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SUPREME COURT OF NORTH CAROLINA

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LEXISNEXIS RISK DATA )  
MANAGEMENT, INC., a Florida )  
corporation, and LEXISNEXIS )  
RISK SOLUTIONS, INC., a )  
Georgia corporation, )  
)  
Plaintiff-Respondents, )  
)  
v. )  
)  
NORTH CAROLINA )  
ADMINISTRATIVE OFFICE OF )  
THE COURTS; JOHN W. SMITH, II, )  
in his official capacity as the )  
Director of the North Carolina )  
Administrative Office of the Courts; )  
and NANCY LORRIN FREEMAN, )  
in her official capacity as the Clerk of )  
the Wake County Superior Court, )  
)  
Defendant-Petitioners. )

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**MOTION OF ASSOCIATE PROFESSOR RYAN THORNBURG FOR  
LEAVE TO FILE BRIEF AMICUS CURIAE**

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**TO THE HONORABLE SUPREME COURT OF NORTH CAROLINA:**

Pursuant to N.C. R. App. P. 28(i), Professor Ryan Thornburg hereby requests leave of this Court to appear as *amicus curiae* for purposes of filing a brief in support of Plaintiff-Appellees LexisNexis Risk Data Management, Inc. and

LexisNexis Risk Solutions, Inc. (collectively “LexisNexis”) in the above-captioned case. A copy of Professor Ryan Thornburg’s proposed brief is attached to this motion as Exhibit 1.

### **STATEMENT OF INTEREST**

*Amicus Curiae*, Ryan Thornburg (“Professor Thornburg”), is an associate professor at the University of North Carolina at Chapel Hill School of Journalism and Mass Communication. At UNC, Professor Thornburg’s focus is on online journalism, journalism’s future and the use of data in journalism. Prior to joining UNC’s faculty, Professor Thornburg served as the managing editor of USNews.com, the online portion of U.S. News & World Report. His experience also includes employment as a managing editor of the Congressional Quarterly’s website and the national/international editor for the Washington Post’s website. During his time at the Washington Post, he also served as a producer for the website whose responsibilities included managing election data, writing articles and producing breaking news.

His interest in this case is in assuring that the North Carolina Public Records Act is applied in a common-sense manner that gives effect to its intent of providing the public with the essential information they need to protect their safety, as well as hold the government accountable, at a minimal cost.

**AMICUS CURIAE PARTICIPATION BY PROFESSOR THORNBURG IS  
DESIRABLE**

Much of Professor Thornburg's current work relates to data-driven journalism. By acquiring and analyzing data that is available from public sources, Professor Thornburg, and others like him, find trends and uncover underlying issues that are not readily apparent from the records themselves. Professor Thornburg, and others similarly situated, frequently rely on open records laws to observe and scrutinize the conduct of public officials, the public's business, as well as those who are subject to criminal infractions. To that end, they have an ongoing stake in ensuring such laws remain robust and are not abused in an effort to conceal information or official misdeeds from scrutiny.

This case will determine whether the public can have access to Automated Criminal Infractions ("ACIS") database from the Administrative Office of the Courts ("AOC") and the Clerk of Court for Wake County under the Public Records Act, and specifically, whether the public has access to criminal infractions information for both informational and academic purposes. Because Professor Thornburg deals regularly with these concerns, he can offer the Court additional perspective as to the vital role of public records in keeping citizens informed about government activities.

### **ISSUES TO BE ADDRESSED**

The issues that Professor Thornburg will address are:

- I. Whether the Act should be construed, as it is written and in a manner consistent with other State laws, to provide access to databases maintained by the government, as well as the information in those databases, which promotes the appropriate use and dissemination of information by academics and the press?
- II. Whether the government agency that holds and maintains a public database containing non-privileged information should be required to produce the database?

### **THE POSITION OF PROFESSOR THORNBURG ON THE QUESTIONS OF LAW TO BE ADDRESSED IN HIS AMICUS CURIAE BRIEF**

Professor Thornburg believes and would argue that the Court of Appeals correctly found both the ACIS database is a public record and the AOC is a custodian of the database. Specifically, based on his experience, the determination that the Court of Appeals made are appropriate based on the public-policy interests underlying the North Carolina Public Records Act, including the mandate for broad access to public records at a minimal cost.

