
Coates' Canons Blog: Setting Salaries and Closed Sessions

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The city council has scheduled a meeting to discuss four things related to employee salaries: 1) Review of a pay study prepared by a consultant that describes current employee salaries compared with market rates; 2) Whether to authorize an across-the-board cost of living raise for all employees; 3) A proposed reorganization which includes a recommendation for a reduction in force affecting several departments; and 4) A request from the city manager for a 5% salary increase to retain a key employee who has been offered a job in another city.

Which of these things *may* be discussed in closed session? Which things *must* be discussed in open session? Can action be taken on any of these things in closed session? Are there any of these things that can be handled either in open or closed session? Answers to these questions involve the laws governing closed sessions, the laws governing the confidentiality of personnel information, and the interplay between them. It's complicated, and some of the answers are not altogether clear. This blog post summarizes the key provisions of the relevant statutes, sets out some questions and answers about them, and applies the resulting conclusions to the four issues facing the city council.

Relevant Statutory Provisions

Personnel Privacy Statutes (G.S. 153A-98;160A-168)

Information in the personnel file of a local government employee is confidential. As interpreted by the courts, the personnel file comprises most of the employee-related records and information that exist in multiple physical places throughout the organization.

The statutes provide a list of specific information about employees that must be made available to the public. That list includes current salary and each increase or decrease in salary during the employment with a particular entity.

Open Meetings Law (G.S. 143-318.11)

A public body has authority to meet and act in closed session in order to prevent the exposure of confidential records or information. G.S. 143-318.11(a)(1).

A public body also has separate authority to meet in closed session to discuss the performance, qualifications, etc. of employees. G.S.143-318.11(a)(6). This authority is not limited to discussions of confidential personnel file information.

Here are three specific limitations about closed sessions under this provision:

- Discussions must relate to a specific employee, not to employees in general.
- No discussion of members of the public body itself, or of members of other public bodies is allowed.
- A final decision on an appointment or termination of an employee, made by a public body with authority to take such action, must be taken in open session.

Minutes of closed sessions involving discussion of employees are confidential personnel records. See, *Times News Publishing Company v. Alamance-Burlington Board of Education*.

Here are some questions and answers about issues that involve these provisions.

Is a public body always required to discuss employees in closed session?

No. Not always. If the information they are relying on exists only in the personnel file, then the discussion must be held in a closed session. But if the information is based on information independent of the personnel file, such as the board members' own impressions or experiences, then the discussion may be held in open session. So for example, the city council could discuss its own feelings about the manager's performance in open or closed session, but it would be required to go into closed session to discuss the manager's decision to put an employee on administrative leave. Similarly, although a public body has authority to hear citizen complaints about employees or public officers in closed session, it is not required to do so.

Are there any final actions involving employees that can be taken in closed session?

Yes. The statute requires hiring and firing decisions to be made in open session, but it does not list any other types of actions that must be taken in open session. Other personnel actions can, and perhaps must, be made in closed session. For example, in a mayor-council form of government, a decision to place an employee on administrative leave, or to place a warning in an employee's personnel file must be taken in closed session. This information is confidential and taking the action in open session would necessarily reveal it.

What about actions that involve confidential personnel information, but result in an action that is public once taken? Must these actions be taken in open session?

There is no clear answer to this question. It is often suggested that since salary information is public under the personnel privacy statutes, the setting of salary should be done in open session. There is nothing in any of the relevant statutes that requires this conclusion, and it's notable that the legislature has specifically required voting in open session regarding two other actions (hiring and firing) that are also public under the personnel privacy statute. By specifying that those actions must be taken in open session, the legislature may have implied that other actions could be taken in closed session. On the other hand, it could be argued that the setting of salary is a financial decision, rather than a personnel matter, and as such, is not a proper subject for a closed session decision. Certainly the discussion of performance that informs the salary decision may, and in some cases must, be conducted in closed session. In the case of salary, there is likely little risk of violating confidentiality with a public vote (but see the next question), and doing so honors the underlying policy of openness embodied in the open meetings law.

What if the board votes in open session to increase an employee's salary but that amount never actually becomes the person's actual salary?

This is the risk of taking action on salary in open session. Two scenarios raise possible concerns. First, what if the board is not united and a proposed increase (or decrease) in salary is voted down. Nothing about this action would have been public but for the decision to vote in open session since the new salary amount did not actually take effect. The link between the public nature of the salary and the need to act in open session does not exist in this scenario. Similarly, if a board approves a salary in an effort to retain the employee but the employee doesn't stay, the salary figure would not be public under the personnel privacy statute because it never became the employee's actual salary. Boards might have internal employee management reasons for not disclosing a retention-based salary offer.

What about other personnel actions that are public information? Should they be voted on in open session too?

There are other actions (in addition to salary) that, once voted upon, would be public information under the personnel privacy statute. For example, the fact that an employee has been suspended is public information. The reasons for the suspension are not. I've never heard anyone suggest that a vote on suspending an employee should be done in open session. As noted earlier, there is a risk of exposure if a proposed suspension does not get a majority of votes. Perhaps salary is unique because it is a financial decision. But this example suggests that just because a decision once made is public information does not necessarily imply that the decision must be made in open session.

There is nothing in any statute that requires the votes on these matters to occur in open session. All we know from the statutes is 1) these matters may be discussed in closed session; 2) they are not listed among the actions that must be

decided in open session; 3) the information about the action will be public once it is effective regardless of whether the action was taken in open or closed session.

Let's now revisit the matters to be taken up by the city council.

1) Review of a pay study prepared by a consultant that describes current employee salaries compared with market rates.

This document is a public record unless it contains recommendations regarding specific employees based on performance. So there is no *requirement* for the board to discuss it in closed session. If, however, the discussion will include consideration of salary changes for specific employees based on the study, then the board would have authority to have that discussion in closed session. If the discussion will involve information about specific employees that is drawn from the personnel file, the discussion *must* be held in closed session.

2) Whether to authorize an across the board cost-of-living raise for all employees.

There is no authority to have this discussion in closed session because it does not relate to the performance or conditions of employment of a specific employee. This must be discussed in open session.

3) A proposed reorganization, which includes a recommendation for a reduction in force affecting several departments.

It seems likely that this discussion will involve a discussion of individual employees based on information that is part of their confidential personnel files. If so, the discussion *must* be held in closed session. If the reduction in force is based purely on budgetary and organizational issues and does not involve any consideration of individual employee performance, this discussion *must* be held in open session.

4) A request from the city manager for a 5% salary increase to retain a key employee who has been offered a job in another city.

The discussion about the employee and her value to the city can be held in closed session, and *must* be held in closed session if information from the personnel file is involved, as it likely would be. What about the vote to authorize the raise? This is unclear. The employee may decide to leave even with an offer of a 5% raise. If that happens, the salary will never actually be an employee's current salary. Perhaps under these circumstances and given the lack of an explicit requirement in the statute for voting on salary, a board could reasonably authorize this increase in closed session.

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=153A-98
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=160A-168
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.11
- appellate.nccourts.org/opinions/?c=2&pdf=32741