ARTICLE 8

Open Meetings and Public Records

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Open Meetings

Public Body

The North Carolina open meetings law (G.S. 143-318.9 through -318.18) extends to all "public bodies." G.S. 143-318.10(b) defines the term *public body* as any board, commission, committee, and so forth, in state or local government that (1) has at least two members and (2) exercises or is authorized to exercise any of these powers: legislative, policy-making, quasi-judicial, administrative, or advisory. It is a very broad definition. In county or city government public bodies include the governing board itself; each committee of the board, whether it is a standing committee or an ad hoc committee; groups created by statute, such as the board of health or the board of social services; and each group established by action of the governing board, such as a planning board, a zoning board of adjustment, a parks and recreation commission, or a human relations commission. (Other public bodies at the local level include local boards of education, community college boards of trustees, and governing boards of public hospitals.)

Official Meetings

All *official meetings* of public bodies must be open to the public (unless closed sessions are permitted). Such meetings occur whenever a majority of the members of a public body gather to take action, hold a hearing, deliberate, or otherwise transact the business of the body. This includes informal gatherings, as long as the statutory requisites are met. The statute requires that each public body give public notice of all its official meetings, even those that will be conducted in closed session. The sort of notice required depends on the nature of the meeting, as follows:

Regular Meetings

If a public body holds regular meetings, it gives public notice of those meetings by filing its schedule of regular meetings in a central location. For public bodies that are part of a county government, that location is the office of the clerk to the board of commissioners. For public bodies that are part of a city government, that location is the office of the city clerk. For local public bodies not part of a county or city, such as a local board of education, that location is the office of its clerk or secretary. Once this notice is properly filed, no other public notice is required for regular meetings held pursuant to the schedule.

Special Meetings

If a public body meets at some time or place other than that shown on its regular meeting schedule, or if the public body does not meet on a regular schedule, it must give special meeting notice. Such a notice sets out the time, place, and purpose of the meeting, and is provided in two ways. First, it must be posted on the *principal bulletin board* of the public body (or on the meeting room door if there is no principal bulletin board); and second it must be mailed to any person who has made a written request for notice of special meetings. (The statute calls for mailed notice, but it might alternatively be faxed or sent by e-mail, if acceptable to the person making the request.) Both the posting and the mailing must occur at least 48 hours before the meeting.

Emergency Meetings

If the public body must sooner than 48 hours, the statute provides for emergency meeting notice. This notice is given to each local news medium that has requested notice and is normally given by telephone, fax, or e-mail. To qualify as an emergency meeting, it must be one called because of "generally unexpected circumstances that require immediate consideration by the public body."

Recessed Meetings

If a public body is in a properly noticed meeting, it may recess that meeting to a time, date, and place certain. If the motion calling for the recess is made in open session, or if the details of the recessed meeting are announced in open session, no further notice of the recessed meeting is required.

Closed Sessions

G.S. 143-318.11 permits a public body to meet in closed session for a variety of reasons. The most important for local government are as follows:

Confidential Records

A public body may have a closed session to discuss information that is part of a record that is confidential or otherwise not available to the public. Thus, for example, a board of social services may have a closed session to discuss matters involving recipients of public assistance, because records about recipients are closed to public access. This is also authority for a closed session to approve the minutes of an earlier closed session, inasmuch as a public body may deny public access to such minutes.

Attorney Consultations

A public body may meet in closed session with its attorney to discuss matters that are within the attorney-client privilege—that is, legal subjects. While in the closed session, the public body may give instructions to the attorney about handling or settling claims, litigation, or other proceedings.

Economic Development

A public body may have a closed session to discuss matters relating to the location or expansion of businesses in the area served by the public body. This is the authority under which a public body may in closed session develop an incentives package to attract a new business or encourage an existing business to expand.

Real Estate

A public body may hold a closed session to develop its negotiating position in the purchase of real property, and it may, while in closed session, give instructions to its bargaining agent in that transaction. Note that there is not similar authority for a closed session if the public body is selling real property.

Employment Contracts

A public body may hold a closed session to develop its bargaining position in the negotiating of an employment contract, and it may, while in closed session, give instructions to its bargaining agent in that transaction.