### **CONCLUSION**

Accordingly, Professor Thornburg respectfully requests that the Court grant this motion and permit him to submit the contemporaneously filed proposed amicus brief.

Respectfully submitted this 24<sup>th</sup> day of September, 2014.

KILPATRICK TOWNSEND & STOCKTON,  
LLP

By: Electronically Submitted

Phillip A. Harris, Jr.

N.C. State Bar No. 39740

N.C. App. R. 33(b) Certification: I certify that the attorney listed below has authorized me to list his name on this document as if he had personally signed it.

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**CERTIFICATE OF SERVICE**

The undersigned certifies that a copy of the foregoing Respondents' New Brief was served on the following persons by United States Mail, postage prepaid addressed as follows:

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# **EXHIBIT 1**

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SUPREME COURT OF NORTH CAROLINA

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**BRIEF OF AMICUS CURIAE ASSOCIATE PROFESSOR RYAN  
THORNBURG**

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NO. 101PA14

TENTH DISTRICT

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SUPREME COURT OF NORTH CAROLINA

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LEXISNEXIS RISK DATA )  
MANAGEMENT, INC., a Florida )  
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RISK SOLUTIONS, INC., a )  
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Defendant-Petitioners. )

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**BRIEF OF AMICUS CURIAE OF ASSOCIATE PROFESSOR RYAN  
THORNBURG**

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## INTRODUCTION

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” Louis D. (later Justice) Brandeis, "What Publicity Can Do," *Harper's Weekly*, Dec. 20, 1913. The present case arises in the context of a dispute about what it means for the State government to meaningfully let the sunlight in, for the benefit of the general public, as is required by N.C. Gen. Stat. § 132-1(b) (the “Public Records Act” or the “Act”). The well-reasoned decision of the Court of Appeals below properly construes and applies the Act as it was intended, to provide access to non-privileged agency records for the benefit of the public.

The public interest in obtaining government-created and government-maintained databases (including, without limitation, criminal records databases) is a significant one. As each individual citizen does not have the time or the resources to collect and to analyze the often-voluminous amounts of data stored in government-databases, the responsibility for doing so often falls to academic researchers, writers, and the media. The interest of the public in having accurate and timely information concerning the business conducted by the State is promoted by the Act’s mandate that all records – including databases maintained by the government – be provided to academics and journalists with the ability to analyze

the databases themselves. And the Act's requirement that such databases must be provided by the Government upon request promotes the dissemination of accurate information, because it allows for those who wish to test and challenge the analysis offered by a particular source to perform their own analysis.

AOC casts the case as one in which a for-profit corporation's demand for a criminal records database pursuant to the Act should be disallowed because, *inter alia*, (1) the AOC does not believe that the database itself is a record, and (2) there is perhaps another more inconvenient, and much more burdensome method, for obtaining the same information that is in the database if this Court sustains the Government's argument that the database itself is not a record. This brief is submitted in the hope of dissuading this Court from changing the law in a manner that would be contrary to the proper construction and interpretation of the Act, would be contrary to the spirit and purpose of the Act, and would be detrimental to the State's citizenry.

The amicus curiae, Professor Ryan Thornburg ("Professor Thornburg"), is an associate professor at the University of North Carolina at Chapel Hill School of Journalism and Mass Communication. Professor Thornburg focuses his research and teaching on online journalism, the future of journalism, and the use of data in journalism. Prior to joining UNC's faculty, Professor Thornburg served as the managing editor of USNews.com, the online portion of U.S. News & World

Report. His experience also includes employment as a managing editor of the Congressional Quarterly's website and as the national/international editor for the Washington Post's website. During his time at the Washington Post, he also served as a producer for the website, where his responsibilities included managing election data, writing articles and producing breaking news. During his tenure at the Washington Post, the newspaper received seven EPPY awards.<sup>1</sup>

Much of Professor Thornburg's current work relates to data-driven journalism.<sup>2</sup> By acquiring and analyzing data that is available from public sources, Professor Thornburg, and others like him, finds trends and uncovers underlying issues that are not readily apparent from the records themselves. Connecting the dots to find these trends and issues requires both a cost effective and efficient public records system. This means that both the availability of public records, and the costs associated with retrieving these records, should be reasonable. Under the interpretation sought by the AOC, neither availability, nor costs, are reasonable. The AOC's interpretation would require Professor Thornburg, and others like him, to either enter into a contract with the AOC to gather the information kept in the Automated Criminal Infractions ("ACIS") database or travel to each of 100 counties to procure the criminal records stored in ACIS. Both of these

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<sup>1</sup> The EPPY awards "honor the best media-affiliated websites across 31 diverse categories." Editor & Publisher EPPY Awards, About the EPPYs, [http://www.eppyawards.com/Content/About\\_the\\_Contest-2-.aspx](http://www.eppyawards.com/Content/About_the_Contest-2-.aspx) (last visited Sep. 24, 2014).

