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## Public Records

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The 2005 General Assembly enacted three significant acts concerning public records: the first is intended to provide protection against identity theft by restricting public access to Social Security numbers and other personal identifying information, the second protects the trial preparation materials of government lawyers from public access, and the third concerns public access to records relating to economic development projects. This chapter addresses these three acts at some length and then briefly summarizes other public records legislation.

### **Social Security Numbers**

S.L. 2005-414 (S 1048) enacts the Identity Theft Protection Act of 2005. Most of the act regulates how private businesses may use Social Security numbers and other personal identifying information, but it also enacts new G.S. 132-1.10 regulating governmental use and distribution of this type of information. *Identifying information*, defined in G.S. 14-113.20, includes driver's license numbers, checking and savings account numbers, credit and debit card numbers, digital signatures, biometric data, fingerprints, and passwords.

Subject to certain exceptions set out below, new G.S. 132-1.10 prohibits state and local government agencies from doing the following:

1. Effective December 1, 2005, an agency may not collect a Social Security number from an individual unless either authorized by law to do so or "collection of the social security number is otherwise imperative for the performance of that agency's duties and responsibilities." Before an agency may collect Social Security numbers, it must document the need for the numbers. In addition, the State Privacy Act (codified at G.S. 143-64.60), which mirrors a comparable federal statute, prohibits a state or local government agency from denying any person any right, benefit, or privilege simply because that person refuses to disclose his or her Social Security number to the agency. The only exceptions to the Privacy Act prohibitions are when disclosure of the number is required or permitted by federal statute or when the disclosure is subject to a state law or regulation in existence before January 1, 1975. In addition, the Privacy Act requires an agency requesting Social Security numbers to inform individuals whether the disclosure is mandatory or voluntary, under what statutory authority the number is requested, and what use the agency will make of the number. The new public records statute repeats the requirement that individuals be given a statement of the purpose or purposes

for which the number is being collected, but conditions the requirement on an individual's requesting the statement. The unconditional requirement set out in the Privacy Act, however, remains in force.

2. Effective December 1, 2005, an agency must maintain any Social Security numbers it collects in a way that facilitates the number's redaction if the record in which it is found will be made public. If the record is maintained in physical form, the statute urges that the number be segregated on a separate page.

3. Effective December 1, 2005, an agency may not use a Social Security number for any purpose other than the purpose or purposes included in the statement made available to individuals when the number is collected.

4. Effective December 1, 2005, an agency may not intentionally communicate or otherwise make available to the public either a person's Social Security number or other personal identifying information. (For purposes of this prohibition, identifying information does not include electronic identification numbers, electronic mail names or addresses, Internet account numbers or identification names, a parent's legal surname before marriage, or driver's license numbers found on law enforcement records.) This is the only provision in the new statute specifically limiting what governments may do with identifying information other than Social Security numbers. [In what may be a bit of redundancy, S.L. 2005-455 (S 1126) prohibits the Wildlife Resources Commission from making public personal identifying information in its possession taken from applicants for licenses, titles, permits, and registrations. The Wildlife Commission statute defines such information more broadly than does the Identity Theft Protection Act, including within the definition a person's mailing address, residence address, date of birth, and telephone number.]

5. Effective July 1, 2007, an agency that provides persons a card required for access to government services may not intentionally print or embed that person's Social Security number on the card.

6. Effective July 1, 2007, an agency may not require a person to transmit his or her Social Security number over the Internet unless the connection is secure or the number is encrypted.

7. Effective July 1, 2007, an agency may not require a person to use his or her Social Security number to access an Internet Web site unless a password, unique personal identification number, or other authentication device is also required.

8. Effective July 1, 2007, an agency may not print a person's Social Security number on any materials mailed to the person unless state or federal law requires that the number be on the mailed document. In addition, if the number is permitted to be mailed, it may not be printed on the envelope or postcard or otherwise be visible without the envelope having been opened.

The new statute then sets out seven exceptions to the prohibitions just summarized:

1. An agency may disclose Social Security numbers or other identifying information to another governmental entity only if disclosure is necessary to the other entity's work. The receiving entity must, however, maintain the confidentiality of the numbers and other information.

2. An agency may disclose Social Security numbers and other identifying information pursuant to a court order, a warrant, or a subpoena.

