sunshine center
of the North Carolina Open Government Coalition

North Carolina Open Government Coalition

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Re: Public records issues regarding UNC system schools monitoring employee e-mail

To Whom It May Concern:

The North Carolina Open Government Coalition ("NCOGC") is a nonpartisan, nonprofit organization whose mission is to educate citizens and public employees on their rights and responsibilities under North Carolina's transparency laws.[*] On August 21, 2021, a coalition of journalists, educators and transparency advocates joined the NCOGC in filing a records request with the University of North Carolina at Chapel Hill (UNC-CH) for: "All documents related to any approval requested or granted by university officials related to accessing e-mail accounts of faculty and staff at the Hussman School of Journalism and Media from July 1, 2021, to the present." The request stemmed from reports that after journalists obtained a purportedly confidential donor agreement, the university began monitoring the e-mails and cloud storage of certain faculty and staff under university policy without notice to or consent from the employees. The university suspected that faculty or staff leaked the donor agreement to the press, so they launched an investigation into the matter. Because UNC-CH and other University of North Carolina system schools have adopted policies that permit administrators to monitor faculty and staff e-mail accounts under certain conditions, we sought the records documenting the approval process outlined in UNC-CH policy.

Seven months later, UNC-CH produced fifteen pages of heavily redacted e-mails purporting to be the responsive documents. They show that from July 15, 2021, to July 28, 2021, Kara E. Simmons, Associate Vice Chancellor and Senior University Counsel, requested approval to monitor the Outlook e-mail accounts and Microsoft Office 365 cloud storage for an unknown number of university employees. Without citing a statutory basis, the university redacted names of employees and the substantive justification for the request to monitor employees' e-mail and cloud storage. It is unclear what legal basis UNC-CH asserts to justify nondisclosure of this information from otherwise public records. We can only assume, based on the events that have transpired, that the university is claiming that the records are confidential personnel records, attorney-client privileged communications, or attorney work product.

The remainder of this letter addresses some of the legal issues with the university's response to help the public understand whether all or some of the information in these documents can be made public. The issues outlined in this letter are relevant to employees at other UNC system schools with similar policies. This letter does not constitute legal advice. We strongly encourage any person considering litigation against a public agency, including any public employees concerned about their rights and responsibilities under North Carolina's personnel laws, to seek counsel from an attorney.

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[*] The North Carolina Open Government Coalition board of directors includes members who are employed by public colleges and universities. This letter does not represent the opinions of these individual members.

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Personnel Records and the North Carolina Public Records Act:

The North Carolina Public Records Act is guided by a simple principle: "The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people." (N.C.G.S. § 132-1(b)). The UNC system and its constituent institutions are public agencies, and documents related to the transaction of university business are presumptively open to the public unless a statutory exception applies. Our courts have long held that exceptions to the public records law should be interpreted narrowly and in favor of disclosure (*News & Observer Pub. Co. v. State ex rel. Starling*). However, several North Carolina statutes exempt from public disclosure considerable information in public employees' personnel files. There are some exceptions to this sweeping prohibition. For example, state employees' names, salary information, contractual terms, records of change in employment status, and certain disciplinary records are public. Generally, however, state employees' personnel records are confidential (N.C.G.S. § 126-22 through 126-30).

To classify as a confidential personnel record, the record must 1) relate specifically to an employee; and 2) be created or gathered by the employer; 3) for a specific, official personnel function. Personnel functions include recruitment, hiring, performance evaluation, disciplinary action, and other similar reasons. The records created by the university related to the monitoring of employee e-mail may qualify as confidential personnel records exempt from public disclosure because 1) they relate to specific employees; and 2) were created by UNC-CH regarding specific employees; 3) potentially for the purposes of investigating breaches of university policy by faculty and staff and engaging in subsequent disciplinary proceedings related to the purported breaches. Nevertheless, the employees named in the university's requests to monitor their e-mail and cloud storage are likely permitted to access their own records under North Carolina law, subject to minor redactions.

State Employee Access to Personnel Files:

Generally, public employees have a right to access their personnel files. There are some exceptions that prevent city and county employees from accessing notes, preliminary drafts, or internal communications related to such employees (*see* N.C.G.S. § 160A-168(c1)(4) for cities; and N.C.G.S. § 153A-98(c1)(4) for counties). However, there is no parallel provision for state employees. State employees may access nearly their entire personnel file (*see* N.C.G.S. § 126-24(1)). A question arises, however, when a document related to a state employee also pertains to another state employee and thus may constitute part of another employee's confidential personnel file. North Carolina courts appear to have answered this question in favor of disclosure.

