewed motion to dismiss based upon North Carolina General Statute § 1A-1, Rule 12(b)(1), (2), and (6).

On 11 August 2017, the trial court held a hearing regarding the pending motions from both parties. On or about 4 October 2017, Plaintiff filed a motion requesting that the trial court make findings of fact and conclusions of law as to its ruling denying Plaintiff's motion for access to records and granting Defendant's motion for protective order. Plaintiff also filed a motion to enforce the MOU.

---

[6] We assume "1A-1" refers to the Rules of Civil Procedure in general. Plaintiff's motion alleges that one document states, "Redacted per G.S. 120-130(d)." This statute refers to "[d]rafting and information requests to a legislative employee." N.C. Gen. Stat. § 120-130 (2017). "A drafting request made to a legislative employee from a legislator is confidential. Neither the identity of the legislator making the request nor, except to the extent necessary to answer the request, the existence of the request may be revealed to any person who is not a legislative employee without the consent of the legislator." N.C. Gen. Stat. § 120-130(a). "Drafting or information requests or supporting documents are not 'public records' as defined by G.S. 132-1." N.C. Gen. Stat. § 120-130(d). Defendant asserted other emails were trial preparation materials for the pending action and thus not discoverable as "public records" under North Carolina General Statute § 132-1.9.

On 16 November 2017, the trial court entered an order allowing Defendant's motion for protective order, denying Plaintiff's motion for access based upon the second request of 4 April 2017, and denying Defendant's motion to dismiss the action. The trial court also entered an order to seal the documents produced in response to the 4 April 2017 request, which were reviewed *in camera* by the trial court based upon Defendant's claim of trial preparation materials.

On 16 January 2018, Defendant filed a motion to enforce the MOU. Defendant alleged it had produced over 13,000 pages of documents and fully satisfied the obligations of the MOU despite Plaintiff's claims otherwise. On 4 June 2018, the trial court entered an order and opinion releasing the Litigation Hold Order, denying Plaintiff's motion to enforce the MOU, and dismissing the action as moot based upon its determination that Plaintiff "has been given the opportunity to obtain the requested records at issue in this civil action." On 2 July 2018, Plaintiff filed notice of appeal "from the Order and Opinion signed by the Honorable R. Allen Baddour, Jr. on May 24, 2018 and filed with the Clerk on June 4, 2018 denying Plaintiff's motion to enforce mediated settlement agreement and dismissing the action as moot."

II. Standard of Review

Both Plaintiff and Defendant filed motions to enforce the MOU, and the trial court granted Defendant's motion and dismissed the case based upon its determination that Defendant had complied with the MOU. Prior cases have

established that we review an order regarding enforcement of a settlement agreement under the Public Records Act under the same standard of review as for a summary judgment order:

> We . . . apply the summary judgment standard of review. It is well-settled that the standard of review for an order granting a motion for summary judgment requires a two-part analysis of "whether, on the basis of materials supplied to the trial court, there was a genuine issue of material fact and whether the moving party is entitled to judgment as a matter of law." The moving party has the burden of demonstrating the lack of any triable issue of fact and entitlement to judgment as a matter of law. The evidence produced by the parties is viewed in the light most favorable to the non-moving party.

Hardin v. KCS Int'l, Inc., 199 N.C. App. 687, 695, 682 S.E.2d 726, 733 (2009) (citations omitted). We therefore review the trial court's order *de novo*.

III. Scope of Appeal

Portions of Plaintiff's argument are based upon his contention that the trial court abused its discretion by granting Defendant's motion for a protective order regarding his second discovery requests and notice of deposition. Plaintiff argues he was "denied the ability to support a motion to enforce the MOU by deposition and answers to his second set of interrogatories because the trial court abused its discretion in granting NCDOR's motion for a protective order." But Plaintiff appealed only from the final order, and he did not appeal from the trial court's order granting the protective order, so we have no jurisdiction to review the protective order.

The North Carolina Rules of Appellate Procedure requires that the notice of appeal "shall designate the judgment or order from which appeal is taken and the court to which appeal is taken[.]" N.C. R. App. P. 3(d).

