
Coates' Canons Blog: Trial Court Review of Closed Session Minutes

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A North Carolina local school board renews its contract with a superintendent for an additional four years. Seven months later, the board meets in closed session to discuss a personnel matter. Immediately after the closed session, the superintendent resigns and the board approves a \$200,000 severance payment. The newspaper requests a copy of the closed session minutes. The board responds that the minutes are confidential personnel records and their release would frustrate the purpose of the closed session. The newspaper files a lawsuit to compel the release of unredacted minutes relating to the superintendent's employment. The board files a motion to dismiss the lawsuit arguing that the records are not subject to disclosure, so the complaint fails to state a claim for which relief can be granted.

Must the trial court take the board's word for it that the minutes are entirely confidential, and grant the motion to dismiss? Or should the trial court review the records to determine whether records may lawfully be withheld? The North Carolina Court of Appeals has held that the trial court must review the records.

The decision is *Times News Publishing Company v. Alamance-Burlington Board of Education*. It involves the interplay between the public records law and the open meetings law. As I discussed in my blog post here, these two distinct open-government laws intersect in G.S. 143-318.10(e). That statute states that minutes and general accounts of closed sessions are public records, but they can be withheld from public inspection "so long as inspection would frustrate the purpose of a closed session."

The *Times News* opinion contains an important holding. It says that records of closed sessions that contain information protected under the personnel privacy statutes will *always* frustrate the purpose of the closed session and can be withheld under the open meetings law provision. The exception in the public records law for personnel information is permanent, the court notes, so the withholding of meeting records containing such information "does not expire with the passage of time."

So why the need for trial court review? The court said that even if the personnel information may be permanently withheld:

[T]hat does not mean that all contents of closed session minutes in personnel cases are beyond disclosure. When a public body meets—particularly one made up of elected officials—the *discussion of a personnel matter often could include political and policy considerations broader than the "core" personnel information described in Section 115C-319*. Moreover, as we explained above, when the withholding is challenged in court, it is for the trial court, not the school board, to assess what is and is not subject to disclosure under this legal test.

Slip op. at 10 (emphasis added). The court remanded the case to the trial court for *in camera* review (that is, review by the judge in chambers out of public view) to determine whether releasing the minutes would frustrate the purpose of the closed session. The court also suggested that trial courts should not hesitate to grant stays pending appeal of orders to disclose records "because the court cannot un-ring the bell once information has been publicly disclosed." *Slip op. at 11, note 2*.

I can imagine plenty of situations in which trial court review would be necessary to determine whether the release of closed session minutes would frustrate the purpose of the closed session. In my blog post, I suggest three questions to

ask in making this determination:

1. Was the closed session validly held?
2. What is the nature of the matter that was the subject of the session and what is its status at the time of the request for or decision to release?
3. What specific information is included in the minutes/account and what is its status at the time of the request for or decision to release?

What is a bit puzzling about the *Times News* decision is the court's statement that closed session discussions "often could include political and policy considerations broader than the core personnel information" that is protected by the personnel privacy statute. This assertion does not seem to square with the language in the open meetings law, which specifically prohibits consideration of policy matters in a closed session held to consider personnel matters. The pertinent provision allows closed sessions:

To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. *General personnel policy issues may not be considered in a closed session.*

G.S. 143-318.11(a)(6)(emphasis added). So if a closed session included discussions of policy or political considerations unrelated to a specific employee, that part of the meeting was held in violation of the law. If the minutes disclosed that improper discussion, then a review of the minutes would disclose the violation. As a practical matter, however, it seems unlikely that such discussions, if they occurred, would be reflected in the minutes. The court's statement nevertheless seems to suggest that such non-personnel discussions might often occur, hence the need for trial court review. To the contrary, the list of personnel matters that may be considered in a closed session tracks quite closely with the core personnel information that is confidential under the personnel privacy statute. So it seems unlikely that minutes of closed sessions discussing personnel matters could lawfully include any information that is not confidential.

Of course there is no reason for the court to require that litigants must take the public agency's word for it when the agency says the minutes must be withheld. *In camera* review is a fair way to make sure that the balance of privacy and transparency is maintained. But since the court concluded that the release of confidential personnel information always frustrates the purpose of a closed session, the only purpose of such review would be to determine whether the minutes reflect discussions that should not have occurred in closed session. It follows, as well, that in order to survive a motion to dismiss, a complaint should have to clearly indicate that the plaintiff seeks records that do not contain core personnel information that is confidential under the personnel privacy statutes.

Links

- appellate.nccourts.org/opinions/?c=2&pdf=32741
- canons.sog.unc.edu/?p=6763
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.10.html
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