In *Wind v. City of Gastonia* (738 S.E. 2d 780, N.C. App. 2013), a Gastonia police officer sought records of complaints made to the department by a co-worker and a citizen. When the City of Gastonia produced the records with the complainants' names redacted, the officer sued seeking full disclosure, including the complainants' names. The Court of Appeals ruled that nothing in the personnel statutes or the public records law prevented disclosure of the full complaint to the record-seeking officer even though the records included information related to another public employee. The court said that the public

policy interests in transparency under the Public Records Act outweighed the privacy interests of the complaining employee.

Applying *Wind* to the facts in this matter, we conclude that even if the university could convince a court that the e-mails requesting and granting permission to access an employee's e-mail and cloud storage constituted personnel records, the employee to which the records pertain would be authorized to access the records. The employee would also be authorized to access the substantive investigatory information related to the employee regardless of whether the document names other employees. However, consistent with the personnel laws governing confidential information, the university may withhold the names of other employees referenced in the same record. Furthermore, employees are permitted to share their own personnel records with their colleagues or anyone else, should they so choose.

Attorney-Client Privilege/Work Product and Requests to Monitor Employee E-mail:

The university may assert that the requests to monitor employee e-mail and cloud storage are either attorney-client privileged communications or attorney work product. These arguments are not supported by the facts in this matter or North Carolina law.

Attorney-client privilege: North Carolina's Public Records Act provides a narrow exception that prevents disclosure of some attorney-client communications. Communications made by an attorney to a public agency are not public records when "made within the scope of the attorney-client relationship," and "involving a claim, defense, settlement, litigation, or administrative proceeding" to which the public body is a party (*McCormick v. Hanson Aggregates*, 596 S.E.2d 431 (N.C. App. 2004)). The legislature intended the statutory privilege that applies to public bodies' attorney-client relationships to be substantially narrower than the common law attorney-client privilege. The university bears the burden of proving that its requests to monitor employee e-mail and cloud storage were made for the purposes of discussing litigation or an official judicial or administrative proceeding. There is no evidence to support that contention. The university was not engaged in litigation of a claim, settlement or other proceeding related to these records at the time they were created and there is no evidence to suggest that the university was creating these records in anticipation of litigation against any employee or as a defendant in a lawsuit. Further undermining any claim that the university was preparing for litigation, the university published the underlying donor agreement, evidently conceding that it was a public record.

Public statements by university leaders further suggest that the investigation was unrelated to any claim or proceeding that would trigger the privilege. Provost Chris Clemens stated, "As I understand the investigation — which is over by the way, there is no open investigation — it was not to look for misconduct by individuals. It was to try to establish what needed to be done to protect or enhance the security of [the university's development and donor relations database]." (Somasundaram, April 12, 2022). This suggests that if the university was not investigating its personnel, then it was conducting an internal review of its record-keeping and file storage systems. Absent a clear statutory exception, such records are public.

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Even if a court were to determine that these documents are attorney-client privileged communications, the privilege is not perpetual. Attorney-client privilege for public agencies evaporates three years after the communication is received by the government agency (N.C.G.S. § 132-1.1).

Attorney work product: North Carolina provides common-law protection against disclosure of work product created by attorneys for the purposes of representing their clients in negotiations, litigation, or the criminal justice process, subject to certain discovery rules. However, North Carolina courts have held strongly that the common law work product doctrine does not supersede the North Carolina Public Records Act. "North Carolina's public records act grants public access to documents it defines as 'public records,' absent a specific *statutory* exemption." (*See* Virmani v. Presbyterian Health Servs. Corp., 515 S.E.2d 675, 686 (N.C. Sup. Ct. 1999). Only after *McCormick* (cited above) did the General Assembly pass a narrow statutory work product exception to the Public Records Act. Under N.C.G.S. § 132-1.9, public agencies may withhold from disclosure trial preparation materials created during or in anticipation of a legal proceeding. The law requires the custodian of the records to provide written justification, upon request, if the records are withheld on the grounds that they are trial preparation materials for a pending proceeding. To date, the university has neither claimed the pertinent records are trial preparation materials nor provided written justification for withholding or redacting the records under N.C.G.S. § 132-1.9 or any other provision.

In summary, the records related to the university's requests to monitor employee e-mail and cloud storage are presumptively public records even if they contain confidential personnel information. To the extent they contain confidential personnel information, the employees named in these records have a strong right to access these records and an interest in exercising that right. These records are not likely to be considered privileged attorney-client communications or attorney work product under North Carolina statutes or case law.

For any questions regarding this memorandum, please contact the North Carolina Open Government Coalition at (336) 278-5506 or ncopengov@elon.edu. We look forward to continuing to support citizens and journalists seeking access to public records and to partnering with government agencies to serve the people of North Carolina.

Respectfully,

P. Brooks Fuller, J.D., Ph.D.
Director, North Carolina Open Government Coalition