Public Employees

A public body may hold a closed session to consider the qualifications, competence, performance, character, fitness, and conditions of appointment or employment of a public employee or public officer. (A public body may not use this provision to discuss the qualifications, competence, etc., of a member of the public body itself or of members of other public bodies.) In addition, a public body may hold a closed session to hear or investigate a complaint, charge, or grievance by or against a public officer or employee.

Criminal Investigations

A public body may hold a closed session to plan, conduct, or hear reports concerning an investigation of alleged criminal conduct.

If a public body wishes to hold a closed session, the body must first meet in open session and then vote to hold the closed session. It is not sufficient for the presiding officer simply to announce that a closed session will be held. Rather, there must be a motion to go into closed session, and the motion must state the session's general purpose. Once the closed session is complete, the open meetings law requires that the public body prepare minutes of the closed session and a *general account* of the closed session. Unless the public body takes action in the closed session, the minutes can be quite skeletal, but the statute requires that the general account be detailed enough "so that a person not in attendance would have a reasonable understanding of what transpired."[1] Like any minutes, closed-session minutes should be approved by the public body; it may hold a closed session to do so.

The statute permits both the minutes and the general account of a closed session to be sealed for as long as is necessary to avoid frustrating the purpose of the closed session. Many public bodies initially seal all minutes and general accounts of closed sessions and then delegate to their attorney or other staff the responsibility for periodically reviewing these documents and opening them to public access when that is appropriate.

1. A case that sets out an acceptable general account is Multimedia Publ'g. Co. of N.C., Inc. v. Henderson County, 145 N.C. App. 365, 550 S.E.2d 846 (2001).

Remedies

There are two statutory remedies for correcting violations of the open meetings law. The first is an injunction. Any person may seek an injunction to stop the recurrence of past violations of the law, the continuation of present violations, or the occurrence of threatened future violations. The second is the invalidation of any action taken or considered in violation of the law. Although such invalidation is not automatic, a trial judge does have the option of entering such an order.

Public Records

North Carolina's public records law is found in G.S. Chapter 132 (although many exceptions to the statute are scattered in other chapters of the General Statutes). G.S. 132-1 establishes a broad definition of *public record* and G.S. 132-6 entitles any person to examine and have a copy of any public record. The state supreme court has concluded that these statutory rights extend to all documents meeting the definition of public record, unless the General Assembly has enacted a statute that limits or denies public access to a category of record.[2] As a result, the great bulk of material held by local governments in North Carolina is public record and therefore open to public access. Financial records, leases and contracts, insurance policies, reports, agency minutes, permit applications, computer databases all must be made available to the public upon request.

Agencies Subject to the Public Records Law

G.S. 132-1 extends the reach of the public records statute to every agency of state and local government in North Carolina. The section defines the covered agencies to include "every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government." Thus at the local level the law extends to counties, cities, school administrative units, community colleges, special districts such as sanitary districts and metropolitan sewerage districts, and public authorities such as water and sewer authorities, housing authorities, and drainage districts. It also extends to joint entities such as councils of government, district health departments, area mental health authorities, regional libraries, and joint agencies established by contracts between local governments.

Documents Included within the Meaning of Public Record

G.S. 132-1 establishes a very broad definition of *public record*, generally unlimited by the form of the material in question or by the circumstances under which it was received or created. The statute begins by including within the definition not only documents and other papers but also "maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, [and] artifacts, . . . regardless of physical form or characteristics." It then goes on to state that the term includes the listed items "made or received pursuant to law or ordinance in connection with the transaction of public business."

Litigants have sometimes argued that the latter part of the definition—"made or received pursuant to law or ordinance"—is limiting and that only those records whose receipt is specifically required by statute or local ordinance are public records. The court of appeals rejected such a limiting reading in *News and Observer Publishing Co. v. Wake County Hospital System, Inc.*, holding instead that the term includes any material kept in carrying out an agency's lawful duties.[3] The supreme court has obviously accepted the same broad reading of the statute given its own public records decisions.[4] In addition, the supreme court has held that the term includes preliminary drafts of documents, and that a person need not wait until a record is finished in order to examine it or have a copy.[5]

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2. News and Observer Publ'g Co., Inc. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).
3. 55 N.C. App. 1, 284 S.E.2d 542 (1981).
4. *E.g.,* Poole, cited in note 2 *supra*.
5. *Id.*

Not all documents located within a public agency are public records, however. Courts in several states have held that documents that are personal in nature do not become government records simply because they are found in a government office or on a government computer. Thus, for example, if a government employee uses his or her desktop computer to send or receive personal e-mail, that e-mail is not a public record simply because of its location. Rather, it is the content of the document that governs its characterization as a public record. Similarly, if a public employee makes notes to help with his or her job, those notes are probably the personal property of the employee and not government documents subject to the public records law.

