FILED

NORTH CAROLINA
COLUMBUS COUNTY

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
2021 FILE NO. 20 CVS 1147

COLUMBUS CO., C.S.C.

THE NEWS REPORTER CO,; ATLANTIC CORPORATION; GREY TELEVISION, INC., d/b/a WECT; and MORRIS NETWORK, INC., d/b/a WWAY-TV, LLC,

Plaintiffs,

vs.

JODY GREENE, in his official capacity as Sheriff of Columbus County,

Defendant.

ORDER

This matter came on for hearing on February 8, 2021, pursuant to the Plaintiffs' statutory request for immediate relief, G.S. § 132-9, and Defendant's motion to dismiss. All parties were present, through counsel. C. Amanda Martin of Stevens Martin Vaughn & Tadych, PLLC, appeared for Plaintiffs. Brian Castro of Womble Bond Dickinson (US) LLP appeared for Defendant.

FINDINGS AND CONCLUSIONS ON JURISDICTION:

In Defendant's original motion to dismiss under 12B and in his responsive pleading filed on January 6, 2021, Defendant rasied the issue of a lack of jurisdiction under the holding of *Tillet v Town of Kill Devil Hills* because the matter has not gone through mediation as required by statute. After an extended discussion, the Defendant explicitly waived mediation, which Plaintiff had requested as an additional ground for relief. However, the court has not relied solely on waiver,

since jurisdiction cannot be asserted by waiver alone. From the statements of counsel in open court and on the record, Counsel asserted that the Defendant did not want to mediate, that the issues were clearly drawn, and that Defendant desired a ruling on the merits of the issue. From this and the further statements of counsel both at the opening of the hearing and in his closing arguments, the court finds that mediation would not be productive, and that to refer the matter to mediation which the court would do but for the representations of the Defendant, would merely result in a further expense and waste of time, which both parties now wish to avoid. Plaintiff in fact did initiate the process of mediation in its pleadings, and although Defendant in his answer indicated at the time he wished to proceed with mediation (Paragraph 10 of Defendant's Answer), when the court indicated that it recognized that right and the holding in *Tillet*, Defendant specifically stated the Defendant no longer desired to participate in the mediation that Plaintiff requested in its Complaint. These circumstances are distinguishable from the jurisdictional holding in Tillet. The court finds that the Plaintiff in fact substantially initiated mediation under 7A-38.3E in its Complaint, but a referral to mediation is now explicitly rejected by the Defendant. Therefore, the court finds and concludes that Plaintff has substantially complied with the intitation of mediation through her pleadings, but now such a further referral is in fact futile. Under these unique circumstances, together with the permissive language of GS 7A-38.3E, the court finds that the court has jurisdiction over the subject matter of this case.

As to the other grounds raised in the 12(b)(1) Motion to Dismiss which the Defenant argued, the court finds that Plaintiffs have standing and that, as more fully set out below, there is a real controversy and the issue is not moot.

FINDINGS FROM THE HEARING

At the outset of the hearing, counsel for Defendant stated that the Defendant waived the right to insist upon mediation of the matter pursuant to § 7A-38.3E and elected to proceed with the hearing. After considering the pleadings, the testimony of witnesses and oral arguments of the parties, the Court finds as follows.

This lawsuit was brought by media organizations seeking information and records from the Columbus County Sheriff's Office ("CCSO" or "the Sheriff's Office") pursuant to the North Carolina Public Records Law, Chapter 132 of the General Statutes. The requested records at issue relate to criminal information reported to and investigated by the CCSO. Plaintiffs are four media organizations that investigate and report on news in Columbus County and the surrounding area. The defendant is Jody Greene, the Sheriff of Columbus County, in his official capacity. At issue are four categories of information made public by G.S. § 132-1.4(c):

> (1) The time, date, location, and nature of a violation or apparent violation of the law reported to a public law enforcement agency.
> (2) The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.
> (3) The circumstances surrounding an arrest, including the time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.
> ***
> (6) The name, sex, age, and address of a complaining witness.

The Sheriff's Office uses a records management system produced by Southern Software. Using that system, CCSO can generate various reports, including an Incident Media Log Details report ("Incident Reports"). Prior to September 4, 2020, on weekdays, CCSO public information officer Michele Tatum sent daily emails to a "Media List" and attached to those emails the Incident Reports for the previous day and an arrest report from the previous day. On Mondays, Ms. Tatum sent reports that included Friday through the weekend.

Individuals and organizations requesting the daily reports which contained the public records made a request to be added to the media listd maintained by the Defendant, and the person making the request was added to the list. All of the evidence clearly and unambiguously shows that the Sheriff, though his Pupblic Information Officers, considered those added to the list as having requested the public information and had customarily provided the public information to those on the list, which included agents of the Plaintiffs, in response to the request. The court finds that this custom, practice, and procedure conformed and continues to conform to a lawful and sufficient request for the specific records at issue in this case.

On August 24, 2020, *The News Reporter* editor Justin Smith wrote to Ms. Tatum and asked that *The News Reporter* journalist Thomas Sherrill be added to the Media List. Ms. Tatum agreed to do so.

On September 4, the Sheriff's Office stopped sending out the Incident Reports and did not resume for the balance of September. On September 8, 2020, Ms.

