

SUPREME COURT OF NORTH CAROLINA

MARGARET DICKSON, *et al.*,
Plaintiffs,

v.

ROBERT RUCHO, *et al.*,
Defendants.

NORTH CAROLINA STATE
CONFERENCE OF BRANCHES OF
THE NAACP, *et al.*,
Plaintiffs,

v.

THE STATE OF NORTH CAROLINA,
et al.,
Defendants.

From Wake County

11 CVS 16896

11 CVS 16940

(Consolidated)

IN THE OFFICE OF
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OF THE STATE OF NORTH CAROLINA

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FILED

BRIEF *AMICUS CURIAE* on Behalf of
The North Carolina Open Government Coalition, Inc.

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<i>Defendants.</i>)	
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BRIEF *AMICUS CURIAE* on Behalf of
The North Carolina Open Government Coalition, Inc.

As a friend of the court The North Carolina Open Government Coalition, Inc., through its undersigned counsel, respectfully submits the following points for the court’s consideration in this appeal.

I. The Statute at Issue in this Appeal is Not Ambiguous.

The argument sections of the defendants' brief cover 34 pages. All of them are devoted to arguments as to *how* this court should interpret and construe N.C. Gen. Stat. §120-133. Nowhere in those 34 pages, however, do the defendants even attempt to explain *why* this court should or must interpret or construe the statute at all. Indeed, this court should not and need not do so, because the statute at issue is not ambiguous.

It is well settled that when the language of a statute is clear and unambiguous, there is no room for judicial construction. Courts must accord such statutes their plain and definite meaning and are without power to enlarge, limit or otherwise interpret them. *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 756 (1974); *State ex rel. Utilities Commission v. Edmisten*, 291 N.C. 451, 465, 232 S.E.2d 184, 192 (1977) ("When the language of a statute is clear and unambiguous, it must be given effect and its clear meaning may not be evaded by an administrative body or a court under the guise of construction."). See also *Board of Architecture v. Lee*, 264 N.C. 602, 611, 142 S.E.2d 643, 649 (1965) (When the General Assembly has "formally and clearly expressed its will," courts are without power to "interpolate or superimpose conditions and limitations" that the statute does not contain.)

Here, as the three-judge panel unanimously concluded, G.S. § 120-133 is “clear and unambiguous.” The defendants’ brief does not challenge this conclusion, nor could it, because the language of the statute could not be clearer or more succinct. The Coalition respectfully submits that this court can and should summarily dispose of this appeal on this ground alone.

II. If the Statute at Issue Were Ambiguous, the Court Should Not Apply the Principles of Construction and Interpretation Urged by the Defendants.

In Sections II (C), (D), (E), (F), (G), (H), (I) and (J) of their brief the defendants urge this court, on a variety of grounds, to construe G.S. §120-133 in a narrow, crabbed and constricted fashion. As explained above, the statute does not warrant or need interpreting on *any* basis, because it is not ambiguous. Even if it were, however, this court should interpret it broadly and expansively, just as it interprets similar and related statutes.

A. G.S. § 120-133 Embodies the General Assembly’s Well-Established Policies Favoring Openness in Government.

Any common-sense analysis of Article 17 of Chapter 120 of the General Statutes readily demonstrates that G.S. §120-133 is not, as the defendants assert, a statute whose purpose is to define or limit the powers or privileges of the General Assembly. To the contrary, when viewed in proper context its purpose clearly is to recognize and effectuate a fundamental precept of democracy as embodied in Article I, Sec. 2 of the North Carolina Constitution: “All political power is vested

in and derived from the people; all government of right originates from the people, is founded upon their will only, and is instituted for the good of the whole.”

The various sections of Article 17 of Chapter 120 (G.S. §120-129 through 133) constitute an integrated statutory mechanism for respecting legislators’ preliminary research processes and protecting legislative employees against undue political or personal pressure or influence by exempting specified legislative records from the Public Records Law, either permanently or temporarily.¹ Some documents, such as drafting or information requests *to* legislative employees *from* legislators and requests for assistance *to* agency employees *from* legislative employees are exempted from the Public Records Law completely. See G.S. §§120-130 and 131.1(a1), which specifically provide that such documents “are not ‘public records’ as defined by G.S. 132-1.” Other records, such as a bill that is drafted by legislative employees for introduction by a member and documents that support a fiscal note released by the Fiscal Research Division, are exempted only temporarily. See G.S. §§120-131 and 131.1(a).

In contrast to the other provisions of Article 17, all of which place limitations or restrictions on specific records and information, G.S. §120-133

¹ This court may judicially notice that legislative employees – particularly those who are members of the nonpartisan research and fiscal staffs – could (and likely would) be susceptible to being put “in the middle” if they were required to disclose drafting or information requests made to them by one member of the General Assembly to another, or to a lobbyist or other interested party.

affirmatively declares that with respect to redistricting, *all* drafting and information requests to legislative employees and *all* documents prepared by them become public records when the redistricting plan becomes law. By enacting this unequivocal provision with respect to a very specific category of information the General Assembly merely confirmed and implemented the policy embodied in the Public Records Law:

The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it 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).