Records versus Information

The theory of the public records law is that when a government maintains records for its own operational purposes, the public enjoys a general right to inspect and copy those records (subject, of course, to statutory exceptions). But in general the public has no right to demand that a government maintain records that the government has no need for itself nor to demand that a government maintain records in a way that facilitates use of the records by others if that use is unimportant to the government. Courts usually express this principle through the statement that the public records law does not require a government to create new records, and the General Assembly has affirmed this point in the statute itself.[6]

The principal exception to this point occurs when a government for its own reasons combines in a single document information that is exempt from public access and information that is not exempt. Simply because the document includes confidential information does not make the entire document exempt from public inspection. Rather, it is the government's responsibility to delete (or *redact*) the confidential information and then make the remaining information public. In a sense this is creating a new record, but the law requires that it be done, and it requires that the agency bear the cost of doing so.[7]

Who May Inspect and Copy a Public Record?

G.S. 132-6 accords the rights of inspection and copying to "any person," and there is no reason to think that the quoted words are limiting in any way. The rights extend both to natural persons and to corporations and other artificial persons (such as associations, partnerships, and cooperatives). And they extend both to citizens of the government holding the record and to noncitizens.

Furthermore, as a general rule a person's intended use of the records is irrelevant to his or her right of access, and the records custodian may not deny access simply because of the intended use. Indeed, G.S. 132-6(b) prohibits custodians from requiring that persons requesting access to or a copy of a record disclose their purpose or motives in seeking access or the copy.

The Rights of Inspection and Copying

North Carolina's public records statutes say nothing about how quickly a custodian must comply with a request to inspect records. Given this statutory silence, a court probably would impose a rule of "reasonableness" on a custodian, but such a rule by itself does not indicate whether a custodian must respond immediately, within an hour or day, or within some longer period. The most likely interpretation of North Carolina's law is that a records custodian should respond promptly to a fairly simple records request, either immediately, within a few hours, or within a day or two. As the request becomes more substantial, however, and the burden on the custodian becomes correspondingly greater, it seems reasonable to allow the custodian somewhat more time to locate and deliver the desired records. Among factors that might appropriately delay granting access are the number of records requested, whether they are scattered in several sites, how large the public agency is, and whether any part of the records must be redacted. Unless a request is extraordinary, however, a custodian probably should respond within a week or two at most.

G.S. 132-6 and 132-6.2 expressly permit fees for *copies* of public records but are silent about fees for the right of *inspection* only. This silence is the common statutory pattern around the country, and courts in other states generally have held that custodians may not charge fees for mere inspection, when the custodian does no more than locate and retrieve the record and no copy is provided.

6. Gen. Stat. 132-6.2(e) (hereafter G.S.).

7. G.S. 132-6(c).

G.S. 132-6 and 132-6.2 impose on a records custodian a duty to provide copies of public records upon request; the records may be certified or noncertified, at the option of the person making the request. If a record is maintained in computerized form, G.S. 132-6.2(a) provides that persons requesting copies "may elect to obtain [the records] in any and all media in which the public agency is capable of providing them. No request for copies of public records in a particular medium shall be denied on the grounds that the custodian has made or prefers to make the public records available in another medium."

The statutes do not establish the fees that a custodian may charge for making a copy but rather give direction about the proper amount that may be charged. G.S. 132-6.2 directs that the fee be based on the *actual cost* of making the copy. The statute limits "actual cost" to "direct, chargeable costs related to the reproduction of a public record . . . [not including] costs that would have been incurred by the public agency if a request to reproduce a public record had not been made." The statute's use of the term *direct costs* seems to rule out inclusion of indirect costs in determining fees for a copy. In addition, because the costs may not include costs that the agency would have incurred whether the copy was made or not, in most instances the fee may not include personnel costs; the person making the copy would have been paid whether he or she made the copy or did other work.

Categories of Records Not Subject to the Right of Access

The General Statutes contains literally dozens of statutes that create exceptions to the general right of access to public records. The following summary lists those that seem most important to local governments.