3. None of the prohibitions apply to Social Security numbers or other identifying information disclosed for public health purposes in compliance with G.S. Chapter 130A. For example, vital records routinely include an individual's Social Security number, and this new statute apparently does not apply to these records.

4. None of the prohibitions apply when the Social Security number or other identifying information has been redacted. The act's provisions applicable to private businesses define *redaction* as "the rendering of data so that it is unreadable or is truncated so that no more than the last four digits of the identification number is accessible as part of the data." This definition does not, on its face, apply to the new public records statute, nor does that statute define redaction. Therefore, it is unclear whether redacting all but the final four digits of a Social Security number would be an acceptable means of redaction under the public records statute as well, although it seems likely intended to be.

5. The State Registrar and other authorized officials may include Social Security numbers in certified copies of vital records issued pursuant to G.S. 130A-93(c). If the Registrar issues an uncertified copy of such a record, the Social Security number must be redacted.

6. None of the prohibitions apply to Social Security numbers or other identifying information included on documents recorded in the office of the register of deeds.

7. None of the prohibitions apply to Social Security numbers or other identifying information filed with a court.

These final two exceptions give rise to a number of special provisions concerning documents recorded with the register of deeds or filed with a court. First, the new statute prohibits any person from including a Social Security number, an employer taxpayer identification number, a driver's license or state identification number, a passport number, a bank account number, a credit or debit card number, a personal identification code, or a password on any document to be recorded with the register of deeds or filed with a court, unless inclusion of that information is required by law or regulation or the number is redacted (probably meaning only the final four digits are visible). The statute makes a loan closing instruction requiring a Social Security number void and makes violation of either of these provisions an infraction. Second, if personal information is improperly included on a document, the inclusion has no effect on the validity of the document, and the register of deeds may not reject such a document. Third, if a register of deeds or clerk of court places or arranges to place documents on the Internet, any person whose Social Security number or other identifying information is on such a document is entitled to have the number or other information removed from the image of the document placed on the Internet. (It is apparent from the statute's context that this may entail removing the number or other information from the original document on file.) Fourth, the register of deeds and the clerk of court must post signs in their offices setting out the rules described in this paragraph.

The major portion of this act became effective December 1, 2005. As noted above, four prohibitions on use of Social Security numbers, however, do not become effective until July 1, 2007.

## **Trial Preparation Materials and Attorneys' Fees**

### **Trial Preparation Materials**

In *News & Observer Publishing Company v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992), the North Carolina Supreme Court held that just because documents were protected under the attorney-client privilege did not mean they were exempt from public inspection under the public records law. The main purpose of the privilege is to protect privileged statements and documents from being introduced into evidence or from being subject to discovery in a court case. The logic of the *Poole* decision suggested that other litigation-related material exempt from discovery might nevertheless also be subject to public access under the public records law, and in June 2004 the state court of appeals agreed. In *McCormick v. Hanson Aggregates Southeast, Inc.*, 164 N.C. App. 459, 596 S.E.2d 431 (2004), the court held that a city attorney's work product, or material prepared by the attorney in anticipation of litigation and which is not subject to discovery, was in fact available, even to a litigant, under the public records law.

S.L. 2005-332 (S 856) partially reverses the outcome of the *McCormick* decision. It applies to trial preparation materials as defined in the Rules of Civil Procedure, which are materials prepared in anticipation of litigation or for trial, including "the mental impressions, conclusions, opinions, or legal theories" of the lawyers involved in the litigation. Until the litigation for which the materials were prepared is entirely completed, these materials are not available under the public records law. Rather, they may be accessed only pursuant to the rules of discovery under the Rules of Civil Procedure. Once the litigation is complete, however, the materials become fully subject to the public records laws. (Some trial preparation materials may be covered by other exemptions to the public records law, and this new statute does not change that status.) These new provisions became effective October 1, 2005.

### **Attorneys' Fees**

G.S. 132-9 has provided that if a person brings suit to force disclosure of public records and wins the suit, the trial court may allow that person to recover attorneys' fees. Before such an award could be

made, the court must have found that the agency denied the person access to the records without substantial justification and that there were no special circumstances that would make the award of fees unjust. As part of the price of obtaining legislative passage of the exemption of trial preparation material from public records access, the lobbying organizations for government agencies were forced to accept modification of this attorneys' fee provision to the end that the chances a successful public records plaintiff would recover his or her attorneys' fees are increased. S.L. 2005-332 amends G.S. 132-9 to change that section's permission for award of attorneys' fees into a requirement. Thus, if a plaintiff wins disclosure of records in a public records suit, the trial court must now award reasonable attorneys' fees to the plaintiff unless the court finds that the agency acted with substantial justification in originally denying access to the records or that there are special circumstances making the award of attorneys' fees unjust. This change became effective October 1, 2005.

