An Overview of Protected and Public Information in North Carolina

David M. Lawrence

North Carolina law reflects a strong general policy of openness in governmental operations, expressed in its public records and open meetings statutes. Because of these statutes, the great mass of public records, especially the business records of government, is open to public access, and most meetings of most public bodies in North Carolina are conducted entirely in public.[1]

Almost all citizens applaud these statutory policies, which North Carolina shares with the other forty-nine states. Sometimes, however, the statutes permit public access to governmental meetings, and especially to governmental records, with results that at least some people consider invasive of their privacy. A client of a community development agency or a person whose occupation is regulated by a state licensing board might suddenly begin receiving junk mail because an advertiser has acquired the agency's list of clients or the licensing board's list of licensees through a public records request. Or a citizen who has written a letter to her city's manager might find it published in the local newspaper, which has obtained a copy pursuant to the public records law.

Nothing in the public records statute protects the people in the preceding examples whose sense of privacy has been violated. The General Assembly has, however, created numerous exceptions to the general demands of openness established in the public records and open meetings statutes. And in most cases it has done so because of concerns about privacy: almost all the exceptions to both statutes can be explained, at least in part, as legislative recognition of the legitimacy of certain claims of privacy. What kinds of information, then, do these exceptions protect?

The author is an Institute of Government faculty member whose specialties include public records and open meetings laws. Contact him at lawrence@iogmail.iog.unc.edu.

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Information about Private Citizens and Entities

The broadest exceptions involve information that government holds about private citizens or entities, either because they deal with government or because government deals with them. These citizens and entities may pay taxes to government, receive special benefits from government, do business with government, be investigated by government, or otherwise interact with government. However the interaction takes place, the government acquires information about the private citizen or entity, and some of that information is likely to be considered personal or otherwise private by the citizen or the entity. Following are some important categories of private information held by government that are shielded by statute from public access or public meetings.

Tax information. Most of the information about taxpayers held by the North Carolina Department of Revenue is made confidential by statute, as is tax information held by local governments that reveals a taxpayer's income or gross receipts.[2] The confidentiality of tax information is particularly strong: improper release of the information is a crime, and the person responsible for the release must be terminated from public employment and may not hold a public job for five years.

These privacy policies, however, do not apply to most of the information held by local tax offices arising from administration of the property tax. Although a person's income is not public, the value of his or her house is.

Information about children and students. Information held by government about children is frequently excepted from public access. Further, federal law conditions federal aid to state and local education on the recipient's maintaining the confidentiality of student records. Accordingly, North Carolina law excepts student records from the public records act.[3] In addition, it excepts records of juveniles —both those enmeshed in the criminal justice system and those protected by social services agencies.[4]

Information about social services clients. Although the names of people receiving public assistance are public record, as is the amount they receive each month, all other information about them in the records of social services departments is confidential, and releasing the information in violation of

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Citizens expect government records to be open to public view and not subject to undue censorship.

the statute is a misdemeanor.[5] This balance recognizes the public interest in monitoring social service programs but also refuses to force public assistance recipients to give up all claims of privacy as a condition of receiving aid.

Medical information. North Carolina law generally protects the confidentiality of medical records, and exceptions to the public records law extend confidentiality to medical records held by public hospitals, public health departments, mental health agencies, and other public health facilities.[6] (For more information on this topic, see the article on page 44.)

Records of library use. Public libraries are prohibited from releasing information that indicates what books library patrons have checked out or how they have otherwise used the library.[7]

Private telephone numbers. Most telephone numbers, of course, are listed in public telephone directories. Not only do people not consider their telephone number to be within their zone of privacy, but they wish it to be known. For various reasons, though, some numbers are considered private information and are unlisted. In at least two situations, state law protects the privacy of unlisted numbers. First, 911 centers normally seek the cooperation of telephone companies in obtaining all local telephone numbers for the 911 system. State law recognizes that some of the numbers provided by the telephone company may be unlisted and prohibits the release of any numbers received from the telephone company in this circumstance.[8] Second, a public employee's home telephone number is a part of the employee's personnel file that is not available to the public.