> Proper notice of appeal is a jurisdictional requirement that may not be waived. As a general rule, the appellate court obtains jurisdiction only over the rulings specifically designated in the notice of appeal as the ones from which the appeal is being taken. As exceptions to the general rule, there are two situations in which the appellate court may liberally construe a notice of appeal to determine it has jurisdiction over a ruling not specified in the notice. First, if the appellant made a mistake in designating the judgment intended to be appealed, then the appeal will not be dismissed if the intent to appeal from the judgment can be fairly inferred from the notice and the appellee was not misled by the mistake. Second, if the appellant technically fails to comply with procedural requirements in filing papers with the court but accomplishes the functional equivalent of the requirement, then the court may find compliance with the rules.

Chee v. Estes, 117 N.C. App. 450, 452-53, 451 S.E.2d 349, 350-51 (1994) (citations omitted).

Neither exception applies here. Plaintiff clearly identified the order from which he was appealing and we cannot "fairly infer" that he made a mistake in designating the order from which he appealed. *Id.* Nor did Plaintiff technically fail to comply with procedural requirements in filing his notice of appeal. Moreover, Plaintiff makes no argument on appeal that he is entitled to review the protective order under North Carolina General Statute § 1-278. Further, the trial court's ruling

on the protective order related to Plaintiff's second discovery requests and notice of deposition did not deny Plaintiff a substantive legal claim. Therefore, we discern no right to appeal the protective order under North Carolina General Statute § 1-278. *See Yorke v. Novant Health, Inc.,* 192 N.C. App 340, 346, 666 S.E.2d 127, 133 (2008). We thus have no jurisdiction to review the trial court's protective order and cannot consider any arguments raised by Plaintiff as to any alleged error in the protective order.[7]

IV. Request for Individual "Tax Information" Under North Carolina General Statute § 105-259

Before we address the issue raised by Plaintiff under the Public Records Act, we must distinguish between the two types of information requested, as they are governed under different statutes. A portion of Plaintiff's request was for his own income tax information from prior years and was not actually a request for public records. Certain "tax information" is specifically excluded from disclosure under the Public Records Acts. "*Tax information may not be disclosed except as provided in G.S. 105-259.* As used in this subsection, 'tax information' has the same meaning as in G.S. 105-259." N.C. Gen. Stat. § 132-1.1(b) (2017) (emphasis added). An individual taxpayer may request his own records under North Carolina General Statute § 105-

[7] We also note that one of the issues Plaintiff argues on appeal as to the protective order arises from documents the trial court determined were protected by attorney-client privilege. The trial court reviewed these documents *in camera* prior to entering the protective order, but the documents are not in our record on appeal. Therefore, we would be unable to review this issue even if we treated the notice of appeal as covering the protective order.

259, but an individual's state income tax records are not "public records" as defined by North Carolina General Statute § 132-1.1. Thus, Plaintiff's request included both "public records" and his own income tax records, which he as the taxpayer could request under North Carolina General Statute § 105-259.

Plaintiff's arguments on appeal do not differentiate between the two distinct types of information requested—his own personal tax records and communications by and between NCDOR, members of the General Assembly, and Governor's office—but he notes in a footnote that although disclosure of tax information is prohibited as a general rule, "denial of access to a public record is improper on the basis that the public record contains nonpublic information, the responsibility being on the agency to separate the nonpublic information from the public" under North Carolina General Statute § 132-6(c). This is true, but there is no issue on appeal regarding Defendant's separation of "the nonpublic information from the public" within the public records produced. Plaintiff overlooks the real distinctions between the different types of records he requested and the different statutes governing the production of this information, but Defendant has attempted to make this distinction clear from the beginning of this dispute.

