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## Coates' Canons Blog: Who Can Request Public Records?

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Article: <https://canons.sog.unc.edu/who-can-request-public-records/>

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The United States Supreme Court recently upheld a provision in the state of Virginia's Freedom of Information Act (FOIA), which allows only Virginia citizens to request public records under the act. The case is *McBurney v. Young*. Could a North Carolina local government impose a similar limitation? The answer is "no". Our statute provides access to "persons" and has never been interpreted to apply only to persons who are residents or citizens of the state. A local government has no authority to limit the scope of the state statute. The Supreme Court decision suggests, however, that the United States Constitution would not prevent the North General Assembly from creating such a limitation.

Virginia's FOIA provides that "all public records shall be open to inspection and copying by any citizens of the Commonwealth," but it grants no such right to non-Virginians. (The court noted seven other states with similar restrictions.) Petitioners *McBurney* and *Hurlbert* are non-Virginians who claimed that the restriction violated the Privileges and Immunities and dormant Commerce Clauses of the United States Constitution. *McBurney* sought information from a public agency regarding his efforts to compel his ex-wife to make child support payments. *Hurlbert* has a business that involves obtaining real estate tax records from state and local governments across the country. The petitioners argued that the citizens-only provision violates four different "fundamental" privileges or immunities: the opportunity to pursue a common calling, the ability to own and transfer property, access to the Virginia courts, and access to public information. The court held that the first three items on the list were not abridged by the Virginia FOIA. The court noted that many of the records *McBurney* and *Hurlbert* sought were actually available to them under other laws.

The Court also rejected the claim under the dormant Commerce Clause, a constitutional doctrine that reflects an implicit limitation on State interference with interstate commerce. (Justice Thomas entered a concurring opinion for the sole purpose of reiterating his view that that "[t]he negative Commerce Clause has no basis in the text of the Constitution, makes little sense, and has proved virtually unworkable in application, and, consequently, cannot serve as a basis for striking down a state statute.") The Court concluded that Virginia's FOIA law neither "regulates" nor "burdens" interstate commerce; rather, it merely provides a service to local citizens that would not otherwise be available at all.

Most importantly, perhaps, the Court held that there is no general common law or constitutional right of access to governmental information. The Court noted that FOIA laws are of "relatively recent vintage," the federal FOIA having been enacted in 1966.

A key aspect of the Court's analysis is its characterization of the state's purpose in creating a statutory right of access to records and meetings for its citizens:

"By its own terms, Virginia's FOIA was enacted to 'ensure the people of the Commonwealth ready access to public records in the custody of a public body or its officers and employees, and free entry to meetings of public bodies wherein the business of the people is being conducted'... The state FOIA essentially represents a mechanism by which those who ultimately hold sovereign power (*i.e.*, the citizens of the Commonwealth) may obtain an accounting from the public officials to whom they delegate the exercise of that power... In addition, the provision limiting the use of the state FOIA to Virginia citizens recognizes that Virginia taxpayers foot the bill for the fixed costs underlying record keeping in the Commonwealth... Even shoehorned into our dormant Commerce Clause framework... *Hurlbert's* claim would fail. Insofar as there is a 'market' for public documents in Virginia, it is a market for a product that the Commonwealth has created and of which the Commonwealth is the sole manufacturer. "

The language in North Carolina's public records law seems quite consistent with the Court's holding about the purpose of Virginia's law. As stated in G.S. 132-1(b) "The public records and public information compiled by the agencies of North

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Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.” I suppose it could be argued that the intent of the statute is to provide access to the people of North Carolina. Without an explicit limitation in the statute, however, I don’t think a court would uphold the denial of access to a non-North Carolina requester.

North Carolina local government officials might well be jealous of Virginia’s citizen-only rule. Demands for access to public records by businesses from outside the state are sometimes a frustration to public agencies. A private company recently sent a records request to numerous North Carolina local governments seeking copies of all invoices and contracts for the past 5 years. The company proposes to use this information to develop a database, which it will market to public agencies and vendors for a fee. The Supreme Court’s mention of tax dollars footing the bill for the costs of record-keeping might resonate with these agencies, especially since the North Carolina law generally does not allow the recovery of personnel time for responding to the request.

In the Virginia case, the Court rejected petitioner’s claim that the state’s law impeded his ability to operate his business. Does this mean that North Carolina public agencies can refuse to provide records that will be used for an out-of-state commercial purpose? I’m afraid not. In addition to the broad right access for any person, our statute specifically prohibits consideration of, or even inquiry about the purposes for which records are sought. And there is a provision in the statute specifically authorizing a limitation on commercial use, but it only applies to GIS records. (See G.S. 132-10.)

As I’ve described here, North Carolina public agencies have almost no authority to impose conditions on the right of access to public records. Requests do not have to be in writing, nor does a person even have to identify him or herself. Access to public information is an important part of a healthy democracy, and there are important policy issues to consider when crafting the requirements for public access. It’s also worth noting, of course, that a citizen-only law doesn’t necessarily prevent access. It may simply mean that a person has to use an in-state intermediary to obtain records. The Supreme Court has made clear, in any case, that limitations on access are mostly policy considerations, rather than constitutional ones.

## Links

- [www.supremecourt.gov/opinions/12pdf/12-17\\_d1o2.pdf](http://www.supremecourt.gov/opinions/12pdf/12-17_d1o2.pdf)
- [www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=132-10](http://www.ncleg.net/gascripts/statutes/statutelookup.pl?statute=132-10)
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