
Coates' Canons Blog: Privacy, Privatization, and Transparency: 2014 Public Records and Open Meetings Legislation

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Should private information in government hands be considered public record? What about information in the hands of private entities that are carrying out governmental functions? These two issues dominated legislative consideration of the public records and open meetings laws in the 2014 session of the General Assembly. They involve the delicate balance between the strong public policy of transparency in government and the strong interests of private individuals and businesses in their privacy and in the protection of proprietary information. The legislature debated these policy issues, attempting to strike the right balance in several different contexts. As you read this post, think about how you have voted in each instance.

Business Information and the New Nonprofit Economic Development Entity. In S.L. 2014-18 (HB 1031) the legislature authorized the North Carolina Department of Commerce to contract with a private nonprofit organization to assist the Department in “fostering and retaining jobs and business development, international trade, marketing, and travel and tourism.” News reports and comments about the proposed public/private arrangement touted the advantages of using a private entity, including its flexibility, and stressed the advantages of maintaining the confidentiality of information about business prospects. The legislation sets out the requirements for the contract between the Department of Commerce and the nonprofit organization. (For more information about the nonprofit and how it will function, see Tyler Mulligan’s blog post [here](#).) Although the nonprofit has been described as a private entity, it has significant ties with the state. The nonprofit board is appointed by the state, the state exerts significant oversight, and the state has residual rights in the assets of the nonprofit upon termination of the contract. These factors are similar to those that have been used by North Carolina courts when determining whether a private nonprofit is, as a matter of law, a public agency. (See my blog post [here](#), discussing this case law.) The legislation specifies that the nonprofit must comply with the requirements of the state open meetings, public records laws, and ethics laws, but does not require adherence to the state budget act.

The law also creates new public records provisions that apply to information and records of businesses that interact with the nonprofit entity. The original wording of these changes in S.L. 2014-18 was not clear, so it was revised in the technical corrections act, S.L. 2014-114, sec. 56.1, HB 1133. First, the new provisions modify the existing exception in the public records law, which protects information about pending economic development projects. (G.S. 132-6(d)) Under this exception, records about proposed projects may be withheld until a business either commits to expand or locate within the state, or makes a final decision not to do so. The new language specifies that if a business does not commit to expand or locate, the records may no longer be withheld once the state or local government involved in the project *knows or has reason to know* that the business has made a final decision not to expand or locate. Second, the revised provisions regarding records involving the nonprofit entity limit access to business information in several situations. Records remain confidential if the business did not request incentives from the state. In addition, if the business requested incentives but did not receive them, or decided not to locate in North Carolina, then only the request and any other information in the possession of the Department of Commerce is public. These provisions do not affect the status of local government records, which remain subject to the general rules for release of records, as described above.

Charter school salary information. Charter schools are operated by nonprofit organizations – another example of privatization. A request for salary information from a charter school in Charlotte resulted in conflicting legal opinions about the status of that information under the public records law. To clarify the issue, the legislature enacted a new statute putting charter school personnel records under the same rules as those that apply to all other public schools. The new law, S.L. 2014-101. Sec. 5 (SB 793) specifies that the nonprofit organizations that operate charter schools are subject to the state’s open meetings and public records laws (including the records retention requirements), and that inspection of

charter school personnel records “for employees directly employed by the board of directors of the charter school” are subject to the personal privacy provisions in Article 21A of Chapter 115C. While the new law clarifies which rules apply to these private entities, not everyone was satisfied with the balance that was struck. Critics noted that the law does not make public the personnel information of employees of the private nonprofit that are not directly employed by the charter school board.

Trade Secrets and the Mining Commission. Preparing the way for exploration and mining of natural gas, the legislature created a commission and a set of rules and procedures for approving mining operations. A significant issue was how the State would handle proprietary information about the methods and chemicals used in the mining process. The findings as set forth in the legislation provide a sense of the competing considerations: “The General Assembly finds that while confidential information must be maintained as such with the utmost care, for the protection of public health, safety, and the environment, the information should be immediately accessible to first responders and medical personnel in the event that the information is deemed necessary to address an emergency.” (2014-4, sec. 8, SB 786) The new law recognizes that information in mining applications is public, and that information that constitutes a trade secret as defined in G.S. 132-1.2 is confidential. The legislation sets out specific procedures applicable only to the mining commission, for how trade secret status will be determined, and how government agencies, and health and emergency services provided will obtain access to this information when necessary. The law designates the State Geologist as the custodian of the commission records regarding the mining methods and process, and makes that person (or his or her designee) responsible for determining whether processes and chemicals comply with state and federal law. The law creates a criminal penalty for unlawful release of confidential information, as well as the possibility of civil damages to be paid to the owner of the information. Finally, the law creates an appeal process for anyone who wishes to challenge the withholding or the release of information. The law provides for an expedited hearing before a business court judge. In an appeal, the owner has the burden of demonstrating that the information is confidential. The law requires that the owner of the information – not the state – must pay attorneys’ fees to a party that successfully challenges the withholding of information.

Personal information of law enforcement personnel. In response to a kidnapping of the father of a prosecutor, which was intended to target the prosecutor herself, legislation was introduced to allow law enforcement personnel to request that their personal information be removed city or county websites. (SB 78) This information includes information drawn from public tax records, including property ownership and location. The bill did not change the status of the information as public. It only created a process for certain individual to request that it be removed from a public website. Legislators struggled to identify the categories of officials who would be entitled to request removal. A study was proposed, but in the end, not even that version was adopted. Local governments are not legally required to post information about taxpayers, though many of them do. Even without the proposed legislation, a local government is free to adopt policies allowing the removal of information by request. Of course, then the local government board would have to wrestle with the policy decision about whose information could be removed and for what reasons. Indeed, this issue presents difficult line-drawing issues for policy-makers at both the state and local levels.