Personnel Records

A number of separate statutes exempt from public access most of the records in the personnel files of public employees.[8] These statutes permit the employee to have access to almost everything in his or her file, as well as anyone with supervisory authority over the employee; and they permit certain others access to the file in very limited circumstances. In addition, they make a few items about each employee public record, including the employee's name, age, current salary, last raise, original employment date, current position title and location, and most recent change in position classification. Otherwise, the file is not a public record and is not open to the public. In addition, a number of statutes permit local governments to require criminal records checks of prospective employees, and G.S. 114-19.13 directs that the records provided by such a check are to be kept confidential.

Criminal Investigation Records

G.S. 132-1.4 establishes special rules of access to records generated while a law enforcement agency is investigating alleged or known violations of the criminal law. In general the statute denies the public any right of access to these records, with a few exceptions. The exceptions allow public access to records involving details of criminal incidents, information about persons arrested or charged, the circumstances of arrests, contents of 911 telephone calls, radio communications between law enforcement personnel, and information about victims of crime and persons who file complaints or report violations.

Legal Materials

Two statutes exempt certain legal materials from public access, although both exemptions are limited in duration. First, G.S. 132-1.1 exempts communications from an attorney to a public body in state or local government when the communications involve (1) a claim by or against the public body or the government for which it acts, or (2) a judicial action or administrative proceeding to which the public body is a party or by which is it affected. This exemption, however, expires three years after the date the public body receives the communication. Second, G.S. 132-1.9 exempts trial preparation materials, such as documents showing the mental impressions or legal theories of an attorney or reports from consultants to be used at trial or in support of trial. Once the litigation is completed, however, this exemption ends. (It should be noted that G.S. 132-1.3 specifies that settlement documents in any suit or legal proceeding involving a government agency are to be open to the public unless closed by court order.)

8. G.S. 153A-98 (county employees); 160A-168 (city employees); 115C-319 through -321 (public school employees); 115D-27 through -30 (community college employees); 130A-42 (district health department employees); 122C-158 (area authority employees); 131E-97.1 (public hospital employees); 162A-6.1 (water and sewer authority employees); and 126-22 through -30 (state employees).

Trade Secrets

G.S. 132-1.2 prohibits a government from allowing access to business trade secrets that have been shared with the government, as long as the business has designated the material as confidential or a trade secret at the time it was disclosed to the government.

Local Tax Records

Two statutes prohibit cities or counties from making public local tax records that contain information about a taxpayer's income or gross receipts.[9] The kinds of local taxes that might generate such records are privilege license taxes, when measured by gross receipts, occupancy taxes, prepared food taxes, and cable television franchise taxes. In addition, some forms that must be filled out to qualify for property tax classifications—the homestead exemption and use-value taxation—also require taxpayers to reveal their income; and that information is also covered by these provisions.

Medical and Patient Records

A variety of statutes exempt from public access records about particular patients held by different sorts of health-related public agencies.[10] These include records held by public hospitals, public health departments, mental health agencies, and emergency medical services providers.

Closed-Session Minutes and General Accounts

G.S. 143-318.10(c) permits a public body to seal the minutes or the general account of any closed session "so long as public inspection would frustrate the purpose of a closed session."

Social Security Account Numbers and Other Personal Identifying and Personal Financial Information

Two statutes restrict or deny public access to information that can be used to steal a person's identity or that reveals certain sorts of financial information about a person. First, G.S. 132-1.10 prohibits government agencies from making public social security account numbers and other "identifying information" as defined in G.S. 14-113.20. This other information includes drivers' license numbers (except as they appear on law enforcement records), bank account numbers, bank card account numbers, fingerprints, and a few other types of similar information. Second, 132-1.1(c) exempts from public access billing information gathered or compiled as part of operating a public enterprise, such as a utility system. Billing information is defined as "any record or information, in whatever form, compiled or maintained with respect to individual customers."

Records Involving Public Security

Several statutes exempt material from public access because of public security concerns. G.S. 132-1.7 exempts from public access the specific details of public security plans and detailed plans and drawings of public buildings and infrastructure. This section also exempts plans to prevent or respond to terrorist activity. G.S. 132-6.1 exempts from public access the security features of a government's electronic data-processing systems, information technology systems, telecommunications networks, and electronic security systems.[11]

Contract Bid Documents and Construction Diaries

G.S. 143-131 specifies that a government's record of informal construction or purchasing bids it has received is not open to the public until the contract for which the bids have been solicited has been awarded. In addition, G.S. 133-33 permits the state and local governments to adopt rules that make confidential the agency's cost estimates for a construction project and any list of contractors who have obtained proposals for bid purposes.

