

Chapter 153A. Counties

▣ Article 5. Administration

▣ Part 4. Personnel

→ § 153A-98. Privacy of employee personnel records

(a) 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 county are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the county 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. As used in this section, "employee" includes former employees of the county.

(b) The following information with respect to each county employee is a matter of public record: name; age; date of original employment or appointment to the county service; the terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the county has the written contract or a record of the oral contract in its possession; current position title; current salary; date and amount of the most recent increase or decrease in salary; date of the most recent promotion, demotion, transfer, suspension, separation or other change in position classification; and the office to which the employee is currently assigned. For the purposes of this subsection, the term "salary" includes pay, benefits, incentives, bonuses, and deferred and all other forms of compensation paid by the employing entity. The board of county commissioners shall determine in what form and by whom this information will be maintained. Any person may have access to this information for the purpose of inspection, examination, and copying, during regular business hours, subject only to such rules and regulations for the safekeeping of public records as the board of commissioners may have adopted. Any person denied access to this information may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders.

(c) All information contained in a county employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:

- (1) The employee or his duly authorized agent may examine all portions of his personnel file except (i) letters of reference solicited prior to employment, and (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient.
- (2) A licensed physician designated in writing by the employee may examine the employee's medical record.
- (3) A county employee having supervisory authority over the employee may examine all material in the employee's personnel file.
- (4) By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.
- (5) An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be necessary and essential to the pursuance of a proper function of the inspecting

agency, but no information shall be divulged for the purpose of assisting in a criminal prosecution of the employee, or for the purpose of assisting in an investigation of the employee's tax liability. However, the official having custody of such records may release the name, address, and telephone number from a personnel file for the purpose of assisting in a criminal investigation.

(6) An employee may sign a written release, to be placed with his personnel file, that permits the person with custody of the file to provide, either in person, by telephone, or by mail, information specified in the release to prospective employers, educational institutions, or other persons specified in the release.

(7) The county manager, with concurrence of the board of county commissioners, or, in counties not having a manager, the board of county commissioners may inform any person of the employment or nonemployment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of a county employee and the reasons for that personnel action. Before releasing the information, the manager or board shall determine in writing that the release is essential to maintaining public confidence in the administration of county services or to maintaining the level and quality of county services. This written determination shall be retained in the office of the manager or the county clerk, is a record available for public inspection and shall become part of the employee's personnel file.

(c1) Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

(1) Testing or examination material used solely to determine individual qualifications for appointment, employment, or promotion in the county's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.

(2) Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded.

(3) Information that might identify an undercover law enforcement officer or a law enforcement informer.

(4) Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

(c2) The board of county commissioners may permit access, subject to limitations they may impose, to selected personnel files by a professional representative of a training, research, or academic institution if that person certifies that he will not release information identifying the employees whose files are opened and that the information will be used solely for statistical, research, or teaching purposes. This certification shall be retained by the county as long as each personnel file so examined is retained.

(c3) Notwithstanding any provision of this section to the contrary, the Retirement Systems Division of the Department of State Treasurer may disclose the name and mailing address of former local governmental employees to domiciled, nonprofit organizations representing 2,000 or more active or retired State government, local government, or public school employees.

(d) The board of commissioners of a county that maintains personnel files containing information other than the information mentioned in subsection (b) of this section shall establish procedures whereby an employee who objects to material in his file on grounds that it is inaccurate or misleading may seek to have the material removed from the file or may place in the file a statement relating to the material.

(e) A public official or employee who knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file, except as is permitted by this section, is guilty of a Class 3 misdemeanor and upon conviction shall only be fined an amount not more than five hundred dollars (\$500.00).

(f) Any person, not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully examine in its official filing place, remove or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars (\$500.00).

