Coates' Canons Blog: What Happens in Closed Session, Stays in Closed Session…Or Does It?

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Elected officials and others are usually surprised to learn that there is no general law that prohibits board members from disclosing information obtained in a closed session. Disclosure of specific types of information is prohibited by separate statutes that make such information confidential (whether from a closed session or in any other context). So long as confidential information is not involved, board members are free to exercise their First Amendment rights to communicate about matters that are discussed in closed session. Could the board adopt an ethics code or other rule prohibiting this? Would a contractual agreement among the board members be legally enforceable? Should the board take other steps to prevent this from happening?

What types of information are confidential?

Public bodies have limited **authority to meet in closed session**. In several cases, closed sessions are authorized in order to prevent unlawful disclosure of confidential information. In other cases, the authorization to meet in closed session is optional, and reflects more practical concerns, such as allowing private consultation with an attorney and avoiding disclosure of a negotiating position. **Trade secrets** and many types of **personnel information** are examples of information that is confidential under state law. So when matters involving these types of information are discussed in closed session, it's the underlying statutes that prohibit disclosure, not the fact that it was discussed in closed session. In other cases, such as those involving consultations with the board attorney, or discussions about economic development incentives (assuming no trade secrets are disclosed), there is no statutory prohibition on communications to the press and the public about what transpired.

Can the board restrict communications about closed sessions?

The disclosure of information from closed sessions is extremely controversial. Most elected officials assume that there is a prohibition, since the ability to disclose information undermines the practical and strategic purposes of going into close session in the first place. Could a local governing board adopt a policy or ethics code provision prohibiting disclosure of closed session information? Such a provision, if adopted, would mostly function as a symbolic or aspirational statement by the board. Although the board could admonish its members not to violate the law by disclosing confidential information, it cannot restrict the rights of individual members to exercise their free speech rights, and there is no clear authority for any kind of sanction. (It's unclear whether such disclosure would warrant removal under the common law sanction of **amotion,** assuming a court still recognizes this an available sanction.)

Could the board members voluntarily agree (by contract) not to disclose closed session information? Would such a contract be enforceable?

Although there is no North Carolina case exactly on point, analogous cases suggest that such a contract would be enforceable if it is knowingly, and voluntarily entered into, and if it does not "undermine the relevant public interest." Even though this type of contract would involve a promise to waive a constitutional right, cases involving these types of promises have been upheld. For example, in a case arising out of North Carolina, a federal court upheld an agreement between a county and its volunteer fire department that required the department to refrain from any court challenges to citizen petitions requesting removal from its district. *Lake James Community Volunteer Fire Dept., Inc. v. Burke County, N.C.*, 149 F.3d 277 (4th Cir.1998). The court held that a contract that includes a waiver of a constitutional right (here, the right to pursue claims in court) will be enforced unless the interest promoted by its enforcement is outweighed by public policy harms resulting from enforcement. Cases cited in this opinion and other opinions apply this standard, enforcing voluntary promises that include waivers of constitutional rights, including free speech rights. *See, Pierce v. St. Vrain Valley School Dist. RE-1J,* 981 P.2d 600 (Colo. 1999) (enforcing school board's nondisclosure promise in settlement agreement).

Even if such a contract is valid, its effect may be more symbolic or moral, than legal, as it's unclear whether any remedy for breach of the contract would be effective in preventing a disclosure.

Is disclosure of closed session information always a bad thing? Are there circumstances where it would harm the public interest to *prevent* disclosure?

It's easy to imagine the types of harm that could come from disclosure of closed session conversations. It's also possible, however, to imagine the perspective of a person who might feel compelled to take this step. If the motivation is simply disagreement with the actions being taken or proposed in closed session, it's possible to argue that a limitation on disclosure is reasonable, since the board members have all of the normal avenues for exercising their political power to vote against or otherwise express opposition to the actions. But what if a member's motivation is based on a good faith belief that the actions of the board in closed session are unlawful? For example, imagine a situation where one or more board members believe that the board has exceeded or abused its authority to meet in closed session. If these were the facts of a case challenging the enforcement of a contract prohibiting disclosure of closed session actions, I can imagine a court refusing to enforce the contract on public policy grounds.

Where does this leave a board that wants to address this issue?

Against the strong constitutional interest in free speech rights, boards are fairly limited in their ability to control what their colleagues say. Fundamentally, this issue is probably better addressed in terms of board relations rather than legal rights or remedies. Boards should consider discussing the legal restrictions on disclosing confidential information, and the fact that individuals who disclose such information may incur personal liability. They may also discuss the potential harms caused by disclosing conversations – that disclosure may compromise efforts that are designed to benefit the unit and its citizens, or that it may violate the trust that allows open discussion and free exchange of ideas among board members during closed sessions. The reality that disclosure of nonconfidential information is legal may create a chilling effect on legitimate uses of closed session authority, but it may also function to limit abuses.

Links

- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_143/GS_143-318.11.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-1.2.html
- www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/BySection/Chapter_160A/GS_160A-168.html