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Local Government Law Essentials for Judges
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Personnel Records after October 1, 2010

The General Assembly in SL 2010-169 amended the personnel records privacy statutes that apply to most public employers in North Carolina. These 2010 Amendments (as I will call them) make five basic changes and have raised many questions about the application of those changes.

To understand the changes and to address the questions, we must keep in mind one important distinction that is hard to keep hold of: the distinction between access to *information* and access to *records*.

The Fundamental Distinction: Access to *Information* vs. Access to *Records*

The state's Public Records Law (GS Chapter 132) on the one hand and the multitude of statutes that apply to privacy of personnel records of governmental employees on the other have employed fundamentally different approaches to public access.

The basic rule of the state's Public Records Law is that (with certain exceptions) *records* made or received in the course of public business are available for inspection by anyone. That is, access is to the very record itself. And the statute is clear [GS 132-6.2(e)] that a governmental entity need not respond to a public records request "by creating or compiling a record that does not exist." The right of access guaranteed by the Public Records Law is access to records, not information. If a requester wants information that has not been compiled into a record, there is no obligation on the part of the government to compile the information or create the record.

For the personnel records privacy statutes, the basic rule has been the reverse. Under the statutes[1] for

municipal employees (GS 160A-168),
county employees (GS 153A-98),
state employees (GS 126-23),
community college employees (GS 115D Art. 2A), and
public school employees (GS 115C Art. 21A)

[1] Along with several other statutes for mental health authorities, water and sewer authorities, public hospitals, and others, all to the same effect.

there has not been a statutory guarantee of access to original *records* in the personnel files, but instead a right of access to certain *information.* In fact, the statues have been clear that the records in the personnel files are *not* subject to access under the Public Records Act: the state employee statute says that personnel files "shall not be subject to inspection and examination as authorized by G.S. 132-6."

The *information* which (before the 2010 Amendments) has been subject to public access has included the employee's

> name,
> date of original employment,
> terms of employment contract,
> current position,
> current title,
> current salary,
> date of most recent promotion, demotion, transfer, suspension, separation, or position classification, and
> station to which assigned.

That's where it stands for municipal and county personnel records privacy statutes. They say that the following "*information* with respect to each [municipal] [county] employee is a matter of public record."

The statues for state employees, community college employees, and public school employees take the matter one step further, however. Here, too, the *records* in the personnel file are not available for inspection under the Public Records Law. As with municipal and county employees, it is the specified *information* that is public. But for state agencies, community colleges, and public schools there is an additional requirement to "maintain a record of each of its employees, showing the following [public] information." [GS 115C-320(a)] Let's call this the Record Creation Requirement.

That is, for state agencies, community colleges, and public schools, there is an obligation to identify the *information* in a personnel file that is available to the public and compile that information in a record, which then may be "inspected and examined" and copied "by any person." [GS 126-23, GS 115C-320(c), and GS 115C-28]]

It is an open question just how faithfully state agencies, community colleges, and school systems have undertaken this record-creation task, and it may be that electronic records automation has eased the burden, but it is certain that the five changes in the 2010 Amendments complicate the task.

The Five Changes

The 2010 Amendments worked five changes in the public employer personnel records privacy statutes.

1. Salary Info Change. Expansion of information to be publicly available:

Old:

"date and amount of most recent increase or decrease in salary"

New:

"date and amount of each increase or decrease in salary with that [public employer]"

The effect of the Salary Info Change is that the public information now includes not simply the date and amount of the most recent change in salary, but the date and amount of all past salary changes with the current employer.

2. Job Action Info Change. Expansion of information to be publicly available:

Old:

"date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification"

New:

"date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that [public employer]"

The old statute was silly. It said that the information available was the "date" of the most recent of these job actions, whatever the action may have been, and not even whether the action was a promotion or a transfer or a dismissal. I wrote a blog piece about this: http://sogweb.sog.unc.edu/blogs/localgovt/?p=684

The Job Action Info Change addresses this silliness by saying that the public information now includes "the type." That is, the fact that the action on May 13, 2011 was a demotion is now public, not just the fact that *something* happened on that date.