Information obtained in criminal investigations. State law excepts from the public records law most of the information gathered by law enforcement agencies in the course of criminal investigations.[9] A major reason for the exception is to protect the integrity of

an investigation; its subjects should not be privy to all its details.

But privacy considerations also shape this exception. First, the statute recognizes the privacy concerns of victims of crime and limits public access to their names and addresses, especially if a victim might be subject to harassment from suspects. Second, the statute recognizes that many suspects in a criminal investigation are ultimately cleared from suspicion. Apparently, legislators see no good purpose in disclosing that these people were ever suspects. Therefore, unlike criminal investigation records in some states, those in North Carolina do not become public once an investigation is completed; they are permanently shielded from public access.

Proprietary business information. Entities that wish to do business with a government agency often possess trade secrets integral to their business. As part of selecting the businesses with which they will deal, local governments and state agencies (as well as private businesses) often require their prospective business partners to reveal some of these secrets. Governments also may acquire business trade secrets through their regulation of businesses or business activities. The General Assembly has determined that a business should not have to relinquish its trade secrets in order to do business with state or local government, or because it is being regulated by government. So if a business reveals trade secrets to a local government or a state agency, that government or agency is prohibited from releasing the secrets.[10]

Information about Public Employees

As employers, local governments and state agencies maintain a wide variety of information about their employees, just as private employers do. A typical personnel file might include evaluations, letters of reference, personnel actions, results of drug and medical tests, a salary history, results of job tests, and records of internal investigations. For a private-sector employee, all this information is private. For a public employee, however, it is public unless excepted by statute from the public records law.

There are good arguments to be made for allowing public access to at least some of the information in a public employee's personnel file. Indeed, in a sense the public as a whole is the employer of a public employee and therefore might be thought entitled to the same rights of inspection of personnel files that private employers have. On the other hand, a private-sector employee's personnel files are not open to the stockholders of his or her company, even though they are the owners. Many public employees think that they should be entitled to the same privacy as private-sector employees.

The treatment of attorney–client communications under the public records law is less protective of governmental clients. The state supreme court has held that the privilege itself does not automatically create an exception to the right of public access under the public records law.

The General Assembly has responded to these arguments by enacting a series of personnel privacy statutes that attempt to forge a balance between the public's interest in monitoring the performance of government and its employees, and the employees' interest in maintaining some privacy about their everyday work life.[11] The statutes make some information in a public employee's personnel file completely public, especially salary, the amount of the last salary change, and the nature and the date of the most recent personnel action affecting the employee. All else is excepted from automatic public access.

The statutes do, however, permit a number of more limited rights of access to or release of information from the files. Some are intended simply to facilitate the work of government itself—for example, a supervisor may see what is in an employee's personnel file, and the file's custodian may release most information in a file to an official of another government agency.

