

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

[REDACTED]

STATE OF NORTH CAROLINA)
)
VS.)
)
[REDACTED] [REDACTED])
Defendant)

MOTION TO COMPEL DISCOVERY

NOW COMES the defendant in the above-captioned criminal cases, by and through his attorney, [REDACTED] [REDACTED] and pursuant to Article 48 of Chapter 15A of the General Statutes of North Carolina and show unto the court the following:

1. That on or about January 6, 2012, [REDACTED] [REDACTED] was forcibly removed and slammed to the ground by two officers who held him at gun point.
2. That CMPD Officers [REDACTED] (# [REDACTED] and [REDACTED] (# [REDACTED] arrested and charged Mr. [REDACTED] with felony drug violations.
3. That on September 25, 2012, Mr. [REDACTED] plead not guilty to the charges.
4. That on October 3, 2012, Mr. [REDACTED] properly filed a Motion to Suppress.
5. That on June 20, 2013, Defense Counsel for [REDACTED] [REDACTED] emailed the District Attorney's Office felony drug supervisor and *Giglio* prosecutor to ask about the procedures for obtaining an officers' personnel file or *Giglio* request.
6. That after an exchange of emails and discussions with the Felony Drug Supervisor, a decision was made for Defense Counsel to subpoena the officers' personnel files and to submit those subpoenas to the District Attorney's Office.
7. That on September 3, 2013, Defense Counsel served the subpoenas on the drug supervisor with the subpoenas requesting "[a]ny and all personnel records for CMPD Officer [REDACTED] # [REDACTED] and another requesting "[a]ny and all personnel records for CMPD Officer [REDACTED] # [REDACTED]
8. That the next day, on September 4, 2013, the felony drug supervisor emailed Defense Counsel stating that "[t]he police attorney's office would have to produce the files for review . . . [and that the felony drug supervisor would] give [REDACTED] [a] heads up and then if the judge orders them to produce something for an in camera review, [that] we will cross that bridge."

9. That on September 13, 2013, one week later, the felony drug supervisor called Defense Counsel and offered to dismiss all of the felonies and to allow the Defendant to plead guilty to a Class 3 misdemeanor instead.
10. That after consulting with the Defendant, Defense Counsel emailed the felony drug supervisor about the new offer.
11. That subsequent to these discussions, the police arrested the Defendant later that month for new charges.
12. That the felony drug supervisor was reassigned to supervise a different unit and all correspondence continued with the prosecutor assigned to this case.
13. That on February 26, 2014, Defense Counsel emailed the prosecutor asking about the status of the subpoenas and to ensure that this case would not be called for trial until the State produced the officer's personnel files.
14. That Defense Counsel sent a second subpoena to the prosecutor requesting the same information on September 4, 2014
15. That Defense Counsel has been waiting for more than 745 days, since the first subpoena was issued, for the State to decide what it will do with this case.
16. That the State has not turned over any documents and it has not provided an explanation for its failure to do so.
17. This case has not been called for trial, but was calendared last month without subpoenas being answered.
18. That Defense Counsel is requesting the subpoenas to be addressed and the officer's personnel files to be provided to the Defendant.

WHEREFORE, the Defendant respectfully prays the Court for the following relief:

1. To conduct an open court and on the record hearing on this Motion.
2. To grant the Defendant's Motion so that Defense Counsel can prepare for trial.

This the 20th day of July, 2015.

Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

CERTIFICATE OF SERVICE

I hereby certify that I have served the foregoing Motion on [REDACTED]
Assistant District Attorney, Twenty-Sixth Judicial District, by hand delivering, this the
20th day of July, 2015.

Toussaint C. Romain
700 East Fourth Street, Suite 400
Charlotte, NC 28202
ATTORNEY FOR DEFENDANT

STATE OF NORTH CAROLINA
COUNTY OF MECKLENBURG

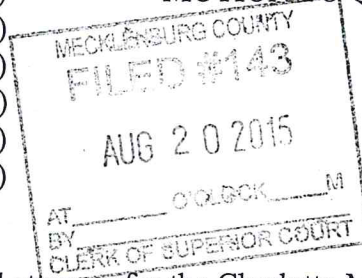
STATE OF NORTH CAROLINA

v.

Defendant.

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION

MOTION TO QUASH



NOW COMES the undersigned attorney for the Charlotte-Mecklenburg Police Department (hereinafter "CMPD") and objects to the subpoena (Attached as Exhibit A) issued by counsel for Defendant [REDACTED] and served on CMPD on August 18, 2015, which requests the production of "a list of disciplinary actions taken and the type of discipline imposed for each officer" with regard to Officers [REDACTED] and [REDACTED] to be produced at the office of the Public Defender on August 21, 2015. Pursuant to Rule 45 of the North Carolina Rules of Civil Procedure, the CMPD respectfully moves this Court for an order quashing Defendant's subpoena. In support of said motion(s), the CMPD shows unto the Court the following:

I.