On 9 June 2016, the day after Plaintiff's initial request, Trevor Johnson, Director of Public Affairs for NCDOR, informed Plaintiff he would address the portion of the request as to communications such as emails, but the portion of his request

regarding "actual taxpayer records" would be forwarded to the Taxpayer Assistance Division. In August 2016, after Mr. Ethan Forrest, as counsel for WBTV, contacted Defendant regarding the public records request, Defendant requested Mr. Forrest to have Plaintiff execute a GEN-58 form, Power of Attorney and Declaration of Representative. This power of attorney was necessary for Defendant to disclose personal tax information of Plaintiff to Mr. Forrest or anyone other than Plaintiff under North Carolina General Statute § 105-259. Mr. Forrest questioned the need for the GEN-58 noting, "I am counsel for WBTV and Raycom Media, seeking records under the Public Records Act pertaining to a WBTV employee. I am not resolving a taxpayer dispute with your office." However, Plaintiff executed the GEN-58 and Defendant then responded to Mr. Forrest's request. Thus, at its inception, there was confusion as to whether Plaintiff's request involved a "taxpayer dispute" or simply a public records request. The record shows that at least until July 2016, Plaintiff was seeking to resolve a taxpayer dispute with Defendant, as his brief acknowledges by noting that "[b]y July 7, 2016, Oschner's tax liability for 2011 had been resolved, but his public records request had not."[8] In any event, the issues on appeal—except

[8] At the hearing on 26 January 2018, the trial court reviewed the various tax years for which Defendant had produced records of Plaintiff's individual returns and sought to clarify which years Plaintiff claimed he had filed in North Carolina but for which Defendant had not produced records. Plaintiff's counsel informed the trial court that he had not filed in 2011, as he had just graduated from Elon and taken a job out of state, and he was not entirely certain at that time as to the exact years he had filed in North Carolina. Defendant's counsel again noted that Plaintiff's "initial request intermingled public records with tax information" and explained that the information regarding his income tax returns could be disclosed to the taxpayer under North Carolina General Statute § 105-259, but it was not a "public record" governed by the Public Records Act.

perhaps as to metadata related to Plaintiff's individual income tax returns—all arise from his request under the Public Records Act, and we will address his arguments accordingly. We therefore express no opinion as to Plaintiff's individual taxpayer dispute, if any, with Defendant or as to the production of individual "tax information" under North Carolina General Statute § 105-259.

V. Substantial Compliance with Memorandum of Understanding

Plaintiff argues that "this Court Should Reject The Notion That, As A Matter Of Law, A State Agency Complies With A Settlement Agreement Reached To Resolve A Public Records Dispute By 'Substantial Compliance.'" Plaintiff notes that the trial court's order denying his motion to enforce the MOU and granting Defendant's motion to enforce the MOU "finds that [NCDOR] has materially and substantially complied with the MOU and, in turn, the N.C. Public Records Act." (Alteration in original.) Plaintiff argues that the sworn certifications by various officers that the required searches were conducted and that no responsive documents were found as to particular types of documents are not sufficient as a matter of law to show that Defendant has actually complied with the MOU. Plaintiff contends these certifications are not sufficient for the trial court to perform its required role of judicial oversight regarding an agency's production of public records.

> The final determination of possession or custody of the public records requested is not properly conducted by the state agency itself. The approach that the state agency has the burden of compliance, subject to judicial oversight, is

> entirely consistent with the policy rationale underpinning the Public Records Act, which strongly favors the release of public records to increase transparency in government. Judicial review of a state agency's compliance with a request, prior to the categorical dismissal of this type of complaint, is critical to ensuring that, as noted above, public records and information remain the property of the people of North Carolina. Otherwise, the state agency would be permitted to police its own compliance with the Public Records Act, a practice not likely to promote these important policy goals.

State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010).

Defendant contends that the undisputed evidence shows it did search for text messages, instant messages, and emails, and it described its search procedures in a certified statement and two affidavits. Specifically, Defendant's Public Affairs Director met with the directors of each of NCDOR's 24 departments and every employee was instructed 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. Only 2 of the 24 departments reported finding responsive documents, and those documents were provided to Plaintiff, except for one personal iPhone message ultimately determined not to be responsive because it did not contain any of the search terms.