The Job Action Info Change is similar to the Salary Info Change above. The public information now includes not simply the most recent job action, but the date and type of all past job actions with the current employer.

3. Promotions Description Change. Brand new provision with respect to promotions:

Old:

"date of most recent promotion"

New:

"date and general description of the reasons for each promotion with that [public employer]"

As we have seen, the Job Action Info Change dealt with promotions along with other job actions, such as demotions, transfers, and separations, expanding the public information to "each" promotion, not just the most recent. The Promotions Description Change goes a step further. It requires a general description of the reasons for each promotion.

The Salary Info and Job Action Changes are very significant. They require governmental employers to make available to the public much more information that the old statute did. But the Promotions Description Change creates a new kind of obligation. In the past, an employee might have been promoted even in the absence of any kind of "general description of the reasons." Perhaps everybody knew that this was the right employee for the promotion, or perhaps this employee's time had simply arrived. Or, perhaps, there really was a distinct reason for the promotion (a unique qualification, a fear of otherwise losing a good employee, etc.), but no one ever felt moved to make record of it. Now, it appears, there is an obligation, accompanying every promotion, to create a record containing a "general description of the reasons" and to make that record available to the public.

Here the General Assembly is identifying a new category of *information* that is to be available to the public and perhaps [see Question 7 below] imposing an obligation to create a record that might otherwise not have been created.

4. Disciplinary Info Change. Expansion of information to be publicly available:

Old:

"date of most recent . . . demotion, transfer, suspension, separation"

New:

"date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the [public employer]"

This change goes beyond amending the old language. Like the Job Action Info Change, it expands the information available from simply the date of the most recent action to the date and type of all past actions. It is, however, restricted to actions taken "*for disciplinary reasons*."

Therefore, the "types" of job action covered by the Disciplinary Info Change are

dismissals for disciplinary reasons,
suspensions for disciplinary reasons, and
demotions for disciplinary reasons

As a consequence, it would appear that in a circumstance in which an employee is suspended for inappropriate conduct, the publicly available information, including the "type" of action, would indicate that the suspension was "for disciplinary reasons," but would go no further in detail, as to go further would unlawfully divulge confidential personnel records information.

5. Written Notice of Dismissal Change. Brand new obligation to create specific written notices of dismissal:

Old:

"date of most recent . . . separation"

New:

"If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the [public employer] setting forth the specific acts or omissions that are the basis of the dismissal."

The Written Notice of Dismissal Change appears to be the most significant change worked by the 2010 Amendments. It has historically not been the case that each time an employee was dismissed in a disciplinary context the public employer has created a written notice "setting forth the specific acts or omissions." In fact, the notion of at-will employment has seemed to protect an employer from such an obligation. The Written Notice of Dismissal Change, however, appears to do two remarkable things: first, it appears to impose an obligation to create such written notices; and, second, it makes them available to the public.

Along with Promotions Description Change, this basic change appears to impose a new record-creation obligation—the duty to create a document that the public employer might otherwise not have created. With the Promotions Description Change, however, documenting the happy reasons that someone is promoted would seem to raise many fewer issues than documenting the unhappy reasons that an employee is dismissed.

To what employers does this new obligation to create a written notice of dismissal and make it public apply? It surely applies to state agencies, public schools, and community colleges, with their statutory Record Creation Requirement, but to what extent does it apply to cities and counties, whose statutes do not contain that requirement? The uncertain answer is found in the discussion at Question 13.

Questions Arising under the 2010 Amendments

The 2010 Amendments became effective October 1, 2010. Questions arose immediately upon enactment as to the scope and application of the amendments. On November 8, 2010 the state's Attorney General issued an opinion (which I'll call the 2010 AG Opinion) in response to questions posed by the state personnel director. The 2010 AG Opinion addressed some questions and not others. The opinion has direct relevance to all public employers affected by the 2010 Amendments, of course, and it is especially relevant to public school and community college employers because the Record Creation Requirement of the introductory language in the public school and community college personnel records statutes also appears in the state agency personnel records statute directly addressed by the attorney general ("shall maintain a record of each of its employees showing the following information with respect to each employee").

