Coates' Canons Blog: AOC Database is Not Subject to the Public Records Act

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In 2011, LexisNexis submitted a request under the North Carolina Public Records Act (Chapter 132 of the General Statutes) to the Administrative Office of the Courts (AOC), and to the Wake County Clerk of Court for a complete copy of the Automated Criminal/Infraction System (ACIS) database. ACIS is an electronic compilation of criminal records. Records are added to the database by individual Superior Court Clerks, but the database is administered and maintained by the AOC. The AOC declined to produce the database arguing that the AOC is not the custodian of the records that are stored in the database, and that access to the database is governed exclusively by G.S. 7A-109(d), which authorizes the AOC to enter into contracts and charge a fee for providing remote electronic access to court records. The Wake County Clerk of Court also declined the request arguing that she is not the custodian of the entire database. LexisNexis sued the AOC and the clerk. The Court of Appeals held that the AOC, and not the clerk of court, is the custodian of the database, and that LexisNexis is entitled to copy of it under the Public Records Act. The North Carolina Supreme Court reversed the Court of Appeals decision and held that the LexisNexis request is governed exclusively by G.S. 7A-109 and that the public records law does not apply. The opinion, *LexisNexis v. N.C. Administrative Office of the Courts,* is here.

The crux of this case appears to be a dispute about whether the access LexisNexis seeks is available under the public records law at minimal or no cost, or whether the AOC can require the company to contract for remote electronic access and be subject to fees to cover the cost of providing that access. The AOC argued that the legislature intended G.S. 7A-109(d) to be the exclusive means of obtaining access to the database, while LexisNexis argued that it was an alternative means of access, in addition to the access afforded by the Public Records Act. The Supreme Court held that G.S. 7A-109 controls because that statute applies to the narrower category of records – specifically, court records — that was the subject of the request. In particular, the Court held that the specific language in 7A-109(d) applies because it is a later-enacted provision that covers requests for access to court records maintained in electronic form. The Court concluded that "the General Assembly intended that the nonexclusive contracts authorized in section 7A-109(d) be the sole means of remote electronic access to ACIS." *Slip op.* at 13.

LexisNexis requested an electronic copy of the entire database. The Public Records Act of course, provides a right to inspect or obtain a copy of government records. G.S. 7A-109(a) requires clerks of court to allow inspection of court records. Neither the Public Records Act nor G.S. 7A-109(a) require a public agency to provide direct, real-time, continuous, or remote electronic access to records. The enactment of G.S. 7A-109(d), therefore, likely represents a legislative recognition that ongoing electronic access to an entire database imposes upon a public agency a unique set of obligations, for which the agency should be able to charge a reasonable fee. The statute doesn't define "remote electronic access" but the presence of this provision suggests that the access provided is distinct from the right to inspect or have a copy of a discreet record under the other existing public records provisions. The holding in the case preserves the AOC's ability to negotiate arrangements and to recover costs for on-going remote electronic access to the database, which seems consistent with the legislative intent.

The Supreme Court's analysis in this case, however, raises questions about the relationship between the court records statute (G.S. 7A-109) and the Public Records Act. Language in the opinion seems to suggest that the Public Records Act does not apply to court records at all, or at least with respect to court records that are within the scope of G.S. 7A-109. While acknowledging the broad scope of Chapter 132, the opinion notes that the Act anticipates that "exceptions may

apply." The Court goes on to say that "indeed, the General Assembly has enacted a separate statute applicable to court records," and quotes *Virmani v. Presbyterian Health Servs. Corp.,* 350 N.C. 449, 463 (1999) which held, "[t]he public's right of access to court records is provided by N.C.G.S. § 7A-109(a), which specifically grants the public the right to inspect court records in criminal and civil proceedings*." Slip op*. at 9. The Court seems to be describing the court records statute as an exception to the Public Records Act, noting that while the Public Records Act applies to all government records, section 7A-109 is limited to court records. The Court holds that the LexisNexis request is governed by the court records statute and that the Court of Appeals erred in applying the Public Records Act.

