NORTH CAROLINA'S PUBLIC RECORDS LAW AND ITS NEED TO CHANGE

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"Information is the currency of democracy."[1]

On September 13, 2008, a woman was nearly murdered in North Carolina.[2] She was attacked in her home and beaten unconscious, nearly to the point of death.[3] Her friend, who was with her at the time, was beaten to death.[4] The two bodies were then set on fire.[5]

As a result of the attack, the woman suffered extensive third- and fourth-degree burns on over seventy percent of her body, resulting in the amputation of both of her legs and two fingers on her dominant hand.[6] Her mandible and two of her ribs were broken, and she sustained severe blunt-force trauma to her head.[7] Ultimately, the woman was left for dead.[8]

The woman then spent six months in the Intensive Care Burn Unit and the better part of two years in the hospital.[9] Following this,

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[1] *Information is the Currency of Democracy (Quote)*, MONTICELLO, http://www.monticello.org/site/jefferson/information-currency-democracy-quotation (last visited Nov. 7, 2015) (noting that there are conflicting views about whether this quote should be attributed to Ralph Nader or Thomas Jefferson).

[2] Brian Clarey, *It Happened in Greensboro*, YES WEEKLY (Dec. 3, 2008), http://yesweekly.com/article-5288-it-happened-in-greensboro.html.

[3] Complaint at ¶ 2, Moy v. City of Greensboro, No. 13 CVS 5541 (N.C. Super. Ct. 2013).

[4] *See generally id.*

[5] *Id.*

[6] *See generally id.*

[7] *See generally id.*

[8] *See generally id.*

[9] *See* Clarey, *supra* note 2.

she spent months in an inpatient rehabilitation center and years in physical therapy in an effort to reassert herself as a contributing member of society.[10]

The murder, attempted murder, and arson occurred shortly after a man drove the woman and her friend home from a party.[11] The Greensboro Police Department (hereinafter "GPD") suspected that man within weeks of the crime and investigated his involvement.[12] Following the attack, the woman and her family have repeatedly requested the involvement of the State Bureau of Investigation (hereinafter "SBI") and assistance from the District Attorney's (hereinafter "DA") office.[13] The GPD and the DA's office declined these requests.[14] Eventually, her telephone calls were ignored, and the case went cold.[15]

Three years lapsed without an arrest until, finally, the man was arrested and placed in jail, pending prosecution in July 2011.[16] Seven months passed without any indictments being issued until the grand jury indicted the man in January 2012.[17] The woman was not contacted by the DA's office until March 2012 when the assistant district attorney informed her that the perpetrator would be released due to police blunders and a lack of evidence.[18] No further explanation was given.

In order to determine what went wrong with the investigation and why, the woman sued the GPD and the City of Greensboro to obtain information about her case, requesting the information that was provided to opposing court-appointed counsel.[19] The woman also sought to launch an independent investigation.[20] To the media, the GPD and the DA both admitted to blunders in the investigation, but they did not offer any more specific information.[21]

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[10] *See generally id.*
[11] *See id.*
[12] *See id.*
[13] *See* Complaint, *supra* note 3, at ¶ 2.
[14] *See id.* at ¶ 21.
[15] *See id.* at ¶ 42.
[16] *Id.* at ¶ 3.
[17] *Id.*
[18] *Id.* at ¶ 7–9, 14–15.
[19] *Id.* at ¶ 22.
[20] *Id.*
[21] *Charges Dropped against Michael Slagle in Death of William Hobbs*, WFMY NEWS (May 18, 2012, 8:35 PM), http://origin.digtriad.com/news/article/229184/1/Charges-Dropped-Against-Willliam-Hobbs-Murder-Suspect ("The lead suspect in the case, Michael

The case was dismissed on a 12(b)(6) motion in the superior court for failure to state a claim for which relief could be granted[22] because the GPD asserted that the case remained an "ongoing investigation," and that the victim was not privy to the information.[23] Additionally, the GPD claimed that disclosure of the information could potentially taint the victim's memory, which should be preserved, pending an eventual trial.[24]

