
Coates' Canons Blog: Settlements Under the North Carolina Public Records Law

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Under the North Carolina public records law, government records are subject to public access unless an exception says they're not. The law's broad definition of "public records," as interpreted by the courts, covers any record, regardless of format, made or received in the transaction of public business. **GS 132-1**. So, if a government agency receives a request for a record that relates to the transaction of government business, and there is no exception that applies, the agency must provide access (inspection and/or a copy) as required under **GS 132-6**. Over the years, the legislature has modified the public records law, primarily to create new exceptions. In 1989, the legislature added a new statute about settlements. **GS 132-1.3** states that settlement records of certain types of actions are public records. It also restricts litigants and judges from sealing settlements in such actions, except in certain circumstances described in the statute. Unlike most of the other provisions in the public records law, the settlements statute seems primarily to affirm that settlements of the covered actions are public, and to restrict the sealing of settlements of those covered actions. This statute raises two issues, which are discussed below.

1. The statute applies only to settlements of actions *against* the agency. What about settlements in actions brought *by* the agency? Are they not public records? Or are they public records that may be sealed?

Before the enactment of the settlements statute, access to the terms of settlements was governed by the general provisions of the public records law. As David Lawrence describes it in *Public Records Law for North Carolina*, "the effect of GS 132-1.3 is not to open settlements to public access but rather to close some that probably would otherwise have been open." p. 238. With regard to sealing settlements, he notes that based on the caselaw at the time of the enactment of the settlements statute, "any attempt by the litigants to seal such settlements [was] unavailing." *Id.*

The statute says:

[A]ll settlement documents in any suit, administrative proceeding or arbitration instituted against any agency of North Carolina government or its subdivisions, as defined in G.S. 132-1, in connection with or arising out of such agency's official actions, duties or responsibilities, except in an action for medical malpractice against a hospital facility.

GS 132-1.3(a). The settlement statute says nothing about settlements of litigation filed by government agencies rather than against them. One might argue that this omission implies that such settlements are not public records. The North Carolina Court of Appeals rejected that argument, however, in *Jackson v. Charlotte Mecklenburg Hospital Authority*, 238 N.C. App. 351 (2014). An individual sought a copy of a settlement of an action that was filed by a hospital authority. The hospital authority argued that the settlement records were not public because they did not fall under GS 132-1.3. The court held that the settlements were public records because they met the general definition of public records, and no statutory exception exempted them from public access under the law. The court held:

It is well established that the purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of "public records" under N.C. Gen.Stat. § 132-1 (2013). Our Supreme Court has held that only specific statutory exceptions exempt documents meeting that definition from disclosure. Because the Public Records Act does not contain a specific statutory exception for settlement documents arising out of litigation instituted by a State agency, we hold that the trial court erred, and we reverse.

Jackson v. Charlotte Mecklenburg Hosp. Auth., at 352. Despite the awkwardness of the statutory construction, this is the only reasonable conclusion. It seems hard to imagine that the legislature intended, by negative implication, to exempt settlement records in actions brought *by* rather than *against* the government.

A related question is whether the settlements statute's rules on sealing settlement documents are limited to the actions covered by GS 132-1.3. It seems most likely that settlement documents that fall outside the settlement provision remain subject to the caselaw that restricts the sealing of such records. In other words, in adopting the settlements statute's sealing rules, the legislature didn't intend to change the law with regard to the sealing of settlements that fall outside the settlements statute. More likely the purpose was to create the exceptions to the prohibition as set out in the statute.

2. What about settlements involving employees of the agency? Are they governed by GS 132-1.3, or are they governed by the personnel records privacy statutes?

The statutes governing the confidentiality of employee records are not found in Chapter 132 – the public records law. Instead, separate statutes provide that records of employees are confidential and can be released only as allowed in the personnel records privacy statute. See, GS 160A-168 (cities), GS 153A-98 (counties), GS 115C-319 (public schools), GS 115D-27 (community colleges), GS 126-22 (state agencies), GS 131E-257.2 (public hospitals), GS 122C-158 (area authorities), GS 130A-45.9 (public health authorities), GS 162A-6.1 (water and sewer authorities). *Each one of these statutes says that access to employee records is governed by the personnel records privacy statute and is not regulated by GS 132-6.* The wording varies, but here are several common examples:

Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by this section.

GS 160A-168. The state employee statute reads:

126-22. Personnel files not subject to inspection under § 132-6.

(a) Except as provided in G.S. 126-23 and G.S. 126-24, personnel files of State employees shall not be subject to inspection and examination as authorized by G.S. 132-6.

The personnel records privacy statutes were enacted long before the settlements statute. It could be argued that the legislature could have created an exception to the settlements statute if they intended to exempt personnel settlements from becoming public. I think a better argument is that there was no need to create such an exception. The personnel records privacy statutes all say that GS 132-6 – the requirement to provide access to public records under Chapter 132 – simply does not apply to personnel records. As a result, the settlements statute does not apply to settlement records that are part of the personnel file.

Which kinds of settlement records might be part of the personnel file?

The settlements statute defines "settlement records" as:

[A]ll documents which reflect, or which are made or utilized in connection with, the terms and conditions upon which any proceedings described in this section are compromised, settled, terminated or dismissed, including but not limited to correspondence, settlement agreements, consent orders, checks, and bank drafts.

GS 132-1.3(c). The personnel privacy statutes vary a bit, but most provide examples of the types of records that are considered to be part of the personnel file. See, for example, this list from the city statute:

For purposes of this section, an employee's personnel file consists of any information in any form gathered by the city with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment.

GS 160A-168(a). Given the breadth of information listed as part of the personnel file, it seems likely that many settlement records involving employees will be confidential. Other laws may also restrict public access to settlement records. For example, workers' compensation settlement agreements and accompanying records will likely include medical records that are confidential under federal law.

On the other hand, some records that fall under the settlements statute may not be considered personnel records. Checks and bank drafts might properly be considered financial records and any money paid by the unit would be public information. Public agencies should review their personnel privacy statute to determine which records are properly considered to be confidential.

Conclusion

Settlement records that are not covered by GS 132-1.3 are still public records unless they are specifically exempted from the public records law. Because the personnel records privacy statutes explicitly exempt personnel records from the public records law, employee settlement records should be released only if they are in fact not personnel records.

Links

- www.ncleg.net/EnactedLegislation/Statutes/PDF/BySection/Chapter_132/GS_132-1.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_132/GS_132-6.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_132/GS_132-1.3.pdf
- www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_160A/GS_160A-168.pdf
- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_153A/GS_153A-98.pdf
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- www.ncleg.gov/EnactedLegislation/Statutes/PDF/BySection/Chapter_162A/GS_162A-6.1.pdf