Coates' Canons Blog: Can I See What's in My Personnel File?

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North Carolina statutes protect most public employee information from public access. Public employees have the right to inspect almost all of the information in the files their employers maintain about them. The statutes do, however, carve a few types of information that the employer "need not" disclose to the employee or any other person. A recent court of appeals opinion clarifies the meaning of one of those types of extra-confidential information. In *Wind v. City of Gastonia* the court held that the city was required to allow an employee to inspect records of complaints made about him, including records disclosing the identities of another employee and a citizen who filed the complaints. In reaching this holding, the court ruled that a decision not to pursue disciplinary action constitutes an "official personnel decision" for purposes of the personnel privacy statute, and that the city had no authority to redact the names of the complainants.

The plaintiff was a patrolman for Gastonia police department. The department received two complaints about him. One was from a citizen and one was from another police officer in the department. The department established an internal affairs ("IA") file for each of the complaints. Wind's supervisor investigated the citizen complaint, and the police chief investigated the internal complaint. The supervisor determined that the citizen complaint was not sustained and that case was closed. The police chief determined that the complaint from the employee was "unfounded" and that case was closed. Wind then requested access to the complete IA files for each complaint. The city eventually provided the records with redactions that concealed the identity of the complainants. It's clear from the court record that the redacted information was precisely what Wind was seeking when he requested the records. Hence the lawsuit.

What Records May be Withheld From an Employee?

There are several personnel privacy statutes that apply to public employees and they vary somewhat for different jurisdictions, but they generally allow employees to inspect almost everything in their files. The provisions for city, county, and several other types of local government employees list several exceptions to the employee's right of access, including the one at issue in *Wind*. As set out in G.S. 160A-168(c1)(4), for cities, and G.S. 153A-98(c1)(4),for counties, the unit need not provide employee access to:

Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

The court addressed two main issues in interpreting this provision: (1) whether the records regarding the complaints were "notes, preliminary drafts, and internal communications," and (2) whether the decision to close the case without taking any further action was an "official personnel decision" triggering the employee's right to inspect the complete IA file, including the names of the complainants.

Notes, Drafts, and Internal Communications

The court used a "plain meaning" approach to analyze the terms "notes, preliminary drafts, and internal communications," and concluded that the General Assembly appeared to have intended the provision to apply to "written materials that are informal or provisional in character." *Slip op. at 12.* In the end, however, the court did not rule on what specific items contained in the IA records actually fall under the subsection (4) provision. Since the complete IA files were not in the record, and the City had the burden of demonstrating to which records the exceptions applied, the court simply could not conclude that every part of the IA files were each a "note, preliminary draft or internal communication" about employee Wind.

Official Personnel Decisions

"Assuming without deciding" that the IA records fell within the exception to the employee right of access, the court went on to decide the second question: whether the supervisor's and police chief's decisions not to take action on the complaints were "official personnel decisions" triggering the employee's right to inspect the records.

The city argued that an "official personnel decision" is one that results in "some type of change or alteration in employment". *Slip op. at 15.* Finding no support for this narrow reading, the court turned to plain meaning, and concluded that the right of access applies when the "informal, provisional or otherwise 'preliminary' or 'internal' communication, note, or draft concerning an employee included in his or her personal file…[is] used to make *an authorized or authoritative judgment or conclusion* with respect to that employee." *Slip op. at 16-17.* The court noted that the police chief had authority as the final decision-maker with respect to complains of misconduct. He analyzed and weighed the information in the files and made a decision finally to dismiss or terminate the complaints. The court concluded that "Chief Adams was authorized to, and did, use [the IA files] to finally adjudicate matters pertaining to plaintiff." Therefore this was an official personnel decision, even though the employee experienced no change in his employment.