<sup>2</sup> See The Future of News, <http://ryanthornburg.com/> (last visited Sep. 24, 2014).



requirements are unreasonable and would hinder the free-flow of information between government and citizenry. It is for these reasons that Professor Thornburg submits this amicus curiae brief.

### STATEMENT OF THE ISSUES

- I. Whether the Act should be construed, as it is written and in a manner consistent with other State laws, to provide access to databases maintained by the government, as well as the information in those databases, which promotes the appropriate use and dissemination of information by academics and the press?
- II. Whether the government agency that holds and maintains a public database containing non-privileged information should be required to produce the database?

### ARGUMENT

- I. THE ACT SHOULD BE CONSTRUED AS IT IS WRITTEN, AND IN A MANNER CONSISTENT WITH OTHER STATE LAWS, TO PROVIDE ACCESS TO DATABASES MAINTAINED BY THE GOVERNMENT, AS WELL AS THE INFORMATION IN THOSE DATABASES, IN ORDER TO PROMOTE THE USE AND DISSEMINATION OF INFORMATION BY ACADEMICS AND THE PRESS.

Academic and journalistic research plays an important role in holding government accountable and in analyzing the role of the government. *See, e.g.*, Jon Ostendorff, *Police Video Taping Public Gatherings Raising Questions*, Asheville Citizen-Times (Sep. 22, 2014, 9 a.m.), available at <http://www.wfmynews2.com/story/news/local/2014/09/22/police-video-taping-recording-public-gatherings-being-questioned/16039285/> (reporting on police videotaping of public gatherings which was discovered after several public records

requests were submitted by the newspaper); Hurst Laviana, *Police statistics show where, when Old Town violence happens*, The Wichita Eagle, Sept. 16, 2012, available at 2012 WLNR 19673420 (describing violent incidents happening in a high-crime section of the community); Jonathan Oosting, *Are more drunken drivers 'super drunk'? 44 percent are more than twice the legal limit*, The Bay City Times, Sept. 13, 2012, available at 2012 WLNR 19597997 (analyzing DUI arrests through the use of police incident reports). For this reason, public records are “[a]mong the most basic building blocks of powerful investigative reporting.” Sasha Chavkin, *How to Unearth Public Records: A Global Guide*, Int’l Consortium of Investigative Journalists, (Sep. 24, 2013, 11:45 a.m.), <http://www.icij.org/blog/2013/09/how-unearth-public-records-global-guide>; see also, e.g., Journalist’s Toolbox, Society of Professional Journalists, <http://www.journaliststoolbox.org/> (last visited Sep. 24, 2014) (providing links to multiple websites related to retrieval and access to public records).

A fundamental tenet of both academic and journalistic research is that a researcher should begin with a broad search and then narrow the results. Accordingly, it is important that, in conducting research, journalists and academic researchers have access to those government records that often have the most voluminous amount of information. When, as with the ACIS database, the information is in electronic form, the researcher can perform her searches of the

database to eliminate extraneous information and to extrapolate information that is relevant to the field of inquiry.

Unfortunately, researchers in the field often find that the legislative grant of access to public records is not always observed by governmental agencies. *See* Andrew Ryan, *Boston's files on employees' gender, race stay shut*, Boston Globe, Sep. 5, 2014, available at <http://www.bostonglobe.com/metro/2014/09/05/walsh-administration-not-required-release-race-gender-data-for-individual-employees/d7zE1qL6yLJ3y8hHwDkGsO/story.html> (last visited Sep. 24, 2014) (stating that a newspaper requested, and was denied, demographic information on city employees to determine whether a mayor honored his pledge to create an administration that mirrored the diverse population of Boston). Often it takes considerable pressure to obtain compliance. *See, e.g.*, Jacob Gershman, *Judiciary to Restore Online Access to Case Archives*, Wall St. Journal Blog, (Sep. 19, 2014 4:32 p.m.), <http://blogs.wsj.com/law/2014/09/19/judiciary-to-restore-online-access-to-case-archives/> (noting that the Director of the Administrative Office of the U.S. Courts reversed a decision to eliminate online access to federal case filings older than 2010 based on, among other responses, input from members of Congress).<sup>3</sup>