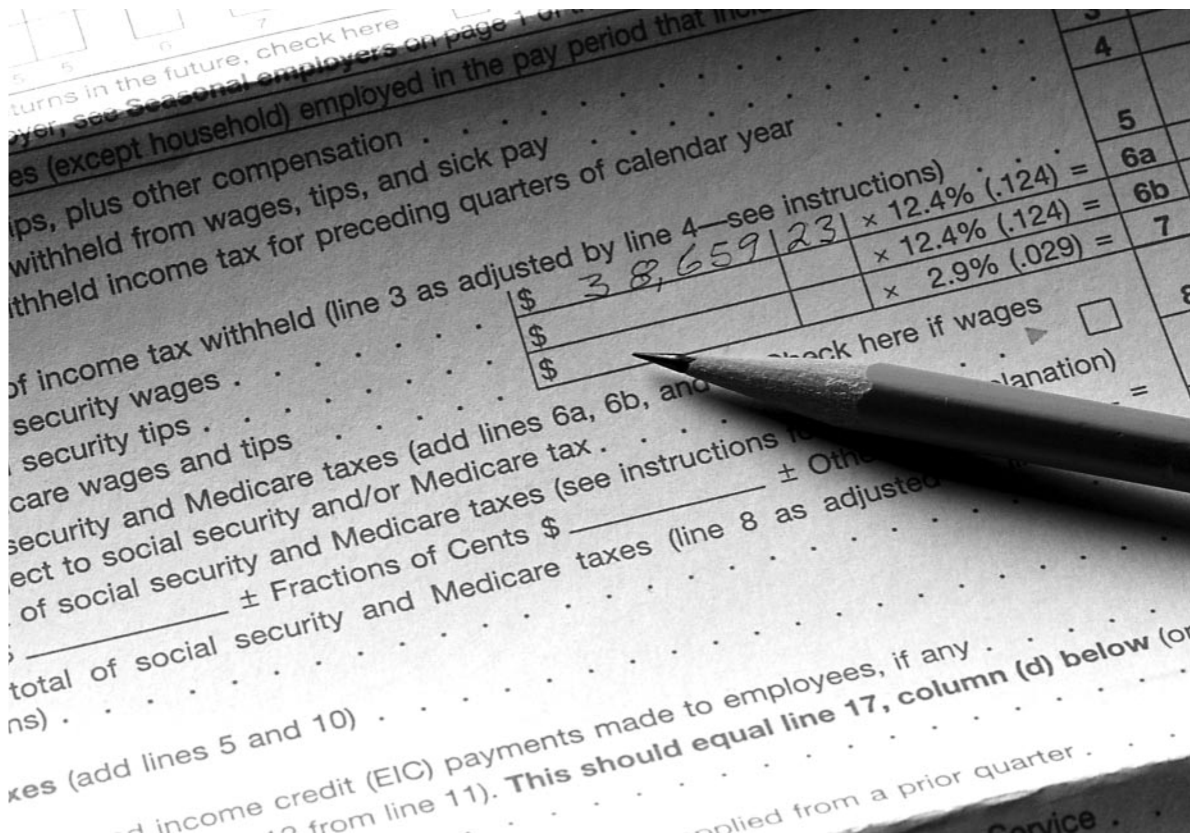
One of these limited rights of access is concerned with providing public information. The head of the appropriate agency or local government may release to the public information about a personnel action, including the reasons for the action, if doing so is "essential to maintaining the integrity" of the agency, "essential to maintaining public confidence" in the local government, or "essential to . . . maintaining the level or quality of services" provided by the agency or local government.[12]

The concerns for employees' privacy embodied in the personnel privacy statutes are repeated in an important exception to the open meetings law. That exception permits public bodies to hold closed sessions to consider the qualifications, the performance, and the fitness of a public employee or an applicant for employment, and to hear or investigate complaints by or against public employees.[13]

The Government's Own Privacy

A final set of exceptions to both the open meetings and the public records law recognizes that government agencies and local governments also have a need for privacy, or at least for secrecy. The policy considerations in this category of information, though, are clearly much more complicated than in either of the two preceding categories. Following are some examples of the protections.

Attorney–client confidentiality. A private individual or business entity is entitled to discuss legal matters in confidence with his, her, or its attorney, and to have written communications with the attorney also protected, even from being produced in a lawsuit. The considerations that underlie this policy also apply when the client is a govern-



North Carolina's public records law makes individuals' tax information confidential.

ment or a government agency, and that fact has been recognized, at least in part, by the General Assembly. One of the exceptions to the open meetings law permits a public body to meet in closed session with its attorney to discuss matters that are protected by the attorney–client privilege, and the statute expressly acknowledges that the privilege applies to government entities.[14]

The treatment of attorney–client communications under the public records law, however, is less protective of governmental clients. The state supreme court has held that the privilege itself does not automatically create an exception to the right of public access under the public records law. Rather, the General Assembly must define the scope of the privilege for public records purposes.[15] The General Assembly has chosen to protect only one category of attorney–client communications—those from attorney to client respecting ongoing litigation.[16] The result is that many other communications between a public entity's attorney and the entity that would be privileged if made to a private citizen or entity are open to public access under the public records laws.