Defendant argues that the MOU "should be construed under principles of contract law." *See Penn Dixie Lines, Inc. v. Grannick*, 238 N.C. 552, 556, 78 S.E.2d 410, 414 (1953) ("Compromise agreements are governed by the legal principles applicable to contracts generally. As a consequence, a compromise agreement is conclusive between the parties as to the matters compromised."). Therefore, Defendant contends Plaintiff must show a material or substantial breach of the MOU to succeed on his motion for enforcement. *See Supplee v. Miller-Motte Bus. Coll., Inc.*, 239 N.C. App. 208, 220-21, 768 S.E.2d 582, 593 (2015) ("It is well established that in order for a breach of contract to be actionable it must be a material breach, one that substantially defeats the purpose of the agreement or goes to the very heart of the agreement, or can be characterized as a substantial failure to perform." (brackets and quotations marks omitted) (quoting *Long v. Long*, 160 N.C. App. 664, 668, 588 S.E.2d 1, 4 (2003))).

Plaintiff replies that the terms of the MOU do not change Defendant's obligations under the Public Records Act and its provisions should "be construed as if the Act had been written into the settlement agreement." Plaintiff contends that Defendant's argument that the MOU went beyond the requirements of the Public Records Act is irrelevant, as Defendant agreed to the MOU. We do not entirely disagree, but Plaintiff has failed to demonstrate any way in which the trial court failed to consider Defendant's obligations under the Public Records Act. The MOU

did not lessen those obligations but simply further defined the scope of the searches Plaintiff requested by setting out the ranges of dates and persons to be searched.

Plaintiff does not contend that the material facts as summarized in the trial court's order are disputed but contends that as a matter of law, Defendant has not fully complied with the MOU by providing sworn statements as to its searches for records. The trial court's order summarizes the facts as follows:

> {6} The basis of Ochsner's Motion is that the Department failed to produce certain documents (e.g., text messages, instant messaging logs, etc.) per the terms of the MOU.
>
> {7} The Motion was supported by an affidavit from Ochsner, in which he alleged that "he has neither received documents responsive to the following MOU items nor any information upon which to make a determination of [the Department's] performance of the following items:"
>
> a. Items 1(e)(i) - emails from personal email accounts;
>
> b. Item 1(e)(ii) - text messages set[sic] or received from NCDOR issued phones;
>
> c. Item 1(e)(iii) - search of text messages sent or received from personal phones;
>
> d. Item 1(e)(iv) - search for any and all logs pertaining to instant messages;
>
> e. Item 1(e)(v) - any and all other forms of written communication;
>
> f. Item 2(c) - the same information contemplated in items 1(e)(i)-(v); and

> g. Item 4(c) - the entire file (including metadata) and any and all documents related to the tax account of Nicholas A Oschner.

See Affidavit of Nicholas A Ochsner ("Ochsner Affidavit"), p. 4 at ¶ 18.

{8} The Court disagrees and, for the reasons discussed in Section III, finds that the Department has materially and substantially complied with the MOU and, in turn, with the N.C. Public Records Act.

{9} Accordingly, Ochsner's Motion is DENIED.

II. MOOTNESS

{10} The Department, like Ochsner, filed a Motion to Enforce Mediated Settlement Agreement. It argued that the MOU "resolved the dispute in this civil action" and the Court should "dismiss [Ochsner's] outstanding claims given the Department's performance of all of its obligations thereunder." Defendant's Motion to Enforce Mediated Settlement Agreement, pp. 1-2.

{11} As explained below, the Court agrees that dismissal is appropriate given that the relief sought by Ochsner has been granted, and this case is therefore moot.

A.

SUMMARY OF MATERIAL FACTS

{12} Ochsner submitted a request for public records to the Department dated 8 June 2016 ("June 2016 Request").

{13} In December 2016, Ochsner commenced this civil action in Wake County Superior Court seeking an order: (i) declaring that the records requested by Ochsner

in the June 2016 Request were "public records" and (ii) compelling the Department, pursuant to General Statute 132-9(a) "to make them available for inspection and copying." Complaint and Motion for Order to Show Cause ("Complaint"), p. 8.

{14} The Court, following commencement of the action, ordered the parties to conduct a mediated settlement conference. The parties' mediation resulted in the execution of the MOU, which, per its terms, "memorialize[d] the matters with regard to each item from [the June 2016 Request]." MOU, p. 1.