B. Like Other Open Government Statutes, G.S. § 120-133 Must Be Interpreted Liberally and Expansively.

By urging this court to construe G.S. § 120-133 narrowly and restrictively the defendants are inviting the court to depart from, and effectively repudiate, well-established principles of statutory construction that both this court and the Court of Appeals have applied consistently and repeatedly to open government statutes such as the Public Records Law and the Open Meetings Law. Like those statutes, G.S. §120-133 embodies North Carolina's strong public policy favoring openness in government. To effectuate that policy, both this court and the Court of Appeals have prescribed that in cases involving the construction of these "sunshine statutes," the usual rules of statutory construction are reversed, so that their

fundamental provisions must be construed and applied liberally, whereas exceptions or exemptions are be construed strictly and applied narrowly. *News and Observer Pub. Co. v. Poole*, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992); *Advance Publications, Inc. v. City of Elizabeth City*, 53 N.C. App. 504, 506, 281 S.E.2d 69, 71 (1981); *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 463-64, 596 S.E.2d 431,434 (2004). Consequently, “those seeking to come within the exceptions should have the burden of justifying their action.” *News and Observer Pub. Co. v. Interim Board of Education for Wake County*, 29 N.C. App. 37, 47, 223 S.E.2d 580, 587 (1976).

Here, of course, the defendants cannot bring the records at issue “within an exception” because no exception exists. As explained above, G.S. §120-133 simply says what it says – i.e., that *all* documents prepared by legislative employees in connection with redistricting *are* public records from the moment the redistricting plan becomes law.

C. The Defendants Do Not Have Standing to Assert the Attorney-Client Privilege on Behalf of the People of North Carolina.

In sections II (B), (C) and (D) of their brief (pp. 16-27), the defendants argue vociferously that G.S. § 120-133 must be construed narrowly and restrictively because it impinges on the attorney-client privilege. This court should reject all of these arguments because, as explained above, the panel below properly concluded

that the statute clearly and unequivocally waives any and all privileges -- including the legislative privilege and the attorney-client privilege -- that conceivably might attach to redistricting records.

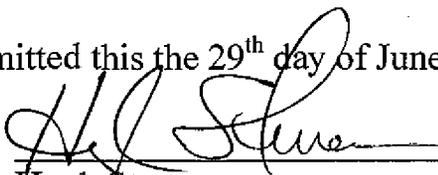
The defendant's strenuous arguments in support of the attorney-client privilege raise the interesting, and apparently novel, issue of whether they have standing or authority to assert the privilege at all. This court clearly has held that the attorney-client privilege belongs to the client, not to the attorney, and that it may be asserted only by the person whose interest it is intended to safeguard. *In re Miller*, 357 N.C. 316, 338, 584 S.E.2d 772, 788 (2003). Here, the legislative defendants are the *nominal* clients of the law firms whose communications are at issue, but in dealing with the attorneys the defendants acted solely as elected representatives of the citizens of North Carolina and were seeking advice and counsel on their behalf, not for themselves personally. Moreover, the attorneys' charges -- which were billed at rates up to \$825 per hour -- were paid by the taxpayers. (R pp. 422-452, 457-499). Under these circumstances, the attorneys simply do not have standing or authority to assert the attorney-client privilege with respect to the documents and information that are the subject of G.S. §120-133. This is especially true because under our law, documents and files created by an attorney are the property of the client, *Womack Newspapers, Inc. v. Town of Kitty Hawk*, 181 N.C. App. 1, 13-14, 639 S.E.2d 96, 104-105 (2007), and public records

and public information are “the property of the people.” N.C. Gen. Stat. § 132-1(b). G.S. § 120-133 does not merely say that redistricting records are no longer privileged once a redistricting plan becomes law; it goes further and declares that they become “public records,” thereby confirming and acknowledging that in this case the attorneys’ true clients are the citizens in whose name and on whose behalf the redistricting process occurs.

Conclusion

For the reasons set forth above, *amicus curiae* the North Carolina Open Government Coalition respectfully urges this honorable court to affirm the order of the three-judge panel.

Respectfully submitted this the 29th day of June, 2012.



Hugh Stevens
N.C. State Bar #4418
Stevens Martin Vaughn & Tadych, PLLC
1101 Haynes Street, Suite 100
Raleigh, North Carolina 27604
(919) 755-0998
hugh@smvt.com

Pursuant to Rule 28(j) of the North Carolina Rules of Appellate Procedure I hereby certify that the foregoing brief *amicus curiae* contains fewer than 3,750 words.



Hugh Stevens

CERTIFICATE OF SERVICE

I hereby certify that I have this day served a copy of the foregoing Motion for Leave to File Brief Amicus Curiae, Affidavit of Hugh Stevens, and Brief Amicus Curiae of the North Carolina Open Government Coalition on counsel by depositing a copy thereof in an envelope bearing sufficient postage in the United States mail, addressed to the following persons at the following addresses:

Alexander M. Peters
Special Deputy Attorney General
Susan K. Nichols
Special Deputy Attorney General
Office of the Attorney General
P.O. Box 629
Raleigh, NC 27602
and via email to
apeters@ncdoj.gov
snichols@ncdoj.gov

Thomas A. Farr and Phillip J. Strach
Ogletree, Deakins, Nash, Smoak &
Stewart, P.C.
4208 Six Forks Road, Suite 1100
Raleigh, NC 27602
and via email to:
thomas.farr@ogletreedeakins.com
phillip.strach@ogletreedeakins.com

Additionally, copies of the foregoing documents were served on counsel for Plaintiffs in *NAACP v. State of North Carolina* and *Dickson, et al. v. Rucho, et al* via e-mail to the following e-mail addresses:

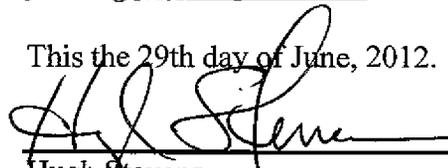
Anita S. Earls
anita@southerncoalition.org

Adam Stein
astein@fergusonstein.com

Edwin M. Speas, Jr.
espeas@poynerspruill.com

John W. O'Hale
johale@poynerspruill.com

This the 29th day of June, 2012.



Hugh Stevens