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<sup>3</sup> For further examples, *see* Ken Ward Jr., *DEP facing lawsuit over access to mining pollution data*, The Charleston Gazette, Sep. 16, 2014, available at <http://www.wvgazette.com/article/20140916/GZ01/140919412> (detailing a lawsuit in which a public interest law firm sought public records in the form that the West Virginia Department of Environmental Protection denied as it claimed complying

In North Carolina, the strongest defense against government withholding a database in response to a request is the language of the Act itself. There can be little doubt that the General Assembly drafted the Act in a manner that facilitates broad searches of government databases by academic and journalistic researchers.<sup>4</sup> *State Emps. Ass'n of N.C., Inc. v. N.C. Dept. of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010) (noting that “the Public Records Act . . . strongly favors the release of public records to increase transparency in government”). The Public Records Act broadly defines public records to include all manner of public records: A public record includes “all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or

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would require the agency to produce a new record after researching its databases) (last visited Sep. 24, 2014) and Frank Main, *List shows two convicted cops were topic of dozens of complaints*, Chicago Sun-Times, July, 30, 2014, available at <http://politics.suntimes.com/article/chicago/list-shows-two-convicted-cops-were-topic-dozens-complaints/wed-07302014-1030am> (last visited Sep. 24, 2014) (describing police complaint records which the Illinois state appeals court ruled were open to the public).

<sup>4</sup> The Act comports with the overarching United States Constitutional requirements related to both the public's and the press' right to public record. See generally 16A Am. Jur. *Constitutional Law* § 496 (“Although the rights granted to the press and embodied in the First Amendment are not absolute, nevertheless the First Amendment provides at least some protection for news agencies' efforts to gather news, and it protects their right to receive protected speech.”) and 66 Am. Jur. *Records and Recordkeeping Law* § 17 (“The public's right to have access to public records is also guaranteed by the Freedom of the Press and Due Process Clauses of the United States Constitution, but the common-law right to inspect public records predates the Constitution and applies in both criminal and civil cases.”).

its subdivisions.” N.C. Gen. Stat. § 132-1. Further, the Act specifically includes computer databases, which are defined by the Act to include “[a] structured collection of data or documents residing in a database management program or spreadsheet software.” *Id.* at § 132-6.1(d)(1). As such, entire computer databases are one of the categories of items that are in themselves records and are subject to production under the Act. *Id.* at § 132-6.2(c) (“Persons requesting copies of computer databases may be required to make or submit such requests in writing.”).

The law of this State contemplates that academics and journalists will be able to fulfill their respective duties to the public in an efficient manner that conserves resources, especially public resources. The AOC’s position that a party seeking a copy of a database in its possession must seek separate records in individual cases in each of the 100 different counties of this State is inconsistent with these legally recognized policies. This is particularly so where, as in the case of the ACIS database, there is a single database already in existence that qualifies as a record in the possession of the government that can easily be produced.

For example, in the case of a research professor at a public university conducting an inquiry about criminal infractions, the AOC’s erroneous interpretation of the Act as requiring only access to underlying information, but not to the database itself, could require double the expenditure of tax dollars because it would require the researcher to compile a research database that has already been

compiled by the government. Not only is such an interpretation at odds with the Act's definition of a record, it is also inconsistent with other provisions of the law. Chapter 116 of the General Statutes, governing the public university system in this State, provides that the university system was created in part "to encourage an economical use of the State's resources" and it imbues the state's universities with the "mission is to discover, create, transmit, and apply knowledge to address the needs of individuals and society." N.C. Gen. Stat. § 116-1. Among other things, this mission is to be accomplished "through research, scholarship, and creative activities, which advance knowledge and enhance the educational process." *Id.* It is the mandate of the General Assembly that "the university shall seek an efficient use of available resources to ensure the highest quality in its service to the citizens of the state." *Id.* It would be inconsistent with this enactment to require educational institutions, and the academics who are employed by these institutions, to be required to retrieve records across 100 counties when these records are compiled in one place by the AOC.