UPDATE ON NORTH CAROLINA PUBLIC RECORDS LAW AND CASES

- **Cooper ex rel. State v. McAden 2008 WL 426617, 1 (N.C. App. 2008)(Stephens, J. with McCullough and Calabria concurring)**

In this very unusual public records case, the plaintiff – the State of North Carolina – brought suit under the Public Records Law for recovery from defendant a battle flag of the 18th North Carolina Regiment which was captured by Private Frank Fesq of the 40th New Jersey Volunteers in the trenches of the Confederate Army at Petersburg, Virginia, on 2 April 1865. Under President Grover Cleveland's directive, the flag was returned to the State and was kept by the North Carolina Hall of History. Without saying *how* the flag escaped custody of the State, the State alleged that McAden was not the lawful owner of the flag and sought, under the seldom used provision for return of a public record (G.S. § 132-5.1). (It is reported that McAden paid \$10,000 for the flag, which he saw advertised in *The Shotgun News*.) The Court found that the flag was a public record and, denying McAden's claims that the State had abandoned the flag, ordered it returned to the State. "We agree with Respondent that the evidence in this case tends to show that Museum officials knew Respondent was in possession of the flag for many years before the State took action to seek its recovery. Museum officials, however, are mere custodians of the State's property, and their action or lack of action does not indicate a grant by the State to discard the flag." Addressing McAden's claims that he should be reimbursed for his costs in acquiring and preserving the flag, the Court found that a decision to reimburse would be the sole province of the legislature.

- ***News and Observer Pub. Co. v. Easley*, 182 N.C. App. 14, 641 S.E.2d 698 (2007) (Geer, J. with Calabria and Jackson concurring)**

The News & Observer sought, pursuant to the Public Records Law, access to the governor's records created, received or maintained related to clemency requests. Finding the governor's argument persuasive, the Court ruled that the North Carolina Constitution provides a very narrow area in which the General Assembly may legislate, relative to the governor's exercise of his clemency powers. "The constitution expressly allows the General Assembly to enact legislation 'relative to the manner of applying for pardons.' *Id.* All other clemency authority rests with the Governor. ... [Such regulation must] specifically relate 'to the manner of applying for pardons' and, therefore, legislation such as the Public Records Law, which does not specifically reference clemency, cannot be allowed to intrude upon the Governor's clemency authority." *Id.* at 16, 641 S.E.2d at 700. The Court rejected the N&O's argument that the overlay of the Public Records Law constituted a regulation "relative to the manner of applying for pardons." *Id.* at 22, 641 S.E.2d at 704.

- ***News Reporter Co., Inc. v. Columbus County*, 184 N.C. App. 512, 646 S.E.2d 390 (2007) (Geer, J. with Levinson and Jackson concurring)**

The Court in this case considered the interplay between the Public Records Law and the confidentiality provisions of North Carolina's public employee personnel statutes. Ronald Hayes, a Columbus County employee and director of the EMS, wrote a memorandum about Dr. Fred Obrecht, the county's independent contractor medical director. The memo was provided to the county manager and county commissioners and was placed in Hayes' personnel file. The county argued that Hayes' memo was not a public record because drafting it was not part of his job duties, nor was it part of his job duties to have input into the selection of the county's medical director. The county argued that the memo was nothing more than his "personal" expression of his feelings about Dr. Obrechts. The Court rejected that argument, however. "It is undisputed that Hayes' letter was written by a county employee, who was required to work with the medical director, and was received by the Board in connection with its

decision regarding whom to hire as medical director, an independent contractor of the County. We hold that, under these circumstances, the Hayes letter constituted a public record." *Id.* at 514, 646 S.E.2d at 392. Nonetheless, the Court found some authority for the county's position "that the letter constitutes a 'personnel record' because it relates to Hayes' performance as a county employee and it was placed in his personnel file." *Id.* at 515, 646 S.E.2d at 393. While rejecting the county's argument that placing the memo in Hayes' personnel file made it a personnel record, the Court did find that those portions of the memo discussing Hayes' interactions with Dr. Obrecht constituted confidential personnel information because, "to the extent it discusses Dr. Obrecht, also relates to Hayes' performance as a county employee." *Id.* at 517, 646 S.E.2d at 394. The remaining portions of the memo – addressing Hayes' recommendation of a different doctor for the position and describing Hayes' interaction with the board of county commissioners related to their selection – were not personnel information and were subject to disclosure under the Public Records Law.

