Coates' Canons Blog: Closed Session Minutes and General Accounts Under the Public Records Law

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North Carolina's open meetings and public records laws contain the core transparency requirements for local governments. They're so often considered together that they can be thought of as first cousins, or even siblings. But they're not twins, and the North Carolina Supreme Court has made clear that their requirements must be considered independently. ("The Public Records Act and the Open Meetings Law are discrete statutes, each designed to promote in a different way openness in government." *News and Observer v. Poole,* 330 N.C. 465, 478 (1992).) There is one place in the General Statutes, however, where the two statutes come together in an important way. That place is G.S. 143-318.10(e), the subsection in the open meetings law that deals with the status of minutes and general accounts, and creates a limited exception allowing them to be withheld from public access. This post describes three questions to consider in applying this exception to the public records law.

The open meetings law requires public bodies to prepare minutes of meetings, and general accounts of closed sessions. (For more on the difference between minutes and general accounts, see my earlier blog post on that topic.) Since these records are clearly created in the transaction of public business, they would be subject to public access under the broad requirements of the public records law unless an exception applies. The open meetings law confirms the status of minutes and accounts as public records, but then creates this limited exception for closed session records:

"Such minutes and accounts shall be public records within the meaning of the Public Records Law, G.S. 132?1 et seq .; *provided, however, that minutes or an account of a closed session conducted in compliance with G.S. 143?318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session."* G.S. 143-318.10(e)(emphasis added).

Questions to Consider in Applying the Exception:

1. Was the closed session validly held?

2. What is the nature of the matter that was the subject of the session and what is its status at the time of the request for or decision to release?

3. What specific information is included in the minutes/account and what is its status at the time of the request for or decision to release?

Was the closed session validly held?

In order to qualify under the exception, the minutes or general accounts must be of a session that was closed in compliance with the statute that authorizes closed sessions. This means that the session must fit one or more of the specific justifications for going into closed session, that the meeting itself was properly noticed, that a motion was made in open session stating the basis for going into closed session, and that the actual discussion or action reflected in the minutes and general account are within the scope of the motion and legal basis for going into closed session.

Suppose, for example, a board goes into closed session to discuss its negotiating position on the purchase of real property under G.S. 143-318.11(a)(5). During the meeting, the discussion drifts into a conversation about economic development incentives. The board asks for the attorney's opinion about the legality of several possible incentives. Some

time later, after the purchase of the property has been completed, there is a request for copies of the closed session minutes. The local government might be inclined to withhold the minutes, or at least redact the portion containing the summary of the attorney's opinion on the economic development incentives. But the records are probably public. Since the transaction that was the subject of the meeting is completed, the exception does not apply to that information. And the other discussion was not held in compliance with the statute, since the board didn't announce that it was going into closed session to discuss incentives or consult with its attorney, so it doesn't fit the exception either.

A different result might occur if the record of the unauthorized conversation is covered by another exception. For example, if the conversation drifted into a discussion about the performance of the manager, the unit might have violated the open meetings law, but the record might still be withheld as a personnel record under the separate authority (and obligation) of the personnel privacy statute.

The main point is that if the only authority to withhold the record or information is the open meetings law, then the validity of the session itself is a necessary prerequisite.

What is the nature of the matter that was the subject of the session and what is its status at the time of the request for or decision to release?

As indicated by the first example, there has to be a clear alignment between what's in the minutes or general account and the announced justification for holding the closed session. In addition, the purpose of the closed session directly affects whether and for how long the exception will apply. In Public Records Law for North Carolina Local Governments, David Lawrence's comprehensive guide to the public records law, Lawrence provides a useful summary of the timing issues for each of the nine authorized purposes for meeting in closed session. (See pages 350-352.) This summary is a great place to start in considering how long closed session minutes for particular types of sessions may be withheld.

It's also important to consider the status of the matter at the time of a request for or decision to release the record. For example, if a public body met in closed session in order to protect the attorney client privilege under G.S. 143-318.11(a)(3), the general account of that meeting could technically remain sealed for as long as the privilege applies, which is basically forever, unless the client (that is, the board) chooses to waive it. On the other hand, once a proposed purchase of real property is completed or abandoned, it will be difficult for the unit to argue that releasing the minutes regarding the board's negotiating position will frustrate the purpose of the closed session.

What specific information is included in the minutes/account and what is its status at the time of the request or decision to release?

As a final level of detail, it's important to know exactly what information is in the particular record before concluding that it can or cannot be released. Even if there was a valid legal reason to meet in closed session, and even if the minutes align with the stated reason for the session, the decision to withhold or release minutes must be based on the specific information in the record itself.

Since the statutory requirement for general accounts of closed sessions clearly does not require detailed documentation of these discussions, there may be times when the minutes or general account do not disclose anything that would frustrate the purpose of the meeting. For example, consider the minutes of a closed session to discuss terms of a pending employment contract. The general account might (lawfully) simply indicate that this discussion occurred and that a range of options was considered, without detailing any of the specifics. If that's the case (and assuming that the fact of the pending contract is already public), there may be no legal basis for withholding the minutes.

Similarly, a public body may not have authority to withhold a general account of a session held to preserve the attorney-client privilege if the actual content of the general account has already become public. In this example, the release of the record does not frustrate the purpose since it discloses information that is, in fact, no longer confidential.

There is another reason for reviewing the specific contents of the closed session records before releasing them. Closed session records that are subject to public access may include attachments or other records that contain confidential information. This information should be redacted before the records are released. As I noted above, even in a case where the minutes reflect a discussion that exceeded the board's authority under the statute, the specific content of the record may include information – such as personnel information — that is confidential under a different statute.

An Ongoing, Record-By-Record Process

The open meetings law does not create specific timelines for releasing minutes and general accounts, but many jurisdictions have established a regular, on-going process for determining what is sealed and what is open for public inspection. The responsibility for this decision rests with the governing board of the public body, but is sometimes delegated, as noted in this blog post. In many cases, the issue comes up in response to a specific request. The considerations described here, along with the analysis in the public records book, should provide useful guidance in this process.

Want to learn more about minutes of closed sessions and the attorney-client exceptions to the public records law? Consider registering for this upcoming School of Government webinar, the last in our series on public records law in North Carolina:

Records Involving Attorney-Client Communications and Work Product, August 22, 2012, 1:00 – 3:00 p.m.

Links

- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=143-318.10
- www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=132-1
- www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition
- canons.sog.unc.edu/?p=621
- www.sog.unc.edu/courses/webinars/public-records-law-records-involving-attorney-client-communications-work-product-webinar-demand