Adversarial situations. Like business organizations, governments are frequently involved in relationships that are somewhat adversarial. If the involved organizations were both private, each could develop its strategies without undue fear that the other party would become privy to them. When one of the organizations is a local government or a state agency, however, the demands of the open meetings or public records laws might force the governmental entity either to make its strategy in open meetings or make its strategy known to the other party through public records. The General Assembly has recognized this as a problem in select circumstances but not as a general principle and not in any patently consistent way. The exception in the open meetings law noted earlier, for attorney–client discussions, specifically mentions the need to have confidential discussions when the governmental client is involved in litigation. Similarly, another exception in the open meetings law permits a public body to hold a closed session when it is developing a negotiating position for the acquisition of real property.[17]

But other potentially adversarial situations are not protected by exceptions to the open meetings or public records laws. The open meetings law contains no exception when a government is *conveying* rather than acquiring property, no exception when it is acquiring (let alone conveying) *personal* property, and no exception when it is negotiating a contract not involving acquisition of real property. Similarly, even though the open meetings law permits lawmakers in a closed session to discuss developing a negotiating position for acquisition of real property, the public records law contains no exception that would protect any property appraisal the government may have had made as part of its negotiations.

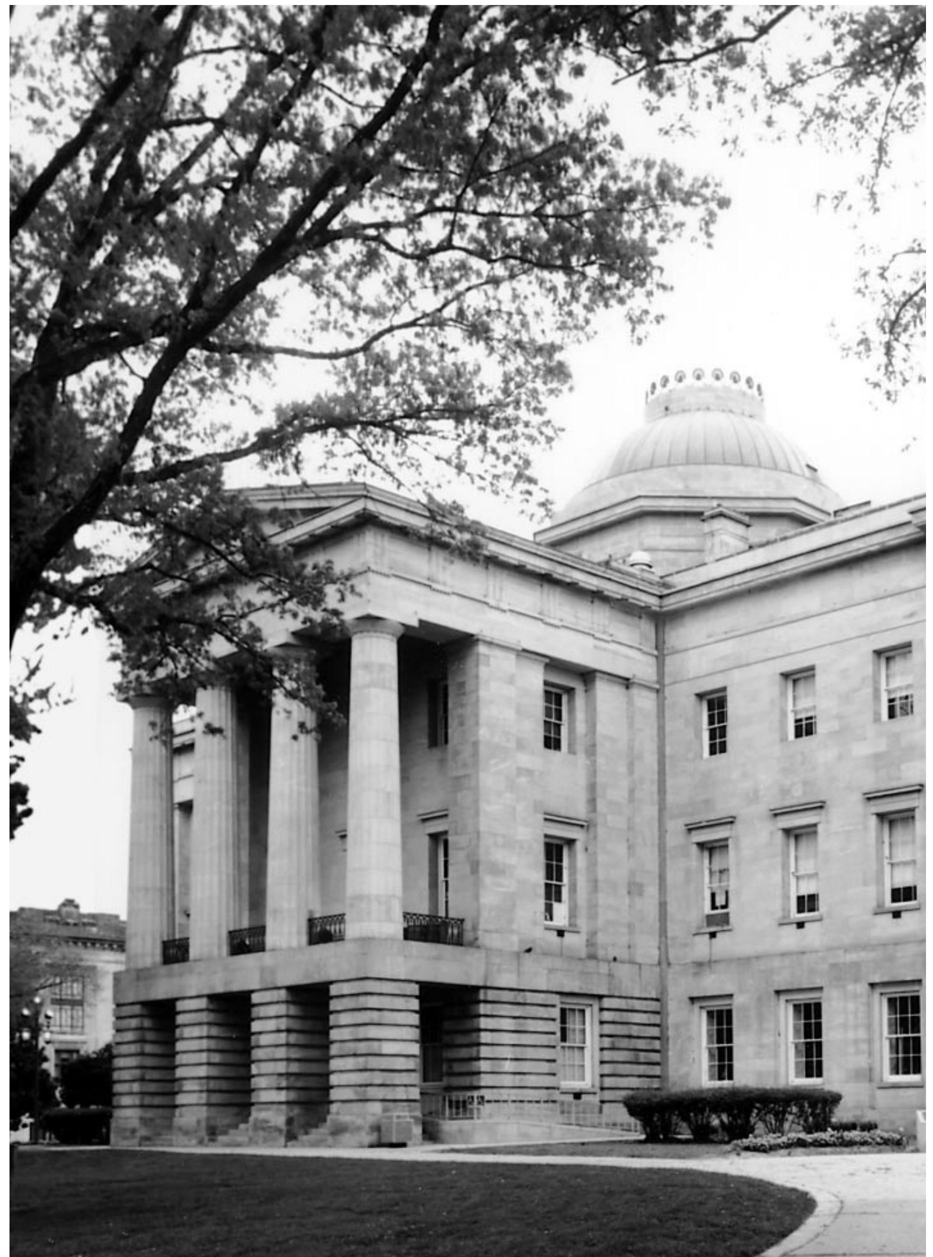
Government as business competitor. Occasionally, governmental entities engage in activities in which they compete with private counterparts—for example, in health care, utility, cable television, and solid waste operations. Normally, business competitors keep a shroud of privacy over their operations, to maintain any competitive advantage they may have. Obviously, the general principles of the public records and open meetings laws conflict with business secrecy. Therefore the General Assembly