- **Quality Built Homes, Inc. v. Village of Pinehurst, 2008 WL 3503149 (M.D.N.C. 2008) (Dixon, M.J.)**

Despite its requirement that public records be provided "as promptly as possible," the U.S. District Court for the Middle District of North Carolina found that the Public Records Law "does not provide relief for mere delay in producing copies of public records." Ruling on a case in which there was as much as a 13-day delay in production of public records, the court found in favor of defendants, found the Public Records Law claims were frivolous and found that defendants were entitled to recover their attorneys fees in defending the action.

- **MLC Automotive, LLC v. Town of Southern Pines, 2007 WL 128945 (M.D.N.C. 2007)(Dixon, M.J.)**

Recognizing statutory provision that public agencies enjoy more limited attorney-client privilege than private sector clients, the Court applied statute to find "that the only communications that are protected are those made by the attorney to the governmental body" and ordered disclosure of communications "flowing from the Town and its employees and agents to the Town's attorney, regardless of whether the communications involved the Architectural Compliance Permit application or the zoning issue."

UPDATE ON NORTH CAROLINA OPEN MEETINGS LAW AND CASES

- **Knight v. Higgs, ___ N.C. App. ___, 659 S.E.2d 742 (2008) (Steelman, J. with McGee and Geer concurring)**

The underlying issue in this case was Roosevelt Higgs' challenge to Andre Knight's voter registration. Knight moved for the recusal of Board of Elections Chair Gladys Shelton based on Shelton's earlier statement that Knight did not live in Edgecombe County. The motion was supported by three affidavits but was not entertained by the Board. Instead, the Board's attorney summarily denied the motion. *Id.* at 744. Deliberations spread over multiple days, and during one of the meetings, it was announced that the Board would "go into Executive Session for just a moment." *Id.* Later, the chair announced "the Board members would talk among themselves and 'make some kind of decision.'" The Board then went into a second closed session. Upon the members' return to the open meeting, it was announced that the hearing would resume on 17 October 2006." *Id.* at 744-45. Repeating a decades-old principle that "A Board may act only as a body and only in a meeting" and that " 'public bodies should act in open session because they serve the public-at-large,'" the Court found multiple violations of the Open Meetings Law. There was no motion to go into closed session and no underlying justification of such a motion. Possibly most importantly, the Court found that "meeting with the attorney to discuss procedure does not fall under any of the exceptions set forth in subparagraph (a)." *Id.* The Court found equally problematic the second closed session to "talk among ourselves and make some kind of decision." *Id.* The Court reiterated that "deliberation on the record is one of the enunciated principles of the Open Meetings Law." Finally, the Court found the Board's failure to consider the recusal motion to be a violation of the Open Meetings Law. *Id.* The Court found the plaintiff to be the prevailing party for the purposes of an attorneys fees analysis and remanded the case to the trial court for such a determination.

- **McClure v. County of Jackson, 185 N.C. App. 462, 648 S.E.2d 546 (2007) (Steelman, J. with Wynn and Jackson concurring)**

Plaintiff in this action was a member of the Jackson County Airport Authority, having been appointed by the Board of Commissioners. Plaintiff later was appointed to the Economic Development Commission. On January, 12, 2005, the Jackson County Board of Commissioners discussed plaintiff's fitness for these appointments in closed session and, in open session, voted to remove plaintiff "from all county committees and appointments." Plaintiff filed suit for, among other things, the county commissioners' closed session consideration of his removal. The trial court found the closed session discussion was a violation of the law and ordered plaintiff reinstated to his positions. Plaintiff filed a motion for recovery of attorney fees, after which the defendant filed a notice of appeal. Notwithstanding the appeal, the trial court granted plaintiff's motion and awarded plaintiff approximately \$35,654 in attorney fees and \$693 in costs. On appeal, the defendant challenged the attorney fee award, arguing that the trial court had been divested of jurisdiction by the notice of appeal. During the pendency of the appeal, plaintiff's terms on the airport authority and EDC expired, raising the additional appellate question of whether such mootness of his claim affected the award of attorney fees. The Court found that the trial court lacked jurisdiction at the time it entered the attorney fee award and remanded the case for entry of a new order on the attorney fees issue.