Proposed restriction on posting mug shots. Several bills proposed restrictions on publication of criminal booking photographs (mug shots). One bill would have made them confidential except in limited circumstances (SB 493), while other bills, including an early version of the state budget bill (SB 744), would have prohibited the practice of posting or publishing booking mug shots and then charging a fee to remove them. (See also SB 594). In an earlier blog post, I pointed out that these records are very likely not public under G.S. 132-1.4, although local law enforcement agencies regularly post them and provide copies to the press and to private companies that post them. Early concerns about the proposed legislation noted possible First Amendment violations. Press reports also noted that efforts in other states to restrict the commercial use of mug shots have not been effective. None of the bills passed.

State Board of Education Tests. A provision included in the technical corrections act (S.L. 2014-115, sec. 49.2, HB 1133) creates a new exception to the public records law to protect tests and related test materials developed, adopted or provided by the State Board of Education. These records are not public records until the State Board releases them. The new law, G.S. 115C-174.13(a) allows the State Board to allow inspections of these records so long as those who inspect them maintain their confidentiality.

Local School Schematic Design and Emergency Plans. (S.L. 2014-100, sec. 8.20, SB 744) The legislature has codified a requirement for local school units to provide schematic diagrams and emergency access to key storage devices. (G.S. 115C-105.53, 54.) These statutes provide that the diagrams and emergency response information are not public records.

Higher Education Proprietary Information. A provision included in the technical corrections act (S.L. 2014-114, sec. 52 HB 1133) creates a new statute, G.S. 116-43.17, which provides that “research data, records, or information of a proprietary nature, produced or collected by or for state institutions of higher learning in the conduct of commercial, scientific, or technical research, where the data, records or information has not been patented, published, or copyrighted” are not public records. Although the statute is included in Chapter 116, which deals with the university system, the law applies to information of institutions of higher education, which probably includes community colleges.

Base Closing Information and Meetings. (S.L. 2014-79, SB 614) The legislature created a new exception in the public records law to protect “documents related to the federal government’s process to determine closure or realignment of military installations until a final decision has been made by the federal government in that process.” G.S. 132-2.1(6). A corollary amendment was made in the open meetings law, G.S. 143-318.11(a)(4), to authorize closed session meetings to “discuss matters relating to military installation closure or realignment.” Amendments to Chapter 127C authorize the Military Affairs Commission to withhold “documents and discussions related to the federal government’s process to determine closure or realignment of military installations” as long as necessary to avoid frustrating the purpose of confidentiality. A new statute, G.S. 127C-5 authorizes the Commission to share documents regarding base closure or realignment with other public bodies and third parties, provided that those who receive the information must maintain its confidentiality.

Complaints about agricultural operations. (S.L. 2014-103, sec. 1(a), HB 366) A new law, G.S. 143-215.9D, makes confidential all complaints of environmental regulation violations relating to an agricultural operation, including all records accumulated in conjunction with the investigation of these complaints. These records become public records only if the Department of Environment and Natural Resources determines that a violation has occurred. Information obtained by a law enforcement, administrative, or regulatory agency “on a confidential or restricted basis” during the course of the investigation “shall be confidential and exempt” from the public records law “to the same extent that it is confidential in the possession of the providing agency or organization.”

Links

- www.ncga.state.nc.us/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2014-18.html
- www.wral.com/fact-check-do-public-records-thwart-job-recruitment-/13632227/
- ced.sog.unc.edu/?p=4958
- canons.sog.unc.edu/?p=4676
- www.ncga.state.nc.us/EnactedLegislation/SessionLaws/HTML/2013-2014/SL2014-115.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6
- www.charlotteobserver.com/2014/03/19/4778491/can-charter-school-pay-stay-secret.html#.U_yJRShgPzJ
- www.ncga.state.nc.us/sessions/2013/bills/senate/html/s793v7.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByArticle/Chapter_115C/Article_21A.html
- www.ncpolicywatch.com/2014/07/29/less-transparency-fewer-protections-hallmarks-of-latest-charter-school-bill/
- www.ncga.state.nc.us/enactedlegislation/sessionlaws/html/2013-2014/sl2014-4.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1.2
- www.ncga.state.nc.us/sessions/2013/bills/senate/html/s78v6.html
- www.ncga.state.nc.us/Sessions/2013/Bills/Senate/PDF/S78v6.pdf
- ncleg.net/Sessions/2013/Bills/Senate/HTML/S493v4.html
- www.ncga.state.nc.us/Sessions/2013/Bills/Senate/PDF/S744v2.pdf
- ncleg.net/Sessions/2013/Bills/Senate/HTML/S594v5.html
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-1.4
- www.wral.com/proposed-mugshots-laws-may-do-little-to-curb-worst-actors-/13720084
- www.ncga.state.nc.us/Sessions/2013/Bills/Senate/PDF/S744v9.pdf
- www.ncleg.net/Sessions/2013/Bills/Senate/PDF/S614v6.pdf
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.11



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- www.ncga.state.nc.us/gascripts/Statutes/StatutesTOC.pl?Chapter=0127C
 - www.ncleg.net/Sessions/2013/Bills/House/PDF/H366v7.pdf