
Coates' Canons Blog: Personnel Privacy Law Changes

By Frayda Bluestein

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UPDATE August 2013: A summary of the Attorney General's opinion about these legislative changes can be found [here](#).

The final hours of the 2010 legislative session produced agreement on changes to the personnel privacy statutes for most public agencies. Prompted by calls for more information about the salary and performance histories of public employees, the changes expand the list of information that must be made available to the public. These provisions were part of the ethics bill, **S.L. 2010 – 169** (sec. 18). This law also includes a new requirement for mediation of public records request disputes, and modifies the statute governing when attorneys' fees may be assessed in lawsuits seeking access to public records. This blog post summarizes the personnel information changes, and **this post** goes over the new mediation and attorneys' fees provisions.

Personnel Information Changes

Most information in public employee personnel files is confidential. Separate but similar statutes address personnel privacy for **state agencies**, **cities**, **counties**, **local school units**, **community colleges**, **area (mental health) authorities**, **water and sewer authorities**, **district health departments** (governed by the county statute), **public health authorities**, and **public hospitals**.

The changes made this session apply to all but the last two of these public agencies; so the public access requirements for public health authorities and public hospitals remain as they were.

For the affected agencies, the new law will require access to two new types of information.

1) Salary history. The law has previously required agencies to make public only "current salary" and the date and amount of "the most recent increase or decrease" in salary. The legislature responded to calls for access to salary history by changing the language to require public access to *each* increase or decrease in salary, indirectly providing access to prior salary information. Technically, this requires a requesting party to do the math to arrive at the previous salaries, though some agencies may be inclined to provide the salary amounts if requested. Although some may argue that the legislature could have, but did not specifically authorize release of salary information other than the current salary amount, it seems extremely unlikely that there could be any liability for the release of prior salary information, since it can so easily be deduced from the information that is clearly public record.

2) Promotion and discipline information. The law has previously required agencies to make public the date of the most recent change in position. There has been some question about whether literally just the date was required, or whether the law required disclosure of something more about the nature of the change. (An earlier **blog post by Bob Joyce** discusses this.) The statutes now specifically require that the date *and type* of the action must be disclosed, and they expand the scope to include *each* such action – not just the most recent. As noted below, the statutes also, in some cases, require an agency to provide information about the basis for promotion and discipline actions.

The language in the new statutory provisions makes clear that the public information regarding salary and change in position relates to actions of the agency to which the request is made. In addition, under existing law, each of the affected provisions applies to former as well as current employees.

A Requirement to Create Records?

The new provisions regarding information about promotion and discipline will not only expand the information that must be made public, they may also require public agencies to create and maintain records to which the statute will require public

access. Two provisions in the legislation require access to information or records that may not exist in some public agencies or for some employees.

First, regarding promotions, the new law will require disclosure of the date and “a general description of the reason for each promotion” an employee with the agency has received. This is not information public agencies are otherwise required to document or maintain, but the statute will now require it to be a matter of public record.

Second, when an employee is dismissed, the law will require public access to “a copy of the written notice of the final decision” of the agency “setting forth the specific acts or omissions that are the basis of the dismissal.” While some agencies are required, for certain employees, to provide written notice of grounds for termination (see, e.g., **G.S. 126-35** for career state employees, and **G.S. 115C-325(h)(2)** for career employees of local school units), many dismissals are not governed by such requirements. When not required to do so, public agencies typically do not create documents specifying the reasons for dismissals, especially of at-will employees, who may be dismissed with or without cause.

Does the new language, in effect, impose upon all agencies, for all employees, an obligation to create written notice of dismissals?

It's clear that these changes in the law are designed to increase access to information about the circumstances of public employee promotion and discipline. It may be a stretch, however, to interpret the requirement to provide “a copy” of written notice, as a requirement to create the written notice. The statutory provisions affecting procedures for public employees vary widely. For some agencies, including state and local school units, the statutes provide fairly specific and sometimes detailed procedures for handling dismissals of some categories of employees. For community colleges, cities, counties, and other local government entities, dismissal procedures are left to local policies and ordinances. (My colleague Bob Joyce informs me that community college employees are hired for terms of one year and are typically “nonrenewed” rather than dismissed. It's unclear whether this requirement would apply to a nonrenewal, and if it did, whether it would add a requirement for written notice of reasons for nonrenewal.) Local governments with policies that require termination only for cause will regularly prepare written notice of the type called for in the new legislation for those employees to whom the policy applies. But for employees of public agencies that are not subject to any statutory or self-imposed requirement for notice, there simply may not be a written notice of dismissal to copy and provide to the public, unless the new language is interpreted as a requirement to create one.

A further complication is that the personnel privacy statutes for state agencies, local school units, and community colleges say that the public agency “shall maintain a record of each of its employees showing, the following information with respect to each such employee...” This language is followed by the list of information that is public record, which now includes the general description of the reason for promotions, and a copy of the written notice of dismissal. For the other public agencies, including cities and counties, the statute simply provides the list of information that is “a matter of public record.”

Under the typical reading of the public records requirements of Chapter 132, an agency is not required to create records in response to a public records request. (See **G.S. 132-6.2(e)**, “Nothing in this section shall be construed to require a public agency to respond to a request for a copy of a public record by creating or compiling a record that does not exist.”) Under the new personnel privacy provisions, however, there appear to be categories of information to which the public has a right of access, perhaps even if the agency did not see fit to create a record of them for its own purposes. It's possible to read the statute as expressing a legislative directive that the public is entitled to this *information* if it is available, regardless of whether it exists in records created by the agency. This may be a reasonable interpretation of the requirement to provide a description of the reasons for a promotion, although it's hard to imagine how this would apply to former employees, if no record or information about such reasons exists.

As suggested above, however, it may be more problematic to assume that the requirement to provide “a copy” of the written notice of dismissal creates an obligation to create the notice in cases where the law doesn't already require it. The language of this provision seems to assume that a document exists. Therefore, an alternative reading, consistent with the usual interpretation of the public records law, is that access to a copy of the written notice is required only if the record exists, but that the provision does not impose a requirement to create the record.

Effective Date



These provisions became effective October 1, 2010.

Links

- canons.sog.unc.edu/?p=3487
- www.ncleg.net/Sessions/2009/Bills/House/PDF/H961v9.pdf
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_126/GS_126-23.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-168.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_153A/GS_153A-98.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_115C/GS_115C-320.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_115D/GS_115D-28.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_122C/GS_122C-158.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_162A/GS_162A-6.1.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-42.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_130A/GS_130A-45.9.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_131E/GS_131E-257.2.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_126/GS_126-35.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_115C/GS_115C-325.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-6.2.html