In North Carolina, there is no statutory definition for "ongoing" or "active" investigations. To that end, the GPD was able to claim that the case, although considered cold, was still ongoing and should therefore be considered private and inaccessible to the public, including the victim.[25] Although the information had been previously disclosed to the potential defendant, the information was still considered private.[26]

Despite not having a definition of ongoing investigation, North Carolina maintains that its Freedom of Information Act (hereinafter "FOIA") should be liberally construed.[27] On its face, the Public Records Act (hereinafter "NC Act") does afford a broad base of situations when the public can view private information.[28] However, a closer examination reveals that criminal records are frequently ex-

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Slagle, was released from custody yesterday afternoon after the District Attorney dismissed the charges against him due to administrative and documentation shortfalls with the investigation that could impair the trial."); Nancy McLaughlin, *'Blunders' to Free Murder Suspect*, LYNC MIGRATION (May 17, 2012), http://www.lyncmigration.com/news/2012/05/17/6307589.htm ("'The district attorney would be unable to defend the actions and procedural blunders of the original detective who would have to testify in this trial,' wrote Detective A.R. Hinson in a seemingly apologetic email to Hobbs' family.").

[22] Order, Moy v. City of Greensboro, No. 13 CVS 5541 (N.C. Super. Ct. 2013).

[23] Robert Lopez, *Greensboro: Records in Fire Investigation Not Public*, GREENSBORO NEWS & RECORD (June 14, 2013, 6:05 PM), http://www.news-record.com/news/local_news/greensboro-records-in-fire-investigation-not-public/article_7b1d64b0-d53e-11e2-9316-0019bb30f31a.html.

[24] *See* Order, *supra* note 22.

[25] *See Deborah Moy Loses Court Battle*, WXII12 (Nov. 13, 2013, 4:00 PM), http://www.wxii12.com/news/local-news/piedmont/deborah-moy-loses-court-battle/22955868.

[26] *Id.*

[27] Thomas H. Moore, Comment, *You Can't Always Get What You Want: A Look at North Carolina's Public Records Law*, 72 N.C. L. REV. 1527, 1528 (1994) ("Legal commentators have labeled North Carolina's public records act, North Carolina General Statutes Section 132-1, one of the more liberal in the country.").

[28] N.C. GEN. STAT. § 132-1(b) (2015) ("The public records and public information compiled by the agencies of North Carolina government or its subdivision are the property of the people.").

empted from public view in North Carolina.[29] Specifically, the statute states, "Records of criminal investigations conducted by public law enforcement agencies, and records of investigations conducted by the North Carolina Innocence Inquiry Commission, are not public records as defined by [NC] G.S. 132-1."[30] The courts have determined the legislative intent to be that *all* records in a criminal investigation are exempted from the NC Act, even if the investigations are active, ongoing, cold, or closed.[31]

In contrast to the NC Act, which gives and takes away the freedom of information, Florida enacted a statute that defines active and ongoing investigations.[32] This Florida statute specifically opens criminal investigative discovery records to the public.[33]

North Carolina should amend its Act to parallel Florida's Act because the exemption of all criminal investigative materials undermines the fundamental rationale behind the NC Act itself. Without a definition of ongoing or active investigation, the NC Act is too broad.

This Note will (I) investigate the history of the Public Records Act and how North Carolina interprets release of criminal public records; (II) examine how Florida interprets free access to information; and (III) argue that North Carolina should adopt a statute similar to Florida's, which defines active investigation and opens criminal investigative discovery records.