II. THE GOVERNMENT AGENCY THAT HOLDS AND MAINTAINS A RECORD IN THE FORM OF A PUBLIC DATABASE CONTAINING NON-PRIVILEGED INFORMATION SHOULD BE REQUIRED TO PRODUCE THE DATABASE.

The AOC argues that it need not produce the ACIS database because the separate, scattered individual records that contain the information in the ACIS database may be obtained from the individual county Clerks of Court from whose

files the information in the database is comprised. AOC's argument in this regard mimics a "get it from someone else" approach that is employed by numerous government agencies confronted with a public records request. Often such agencies attempt to redirect the efforts of an academic researcher or journalist and have them try to obtain a record from another government entity that might also have all or a portion of the record. This approach has the practical effect of making academic and journalistic research more difficult and of hampering reporting about the contents of government records.

In practice, as evidenced by arguments made by the Defendants, government agencies often claim that they are not the true custodians of public records, and point the requestor to another agency as the proper custodian for the records that are being sought. In turn, the agency to which the initial request was redirected may claim that the original requestee or some other agency is the proper recipient. This practice greatly complicates research when it turns out that no agency will admit to being the custodian of the record. Socially useful research can be delayed, or in some instances, stifled altogether by this frustrating and disappointing process. At a minimum, academics and journalists lose valuable time and are forced to expend significantly more effort and resources to retrieve public records. Moreover, the Act makes it clear that every record must have at least one custodian, and it also clearly allows for the possibility that some records

may have more than one custodian. In such cases, all custodians are equally required to comply with the Act.

The amicus respectfully submits that this Court's decision in the present case should discourage the use of "get it from someone else" as a tactic by requestee agencies, which is plainly contrary to the Act. Section 132-2 of the General Statutes states that "the public official in charge of an office having public records shall be the custodian thereof." An exception to this general rule exists if an agency "holds the public records [of another agency]... *solely* for purposes of storage or safekeeping, or *solely* to provide data processing," N.C. Gen. Stat. § 132-6(a). "Solely" should be construed to mean "solely." Where, as here, the agency holds a public record for a number of purposes, the Act should not be read so as to allow that agency to avoid its obligation to produce the record. *See State Emps. Ass'n of N. C., Inc.*, 364 N.C. at 214, 695 S.E.2d at 97 ("permit[ing] [a state agency] to police its own compliance with the Public Records Act[] [is] a practice not likely to promote the[] important policy goals [of the Act]").

"Get it from someone else" also is inconsistent with the Act's expressed intent to make public records readily available at minimal cost. "[I]t is the policy of this State that the people may obtain copies of their public records and public information *free or at minimal cost* unless otherwise specifically provided by law." N.C. Gen. Stat. § 132-1(b). "Minimal cost" is defined as "the actual cost of



reproducing the public record or public information.” *Id.* Though this provision of the Act is directed at hard costs, it demonstrates the intent of the legislature that obtaining public records should not be an exercise in wasting resources. Requiring a requestor to expend time and financial resources to chase down the agency who will accept (or be forced by a court to accept) its statutory responsibility as custodian of records is inconsistent with this provision and with the Act as a whole.

For the same reason, this Court should reject AOC’s argument concerning N.C. Gen. Stat. § 7A-109(d). That statute provides: “[T]o facilitate public access to court records . . . , the Director may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access to the records by the public.” AOC claims that requestors of the database (presumably including research professors and journalists of limited means) can be required under this statute to enter into a nonexclusive contract with the AOC requiring payment to the AOC. AOC misreads the statute (as is addressed in the Respondent’s brief) because the statute simply provides that the AOC can contract with a third-party to provide information to all of the public via remote access (as is done with the federal courts’ PACER program). Further, AOC’s proposed alternative method of providing access undoubtedly would increase the costs above the minimal costs allowed by the Public Records Act.

On all points, a tortured reading of the Act is entirely unnecessary, and disturbing the correct interpretation of the Act adopted by the Court of Appeals would make it far more difficult for academic researchers and journalists to obtain basic public information that they are entitled to receive under the statute. Databases, like the ACIS database, are public records. They are in the custody of the agency that holds them. And they should be produced at minimal cost as the Act requires.

### CONCLUSION

For the foregoing reasons, the amicus respectfully requests that this Court affirm the well-reasoned decision of the Court of Appeals below.

Respectfully submitted this 24<sup>th</sup> day of September, 2014.

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