{15} The four (4) items in the MOD directly correspond to the four (4) categories of documents sought in the June 2016 request. These documents can be generally described as follows:

a. Written communications between the Department and certain individuals with North Carolina General Assembly or otherwise associated therewith;

b. Written communications between the Department and certain individuals with the Office of the Governor;

c. Certain notices of unpaid taxes and collection and other letters regarding unpaid taxed issued by the Department; and

d. The entire file and all documents related to the tax account of Mr. Ochsner.[9]

See MOU and Complaint, Ex. A.

{16} The Department produced documents to Ochsner following execution of the MOU and, on 31 May

[9] As noted above, Plaintiff's "tax information" as defined by North Carolina General Statute § 105-259(a)(2) is not a public record, but this portion of the order is not in dispute.

> 2017, informed Ochsner by letter that it had fully satisfied all of its obligations under the MOU.
>
> {17} The Department has provided numerous sworn statements from its employees during the course of this action. These statements include: (a) Certified Statement of Schorr Johnson dated 20 June 2017 ("Johnson Certified Statement"); (b) Certified Statement of David Roseberry dated 19 April 2017 ("Roseberry Certified Statement"); (c) Affidavit of Daniel Garner dated 16 January 2018 ("Garner Affidavit"); (d) Affidavit of Schorr Johnson dated 26 February 2018 ("Johnson Affidavit"); and (e) Affidavit of David Roseberry dated 2 March 2018 ("Roseberry Affidavit").

(Alterations in original.) The trial court then noted several cases addressing when a case may be dismissed as moot:

> {23} Here, Ochsner seeks relief under the North Carolina Public Records Act and, specifically, General Statute 132-9. Subsection (a) of this statute provides, in part:
>
> > 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 order if the person has complied with G.S. 7A 38.3E.
>
> {24} Accordingly, the recovery provided for by this statute, and which Ochsner sought in commencing this action, is the opportunity to inspect those public records requested from the Department in the June 2016 Request, as modified by the parties' MOU. Ochsner has been given the opportunity to obtain the requested records at issue in this civil action.

{25} Both parties' acknowledge that the MOU limited the scope of the June 2016 Request. See e.g. Ochsner Affidavit, p. 2 at ¶ 6. A mediated settlement agreement, such as the MOU, "is . . . the document used to memorialize the substantive terms reached between the parties during the mediated settlement conference." Barnes v. Hendrick Auto., 2014 N.C. App. LEXIS 73, at *9 (N.C. Ct. App. Jan. 21, 2014). Thus, the MOU reflected the parties' mutual agreement as to what would satisfactorily complete the Department's obligations with respect to the June 2016 Request.

{26} The Department has produced documents in response to each section of the MOU. This included the over [sic] 13,000 pages of documents of written communications provided pursuant to Sections 1 and 2 of the MOU,. the certified statement from a Departmental official addressing the Department's issuance of certain notices provided pursuant to Section 3 of the MOU, and the documents in Ochsner's tax file as delineated in Section 4 of the MOU, some of which were provided to Ochsner prior to the commencement of the civil action.

{27} Ochsner complains that he did not receive certain documents. See Section II, , 7 supra. However, the Department in sworn statements from its Public Affairs Director, the individual with oversight of its public records requests, averred that the Department conducted its search for responsive records in accord with the MOU and explains, in reasonable detail, the scope and method of the Department's search, including the search terms used and locations searched. See Johnson Certified Statement, pp.1-2; Johnson Affidavit, pp. 1-4. Indeed, the Department further explains in these statements that its search included all Departmental employees, that it was for written communications (which included text messages), and that it encompassed all locations likely to contain the requested communications (which included personal and official devices, personal e-mail accounts). See Johnson

Affidavit, pp. 1-4.

{28} The Department, in its affidavits and other sworn statements, also explains why some documents were not located. For example, Ochsner complains the Department failed to produce instant messaging logs and text messages on Department issued phones. See Section II, ¶ 7 supra. However, the Department's Chief Information Officer explained that, during the relevant period, Departmental-issued phones "did not have text messaging capability enabled or available," and "there were no instant messaging systems on Department-issued computers." See Roseberry Affidavit. pp. 1-2.