I. North Carolina's Freedom of Information Act

In 1966, President Johnson begrudgingly signed into law the FOIA due to massive lobbying from the media and recognition of the importance of incorporating a public records act.[34] Johnson's resistance to

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[29] Moore, *supra* note 27, at 1528 (quoting N.C. Gen. Stat. § 132-1 (1993)) ("Given a cursory reading . . . the Act apparently makes available to the public all documents, papers, [etc.]."); N.C. Gen. Stat. § 132-1.4(a) (2013); *see also* Moore, *supra* note 27, at 1529 ("The North Carolina freedom of information act, however, is not all it seems. North Carolina's legislature and appellate courts have limited the Act's scope by carving out exceptions for law enforcement, personnel, and professional disciplinary records.").

[30] N.C. Gen. Stat. § 132-1(b) (2013).

[31] *See, e.g.*, McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 467, 596 S.E.2d 431, 436 (2004).

[32] Fla. Stat. Ann. § 119.011(3)(d) (West 2008).

[33] Fla. Stat. Ann. § 119.011(3)(c)(5) (West 2008).

[34] *Bill Moyers on the Freedom of Information Act*, PBS (Apr. 5, 2002), http://www.pbs.org/now/commentary/moyers4.html.

signing the law highlights the government's constant resistance to outside scrutiny.

FOIA provides that governmental information is accessible to the people, establishing the right of the public to obtain information from government agencies.[35] It "was an effort by congress to balance society's interest in open government with other important interests, 'such as the public's interests in the effective and efficient operations of government, . . . and in the preservation of the confidentiality of sensitive, personal, commercial, and governmental information.'"[36] However, FOIA only applies to federal government agencies.[37] As a result, each state adopted its own version of FOIA, which "provid[ed] public access to government records."[38]

Setting precedent for FOIA, North Carolina recognized the right of the public to inspect public records in 1935.[39] However, the term "public records" was not defined until forty years later when the NC Act was amended.[40] Additionally, the amendment allowed citizens to sue for access to records, leaving the decision about whether to release the records to the court's discretion.[41] The amendment still denied attorneys' fees or fines until the General Assembly provided for those fees when records were wrongfully denied to the public.[42]

Following the enactment of the NC Act in 1935 and its amendment forty years later, the Attorney General's (hereinafter "AG") office defined the parameters of the law.[43] In fact, the AG's office determined the scope of the law, "decid[ing] that the original public records law did not provide for public inspection of active criminal

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[35] *See* 5 U.S.C. § 552 (2012).

[36] Matthew Bunker, et al., *Access to Government-Held Information In The Computer Age: Applying Legal Doctrine To Emerging Technology*, 20 FLA. ST. U.L. REV. 543, 554 (Winter 1992–93) (citation omitted).

[37] *Id.* at 555.

[38] *Id.*

[39] Act of May 2, 1935, ch. 265, § 1, 1935 N.C. Sess. Laws. 288, 288 (codified as N.C. GEN. STAT. §§ 132-7, 132-8 (1935)).

[40] N.C. GEN. STAT. § 132-1 (2013) ("'Public record' or 'public records' shall mean 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[.]").

[41] Act of June 24, 1975, ch.787, § 3, 1975 N.C. Sess. Laws 1112, 1113 (codified as amended at N.C. GEN. STAT. § 132-9 (1993)).

[42] Act of July 22, 1983, ch. 918, § 1, 1983 N.C. Sess. Laws 1266, 1266 (codified as amended at N.C. GEN STAT. § 6-19.2 (1993)).

[43] Moore, *supra* note 27, at 1555 (citing 29 Op. N.C. Att'y Gen. 697 (1948)).

investigatory records compiled by local law enforcement agencies," because release of such records would nullify North Carolina's criminal discovery laws and may "jeopardize an accused criminal's right to a fair trial."[44]

In 1983, the North Carolina Supreme Court finally weighed in on the release of criminal investigative materials in *News & Observer Publ'g Co. v. State ex. rel. Starling*.[45] In this case, the court reversed the court of appeals decision, which allowed newspapers access to SBI criminal records.[46] The court held that only targets of SBI investigations could petition the court for release of criminal investigative material.[47]

In 1993, the legislature again amended the NC Act to clarify which criminal investigative records could be disclosed to the public.[48] The amended NC Act allowed for public inspection of arrest records and incident reports.[49] However, the new NC Act still excluded internal police records.[50]

Because the NC Act is broad in scope, "[l]egal commentators have labeled North Carolina's public records act [as] . . . one of the more liberal in the country."[51] A *prima facie* reading of the statute would lead one to believe that North Carolina's statute provides liberal access for the public to documents.[52] However, North Carolina's version of FOIA is "not all it seems."[53] Because of its broad construction, the legislature and courts have subsequently "limited the Act's scope by carving out exceptions for law enforcement."[54] Therein lies the problem.

