Coates' Canons Blog: Draft Records Under the Public Records Law

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A really hot topic is occupying the city council: to allow food trucks or not to allow food trucks, that is the question. Local restaurants are opposed, but the trucks are really popular and may revive downtown foot traffic. The council finally decides to consider a proposed policy. They instruct the manager to develop a proposal for their review. The manager has completed the task. Knowing that it will be controversial, she decides to run it by the mayor before submitting it to the whole board. Just for good measure, she stamps every page "Preliminary Draft – For Internal Review Only." The mayor reviews the draft, makes some changes using "track changes" on the electronic version, and sends it back to the manager. The Chamber of Commerce, anxious to see what will be proposed, submits a public records request for a copy of any and all proposals, including any preliminary drafts, whether or not approved by or submitted to the council.

Must the city provide a copy of the preliminary draft? What about the version with Mayor's comments? What obligation, if any, does the city have to retain drafts, including the different versions of the proposed policy as it goes through the review and revision process?

The short answers are: The drafts are public records and are subject to public access under North Carolina law. Most drafts and embedded comments are of short-term value, and are not subject to any retention requirements. Changes that are embedded in the metadata, if retained, are probably subject to access as well, though this is an open question under North Carolina law.

Drafts and the Public Records Law

There's nothing in North Carolina's public records law that specifically addresses draft documents. However the scope of the statute's main provision doesn't leave much room for doubt about whether draft records are covered. **G.S. 132-1** provides that records made or received in the transaction of public business are public. An argument might be made for an implicit exception for records that are still in discussion, perhaps on the grounds that making them public inappropriately interferes with the deliberative process. Such an argument was rejected in *News and Observer Publishing Co., Inc v. Poole,* 330 N.C. 465 (1992). In that case, the North Carolina Supreme Court held that draft reports prepared by members of the "Poole Commission," appointed to investigate irregularities in a university athletics program, were subject to public access. The court sent a strong message in its decision that the courts will not create exceptions to the public records law. The statute contains no exception for drafts, it said, and whether such an exception should be made is a question for the legislature.

Other states, by contrast, have recognized exceptions for drafts, typically based on the specific language in their statutes. Some states make public only those records that serve to "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office" See **Ohio Revised Code, 149.011(G)**. Under such statutes, there is the possibility of arguing that preliminary drafts are not subject to public access. Our statute contains no language to support such a limitation.

Informal or Incomplete Records

Even under North Carolina's broad definition of public records, there are surely some records that are simply too preliminary or informal to be subject to public access. As David Lawrence notes in his **book on North Carolina public records law**, a record that is still in preparation, not having been circulated beyond the author, or in a stage when the content is "changing daily or more often," may simply be too incomplete to be considered a record. (See Lawrence, pp. 14-15.) In *Poole,* the draft reports had been submitted to the university president for review. Perhaps a draft or other type of

record that is never circulated or used might be outside the scope of the statute.

A related point, also described in David's book (p. 19) is that there may be records created solely for personal (but work-related) use that are outside the scope of the statute. Although neither the legislature nor our courts have addressed this concept, courts in other states have held that notes and other types of informal records created for the personal use of public employees are not public records. So for example, in our hypothetical scenario, if the mayor marked up the draft with her personal notes in anticipation of a discussion with the full council, rather than sending comments and suggestions back to the manager, it might be possible to argue that the mayor's version is not a public record – or at least that the mayor's personal notes could be redacted.

A leading case supporting this argument is *Shevin v. Byron, Harless, Schaffer, Reid & Associates,* 379 So. 2d 633 (Fla. 1980), interpreting Florida's public records law, which is similar to North Carolina's. As stated in another case from Florida: "To give content to the public records law which is consistent with the most common understanding of the term 'record,' we hold that a public record, for purposes of section 119.011(1), is any material prepared in connection with official agency business which is intended to perpetuate, communicate, or formalize knowledge of some type. To be contrasted with 'public records' are materials prepared as drafts or notes, which constitute mere precursors of governmental 'records' and are not, in themselves, intended as final evidence of the knowledge to be recorded." *Johnson v. Butterworth, 713 So.2d 985(Fla. 1998).* The notion here is not that there is an implied exception to the law, but instead a recognition that to be considered a record at all, a writing or other manner of documentation needs to have a degree of formality and purpose, and might not include records created for sole use of the individual author. Examples might of this type of record might include notes made at meetings or on other documents, lists of things to do or ideas to pursue, and other reflections and work aids created for personal, although work-related, use.

Drafts Subject to Exceptions

It is important to note that some notes and drafts may be protected from public access under exceptions in the public records law. Attorney records, including drafts and notes prepared in anticipation of or in relation to litigation may be protected under the work product exception, and notes and drafts relating to personnel matters are confidential. In addition, a draft proposal or other record that is presented in a closed session of the governing board could be maintained confidential as long as necessary to avoid frustrating the purpose of the closed session. This might occur, for example, with a report or proposal prepared by a third party and not otherwise made or received by the public agency. Of course, the subject of the draft record would have to be one about which there is authority to meet in closed session, or in the alternative, there would have to be a legitimate need to consult with the unit's attorney on the matter.

Records Retention Requirements

Just because drafts are subject to public access doesn't mean they have to be retained. Indeed, the state retention rules specifically categorize drafts as records of "short term value" which need not be retained. This guidance can be found in the retention schedules for specific units of government and on the **agency's website**. As described there, records of short term value include "Preliminary or rough drafts containing no significant information that is not also contained in the final drafts of the records."

Open Questions Remain

Returning to food trucks and draft proposals: What about the mayor's "track changes" comments embedded in the manager's draft? As just noted, in most cases, there is no obligation to preserve them under the retention rules. However, it is easy to forget that they're there when you're looking at the record in "final" mode. This raises a series of questions that I'll defer to future blog posts. These include, the open question, discussed in Kara Millonzi's blog posts, **here, here,** and **here,** about whether this type of "metadata" is automatically or only by request, or not at all, subject to public access; the obligation attorneys have to "scrub" documents of client information before releasing them in discovery requests (and how that squares with the public records law); and the question of whether records may be converted to a format (PDF, view only?) that would prevent access to or modification of this type of information.

Stay tuned…

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1
- codes.ohio.gov/orc/149.011
- www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition
- archives.ncdcr.gov/government/retention-schedules