Protecting Names of Complainants

Finally, the court concluded that there was no legal basis for redacting the names of the complainants. Judge Dillon's dissenting opinion set out policy arguments for withholding records when no disciplinary measures result, citing to examples in other statutes, and concluding that a the decision to classify complaints as "not sustained" does not rise to the level of an "official personnel decision." *Slip op. dissenting opinion at 15*. Relying on *S.E.T.A. UNC-CH v. Huffines* (399 S.E.2d 240 (1991)), the dissent would have ruled that the city could redact the identities of the complainants based on a public policy concern for the safety and security of the individuals, and the possible chilling effect on individuals reporting misconduct. (The dissent took note of the plaintiff's comment that he might have a defamation claim against the complainants.) Rejecting the dissent's public policy arguments, the majority affirmed the trial court's order for the city to release the unredacted records to the plaintiff.

Implications of the Decision: Employee Complaint Information

The notion that a local government has an obligation to make public the identities of people who file complaints is not entirely novel. There is no general exception in the public records law for this type of record. Indeed, the exception for criminal investigation records specifically provides that the identity of a complaining witness is a public record and may be withheld only if its release is likely to pose a risk to the individual. G.S. 132-1.4 (c)(6), (d). Most public employers, however, probably assume that a complaint made by an employee would be part of that employee's confidential personnel file. Most city and county employers would likely have thought, before the *Wind* decision, that they therefore could withhold from a complained-about employee the identity of the complaining employee. Perhaps not, after *Wind.*

It is surprising that neither the majority nor the dissent mentioned the court of appeals opinion in *News Reporter Co. v. Columbus County* (646 S.E. 2d 390 (2007)). That case involved a letter written by a current county employee regarding the qualifications of another person who was a candidate for appointment as medical director. The letter from the current employee described his experience working with the candidate under consideration. Since the main subject of the letter was an external candidate and not an employee, the court held that the letter was a public record, and that no exception prohibited its release. The comments of the current employee, on the other hand, were held to be confidential since the letter "relates to [the employee's] performance as a county employee." The court ordered that the letter be provided with the information about the county employee redacted.

Is *Columbus County* on point? Perhaps there is a difference between a simple complaint or report of misconduct by one employee about another (as in the *Wind* case), and a letter that describes one employee's experience working with another person (as in the *Columbus County* case). But it is not hard to imagine a scenario in which complaints or comments by an employee about another employee would reflect upon and be relevant to the evaluation of the commenting employee. The *Wind* decision appears to elevate the right of access to an employee's own file over the confidentiality of another employee's personnel information.

More Implications: Identifying Official Personnel Actions

The *Wind* court's decision as to what constitutes an official personnel decision may have the effect of broadening the

rights of employees to information in their personnel files. It may be difficult to determine what other types of decisions to refrain from taking action will trigger the right of access to internal documents. The *Wind* facts clearly involved an established procedure for reviewing complaints, which included assigning a case file and other indicia of formality. It's unclear whether a less formal process would rise to the level of official action. Consider for example an email from a citizen, board member, or employee making unfounded and extraordinary accusations about an employee, which the supervisor simply chooses to ignore, based on her knowledge of the accused as an exemplary employee. If the email is filed in the employee's personnel file with a notation "no action taken" – does this trigger the right of access? These and perhaps other questions may result from the *Wind* decision, as will, also, perhaps, a rash or requests from employees and former employees, about information in their personnel files that were used in any official personnel decisions.

Scope of*Wind* Decision: Other Public Employees

The provision at issue in *Wind* applies only to city, county, and a few other categories of local government employees. The personnel privacy statutes that govern state, public school, and community college employees, do not include the "notes, preliminary drafts and internal communications" exception to their right of access to records in their personnel files. These employees have access to informal or provisional records, regardless of whether they were used for any official personnel decision. The court's holding regarding the right of access to the co-worker complaints, however, does not appear to be limited in any way. So presumably, state, school, and community college employees, just as local government employees, have access to this type of information when it is gathered as part of their own personnel files, but may not have any protection from access by other employees when their comments are included in the files of those other employees.

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