## **Economic Development Records**

G.S. 132-6(d) has exempted from public access records "relating to the proposed expansion or location of specific business or industrial projects." The exemption exists as long as necessary to avoid frustrating the purpose for which the records were created. S.L. 2005-429 (S 393) modifies this law by providing a deadline for release of these economic development records. The statute provides that the exemption is no longer valid once the state, a local government, or the business itself has announced the business's commitment to expand or locate in North Carolina. (If the business commits to locate in the state but leaves open the issue of where to locate within North Carolina, local government records associated with the project remain confidential until that second decision is announced.)

The state and its local governments often undertake cost-benefit analyses or similar assessments to determine how large any incentives offered to a project should be. S.L. 2005-429 adds a new provision to the public records law requiring any agency preparing such an analysis or assessment to "describe in detail the assumptions and methodologies used" in making it. This description is then a public record subject to all the provisions of the public records law [including the possibility of being held confidential pursuant to G.S. 132-6(d)].

Finally, the act requires the state and local governments to prepare a document describing to businesses the state laws that regulate records received or created as part of an economic development project. In particular, the document must describe when confidential information may be withheld from disclosure and what steps must be taken to ensure the information remains confidential. This provision seems intended to ensure that businesses are aware of their responsibilities if they wish to maintain the confidentiality of their trade secrets under G.S. 132-1.2. A government agency must share this document with a potential applicant for economic development incentives at the beginning of its negotiations with such an applicant.

This act became effective when it was signed by the Governor on September 22, 2005.

## **Other Public Records Legislation**

### **Autopsy Photos and Recordings**

After the death in Florida of NASCAR driver Dale Earnhardt and the resulting controversy over access to the photographic records of his autopsy, legislation was introduced in the 2003 General Assembly to restrict public access to such photographs. It did not pass in that General Assembly, but comparable legislation did pass this year. S.L. 2005-393 (H 1543) continues to allow any person to examine photographs or video or audio recordings of autopsies, but it sharply restricts who may be given a copy of the photographs or recordings. The new statute permits giving a copy to a quite short list of public officials, to personal representatives of the estate of the deceased, and to physicians for purposes of conferring with attorneys or for teaching purposes. It also permits any other person who wishes to have a copy of such a photograph or recording or to use it in ways not permitted by the

statute to bring a special proceeding before the clerk of court. After considering whether the disclosure is necessary for the public evaluation of governmental performance, the seriousness of the intrusion into the family's right to privacy and whether the disclosure is the least intrusive means available, and the availability of similar information in other public records, the clerk may in his or her discretion permit making or using the copy.

### **School Employee Personnel Records**

There are separate personnel privacy statutes for several different groups of public employees, including one for public school employees. Most of these statutes make improper release of the records a misdemeanor, but the school statute has not included any remedies for violation. S.L. 2005-321 (S 1124) addresses this situation, adding to the school statute (G.S. 115C-321) criminal enforcement provisions identical to those already found in the comparable statutes for county and city employees.

### **Other Legislation**

S.L. 2005-65 (H 231) specifically permits the State Controller to review a state agency's compliance with prescribed uniform state accounting system standards. The act also adds new G.S. 143B-426.39B, which excludes from the definition of public record under G.S. Chapter 132 the work papers and other supportive material created as a result of such a review.

G.S. 7A-38.2 establishes the Dispute Resolution Commission within the Judicial Department and charges it with administering the state's program to qualify and certify mediators and other so-called neutrals. S.L. 2005-167 (S 806) amends this statute to make confidential all information held by the commission pertaining to mediator certification, qualification of other neutrals, certification or qualification of training programs for mediators and neutrals, and certain other information.

S.L. 2005-231 (S 527) provides for the establishment of a Campus Police Program within the state Department of Justice, which will permit certification of campus police agencies in both private and public universities. The act provides that the personnel files of individual officers held by the program must be treated in the same way as the personnel files of state, county, and city employees—that is, these records will be largely exempt from public access.

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