The NC Act exempts criminal investigations from being disclosed to the public.[55] Moreover, it continues to lack a definition of ongoing

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[44] Moore, *supra* note 27, at 1556 (citing 44 Op. N.C. Att'y Gen. 340, 341 (1975)).

[45] *See* News & Observer Publ'g Co. v. State *ex rel.* Starling, 312 N.C. 276, 285–86, 322 S.E.2d 133, 140 (1984).

[46] *Id.*

[47] *Id.* at 139.

[48] Act of July 23, 1993, ch. 461, § 1, N.C. Sess. Laws 1756, 1756–59 (codified as N.C. GEN. STAT. § 132-1 (1993)).

[49] *Id.*

[50] N.C. GEN. STAT. § 132-1.4(a) (2013).

[51] Moore, *supra* note 27, at 1528 (citing Burt A. Braverman & Wesley R. Heppler, *A Practical Review of State Open Records Laws*, 49 GEO. WASH. L. REV. 720, 740–41 (1981)).

[52] N.C. GEN. STAT. § 132-1(b) (2013) ("The public records and public information compiled by the agencies of North Carolina government or its subdivision are the property of the people.").

[53] Moore, *supra* note 27, at 1529.

[54] *Id.*

[55] *See* N.C. GEN. STAT. § 132-1.4 (2013).

or active investigation.[56] As a result, the courts are left to speculate about legislative intent, usually finding that criminal investigative information should be exempt from public disclosure because whether the investigation is open, ongoing, active, or closed has not been decided yet.[57]

II. Florida's Statute

Like North Carolina, Florida's public records act claims to promote transparency between the public and the government.[58] However, Florida's laws, seeking to maintain an open and transparent government, are "widely regarded as some of the broadest and most all-encompassing in the country."[59] In fact, Florida's AG, Pam Bondi, declared that, "In Florida, transparency is not up to the whim or grace of public officials. Instead, it is an enforceable right."[60] Moreover, "[w]ithout information, citizens are powerless to impact their government. Without citizens impacting government, power becomes concentrated in an elite few. Without the fear of public outcry, the will of the few trumps the will of the many."[61] Florida operates under the fundamental tenet that "[t]he public's right of access to information about its government is a fundamental constitutional right[.]"[62]

In analyzing Florida's statute, this section will examine how the legislature defines and how the courts interpret: (A) the statute's definition of "active investigation" and (B) the release of criminal discovery information.

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[56] *Id.*

[57] *See, e.g.*, McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 467, 596 S.E.2d 431, 436 (2004) (observing that the "Public Records Act does not distinguish between active and inactive or closed investigations" for purposes of the criminal investigation exception); Gannett Pac. Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 160, 595 S.E.2d 162, 166 (2004) (finding that the Public Records Act contains no exception for disclosure of records where a criminal investigation is complete); Times-News Publ'g Co. v. State, 124 N.C. App. 175, 177, 476 S.E.2d 450, 452 (1996) (holding that criminal investigative materials transmitted to the district attorney's office in preparation for trial were exempted from classification as public records under the Public Records Act).

[58] *See* Pam Bondi, *Open Government*, Office of the Att'y Gen. of Fla., http://www.myflsunshine.com/ (last visited Nov. 8, 2015).

[59] Joseph T. Eagleton, *Walking on Sunshine Laws: How Florida's Free Press History in the U.S. Supreme Court Undermines Open Government*, 86 Fla. B.J. 22, 24 (Sept./Oct. 2012).

