

**STATE OF NORTH CAROLINA
UTILITIES COMMISSION
RALEIGH**

DOCKET NO. A-41, SUB 21

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of			
Village of Bald Head Island,)		
Complainant,)		
)		ORDER ALLOWING IN PART
v.)		AND DENYING IN PART
)		RESPONDENTS' MOTION TO
Bald Head Island Transportation, Inc.,)		COMPEL
and Bald Head Island Limited, LLC,)		
Respondents.)		

BY THE PRESIDING COMMISSIONER: On July 12, 2022, Bald Head Island Transportation, Inc., and Bald Head Island Limited, LLC (collectively, Respondents), filed with the Commission a Motion to Compel Response of Complainant to Data Request 1-21 (Motion to Compel).

On July 13, 2022, the Village of Bald Head Island (VBHI or Complainant) filed a Response to Respondents' Motion to Compel (Response).

On July 14, 2022, Respondents filed a Reply in support of its Motion to Compel (Reply).

DISCUSSION AND CONCLUSIONS

North Carolina Rule of Civil Procedure 26(b)(1) provides that “[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . .”; “[i]t is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence . . .” N.C. Gen. Stat. § 1A-1, R. 26(b)(1) (Rule 26(b)(1)). “The discovery rules should be liberally construed in order to accomplish the important goal of ‘facilitating the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial.’” *Williams v. North Carolina Dept. of Correction*, 120 N.C. App. 356, 359, 462 S.E.2d 545, 547 (1995) (citation omitted).

Although the rule should be construed liberally neither party should be allowed to roam at will in the closets of the other. The test of relevancy under

Rule 26 is not, of course, the stringent test required at trial. The rule is designed to allow discovery of any information “reasonably calculated to lead to the discovery of admissible evidence” [However, o]ne party’s need for information must be balanced against the likelihood of an undue burden imposed upon the other.

Willis v. Duke Power Co., 291 N.C. 19, 34, 229 S.E.2d 191, 200 (1976) (citations omitted).

Respondents seek to compel VBHI to respond to their Data Request 1-21. Respondents identify this data request as the following:

Produce all Documents received by any elected or appointed official of the Village, since January 1, 2021, through any email, text, social media or other electronic account personally maintained by that official that relate in any way to (i) BHIT’s ferry and on-island tram systems (“the Regulated Assets”), (ii) BHIL’s vehicle parking facility on the mainland, (iii) BHIL’s tug and barge operation (“ii” and “iii” together, “Unregulated Assets”), or (iv) the facts and allegations set forth in the Complaint.

(DR 1-21). Respondents state that VBHI objects to the request insofar as it seeks communications that do not concern the utility status of the Unregulated Assets and as unduly burdensome, irrelevant, duplicative, and not reasonably calculated to lead to the discovery of admissible evidence. Respondents also state that VBHI objects to the extent the request seeks information that is protected by legislative immunity or quasi-judicial immunity. Finally, Respondents state that VBHI states that it is not in possession, custody, or control of email, text, social media, or other electronic accounts personally maintained by any elected or appointed official of the Village of Bald Head Island.

Respondents argue that DR 1-21 is designed to elicit relevant information relating to whether the Unregulated Assets should be subject to Commission regulation. Respondents also argue the request seeks discussions and information exchanges in which Village officials have been involved regarding any purported relationship — “integral” or otherwise — between the regulated assets and the unregulated assets. Respondents also argue that the request relates to VBHI’s attempt to acquire the Regulated and Unregulated Assets, communications with or between elected officials to do so, and VBHI’s intentions behind filing the Complaint. Respondents also argue that communications conducted in or through personal accounts of VBHI officials may involve the transaction of public business and are thus discoverable.

VBHI responds that it has produced all requested documents in its possession related to the parking facilities and the barge. VBHI states that to avoid a discovery dispute, it also provided descriptions of all communications VBHI had with various entities regarding the ferry, the tram, the parking facilities, and the barge. See Response Exhibit A at Request Nos. 1-2 through 1-7. VBHI states that it also has produced all documents and official communications received by VBHI related to the parking facilities and the barge since January 1, 2021. See *id.* at Request No. 1-20. VBHI states that it provided

these documents even though those communications do not bear directly on the factual issues before the Commission.

VBHI argues, however, that the additional information Respondents seek is not reasonably calculated to lead to the discovery of admissible evidence. VBHI states that Respondents have failed to explain how documents received by VBHI's council members are relevant to whether the Unregulated Assets are subject to Commission regulation. VBHI also argues that Respondents misapprehend its objection and note that it has already provided documents in its possession related to the Unregulated Assets. VBHI states that Respondents are seeking public officials' communications — made in their personal accounts — to find information that will paint the Village officials in a negative light. VBHI argues that council members' motivations — or any evidence that the Complaint proceeding is a multi-pronged approach by VBHI to acquire the assets — are not relevant to the regulatory status of the Unregulated Assets. Finally, VBHI argues that it cannot produce documents that it does not have — that these documents are instead in the possession, custody, and control of its officials' personal accounts and VBHI does not have the legal right to rummage through its council members' personal accounts.