{29} Courts, in context of reviewing public records disputes, have held that similar affidavits from governmental entities "are accorded a presumption of good faith" and, when unrebutted, "can prove that an agency satisfied" its obligations under a public records law. See e.g., Powell v IRS, 2017 U.S. Dist. LEXIS 198605, at *14 (D.D.C. Dec. 4, 2017) (internal citations omitted).

{30} Here, there are no positive indications of overlooked materials by the Department that raise doubt about the adequacy of the Department's search. Ochsner's claims that other responsive documents and information exists therefore amount to nothing more than speculation. As explained by the court in Powell when finding that the IRS fulfilled its obligations under FOIA, the good faith presumption afforded to such declarations cannot be rebutted "by purely speculative claims about the existence and discoverability of other documents." Id.

{31} "It is not the function of this Court to consider and rule on imagined controversies." Sbella v. Moon, 125 N.C. App. 607, 610, 481 S.E.2d 363, 365 (1997). Thus, the Court, for the reasons discussed above, finds that Ochsner has been granted the relief he sought by initiating this action under General Statute 132-9 and the issue upon which he sought a determination is moot. The Court

therefore dismisses this civil action.

(First alteration in original). (Footnotes omitted.)

The Public Records Act does not require an agency to create or compile records responsive to a request if those records do not exist; the agency must produce only the records which already exist. N.C. Gen. Stat. § 132-6.2(e) ("Nothing in this section shall be construed to require a public agency to respond to a request for a copy of a public record by creating or compiling a record that does not exist. If a public agency, as a service to the requester, voluntarily elects to create or compile a record, it may negotiate a reasonable charge for the service with the requester. Nothing in this section shall be construed to require a public agency to put into electronic medium a record that is not kept in electronic medium."). The MOU went beyond the requirements of the Public Records Act because it required Defendant to create records. For example, Defendant was required to create a list of staff members of six specific members of the House of Representatives and one Senator during the relevant time. The MOU required Defendant to search for certain records and to produce any records responsive to the request. As the trial court noted, both parties agreed that if the terms of the MOU were met, this would satisfy Plaintiff's request. The MOU did not set forth requirements as to the exact methodology of the searches or who would conduct the searches. This type of information would also go beyond that required by the Public Records Act, since it would require the agency to create

records regarding the search. As the trial court noted during the hearing, Plaintiff could have insisted that the MOU include specific requirements regarding the methodology, dates, and persons conducting the searches, but the MOU did not include this requirement.

Although Plaintiff argues that "material" and "substantial" compliance with a settlement agreement regarding public records is contrary to the intent of the Public Records Act, he has cited no authority, and we find none, which would require some higher level of compliance with a settlement agreement in this context than in any other. *See Supplee*, 239 N.C. App. at 220-21, 768 S.E.2d at 593. Although no case in North Carolina has addressed the use of sworn statements by agencies to show good faith efforts to search for requested documents, we find many federal cases under the Freedom of Information Act which have addressed this issue. 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." *Baker & Hostetler LLP v. U.S. Dep't of Commerce*, 473 F.3d 312, 318 (D.C. Cir. 2006).

> To meet its burden to show that no genuine issue of material fact exists, with the facts viewed in the light most favorable to the requester, the agency must demonstrate that it has conducted a "search reasonably calculated to uncover all relevant documents." Further, the issue to be resolved is not whether there might exist any other documents possibly responsive to the request, but rather whether the *search* for those documents was adequate. The

> adequacy of the search, in turn, is judged by a standard of reasonableness and depends, not surprisingly, upon the facts of each case. In demonstrating the adequacy of the search, the agency may rely upon reasonably detailed, nonconclusory affidavits submitted in good faith. With the guiding principle of reasonableness in mind, we turn to each of appellant's contentions.

Weisberg v. U.S. Dep't of Justice, 745 F.2d 1476, 1485 (D.C. Cir. 1984) (citations omitted).