The Motion requests disciplinary actions and the type of discipline for two CMPD police officers. This information is made privileged and confidential by the Personnel Privacy Act, N.C.G.S. §160A-168. (A copy of this statute is attached as Exhibit B.) The disclosure of documents and information relating to an individual's employment, or contained in an employee's personnel file, is protected under N.C.G.S. §160A-168, which includes any disciplinary action. Moreover, the disclosure of this information without a court order is a misdemeanor, hence a subpoena cannot require such disclosure. The information that is public under G.S. 160A-168 with regard to each officers' discipline is as follows:

1. [REDACTED] 24 hours active suspension.
2. [REDACTED] 80 hours – 40 hours active suspension and 40 hours inactive suspension.

II.

The North Carolina Court of Appeals has repeatedly ruled that the personnel and discipline files of law enforcement officers' are confidential and should be protected. *In the Matter of Brooks*, 548 S.E. 2d 748, 755 (2001), the Court reviewed the showing necessary by the party requesting disclosure, in order for a court of competent jurisdiction to review requests for confidential personnel files. The Court found that "at a minimum, an *ex parte* petition submitted pursuant to section 160A-168(c)(4) should be accompanied by sworn affidavits(s) or similar evidence, including specific factual allegations detailing reasons justifying disclosure. The petition should further state the statutory grounds which allow disclosure." The Court further stated that "the Superior Court should make an independent determination that the interests of justice require disclosure of the confidential employment information."

More recently, the Court of Appeals addressed the issue of examination and release of law enforcement officers' personnel files in *In Re Release of the Silk Plant Forest Citizen Review Committee's Report v. Barker*, 719 S.E.2d 54 (2011). The Court found that the statutory language specifying "examination" of the "relevant" portion of a city employees' personnel file "indicate a clear intent to maintain the privacy of a city employee's personnel file except under limited circumstances where examination of only the relevant portion of the file is allowed." *Id.* at 58. Thus, the legislature chose to grant the trial court limited authority to allow "any person" to "examine" a relevant "portion" of the file. *Id.*

III.

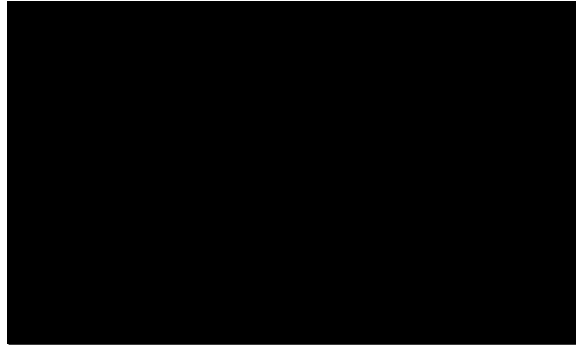
Moreover, the state has the burden of disclosing any potentially impeaching evidence which makes the request for the personnel file unnecessary and duplicative of the state's responsibilities under *Giglio v. United States*, 405 U.S. 150 (1972). *See United States v. Newby*, 251 F.R.D. 188, 190 (E.D.N.C. 2008); Affirmed by *United States v. Newby*, 403 Fed. Appx. 809, 2010 U.S. App. LEXIS 24792 (4th Cir. N.C., 2010) Post-conviction proceeding at, Magistrate's recommendation at *Newby v. United States*, 2013 U.S. Dist. LEXIS 184318 (E.D.N.C., Mar. 19, 2013) ("The government has asserted that it is aware of its obligation to provide exculpatory evidence and will turn over any

impeaching materials..... Because the government already has an obligation to turn over impeachment evidence which would include records of any disciplinary action for its witnesses, Defendant's request to subpoena the employment/personnel files of the [officers] is denied.") *Id.*

IV.

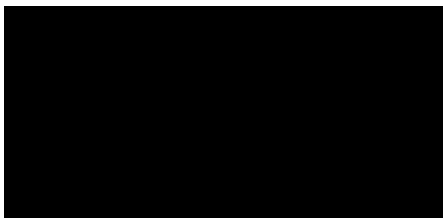
WHEREFORE, the CMPD respectfully requests that the Court enter an order quashing the Subpoena for the production of Officers' [REDACTED] and [REDACTED] discipline files and relieve the CMPD from compliance with the subpoena.

Respectfully submitted this 20th day of August 2015.



CERTIFICATE OF SERVICE

The undersigned certifies that a copy of the foregoing Motion to Quash was served upon the following by e-mail:



Toussaint C. Romain
Assistant Public Defender
700 East Fourth Street, Ste 400
Charlotte, N.C. 28202
Toussaint.Romain@mecklenburgcountync.gov

This the 20th day of August 2015