The long-standing policy of the North Carolina General Assembly is that the work of government be conducted in the open.

has permitted limited exceptions to protect government-operated businesses. One statute excepts from the public records law "information relating to competitive health care activities."[18] Another excepts discussions of proposed or existing contracts entered into by the state's joint power agencies (two entities through which cities with electric distribution systems helped finance nuclear power facilities).[19] These are the only instances, however, of the General Assembly's recognition of the special demands that competition might make on governments for privacy in their operations. No statute, for example, excepts from the public records law the competitive strategies of a city that distributes natural gas or a county that operates a facility for solid waste disposal.

Summary

The general policies of North Carolina law open up to public viewing and inspection the meetings and the records of state agencies and local governments. For the most part, these policies govern the day-to-day operations of government. The General Assembly has recognized, however, that sometimes the claims of privacy are strong enough to justify exceptions to these general policies. Most of the exceptions fall into three broad categories: information that government has received from or collected about individuals or private entities, and discussions about that information; information that government has received or created about governmental employees, and discussions about those employees; and situations in which the government itself has a strong need for privacy.



Notes

1. The public records law is centered in Chapter 132 of the NORTH CAROLINA GENERAL STATUTES (hereinafter G.S.), but exceptions to the right of public inspection are scattered throughout the General Statutes. The open meetings law is found in G.S. 143-318.9 through -3l8.18.

2. G.S. 105-259 for the N.C. Department of Revenue; G.S. 153A-148.1 for counties; G.S. 160A-208.1 for cities.

3. G.S. 115C-402. Other laws bar disclosure of information about students. See the article on page 36.

4. G.S. 7B-2901, -3000, -3001.

5. G.S. 108A-80.

6. G.S. 131E-97 (health care facilities); G.S. 130A-12 (public health departments); G.S. 122C-52 (mental health agencies); G.S. 143-518 (emergency medical services providers).

7. G.S. 125-19.

8. G.S. 132-1.5; G.S. 62A-9.

9. G.S. 132-1.4.

10. G.S. 132-1.2.

11. No single statute regulates the records of all public employees in North Carolina. Rather, several statutes apply to different kinds of governments. These statutes are broadly comparable, but, except for the city and county statutes, not identical. The principal statutes are G.S. 126-22 through -30 (state employees); G.S. 153A-98 (county employees); G.S. 160A-168 (city employees); and G.S. 115C-319 through -321 (public school employees).

12. The different statutes use slightly different criteria for justifying release of this information.

13. G.S. 143-318.11(a)(6).

14. G.S. 143-318.11(a)(3).

15. News and Observer Publ'g Co. v. Poole, 330 N.C. 465, 482–83, 412 S.E.2d 7, 17 (1992).

16. G.S. 132-1.1.

17. G.S. 143-318.11(a)(5).

18. G.S. 131E-97.3.

19. G.S. 159B-38.