Here, the trial court determined that Defendant's sworn declarations were sufficient to show that it conducted a reasonable search:

> However, the Department in sworn statements from its Public Affairs Director, the individual with oversight of its public records requests, averred that the Department conducted its search for responsive records in accord with the MOU and explains, in reasonable detail, the scope and method of the Department's search, including the search terms used and locations searched.

The MOU itself did not set any higher standard for Defendant's search efforts or certification of those efforts than would be required under the Public Records Act.

Other than the failure to produce records which Defendant has certified do not exist or at least have not been found despite its reasonable efforts in searching, Plaintiff has failed to identify any other manner Defendant did not comply with the MOU. Plaintiff's primary argument is based upon his disbelief of Defendant's certifications that the directors and employees within NCDOR completed the required searches, based at least in part upon their not finding any text messages

responsive to his request. We appreciate the difficulty presented to both Plaintiff and Defendant. The law generally does not require a party to prove a 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. As Plaintiff argued to the trial court:

> With the affidavit of Ochsner here, in paragraph 18 where he says I've not been given any documents or any basis to know whether these things have been performed and we're trying to prove a negative here. We're trying to prove the non-happening, okay, and this affidavit based on personal knowledge pursuant to the requirements of 56(e) is sufficient to meet the requirement that his burden of proof, this nonperformance, has not occurred.

The trial court asked Plaintiff's counsel, considering the responses in context and the certifications that Defendant had searched all employees for the various types of documents and none were found in some areas, "how would we ever … know"

if the searches were or were not correctly done as to records Defendant claims do not exist? Plaintiff's counsel responded, "I could put somebody under oath and ask them." To which the trial court stated, "This is under oath."[10]

Plaintiff argues he was denied the ability to prove Defendant's lack of compliance by the trial court's protective order as to his second set of discovery, but as noted above we do not have jurisdiction to review the protective order. But we note that Plaintiff did conduct discovery before entry of the MOU, and Defendant responded to Plaintiff's first interrogatories and request for production. Plaintiff did not move to compel further production under the first set of discovery or allege Defendant's responses to the first set of discovery were incomplete. In addition, after the colloquy noted above, at the hearing on 26 January 2018, the trial court had a conference with counsel for both parties and adjourned the hearing to allow Plaintiff the opportunity to present the questions "plaintiff would like answered in order to determine whether NCDOR conducted a search per the terms of the MOU." Plaintiff asked Defendant, with questions tailored to the category of document, for the following information: who conducted the search; when did the search occur; what methodology was used to ensure each account or phone was searched; did the search yield anything responsive to Plaintiff's request; and is Defendant claiming any exemption or exception to disclosure of any item? In response, on 9 March 2018,

[10] The trial court was referring to the sworn and notarized affidavits submitted by Defendant.

Defendant's counsel sent a letter to the trial court and Plaintiff with answers to each question, along with sworn affidavits from the Director of Public Affairs for NCDOR and the Assistant Secretary and Chief Information officer for NCDOR. Thus, the trial court, in its role of providing judicial oversight, addressed Plaintiff's concerns regarding how Defendant conducted its searches and Defendant provided the explanation of its searches to the trial court and Plaintiff. Plaintiff's argument on appeal remains the same: he disagrees that Defendant actually conducted all of the required searches, despite the multiple sworn certifications the searches were done and the over 13,000 pages of records actually produced. But based upon the record before us, the trial court properly determined that Defendant substantially and materially complied with the MOU, and Plaintiff has made no showing of any reasonable basis to doubt Defendant's certifications and responses.

Our Supreme Court has addressed a case in which the plaintiff showed that the defendant may have failed to produce responsive records despite its production of hundreds of pages of documents and its claim that no additional documents existed. *State Employees Ass'n of N.C., Inc. v. N.C. Dep't of State Treasurer*, 364 N.C. 205, 695 S.E.2d 91 (2010). In *State Employees Association of North Carolina, Inc. v. North Carolina Department of State Treasurer*, our Supreme Court reversed a trial court's order dismissing the plaintiff's claim under North Carolina General Statute § 1A-1, Rule 12(b)(6) holding that the plaintiff's complaint was sufficient to state a claim

under the Public Records Act because plaintiff had shown a "reasonable inference" that some responsive documents had not been provided. *Id.* at 212, 695 S.E.2d at 96. Plaintiff had requested certain information from defendant, and defendant produced 700 pages of documents. *Id.* at 207, 695 S.E.2d at 93. After the initial response, plaintiff sent several letters noting deficiencies and requesting that all of the responsive records be produced. *Id.* at 207-08, 695 S.E.2d at 93-94. Ultimately, the plaintiff filed its lawsuit under the Public Records Act. *Id.* at 209, 695. S.E.2d at 209. Our Supreme Court noted that based upon the documents produced, plaintiff had identified

