
Coates' Canons Blog: Attorney General Opinion on 2010 Personnel Privacy Changes

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As I have described in several posts (links to these are listed at the end of this post), the **legislature's 2010 amendments** to the personnel privacy statutes affecting most North Carolina public employers raised many questions. Several state and local agencies, including the Office of State Personnel, asked the State Attorney General for opinions on these questions. This post summarizes the opinion, which is available **here**, and discusses how it affects local governments.

The Structure of the Request and the Opinion

This opinion was issued in response to a request from the State Personnel Director, Linda Coleman, on behalf of the Office of State Personnel (OSP). As noted in my earlier post, the laws governing personnel privacy are not contained in the public records law (**Chapter 132**), but are incorporated into separate chapters for each type of public agency. The 2010 law amended these separate statutes affecting distinct local government entities, as well as **G.S. 126-23**, which governs access to information about state employees. The opinion responds to the specific questions posed by OSP and interprets the law as it affects and relates to provisions in Chapter 126. Although the opinion lists in a footnote the amendments to other sections of the General Statutes that affect other units of government, the analysis reflects the particular language and statutory structure in **Chapter 126**. In places, however, the opinion seems to assume that the conclusions apply to all public employers. As further discussed at the end of this blog, those conclusions may be troublesome in light of an important difference in the language of the statutes.

Summary of Opinion

Here is a summary of the Attorney General's opinion on the major issues:

1. The new law applies to records and information that exist in the files of public agencies on the effective date of the act (October 1, 2010), even if they relate to actions that occurred prior to that date. This includes records of final dismissals, and information about salary increases and decreases, the date and type of disciplinary actions, and general descriptions of reasons for promotion.
2. The new law requires public agencies to create and maintain records about promotions and dismissals for disciplinary reasons that occur after October 1, 2010. The opinion interprets the law to require "public employers" to create and make available for public inspection final notices of dismissal *for disciplinary reasons* setting forth the acts and omissions constituting the basis for the dismissal, even if there is no requirement in any other law that requires provision of such notice – that is, even for at-will employees.
3. The new law does not require public agencies to create records about promotions or dismissals that occurred prior to October 1, 2010. However, if a public agency has a record stating the general reasons for promotion, or a notice of final dismissal for disciplinary reasons, these records are subject to access even if the actions occurred prior to the effective date of the act.
4. Final notices of dismissal for non-disciplinary reasons (such as reduction in force or disability) are not covered by the act and are not subject to public access.
5. When the statute calls for access to information, it should not be interpreted to mean that the underlying records containing that information are subject to public access. Only one provision explicitly requires access to a specific record; that's the one that provides access to a copy of the final notice of dismissal. In addition, the opinion suggests that if there is a record that contains a general description of reasons for promotion, that record is subject to access as well. In all other cases, the obligation is to provide the listed information, but not access to the records from which the information is drawn.

The law does not amend the otherwise applicable statutes that make those records confidential. For example, the date and type of each disciplinary action is public information, but records containing the details of or reasons for those actions are not public.

6. The statute requires access to copies of the written notice of “final decisions” to dismiss employees. A “final decision” for purposes of the statute is “a decision which is made by the highest authority in the employing agency or which due to the passage of time, or other procedural defaults is not subject to further review within the department, agency, institution, commission, bureau, or other employing body or authority.”

Applicability to Local Governments

As noted above, the opinion was issued in response to a request from OSP, and it analyzes the statute governing that agency. That statute, and the statutes that apply to community colleges and local school boards, require those agencies to “maintain a record of each of its employees, showing the following information with respect to each employee.” In contrast, the statutes that apply to cities, counties, and most other units of local government say, “The following information with respect to each [unit of government] employee is a matter of public record.” The Attorney General’s conclusion that the new law requires state agencies to “create and maintain” records documenting reasons for final dismissal of employees may well be inescapable given the language of G.S. 126-23, quoted above. Language throughout the opinion suggests that it assumes that parallel responsibilities apply to all “public employers” even though there is no specific reference to or analysis of the differently worded provisions in G.S. **153A-98**, **160A-168** and the other affected provisions. The difference is not significant for the other categories of information, since it is likely that this information exists and must be provided. The effect on notices of dismissal, however, is significant. In contrast to the assumption in the opinion (which states that “most public employees are entitled to protection from dismissal without just cause”), most city and county employees are “at will” and are not entitled to notice of reasons for dismissal.

Local governments will have to decide whether to interpret the opinion to mean that the legislation requires all public agencies to create and maintain documents, or whether to interpret the scope of the opinion more narrowly, as applying only to the specific statutes it actually addresses. Several local governments have submitted separate requests for Attorney General’s opinions interpreting the local government statutes. If the Attorney General provides separate responses to those requests, some of these questions may be resolved.

Effect of the Opinion

Attorney General opinions are considered advisory, and are not binding on courts. They are, however, regularly relied on by litigants as authoritative interpretations of state law. Because of the recent amendments to the public records law regarding availability of attorneys’ fees, the impact of this Attorney General’s opinion is much greater. Reliance on a court decision involving the unit of government, other relevant case law from North Carolina, or an Attorney General’s opinion, are the only sources that will shield the public agency from an award of attorneys fees if a litigant substantially prevails in a public records case. As I noted in an earlier blog, public agencies cannot initiate an action to obtain an opinion from a court – only a person denied access to records can do that. Public agencies will therefore have strong incentives to follow the directives laid out in this opinion and any other opinions the Attorney General may issue interpreting the public records laws.

Here are links to previous blog posts I’ve done on this topic:

Personnel Privacy Law Changes

Public Records Mediation and Attorneys’ Fees Provisions

Access to Records or Lists of Information: What Does the Public Records Law Require?

Links



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- www.ncleg.net/Sessions/2009/Bills/House/PDF/H961v9.pdf
 - www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions/Personnel-Information-Required-to-Be-Made-Availabl.aspx
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_132.html
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_126/GS_126-23.html
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_126.html
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-98.html
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-168.html