Coates' Canons Blog: Release of Personnel Records: What Rights Does An Employee Have?

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In **this blog post** about the personnel privacy provisions, I described a scenario in which a North Carolina city receives a request under G.S. 160A-168(b)(11) for a copy of the written notice of the final dismissal of former police chief Chris Jones, setting forth the specific acts or omissions that were the basis of the dismissal. The city isn't sure how to respond. There is no record that precisely fits the description of what is public under the statute. Jones was an "at will" employee, and there was no hearing or other formal process for the dismissal. The personnel file contains a memorandum from the manager laying out concerns with the chief's performance, which was sent three months before the dismissal. The file also contains a letter of dismissal, which does not set out any specifics.

Continuing the scenario, let's assume that in order to avoid a lawsuit in which the city could be assessed attorneys fees, the city is inclined to release both the notice of dismissal and the memorandum with the supporting bases for dismissal. The city is aware, though, that the former employee would not want this information to be made public, and that an argument could be made that the law doesn't allow disclosure of the memo. May, must, or should the city notify the former employee prior to releasing the records? Does the employee have any legal recourse to prevent the release of the records?

Notifying Employees

There is no legal requirement for a local government to notify current or former employees upon receipt of a request for records or upon their release. A local government is free to do so, however, and may wish to, as a courtesy to the employee. Another possible motivation might be to give the employee time to make any arguments or file any claims asserting grounds for denying access. The employee can certainly make his or her arguments to the employing agency, which is free to consider them, but of course, is not bound to accept them. If the employing agency rejects the arguments and decides to release the records, does the employee have any legal recourse?

Employees' Legal Recourse

It is by no means clear that a public employee in North Carolina can file an action under the public records law to prevent disclosure of records from his or her personnel file. An employee might have claims under other laws, such as for defamation, or for violation of due process rights under federal law. A discussion of those remedies will have to wait for a future blog post. This blog focuses just on the cases involving claims under the public records law.

There are several ways that an employee might consider taking legal action to prevent release of records. The employee's options are affected by the stance the agency takes on whether to comply with the request for access. If the agency has not yet released the records, the employee might want to file an action against the agency to prevent it from doing so. If the agency refuses to release the records and is sued by the requestor, the employee might want to intervene in that lawsuit to assert arguments in support of the agency's refusal to release the record. If the agency releases the records, the employee might want to file an action against the agency under the public records law, seeking damages for the unlawful release of the records. (As noted earlier, the employee might also have other legal claims against the agency, which are not addressed in this discussion.)

Let's look at the last option first – the employee sues for damages under the public records law. This lawsuit is not likely to succeed. In *Houpe v.City of Statesville,* 128 N.C. App. 334 (1998), the North Carolina Court of Appeals held that the exclusive remedy for the unlawful release of personnel records is the criminal sanction in the statute: G.S. **160A-168(e)** for cities; G.S. **153A-98(e)** for counties. Private individuals, including employees whose records are released, simply do not have grounds for seeking damages under the statute, even if the release is unlawful.

What about seeking an injunction to prevent the agency from releasing the records? An earlier North Carolina Court of Appeals case explicitly held that that a company has a right to file a lawsuit seeking to prevent release of records under the public records law (that is, an action for injunctive relief). That case, *North Carolina Electric Membership Corp. v. North Carolina Department of Economic & Community Development* (108 N.C. App. 71, 716 (1993)) involved the potential disclosure of trade secret information a company submitted to a state agency. The company claimed that the information was protected under **G.S. 66-152** and prohibited from being released under **G.S. 132-1.2**. A competitor had requested the records and intervened in the lawsuit arguing, among other things, that the court had no jurisdiction to hear the case. The court disagreed, asserting that, "The fact that the statute provides an exemption for certain documents leads this Court to the logical conclusion that those claiming that their documents are exempt must have some recourse in our court system. To conclude otherwise, we believe, would offer no protection from agency error or from an agency's abuse of its discretion."

Like the trade secret information in the *Electronic Membership Corp.* case, personnel information is confidential under the public records law. Does that mean that the reasoning in that decision applies to a case involving employee records? The argument would be that since the law protects the confidentiality of information about the employee, the employee must have a right to petition the court to prevent its disclosure. Cases from other jurisdictions that have applied this reasoning in upholding employees rights to sue are discussed in David Lawrence's book, **Public Records Law for North Carolina Local Governments**, at p. 122-125.) The particular wording of the North Carolina statute, and the cases interpreting it, place the right of an employee to obtain even declaratory or injunctive relief somewhat in doubt.