[60] Bondi, *supra* note 58.

[61] Eagleton, *supra* note 59, at 23.

[62] *See* Univ. of Fla., Florida Government in the Sunshine: A Citizen's Guide 3 (2008), http://www.brechner.org/citizen_guide_08.pdf.

A. *Definition of "Active Investigation"*

Florida Statute section 119 states the following:

> Criminal intelligence information shall be considered 'active' as long as it is related to intelligence gathering conducted with a *reasonable, good faith belief* that it will lead to detection of ongoing or reasonably anticipated criminal activities. Criminal investigative information shall be considered 'active' as long as it is related to an ongoing investigation which is continuing with a *reasonable, good faith anticipation* of securing an arrest or prosecution in the foreseeable future. In addition, criminal intelligence and criminal investigative information shall be considered 'active' while such information is directly related to pending prosecutions or appeals. The word 'active' shall not apply to information in cases which are barred from prosecution under the provisions of [§] 775.15 or other statute of limitation.[63]

According to Florida Public Records Act's (hereinafter "FL Act") exemptions for active criminal intelligence and investigative information, active means that "even though there is no immediate anticipation of arrest, so long as investigation is proceeding in good faith, and the state attorney or grand jury will reach a determination in the foreseeable future, the requested information is not subject to disclosure."[64]

However, in *Christy v. Palm Beach Cty. Sheriff's Office*, the court found that a particular time lapse exceeded the time limitation on how long criminal investigative material could be considered pertinent to an investigation.[65] The court held that records generated in connection with a criminal investigation conducted thirteen years prior were no longer considered active.[66] This decision was based on the fact that there was no evidence that the information would lead to detection of ongoing or reasonably anticipated criminal activities.[67]

B. *Release of Criminal Discovery Information*

Florida's statute explicitly releases documents given to a potential defendant upon discovery into public forum.[68] It states:

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[63] FLA. STAT. ANN. § 119.011(3)(d)(2) (West 2008) (emphasis added).

[64] Barfield v. City of Ft. Lauderdale Police Dep't, 639 So. 2d 1012, 1017 (Fla. Dist. Ct. App. 1994).

[65] *See* Christy v. Palm Beach Cty. Sheriff's Office, 698 So. 2d 1365, 1367 (Fla. Dist. Ct. App. 1997).

[66] *Id.*

[67] *Id.*

[68] FLA. STAT. ANN. § 119.011(3)(c)(5) (West 2008).

> Documents given or required by law or agency rule to be given to the person arrested, except as provided in § 119.071(2)(h), and, except that the court in a criminal case may order that certain information required by law or agency rule to be given to the person arrested be maintained in a confidential manner and exempt from the provisions of § 119.07(1) until released at trial if it is found that the release of such information would: (a) Be defamatory to the good name of a victim or witness or would jeopardize the safety of such victim or witness; and (b) Impair the ability of a state attorney to locate or prosecute a codefendant.[69]

However, "[i]n 1975 . . . the Florida legislature amended the statute to restrict the exemptions to only those 'provided by law.'"[70] As a result, the Florida Supreme Court interpreted the legislature's intent to eliminate judicially defined exceptions, limiting it to those created by the legislature.[71]

Since the 1975 amendment, Florida courts have been grappling to define what can be exempted from release.[72] As a result of the statute, the state has a burden of proof as to why certain information or judicial proceedings should not be disclosed.[73]

In 1978, the Fourth District Court of Appeals established a balancing test for closure of judicial proceedings, including discovery records.[74] In this case, the court determined that judicial proceedings can only be closed if the party seeking closure can prove: "(1) closure is necessary to prevent a serious and imminent threat to the administration of justice, (2) that no less restrictive alternative measures are available, and (3) that closure will in fact achieve the Court's purpose."[75]

In *Tallahassee Democrat, Inc. v. Willis*, a 1979 First District Court of Appeals case, the court held that filing discovery records served as a "trigger" by which the information became public.[76] In deciding this, the court relied on Florida Statute section 119.011 and the Florida

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[69] *Id.*

[70] Charles N. Davis, *Access to Discovery Records in Florida Criminal Trials: Public Justice and Public Records*, 6 U. FLA. J.L. & PUB. POL'Y 297, 303 (1994) (quoting Wait v. Fla. Power & Light Co., 372 So. 2d 420, 424 (Fla. 1979)).