Tatum wrote in her daily email that the Office was "implementing a policy change in regards to incident reports. Additional information will be emailed to you in the near future." The Sheriff's new policy was reflected in a September 10, 2020, memorandum that was adopted by the Sheriff but written by Chief Deputy Aaron Herring. The policy or memorandum publicizing the new procedure, which was introduced and is fully incorporated herein as though fully set out, stated,

> "Effective immediately, in accordance with NC G.S. § 132-1.4 (a), information pertaining to open criminal investigations will not be released prior to the conclusion of the investigation and/or the arrest of all suspects involved."

When Chief Herring sent the memorandum to Plaintiffs' counsel, the document was named "New Records Procedure." On September 25, 2020, the Sheriff's Office made a post on Facebook that the records release policy had changed.

While the Public Information Office testified that the Sheriff had heard complaints about the content of reports such as addresses having appeared in the paper and the department wanted to make sure all information was accurate, the decision to withhold those items covered under the public records law until they had been "approved" did not address or resolve the articulated problems used to justify the change in procedure. Furthermore, the fact that a record had been "approved" was not final. If another officer opened the record for review after it had been "approved," the system defaulted back to an unapproved status and returned to a red or "unapproved" status. On these narrow facts, the withholding of the original public information until a supervisor had "approved" the report served no useful law-enforcement purpose other than to gain an unnecessary delay in releasing what

was and remained a public record which the Sheriff had, until this change in procedure, been providing promptly. The court has balanced the interests of the public in a timely disclosure of this public information against the interests of the law enforcement agency and any victim or other person, and concludes that denying or delaying the release of the public information in this instance is not justified.

On September 11, 2020, *The News Reporter* Editor Justin Smith emailed Sheriff Greene to clarify and repeat the newspaper's request for continued access to the full information made public by G.S. § 132-1.4(c).

On October 6, Ms. Tatum sent an email to the Media List stating, "Attached you will find closed incident reports from September 2, 2020 to October 5, 2020." She further stated that going forward, "Closed incident reports will be sent daily." The document attached to Ms. Tatum's October 6 email was named "Sept 2 through Oct 5 closed incidents.pdf."

Ms. Tatum testified that following October 6, her practice was to create an Incident Report for the time period since her last report, to remove any reports that had not been marked "approved" and to provide copies of the "approved" reports to the Media List. Ms. Tatum also testified that she looked at her records from the previous week to see if any additional reports needed to be added.

The crux of the dispute between the plaintiffs and the Columbus County Sheriff's Office involves (a) whether the plaintiffs, by requesting to be included in the Media List, had a standing request for all publicly available criminal information, (b) whether information in the computerized database is a public

record subject to disclosure, (c) whether criminal information is exempt from disclosure until it has been approved by management-level members of the Sheriff's Office, and (d) whether the delay of days before production complies with the statutory requirement to provide records "as promptly as possible." G.S. § 132-6(a).

Based on the evidence and testimony presented, the Court makes the following findings of fact and conclusions of law:

This Court does have jurisdiction, the plaintiffs have standing, and there is an actual controversy that exists and continues to exist.

The Incident Reports are public records subject to request and disclosure by the Sheriff's Office. The members of the media who are on the Sheriff's Office Media List to receive weekday email updates have requested all publicly available criminal information be provided to them in a timely manner.

For the period September 4 until October 6, 2020, the Sheriff's Department chose to stop providing access to the requested public criminal records altogether. The plaintiffs have been denied access to public records in the sense that an unnecessary, undue, and unreasonable delay in providing them amounts to a substantial failure to comply with the Public Records Law.

After October 6, the Sheriff's office resumed sending out Incident Reports for closed cases, and only the filing of the instant lawsuit prompted the resumption of the production of public records for cases that had not been closed.

The dispute between the parties is not moot, as Sheriff's Office has not withdrawn the September 10, 2020, Memorandum or otherwise changed the policy

of the Office with regard to releasing records of cases that are still active and under investigation or otherwise have not been closed.

The Columbus County Sheriff's Office is ordered to provide timely access to the Incident Reports, and timely shall be production consistent with the custom and practice that was in place prior to the September 2020 policy change. North Carolina does not have an exemption to the Public Records Law for draft documents. *News and Observer Publ'g Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992). The Sheriff's Office shall release reports that have been finally approved and those that have not yet been approved. To the degree the Sheriff's Office is concerned about whether the information on the reports has been fully confirmed, the Sheriff's Office can mark whether the reports have been approved. The lack of approval cannot be a basis for refusing to provide those records, however. Nothing in this order shall be construed to limit the statutory authority of the Sheriff to delay the release of information on a case-by-case basis which, in a specific case, is justified for a reasonable time by a legitimate articulable law-enforcement or safety purpose under the public records exception.

IT IS, THEREFORE, ORDERED, ADJUDGED AND DECREED:

Defendant's Motion to Dismiss is denied;

The Court grants judgment for the Plaintiffs with respect to all issues as ordered above;

The Court holds open the issue of attorney fees. Because Plaintiffs prevailed and Plaintiffs seek attorney fees, the Court directs counsel for Plaintiffs to submit

to the Court detailed affidavits setting out Plaintiffs' attorney's fees, itemizing the basis for them, and including a memorandum in support of the request. The Defendant may submit a memorandum in response to the items and memoranda submitted by the Plaintiffs, and shall let the court know if he wishes to be heard other than by way of affidavit or memorandum.

IT IS SO ORDERED.

This the 19 day of February 2021.

John W. Smith
Superior Court Judge