

THE PEOPLE'S BUSINESS -- Open Meetings and Public Records

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...and that this Government of the people, by the people, for the people...

A. Lincoln, November 19, 1863

When government agencies -- whether bodies of elected officials or public servants in the executive branch -- conduct the public's business, those deliberations and actions should be done in the full light of day, rather than in the proverbial smoke-filled back rooms. The documents that are relied upon or are the result of governmental decisions should be available for full public scrutiny and debate.

This paper looks at two North Carolina laws, the Open Meetings Law, the Public Record Law, and one federal, the Freedom of Information Act (FOIA), that define the scope and exceptions to the doctrine of openly conducting government activities. For the public, these three laws make much of the information about governmental activities readily available for preparation of positions in both the public policy arena and in the courtroom. Public bodies should have familiarity with these laws to insure compliance in both spirit and letter.

I. THE OPEN MEETINGS LAW (the "Sunshine Law"), G.S. 143-318.9.

Public policy encourages open meetings. The overriding public policy in G.S. 143-318.9 is one of openness; "each official meeting of a public body are open to the public, and any person is entitled to attend such a meeting."

"Public body" broadly includes "any elected or appointed authority, board, commission, committee, council or other body of the State" or other political subdivision, that "exercises or is authorized to exercise a legislative, policy-making, quasi-judicial, administrative, or advisory function." A public body does not include a "meeting solely among the professional staff of a public body." G.S. 143-318.10 (b).

An "official meeting" broadly includes "a meeting, assembly, or gathering together at any time or place or the simultaneous communication by conference telephone...of a majority of the members of a public body for the purpose of conducting hearings, participating in deliberations, or voting upon or otherwise transacting the public business..." G.S. 143-318.10(d). While the statute allows a social meeting or informal gathering of the members of a public body unless it is to evade the spirit and purposes of the Open Meetings Law, many public bodies have set a conservative policy that a quorum of the body should not be present at a social function.

G.S. 143-318.18 lists a number of exceptions to the law, including juries, public bodies specifically authorized or directed by law, law enforcement agencies, various General Assembly functions, bodies which issue professional licenses, and the General Court of Justice. Certain hospital actions regarding patient care are also protected from public scrutiny.

The statute requires that the every public body shall keep full and accurate minutes of all official meetings, including those that are closed sessions. The minutes to the open meetings should be readily available from the clerk or secretary, with the minutes to the closed session available when there is no longer any need for the deliberation to be held from public scrutiny (for example, after the property has been purchased). G.S. 143-318.10(e). The account of the closed session is required to be in enough detail that one not attending have "a reasonable understanding of what transpired."

G.S. 143-318(11) provides express purposes for which a public body may hold a closed (or "executive") session and exclude members of

the public:

(1) to prevent the disclosure of information that is privileged or confidential pursuant to state or federal law, or that is not considered a public record pursuant to Chapter 132 of the General Statutes (this latter addition in the 1995 amendment to the law greatly reduced the number of expressed permitted purposes);

(2) to prevent the premature disclosure of an award;

(3) to consult with an attorney retained by the public body to preserve the attorney-client privilege (the statute makes clear that open discussion of general policy matters are not somehow shielded by the presence of the attorney, and that any final decision or settlement is required to be reported in a public session as soon as possible);

(4) to discuss matters relating to the location or expansion of industries (including any tentative economic development incentives);

(5) to discuss the acquisition of property or the terms of an employment contract;

(6) to evaluate an employee or investigate a grievance by or against an individual public officer or employee (discussion of general personnel policy cannot be held in closed session; any final decision or finding is reported in a public session as soon as possible); and

(7) to hear reports of alleged criminal misconduct;

(8) to make plans related to school violence; and

(9) to make plans or take action relating to terrorist activities.

The motion to go into executive or closed session is made in open session with a reference to one of the permissible purposes. Any member of the public or the press can ask the chair to state for which purpose the public body is going into executive session.

Public notice of official meetings. Depending on the type of public body, the meeting schedule is filed with the Secretary of State, the clerk of the board of county commissioners or the city clerk. G.S. 143-

318.12(a).

Public notice is required for additional, i.e. non-regularly scheduled, meetings -- these meetings can be announced in open session, or an announcement posted at the public body's principal bulletin board, mailed to media, and mailed to any person who has filed a written request with the clerk or secretary of the public body. (The public body can require that the request be re-filed quarterly, and that a member of the public pay \$10.00 to be on the notice list).

Notice is required at least 48 hours before time of the meeting. G.S. 143-318.12(b). Subsection (c) allows an emergency meeting because of generally unexpected circumstances but limits the actions the body can take at the meeting.

A public body may hold an electronic meeting. G.S. 143-318.13(a).