[71] *Wait*, 372 So. 2d at 425.

[72] *See* Davis, *supra* note 70, at 317.

[73] *Id.* at 316.

[74] *Compare* Miami Herald Publ'g Co. v. Lewis, 426 So. 2d 1, 3 (Fla. 1982), *with* Miami Herald Publ'g Co. v. State, 363 So. 2d 603, 606 (Fla. Dist. Ct. App. 1978).

[75] *Id.*

[76] Tallahassee Democrat, Inc. v. Willis, 370 So. 2d 867, 870–71 (Fla. Dist. Ct. App. 1979).

Rules of Judicial Administration, ultimately holding that once the clerk of court filed dispositions, the records are open for public inspection.[77]

The test for exemption in *Miami Herald Publ'g Co. v. State* was further broadened in 1982, with the Florida Supreme Court decision in *Miami Herald Publ'g Co. v. Lewis*.[78] In its modified test, the court held that in order for judicial documents to be closed, the petitioner must prove:

> (1) Closure is necessary to prevent a serious an imminent threat to the administration of justice; (2) No alternatives are available, *other than change of venue*, which would protect a defendant's right to a fair trial; and (3) Closure would be effective in protecting the rights of the accused, without being broader than necessary to accomplish this purpose.[79]

This balancing test "provide[s] the best balance between the need for open government and public access . . . to the judicial process, and the paramount right[s] of a defendant in a criminal proceeding[.]"[80]

> The *Lewis* test added two new wrinkles to the *Miami Herald* test. First, the court eliminated change of venue as an alternative to closure in the second arm of the test . . . . Second, the third arm of the test was expanded to require courts to demonstrate that there is a substantial probability that closure will be effective in protecting against the perceived harm.[81]

The test, as it currently stands, reconciles the government's interest in preserving the integrity of the investigation and the privacy of the accused, while maintaining the public's right to access records.[82]

III. The Inconsistencies in North Carolina's Public Records Act

A. *What North Carolina Says It Does*

At first glance, the AGs' interpretations of FOIA in both North Carolina and Florida would suggest that the two states embrace similar laws because the language is strikingly similar.[83] However, Florida's

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[77] *Id.*

[78] *Lewis*, 426 So. 2d at 3.

[79] *Id.* at 6 (emphasis added).

[80] *Id.* at 7.

[81] Davis, *supra* note 70, at 308.

[82] *See Lewis*, 426 So. 2d at 6 (citing Mills v. Alabama, 384 U.S. 214, 218–19 (1966)).

[83] *Compare* Bondi, *supra* note 58, *with* Roy Cooper, North Carolina: Guide to Open Government and Public Records, N.C. Dep't of Justice 1–11 (2008), http://www.ncdoj.gov/getdoc/ef04d580-eee7-4cfe-b2ec-06c26a6f95b9/AG-open-government-booklet-4-8-08.aspx.

statute lacks the criminal investigation exemption laid out in the NC Act.[84]

In *North Carolina: Guide to Open Government and Public Records*, North Carolina's current AG, Roy Cooper, states, "The policy of the state of North Carolina's [Act] is to allow public access to the activities of government."[85] Cooper goes on to say, "When in doubt about how to interpret the state's open records . . . laws—always work to resolve the question in favor of openness."[86]

Cooper ends by stating, "Strong laws and a commitment to openness will ensure that North Carolina residents are informed about government's business."[87] However, because of the courts' various interpretations of the NC Act, all criminal investigative material, whether from a past, present, or future investigation, is exempt from disclosure.[88] As a result, the public is not entitled to access those records, and thus the government cannot be monitored.