Respondents reply that the purpose of DR 1-21 is to capture records that reflect the conduct of any public business that may have been conducted through, and maintained in, personal accounts. Respondents state that the motivations of these officials is not being targeted. Respondents argue that public records can be housed in personal accounts and that since records located in the personal accounts of elected and appointed officials must be produced in response to a formal public records request, there is no reasonable basis to contend those records should evade discovery under the Rules of Civil Procedure. Respondents state that the request only requires VBHI to identify, in the personal accounts of its elected and appointed officials, business communications about the assets, their possible sale, VBHI's potential purchase of them, and interchanges with other local and state officials regarding these issues and the other matters raised in the Complaint.

After careful consideration, the Presiding Commissioner concludes that insofar as Respondents' request seeks documents that both (1) exist in the personal accounts of VBHI's elected or appointed officials and (2) are documents or records, regardless of physical form or characteristics, that were made or received pursuant to law or ordinance, in connection with the transaction of the public business of VBHI, the Presiding Commissioner is persuaded and finds that Data Request 1-21 is reasonably calculated to lead to the discovery of admissible evidence relevant to the assets at the heart of this proceeding and thus is sufficiently within the scope of Rule 26(b)(1). Therefore, Respondents' motion to compel should be allowed. Records that were created or received by VBHI officials in connection with transacting VBHI's public business are public records in VBHI's control, regardless of whether they were created or received through electronic media or accounts owned by VBHI or owned by individual VBHI officials in their personal capacities. If VBHI officials have used their personal accounts to conduct or transact the public's business, they are obligated by Chapter 132 of the North Carolina General Statutes to preserve records made or received as part of or as a means of conducting

that business and have a duty to provide all such records to VBHI upon request of VBHI's custodian of records. That VBHI has the right to ask for and receive public records in the possession of its officials means the documents sought by Data Request 1-21 are in the control of VBHI and thus it is fair and reasonable that VBHI should be required to request its officials to check their personal accounts in connection with Respondents' data request and provide any responsive documents or records to VBHI in order that VBHI may comply with its discovery obligations. Neither Data Request 1-21 nor this Order should be construed as requiring VBHI to possess, control, or access the personal accounts of VBHI officials.

However, to the extent that Respondents' request can be read to include or cover documents or records in the personal accounts of VBHI officials that were not made or received in the conduct or transaction of the public business, Respondents' motion to compel should be denied. Non-business communications or non-business records of public officials are not public records pursuant to Chapter 132 and therefore are not in the possession or control of VBHI. Thus, VBHI need not produce or provide access to communications about the Assets if they concern personal, private, non-business matters, *i.e.*, were not made or received in the conduct or transaction of public business.

The Presiding Commissioner is aware that the phrase "transaction of public business" is not a defined term in Chapter 132 and therefore the words of the statute must be interpreted to have their plain and common meaning. For purposes of this Order, the following guidelines are given. Records connected to transaction of the public business of VBHI would generally relate to VBHI's business or community concerns and affairs. Personal communications that cannot reasonably be said to relate to VBHI's business, such as personal texts or emails between friends and family about grocery trips, personal ferry rides or experiences related to parking, would not be documents made or received in the transaction of VBHI business. On the other hand, communications or inquiries on similar topics received or commented on by VBHI officials because of their official positions with VBHI could be connected to the transacting of VBHI public business, thus qualifying related documents as public records that might possibly shed light on the relation between the Assets at issue in this docket. Still, merely because a document is *about* a topic of public concern or interest does not make it a public record if it was not made or received in connection with the transaction of public business. For example, an email exchange between a council member and his parent about the unavailability of ferry tickets or inaccessibility of parking during the parent's planned visit with the council member would seem unrelated to VBHI's business interests and therefore not connected to the transacting of public business. Should further dispute exist regarding the nature of a communication, the communication may be submitted to the Commission for in camera inspection and resolution of the dispute.

IT IS, THEREFORE, ORDERED as follows:

1. That Respondents' Motion to Compel is allowed insofar as it seeks documents and records that exist in the personal accounts of VBHI's elected or appointed officials and are also public records pursuant to Chapter 132 of the North Carolina

General Statutes, and is denied insofar as it seeks documents and records in the personal accounts of VBHI's elected or appointed officials that are not also public records under said law;

2. That VBHI shall inquire of its elected and appointed officials whether any of those officials have any email, text, social media, or other electronic types of records in accounts they personally maintain or control (outside of VBHI-managed accounts) that may contain public records under North Carolina law and that are in any way related to (i) BHIT's ferry and on-island tram systems, (ii) BHIL's vehicle parking facility on the mainland, (iii) BHIL's tug and barge operation, or (iv) the facts and allegations set forth in the Complaint;

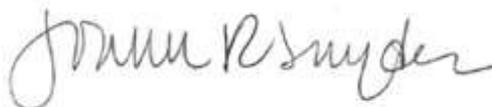
3. That VBHI shall, in a timely manner, produce such responsive records as are not privileged and concurrently provide an appropriate log of all such records withheld on the basis of an asserted privilege; and

4. That should VBHI determine that there are responsive records that contain personal or private communications not required to be disclosed pursuant to this Order, VBHI may redact the personal or private communications from the records to be provided to the Respondents.

ISSUED BY ORDER OF THE COMMISSION.

This the 27th day of July, 2022.

NORTH CAROLINA UTILITIES COMMISSION

A handwritten signature in black ink, appearing to read "Joann R. Snyder". The signature is written in a cursive, flowing style.

Joann R. Snyder, Deputy Clerk