> *specific reasons why plaintiff believed that additional public records implicated by its initial requests existed, but had not been provided.* For example, in regards to its 1 March 2007 request, plaintiff stated, *inter alia*:
>
> > [I]t is clear that not all documents containing correspondence from Forbes has been provided. The January 19, 2007, 3:43 p.m. e-mail from Kai Falkenberg to Ms. Lang refers to an attached letter "a copy of which—with enclosures—has also been sent to you by fax." You have provided neither that letter nor the enclosures. Moreover, Neil Weinberg's message on the same date refers to a letter faxed to Ms. Lang from Forbes' attorney. If this is not the same letter referred to by Ms. Falkenberg, then you have not provided a copy of it.
> >
> > In addition, except for some responses that are attached to the Forbes e-mails, you have not provided all responses from Ms. Lang to Forbes. For example, attached to the

> February 14, 2007, e-mail message from Jason Storbakken is an e-mail from Ms. Lang stating: "Please see answers inserted in your original e-mail below." However, you have not produced the e-mail that contains Ms. Lang's answers. Moreover, attached to Jason Storbakken's message of February 14, 2007, 6:16 p.m., is a message stating: "On 2/14/07 PM, 'Sara Lang' . . . wrote:" but the text of Ms. Lang's message is omitted. It is difficult for me to draw any conclusion except that Ms. Lang's message has been intentionally deleted from the document.
>
> Finally, based on the size of the fee paid to the retained law firm and, thus, the number of hours that firm must have worked on this issue, it would appear that there must have been electronic or written correspondence between your office and that law firm regarding the Forbes public information request. However, no copies of any such correspondence have been produced.
>
> *Thus, plaintiff's allegations that additional public records exist that have not yet been disclosed are based on reasonable inferences.*

Id. at 211-12, 695 S.E.2d at 96 (alterations in original) (emphasis added).

Here, 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." *Id.* As to the documents Defendant avers do not exist, Defendant provided the portion of its Security Policy

Manual regarding "Messaging Systems" and its Email Retention Policy. The Security Policy provides that employees are "expressly prohibited" from using "alternate messaging systems for the purpose of conducting Agency business." If Defendant's employees complied with its policy, searches of their personal email, text message, or other accounts or devices would not produce any responsive documents. Emails sent or received on employees' official accounts were captured by the department's "Email Repository" and stored so they would not be deleted. Emails stored in the repository are searchable, so Defendant's searches should have discovered any responsive emails sent or received by employees, even if an employee attempted to delete an email. In addition, since most of the information produced by Defendant is not in our record, we have no means of reviewing the trial court's analysis of its completeness.

Plaintiff argues that "[t]he practical effect" of the trial court's ruling that Defendant had materially and substantially complied with the MOU and dismissing the action as moot "is to permit NCDOR to police itself and declare compliance with the MOU and Public Records Act, contrary to its spirit and intent." We disagree with Plaintiff's claim that the trial court allowed Defendant to "police itself." The trial court vigorously exercised its judicial oversight function. Almost immediately after the action was filed, it entered a litigation hold order and mediation order *sua sponte*. It held status conferences to oversee the ongoing production of documents. Even after

Defendant had produced thousands of pages of records and many certifications, the trial court still required Defendant to respond to Plaintiff's detailed questions regarding the search methodology and did not enter the order dismissing the action until all of the questions had been answered. This argument is without merit.

VI. Conclusion

We therefore affirm the trial court's order.

AFFIRMED.

Judges DIETZ and HAMPSON concur.