One possible interpretation is that this decision simply holds that requests for remote electronic access to AOC records are governed by the specific provision in G.S. 7A-109(d), which directly addresses those types of requests. But the language could also be read more broadly as holding that court records within the scope of section 7A-109 are subject to that statute only, and are not governed by Chapter 132. This broader interpretation may be grounded in constitutional principles, as there is little evidence of a legislative intent to create the court records law as an exception to the Public Records Act. In other contexts, the legislature has been specific when creating exceptions to the Public Records Act. The personnel records privacy statutes, for example, specifically say, "Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files…are subject to public inspection and may be disclosed only as provided by this section." *See* G.S. 160A-168(a); 153A-98(a). There is no such language in G.S. 7A-109.

The court records law overlaps with the Public Records Act and uses similar language to describe the right of access, which raises questions about whether the legislature intended the Public Records Act to apply at all to court records, or whether the two provisions should be read together. On the other hand, it's possible to read the court records provision (which is titled: "Record-keeping Provisions") as simply providing specific duties for the clerk with respect to the maintenance of court records, rather than as a court-specific right of access. Prior case law has recognized the application of the Public Records Act to court records. In the *Virmani* case, medical records that had been filed with the clerk were deemed to be public records under the Public Records Act. *See Virmani* at 463*,* ("[o]nce [the records] were filed in the public records of the court by the plaintiff, they were thrust into the public domain, *de facto* and became subject to the public records act…The public and the news media have the same right to inspect and obtain copies of those records as they do with any other open court records. N.C.G.S. 132-1(b)").

As the Supreme Court noted in *LexisNexis,* however, it is important to remember that the judiciary has inherent power over court records in certain situations:

> North Carolina courts "always retain the necessary inherent power granted them by Article IV, Section 1 of the North Carolina Constitution to control" their records "in the proper circumstances" and that "the power to do so is a necessary power rightfully pertaining to the judiciary as a separate branch of the government, and the General Assembly has 'no power' to diminish it in any manner."

Slip op. at 9, note 3, (citing *Virmani,* 350 N.C. at 463). As further described in *Virmani,* "This necessary and inherent power of the judiciary should only be exercised, however, when its use is required in the interest of the proper and fair administration of justice or where, for reasons of public policy, the openness ordinarily require of our government will be more harmful than beneficial." *Virmani* at 463*.*

Even if the Public Records Act does not apply to records within the scope G.S. 7A-109, it seems likely that the Act would still apply to other types of records made or received by judicial agencies, such as financial and administrative records that are not maintained in connection with specific judicial proceedings. Even in some states that recognize an exclusion of judicial records based on separation of powers, administrative and financial records have been considered to be subject to public access under state public records laws.

See, Henderson v. Bigelow, 982 So. 2d 941, 950 (La.App. 2008) ("While we recognize that matters regulating all aspects of the practice of law are reserved solely for the Supreme Court, we find that the same cannot be said for the expenditures and disbursements of public funds by the judiciary."); *and Clerk of Superior Court v. Freedom of Information Com'n,* 895 A.2d 743 (Conn. 2006) (recognizing a right of access to records regarding the judicial branch's "administrative functions" described as activities relating to its budget, personnel, facilities and physical operations.)

It must be left to future cases to determine more precisely the relationship between the Public Records Act and the court records statute, as well as the relative powers of the legislative and judicial branches when it comes to withholding or providing access to court records.

The Court of Appeals opinion in this case created a short-lived body of law about databases under the Public Records Act. It includes a discussion of who is considered to be the custodian of a database and how the database itself relates to the individual records that cumulatively comprise the database. Since the Supreme Court reversed the Court of Appeals decision, that analysis is no longer good law. But it may serve as a guide to public agencies and litigants, and offers a sense of how a court might rule in a future case involving these issues. My summary of the Court of Appeals decision remains available here.

[**Update:** The 2015 state budget act (S.L. 2015-141, Sec. 18A.24) amended the statute that is the subject of this blog post. It now says that access to electronic records, electronic data processing records, or any compilation of electronic court records or data of the clerks of superior court, are governed by G.S. 7A-109(d). It goes on to say that "[n]either the Director nor the Administrative Office of the Courts is the custodian of the records of the clerks of superior court or of the electronic data processing records or any compilation of electronic court records or data of the clerks of superior court."

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