The statutory language in North Carolina presents the same "open access to information" feel that North Carolina AG's webpage does. North Carolina Statute section 132-1 states:

> The public records and public information compiled by the agencies of North Carolina government or its subdivision 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.[89]

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[84] *Compare* FLA. STAT. ANN. § 119.011(3)(c)(5) (West 2008) (contending that criminal investigation records and criminal intelligence information are not exempt from public disclosure), *with* N.C. GEN. STAT. § 132-1.4(a) (2013) (stating that criminal investigation records and criminal intelligence information are not public records).

[85] Cooper, *supra* note 83, at 1.

[86] *Id.*

[87] *Id.*

[88] *See, e.g.*, McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 467, 596 S.E.2d 431, 436 (2004) (observing that the "Public Records Act does not distinguish between active and inactive or closed investigations" for purposes of the criminal investigation exception); Gannett Pac. Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 160, 595 S.E.2d 162, 166 (2004) (finding that the Public Records Act contains no exception for disclosure of records where a criminal investigation is complete); Times-News Publ'g Co. v. State, 124 N.C. App. 175, 177, 476 S.E.2d 450, 452 (1996) (holding that criminal investigative materials transmitted to the district attorney's office in preparation for trial were exempted from classification as public records under the Public Records Act).

[89] N.C. GEN. STAT. § 132-1(b) (2013).

Based on the plain language of both North Carolina's AG and North Carolina's statute itself, North Carolina presents itself as a state where access to information is freely given to the public.[90]

B. *What North Carolina Actually Does*

The statute is limited by what is "otherwise specifically provided by law."[91] One limitation that specifically exempts public access is criminal investigations.[92] The statute states, "Records of criminal investigations conducted by public law enforcement agencies, records of criminal intelligence information compiled by public law enforcement agencies . . . are not public records as defined by [N.C.]G.S. 132-1."[93] The statute continues by defining key terms, such as "records of criminal investigations," "records of criminal intelligence information," "public law enforcement agency," and "violations of the law."[94] However, the legislature neglected to define "active" or "ongoing" investigation.[95]

As a result, the court interpreted the lack of a definition to mean that criminal investigative materials are exempt from public access whether the investigation is ongoing or closed, including material collected "prior to any actual violations."[96] Furthermore, the court found, "[a]s currently enacted, the Public Records Act contains no exceptions for disclosure of records even after a criminal investigation is complete."[97]

In *Gannett Pac. Corp. v. North Carolina State Bureau of Investigation*, the plaintiffs sought records from the State Bureau of Investigation concerning incidents surrounding a fatal fire in the county jail.[98] The

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[90] *Compare* Cooper, *supra* note 83, at 1 (contending that North Carolina allows public access to the activities of the government), *with* N.C. GEN. STAT. § 132-1(a), (b) (2013) (indicating that public records and public information gathered by the government are the property of the people).

[91] N.C. GEN. STAT. § 132-1(b) (2013).

[92] N.C. GEN. STAT. § 132-1.4(a) (2013).

[93] *Id.*

[94] *Id.*

[95] *Id.*

[96] McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 467, 596 S.E.2d 431, 436 (2004).

[97] Gannett Pac. Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 160, 595 S.E.2d 162, 166 (2004).

[98] *Id.*

court held that "criminal investigation and criminal intelligence information sought by the Plaintiffs are not public records."[99]

The court further explained that since the plaintiffs were neither criminal defendants nor civil litigants and the plaintiffs were seeking the information solely for publication, the trial court properly dismissed the plaintiff's complaint.[100] This decision begs the question of whether the court would have granted the information if the plaintiff had a legitimate, non-media-related reason to view the information. The answer is likely no. However, North Carolina case law on this subject is sparse because most cases do not go to trial.[101]

The inconsistencies between North Carolina's idealistic view of the public having free access to information[102] and all requests for information regarding criminal investigations being barred[103] presents a very real problem for North Carolina's citizens.