A public body may not decide its vote by secret or written ballot. G.S. 143-318.13(b). A public body may not act by reference "with the intention of making it impossible for persons attending the meeting of the public body to understand what is being... acted upon." G.S. 143-318.13(c).

Open meetings may be broadcasted or recorded, although the public body may regulate the placement and use of the equipment. G.S. 143-318.14.

Legal remedies against violations. The General Court of Justice can enter mandatory or prohibitory injunctions to enjoin threatened violations, recurrence of past violations or continuing violations of the Open Meetings Law. G.S. 143-318.16. An alleged violation can be taken to the Superior Court for declaratory judgment, and upon the finding that the action was in violation and after consideration of several factors, the court may declare any such action null and void. The Plaintiff does not need to show special damages different from that suffered by the public at large. There is 45-day statute of limitations following the initial disclosure of

the action. G.S. 143-318.16A.

For actions brought above, the Court may award the prevailing party a reasonable attorney's fee (and is able to order that the individual members of the public body pay the fee). G.S. 143-318.16B.

Actions for injunctive relief or declaratory judgment are given priority and set down for immediate hearing. G.S. 143-318.16C.

Disruption of official meetings. "A person who willfully interrupts, disturbs, or disrupts an official meeting and who upon being directed to leave the meeting by the presiding officer, willingly refuses to leave the meeting is guilty of a Class 2 misdemeanor." G.S. 143-318.17.

II. THE PUBLIC RECORDS LAW, G.S. Chapter 132.

Liberal access to public records. The legislative intent of the Public Records Law is that the public would have liberal access to public records. *News & Observer v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992). This is borne out further in the Governor's Executive Order concerning citizen access to public records maintained by State government.

"Public records" broadly include "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, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency or North Carolina government or its subdivisions." G.S. 132-1. Upon guidance from the Attorney General's Office, the agencies are currently including e-mail messages within the definition of public records.

G.S. 132-1 broadly defines state agency to include "any 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.

Specifically included in the definition of public records are all settlement documents relating to the settlement of legal actions. An exception is made for medical malpractice against a hospital facility which may be kept confidential. G.S. 132-3(a). No court can seal the settlement documents except on a finding that "(1) the presumption of openness is overcome by an overriding interest and (2) that such overriding interest cannot be protected by any measure short of sealing the settlement." G.S. 132-1.3(b).

Similarly to the Open Meetings Law, there are a number of exceptions, those being:

- (1) confidential communications by the counsel for the board or agency to protect the attorney-client relationship, G.S. 132-1.1(a);
- (2) state tax information, G.S. 132-1.1(b);
- (3) billing information for public services, G.S. 132-1.1(c)
- (4) trade secrets as defined in G.S. 66-152(3), G.S. 132-1.2;
- (5) personal information that may lead to identity theft, G.S. 132-1.2(2)-(4);
- (6) criminal investigations conducted by public law enforcement agencies, unless released by court order (and with the provision that the law enforcement agency cannot prevent another agency with custody of the record from releasing it) (access to SBI records is controlled entirely by G.S. 114-15), G.S. 132-1.4;
- (7) emergency response plans, G.S. 132-1.6;
- (8) the 911 database, G.S. 132-1.5;
- (9) proposed expansion or location of specific industrial projects for so long as the inspection, examination or copying of the records would frustrate the purpose for which they were created (but again, not general economic development policies), G.S. 132-6.

Geographical information systems (GIS) are public records although the local government

can restrict the datafiles from being resold.

Note that unlike the exception to FOIA discussed below, North Carolina does not have a "deliberative process privilege exception." *News & Observer*, supra.

Duties of the custodian. The public official in charge of an office having public records shall be the custodian thereof." G.S. 132-2. The custodian is required to keep the records in safe places. G.S. 132-7. The Department of Cultural Resources is to assist the other agencies in the management and preservation of the records. G.S. 132-8.

No public official may destroy, sell, loan or dispose of any public record except in accordance with G.S. 121-5 (the custodian certifies that the records no longer have value, and the Department of Cultural Resources approves). Violation of this provision is a Class 3 misdemeanor. G.S. 132-3.

At the end of the official's term in office, the records shall be turned over to his or her successor. If not done, this is also a Class 1 misdemeanor. G.S. 132-4. The custodian is entitled to demand the record from any person having illegal possession of them. If the records are not turned over after the demand, this is also a Class 1 misdemeanor. G.S. 132-5. The custodian may also request injunctive relief or under the court's contempt power to regain the records. G.S. 132-5.1.

The right to inspect public records. The heart of the Public Records Law is the provision stating that the custodian "shall permit [the records] to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law." G.S. 132-5. See attached sample request letter.