It seems to me that there is a need to reconcile the two cases just discussed. The *Houpe* case, after all, clearly rejected an employee's attempt to recover damages under the personnel privacy statute. How does this square with the court's earlier holding that a company has a cause of action under the public records law to prevent release of its trade secret information in a public record? An obvious point could be the simple distinction that one case sought damages and the other, only injunctive relief. The argument could be made that the ruling in *Houpe* applies only to actions seeking damages, and that it does not limit an employee from bringing a claim that only seeks to prevent release of personnel records. If interpreted this way, it's possible that the logic in *Electric Membership Corp* could be extended to recognize that the exceptions in the personnel privacy statutes are designed to protect individual employee privacy interests, and that the importance of those interests justifies a judicial recognition of an opportunity to advocate for them and prevent the irreparable damage that might be caused by their release.

On the other hand, it could be argued that the holding in *Electric Membership Corp* doesn't reach personnel records, and is limited to exceptions under the public records law for which that law does not contain any other mechanism for enforcement. Indeed, the lack of any other mechanism to protect against abuse seemed to be an important basis for the ruling. As noted above, the opinion in *Houpe,* is based on the existence of the specific remedy available under the personnel statute, which was deemed to be exclusive. Under this analysis, and also in consideration of the fact that *Houpe* came later and deals with the specific statutory provision at issue (the personnel privacy statute), we might conclude that *Houpe* applies and the employee does not have the right to file a lawsuit enjoining the release of records.

Another line of cases involving litigation under the public records law might cause a court to limit actions initiated by employees. As summarized **in this post**, several North Carolina cases have held that our public records and open meetings laws do not allow a right of action by the agency itself, even for declaratory judgment, to obtain an interpretation of these laws. See ***McCormick v. Hanson Aggregates Southeast, Inc.,*164 N.C.App. 459 (2004)**, and ***City of Burlington v. Boney Publishers, Inc.,*166 N.C. App. 186 (2004)**. The *McCormick* case relied on the wording of the public records statute (wording that is also contained in the personnel privacy statutes), that only those denied access to records may file an action. These cases also reflect a judicial recognition of the policy of providing broad public access to records and of preventing the use of lawsuits to financially burden those who seek access. How would a court balance this

interest against the interest of a public employee who seeks to protect the privacy interests reflected in the statutory exemptions for personnel records?

A court's analysis of the strength of that privacy interest might affect how a court balances these interests. This brings up one more possible distinction between the situation in *Electric Membership Corp* and the case an employee might bring to enjoin release of personnel records. *Electric Membership Corp* involved trade secret information that was created by a private entity and that is entitled to protection under a separate statute as the property of that entity. Indeed, the quotation above from the opinion refers to the records as "their documents" even though the records sought were in fact government records. The personnel records in our scenario were created by the government as part of its personnel administration process. Indeed, even though the exceptions that protect information in personnel files clearly reflect a desire to protect individual privacy rights, those statutes allow the public agency to release personnel records when the agency deems it essential to effective administration of agency services. A court might conclude that the North Carolina statutory framework for protection of private trade secrets that become a part of government records creates a greater need and legal basis for a private right of action than does the statutory framework (which includes a criminal remedy for malicious release) for employee personnel records created by the public agency.

A final point about about the second option of trying to prevent release of records, is that these court opinions and policy considerations all arise in cases filed under the public records law. It's possible that declaratory or injunctive relief may be available to an employee in a claim that arises outside the public records law.

The employee's third option is intervention in a lawsuit if the requestor challenges an agency's refusal to produce records. As established in the *McCormick* case cited above, only a person denied access may bring such a suit, so the employee would have to petition the court to intervene if he or she felt that the agency's defense would be insufficient to protect his or her separate interests. It's possible that a court's assessment of how strong a privacy interest an employee has, and the extent to which the exception is designed to protect it, would come into play in determining whether to allow such intervention.

Links

- 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_66/GS_66-152.html
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-1.2.html
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