Economic Development Records

G.S. 132-6(d) exempts from public access records that relate to the proposed expansion or location of specific business or industrial projects. Once the project has been announced, however, or once the company has communicated a decision not to locate or expand in the state, the exemption ends.

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9. G.S. 153A-148.1, for county tax records, and 160A-208.1, for city tax records.

10. G.S. 131E-97 (medical records and financial records of patients at health care facilities); 130A-12 (patient medical records held by local health departments); 122C-52 (patient medical records held by area authorities); 143-518 (medical records held by EMS providers).

11. *See also* G.S. 132-1.6, which exempts from public access emergency response plans adopted by a constituent institution of The University of North Carolina, a community college, or a public hospital.

Social Services Records

G.S. 108A-80 and 108A-73 prohibit any person from obtaining, disclosing, or using a list of names or other information about persons applying for or receiving public assistance or other social services.

Library Records

G.S. 125-19 prohibits a public library from disclosing any record that identifies a person as having requested or obtained specific materials, information, or services from the library.

Telephone Numbers Held by 911 Systems

Several statutes prohibit local governments operating 911 systems from releasing telephone numbers received from telephone companies, except in response to an emergency.[12]

Records Management

General Statutes Chapter 132 and G.S. 121-5 together establish responsibilities for records protection and records management for two kinds of actors. The first is each custodian of one or more public records, and the second is the state Department of Cultural Resources. Together the custodians and the department are responsible for maintaining the integrity of public records and for developing a plan for the management of records in every public office or agency.

The Custodian

G.S. Chapter 132 imposes a number of responsibilities on the *custodian* of public records. This official maintains public records, may bring actions to recover records improperly held by others, and is required to permit public inspection of records and provide copies of records to those who request them. G.S. 132-2 declares that the official in charge of an office that holds public records is the custodian of those records. Thus, the register of deeds is the custodian of records in his or her office, the sheriff is the custodian of records held by the sheriff's department, the county assessor is the custodian of records in his or her office, and so on. G.S. 160A-171, however, provides that the city clerk is the custodian of all city records, and that appears to mean that a city or town has only a single custodian, the clerk.

Records Retention and Disposition

G.S. 132-3 prohibits any public official from destroying, selling, loaning, or otherwise disposing of any public record except in accordance with G.S. 121-5. That section in turn empowers the Department of Cultural Resources to decide how long particular categories of records are kept and whether and when they may be destroyed. In furtherance of that responsibility, the department has adopted a series of Records Retention and Disposition Schedules for almost all forms of records held by local governments. Once agreed to by the officials of a particular local government, these schedules govern whether various categories of records may be destroyed and when that may occur. For example, the original of all minutes of a city or county governing board must be retained permanently at the city or county offices, with a microfilmed duplicate set maintained by the department at the State Records Center. Local government contracts may be destroyed three years after their termination, if there is no outstanding litigation, while records of vehicles owned and maintained by the unit may be destroyed after one year. Most e-mails may be destroyed as soon as their usefulness is over. The department maintains current copies of its records schedules on its website.[13]

In order to be able to dispose of records pursuant to the appropriate schedule, a local government's governing board must agree to the schedule and sign an agreement with the department. If no agreement is signed, the local government has no continuing authority to dispose of any records. When a government does exercise its authority to destroy records, the department's rules permit the government to do so in any of five ways:

- burning the records
- shredding the records, so that their content is destroyed
- placing the records in an acid vat, thereby reducing them to pulp
- burying the records, in such a way that the record content becomes indecipherable
- selling the records as waste paper, if the purchaser agrees in writing that the records will not be resold as documents or records

These are the exclusive means of records disposition.

12. G.S. 62A-9; 62B-9; and 132-1.5.

13. The current URL for the department's site with these schedules is http://www.ah.dcr.state.nc.us/records/local/default.htm.

Additional Resources

Lawrence, David M. *Open Meetings and Local Governments in North Carolina*, 6th ed. Chapel Hill, N.C.: Institute of Government, University of North Carolina at Chapel Hill, 2002.

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