Coates' Canons Blog: Waiting for Interpretations of the New Personnel Privacy Provisions: What Options Do Local Governments Have?

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On October 1, 2010, 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. (This is information that will be "a matter of public record" as a result of changes in the **personnel privacy statutes**, summarized in a **previous post**.) The city is unsure about what, if anything, must be provided in response to the request. There is no record that precisely fits the description of what is public under the statute. The city dismissed chief Jones 10 years ago. Jones was an "at will" employee, and there was no hearing or other formal process for the dismissal. Jones' 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. Although the memorandum and the dismissal letter are documents that contain information about reasons for dismissal, perhaps the city's only obligation is to provide a copy of a record as described in the statute if that exact type of record exists. Release of the other records might be an unlawful disclosure of confidential information. The city may also be concerned about whether the release of the reasons for dismissal might trigger the right to a "name clearing hearing" under the constitutionally protected liberty interest. On the other hand, failure to disclose the information could create liability for attorneys' fees if the person requesting the records substantially prevails in lawsuit to compel disclosure.

Where can the city go for an interpretation – the courts? the state Attorney General? And how much time does the city have to obtain guidance before the person requesting the records can claim that the city has unlawfully refused the request?

Opinion From a Court

The city might reasonably conclude that the best option is take the matter to court and get a judicial ruling clarifying the city's obligation under the law. This would involve filing a lawsuit – probably an action for declaratory judgment – asking the court to answer the question of whether the records must, or must not, be provided. Despite the value of having a court ruling to clarify the city's obligation, this is probably not an option. Under existing North Carolina case law, it seems very unlikely that the city can bring such an action.

In ***McCormick v. Hanson Aggregates Southeast, Inc.,* 164 N.C.App. 459 (2004)**, the North Carolina Court of Appeals held that the **Public Records law (Chapter 132 of the General Statutes)** does not allow a public agency to bring an action for a declaratory judgment as to the city's obligation to provide records requested under that law. The specific language in **G.S. 132-9**allows "any person who is denied access" to initiate an action to compel disclosure. The court interpreted the language to mean that only those persons who request the records to file an action to determine what must be disclosed. Why the one-sided result? Although the court recognized that the statute is silent about the right of the agency to bring the action, the court noted the policy implications of a contrary result, citing a California case, *Filarsky v. Superior Court,* 49 P. 3d 194 (2002). That case held that an agency lawsuit would require members of the public to incur the cost of litigation, and would eliminate the protections and incentives in the law for open access to records. In effect, the case reflects a concern about the chilling effect of agency-initiated litigation on public access. The court reached the same result in***City of Burlington v. Boney Publishers, Inc.,* 166 N.C. App. 186 (2004)**, interpreting the Open Meetings Act to allow only a person "seeking a declaration that an action of a public body was in violation of the Open Meetings Act" to file an action for its enforcement. *Boney at 193.*

The language about who can bring an action under the Public Records act is also contained in the personnel privacy statute (**G.S. 160A-168(b)**). It seems likely that a court would reach the same result as it did in the earlier cases, which

means that an opinion from a court would only become available if the city denies access and the requester chooses to file an action to compel disclosure.

Advice from Attorneys

The city will certainly look first to the city attorney for advice. Since the statutory provision is new, the city attorney faces significant challenges in determining the best course of action. The statutory provisions won't have been interpreted by the North Carolina courts, and cases from other states are unlikely to be much help unless their statutes have the identical wording about the specific record that must be produced. Other resources, such as the League of Municipalities and the School of Government might also be tapped.

Seeking an opinion from the state Attorney General's office seems like an extremely good option. Not only does this provide an objective and authoritative analysis of the law, it may protect the city in the event of a lawsuit. Under another new provision in the law (summarized in **another post**) a city is not liable for attorneys' fees under the Public Records law if it reasonably relies on an Attorney General's opinion.

But there is a question (another unresolved legal issue) about whether the attorneys' fees provision in the Public Records law applies to requests for personnel records under 160A-168. As noted earlier, the Public Records law provides a remedy and the possibility of recovering attorneys' fees for anyone who is denied access to records. **G.S. 132-9(c)**. But the particular provision at issue in our scenario is in **G.S. 160A-168(a)**, which says "Notwithstanding (provisions of the Public Records law) or any other general law or local act concerning 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."* (emphasis added). So does the provision about attorneys' fees in public records cases even apply to personnel records or information requested under 160A-168?

This appears to be an open question of law, resolution of which will depend upon how broadly a court is willing to read the language in **G.S. 132-9** of the Public Records law. That statute provides a right of action for "any person who is denied access to *public records*…" It doesn't specifically say public records requested *under the Public Records law*. The attorneys' fees provision, however, applies to actions brought "pursuant to this section (section 132-9) in which a party successfully compels the disclosure of public records…" The answer hangs on whether a court views the remedy provided as applying only to public records requested under the Public Records law, or public records more generally. Since nothing in G.S. 132-9 specifically limits its application to public records under the Public Records law, it seems possible that a court might apply the statute to a lawsuit involving access to records, or information about records, contained in a personnel file under G.S. 160A-168.

Waiting for an Opinion

Even though it's not clear whether the person requesting the record about Chief Jones' dismissal would have a right to attorneys' fees if he or she brought an action to compel disclosure, and it's not clear whether the city's "safe harbor" for reliance on an Attorney General's opinion would apply, the city may still consider it prudent to seek guidance from the Attorney General. Is it permissible for the city to delay release of requested records or information pending the receipt of such an opinion? The statutes don't establish a specific time frame for responding to records requests. Under **G.S. 132-6(a)** the custodian of records must provide access for inspection "at reasonable times and under reasonable supervision,"and must provide copies "as promptly as possible." Given the possibility that the city could face liability for releasing, and for not releasing the records, a delay for the purpose of obtaining an interpretation of the city's obligation may well be considered reasonable. If a court opinion can only be obtained by the person seeking the records, it seems even more reasonable – perhaps essential – for the city to seek guidance from the Attorney General, and for a reasonable time to be allowed for the receipt of that guidance before responding.

Links

- www.ncleg.net/EnactedLegislation/SessionLaws/HTML/2009-2010/SL2010-169.html
- canons.sog.unc.edu/?p=2798
- appellate.nccourts.org/opinions/?c=2&pdf=22627
- www.ncleg.net/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_132.html

- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-9.html
- appellate.nccourts.org/opinions/?c=2&pdf=22849
- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-168.html
- canons.sog.unc.edu/?p=2884