Any person who is denied access to the public records for the purposes of inspection, examination or copying may apply to General Court of Justice for an order compelling disclosure. G.S. 132-9. (In my opinion, an

unreasonably high cost for copying the records may in effect deny access to the records.) The Court may grant anyone who is denied access without substantial justification their attorney's fees. If the action is frivolous, the Court may award the agency its attorney fees.

III. THE FREEDOM OF INFORMATION ACT, 5 U.S.C. 552.

Access to records of federal agencies. The Freedom of Information Act ("FOIA") gives access to all records to all federal agencies, unless specifically excluded, such as Congress, the federal courts, private corporations or certain federally funded state agencies. However, if documents generated by these agencies are filed with covered agencies, the documents are then subject to disclosure.

"Records" are broadly defined to include all types of documentary information, unless those records fall within one of nine categories of exempt information which agencies are permitted (but not required) to withhold. 5 U.S.C. 522(b). The disclosure exemptions are:

(1) national security considerations, specifically authorized by Executive Order and classified;

(2) internal agency personnel rules and "housekeeping" matters;

(3) information specifically exempted by other federal laws (the "Catch-All" Exemption), including such diverse laws as those governing agricultural loans, census data, FTC investigations, consumer product safety, public utility information, the CIA, tax returns, veterans' benefits, employment discrimination, postal regulations, grand juries, and arms exports;

(4) trade secrets and confidential commercial information;

(5) internal agency memoranda and policy discussions, such as working papers, preliminary drafts, and other pre-decisional documents;

(6) personal privacy and medical files;

(7) law enforcement investigations;

(8) federally regulated banks; and
(9) geological information on oil and gas wells.

do not require major search time, and fewer copies are made.

Most agencies have a designated FOIA officer responsible for responding to written requests and will inform you by phone who that officer is. FOIA requests must be responded to within 10 working days (although the agency may request an extension if there is a backlog to the requests.) See attached sample request letter.

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(up-date through 2003)

In withholding a document, the agency must specifically reference one of the exemptions above and do so in writing. A decision withholding a document may be appealed to the agency administrator, followed by a complaint for injunctive relief to a federal district court (with potential attorney fees and litigation costs awarded to a prevailing party pursuant to 5 U.S.C. 552(a)(4)(E)).

Waiver of fees. Agencies are authorized to charge fees to search and copy the requested documents, although there is a provision to waive or reduce fees when a public interest test is met. Pursuant to a Justice Department advisory memorandum to all federal agency heads, April 2, 1987, a waiver may be granted if:

(1) the subject of the requested records concerns government operations or activities;

(2) the disclosure is likely to contribute to understanding these operations or activities;

(3) disclosure may likely result in public understanding of the subject;

(4) the contribution to public understanding of government operations or activities will be significant;

(5) the requester has a limited commercial interest in the disclosure (for example, the requester is a reporter or non-profit organization); and

(6) the public interest is greater than the requestor's commercial interest.

The fees are more likely to be waived when the documents requested are fairly specific,

SAMPLE REQUEST LETTER for PUBLIC RECORDS LAW or FOIA

(modified from sample letter in How to Use the Federal FOI Act, FOI Service Center, Reporters Committee for Freedom of the Press, 1-800-336-4243).

Your address
Day time phone number
Date

[Freedom of Information Office] [Public Records Custodian]
Agency
Address

Re: [FOIA] [Public Records Law] Request

Dear [FOIA Officer] [Public Records Custodian]:

Pursuant to the [Freedom of Information Act, 5 U.S.C. 552] [the N.C. Public Records Law, G.S. Chapter 132], I request access to and copies of:

[As clearly as possible, describe what documents you want, include identifying material, such as names, places, and the time period you are interested in. If you think they will help to explain what you are looking for, attach news clips, reports, and other documents which describe the subject of your research].

I agree to pay reasonable duplication fees for the processing of this request in an amount not to exceed \$ _____. However, please notify me prior to your incurring expenses in excess of that amount.

[Optional fee waiver request] Please waive any applicable fees. Release of the information is in the public interest because it will contribute significantly to public understanding or government operations and activities [and other factors which support a public purpose for the waiver, such as the organization is a non-profit public interest organization which will use the information for a report to its members and the general public.]

If my request is denied in whole or part, I ask that you justify all deletions by reference to specific exemptions of the Act. I will also expect you to release all segregable portions of otherwise exempt material. I, of course, reserve the right to appeal your decision to withhold any information or to deny a waiver of fees.

As I am making this request as a [journalist, representative of a non-profit group, etc.] and this information is of timely value, I would appreciate your communicating with me by telephone, rather than by mail, if you have any questions regarding this request. I look forward to your reply within 10 business days, as the statute requires.

Thank you for you assistance.
Sincerely,
your signature