C. *What North Carolina Should Do*

North Carolina should adopt a statute similar to Florida's statute section 119.[104] First, since the statute defines "active investigation," the courts will not be forced to interpret the legislature's intent.[105] By defining "active" as pertaining to either an anticipated arrest or a good faith effort to proceed with the investigation, the information is not deemed public.[106]

Furthermore, once information is released to an accused upon discovery, that information can no longer be considered private for the purposes of the FL Act.[107] This approach makes sense because if the information is turned over to the accused, and the accused is freed, then that information is "on the streets," so to speak. It would not be monitored or controlled, as the accused is free to announce the information from the nearest mountain, if he or she chooses.

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[99] *Id.*

[100] *Id.*

[101] *See, e.g.*, *id.*; Times-News Publ'g Co. v. State, 124 N.C. App. 175, 179, 476 S.E.2d 450, 453 (1996).

[102] Cooper, *supra* note 83, at 1.

[103] *See* N.C. GEN. STAT. § 132-1.4 (2013).

[104] FLA. STAT. ANN. § 119.011(3)(d)(2) (West 2008).

[105] *Id.*

[106] Barfield v. City of Ft. Lauderdale Police Dep't, 639 So. 2d 1012, 1018 (Fla. Dist. Ct. App. 1994).

[107] FLA. STAT. ANN. § 119.011(3)(c)(5) (West 2008).

Opponents of North Carolina releasing information upon discovery will point to the rationale behind the criminal investigation exception. Specifically, "[r]eports based on criminal investigations are often exempt from disclosure because they are based on hearsay and consist largely of the opinions and conclusions of the investigators."[108] Other concerns include "protecting investigative techniques, informant identities, and reputations of persons investigated but not charged, and encouraging citizens to volunteer information."[109]

However, this rationale does not comport with the spirit of openness that underlies the NC Act itself. Rather than "work[ing] to resolve the question in favor of openness,"[110] the statute instead minimizes access to information. Therefore, although the NC Act's language suggests that there is a presumption of open access to information,[111] the opposite is true.

The test developed in Florida's courts will combat the rationale behind the criminal investigation exception in North Carolina.[112] The test is meant to reconcile the opposing concerns of governmental interest in preserving the integrity of the investigation and the public's right to access records.[113] The balancing test originally set out in *Miami Herald Publ'g Co. v. State* explains that all judicial documents should be open to the public unless the three-pronged test is satisfied.[114] Thus, if all three prongs of this test are met, then North Carolina's concerns about releasing criminal investigative material are adequately assuaged.

CONCLUSION

In conclusion, North Carolina's Public Information Act is the type of statute that should govern this state. However, the criminal investigation exception prevents innocent victims from any relief, including (but not limited to) the ability to monitor the government and to hold

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[108] News & Observer Publ'g Co. v. State *ex rel.* Starling, 312 N.C. 276, 282, 322 S.E.2d 133, 138 (1984) (citing Mathews v. Pyle, 251 P.2d 893 (1952)).

[109] McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 467, 596 S.E.2d 431, 436 (2004).

[110] Cooper, *supra* note 83, at 1.

[111] *See generally id.* (discussing the open access to information).

[112] Miami Herald Publ'g Co. v. State, 363 So. 2d 603, 605 (Fla. Dist. Ct. App. 1978) (quoting Craig v. Harney, 331 U.S. 367, 374 (1947)).

[113] *Id.*

[114] *Id.* at 606.

it accountable should any blunders prevent its investigation from progressing.

One does not need to look any further than the example given in the introduction to see a citizen harmed by the criminal investigation exception in the NC Act. North Carolina needs to define "active" or "ongoing" investigation in its statute. Likewise, North Carolina needs to adopt a statute that mirrors Florida's statute, which allows public access to any document released to a potential defendant upon discovery.