Questions Related to the Salary Info Change

Question 1. Is a public employer obligated to maintain in a way that is available to the public the full salary history of each employee for salary changes beginning October 1, 2010?

Yes. That is exactly what the Salary Info Change was all about. Under the old statutes, only the date and amount of the most recent change was ever available to the public. The 2010 Amendments make it clear that the date and amount of *each* change is available.

Question 2. Is a public employer obligated to research changes in salary occurring before October 1, 2010, to make that information available to the public?

Yes. To the extent that it has the information, it is now publicly available. The 2010 AG Opinion directly answers this question—the full salary history with the public employer is now publicly available information. As discussed on pages 1 and 2 above, it is not the original salary records that are publicly available, but rather the *information* from those records, which the public employer is obligated to gather, synthesize, and make available.

But, the 2010 AG Opinion makes clear, if, for some reason, the public employer does not have records that show salary history for some time prior to October 1, 2010, is not required to retroactively create such records. Instead, the attorney general expressed his "belief that the General Assembly intended to make public a record of *existing* salary and classification history."

Question 3: Is a public employer obligated to maintain, and make publicly available, the salary history of an employee with a former employer?

No. The 2010 AG Opinion makes clear that the obligation is on the public employer only to maintain (and thus make available) salary history with that public employer. However, the opinion seems to say that if the public employer has in its records prior salary history of that employee with former employers covered by the state's personnel records privacy statutes (that is, other public school systems, community colleges, state agencies, municipalities, counties, and a few others), the employer would have to make that prior salary history information available to the public.

Questions Related to Job Action Info Change

The Job Action Info Change is very similar with respect to its expansion of publicly available job action information as the Salary Info Change is with respect to salary information, so the questions and answers are very similar.

Question 4. Is a public employer obligated to maintain in a way that is available to the public the full job action history of each employee for promotions, demotions, transfers, suspensions, separations, or other changes in position classification beginning October 1, 2010?

Yes. The public employer is obligated to make that information available to the public now and to maintain it in an ongoing way so that it will be available indefinitely into the future.

Question 5. Is a public employer obligated to research changes in job actions occurring before October 1, 2010, to make that information available to the public?

Yes. Just as with salary information, this old job action information is available to the public to the extent that the employer has it. On request, the employer must search its records to discover the information and make it available. If, however, records do not exist with respect to actions taken before October 1, 2010, there is no obligation to recreate them.

Question 6: Is a public employer obligated to maintain, and make publicly available, job action history of an employee with a former employer?

The answer to this question is exactly the same as the answer in Question 3 with respect to *salary* information.

Questions Related to the Promotion Description Change

Question 7: With respect to promotions occurring October 1, 2010 and later, is a public employer obligated to create a written document containing a general description of the reasons for the promotion?

Yes. Two factors join together to render this conclusion.

First, for all public employers the 2010 Amendments make clear that a "general description" of the reasons for the promotion is part of the information that is to be publicly available with respect to employees. How can that information be made available unless it is written down somewhere?

Second, for state agencies, community colleges, and public schools, their statutes contain the Record Creation Requirement: The employer "shall maintain a record of each of its employees showing the following information with respect to each employee." This language is different from the language that introduces the personnel records privacy statutes for cities and counties, "the following information with respect to each [city] [county] employee is a matter of public record." Cities and counties might be able to argue that as long as they can come up with

a "general description" on request, they are not obligated to create a document at the time of the promotion. For state agencies, community colleges and schools, though, it looks like the requirement "shall maintain a record" directly means that a document must be created.

Keep in mind, however, that this newly-created record is what is to be publicly available. There may well be documents in the personnel file that relate to the promotion and contain information that led to the promotion. But those underlying documents are still confidential. Only the newly-created document with the "general description" is public. The 2010 AG Opinion puts it this way: "There is nothing in the amendments or the statutes they amend which require public employers to permit the public to inspect or copy the *documents* from which the information maintained in the public record is gathered." Since nothing requires that those underlying documents be made public, they are, in fact, confidential.

Question 8: Must public employers now create documents containing a "general description" of reasons for promotions that occurred before October 1, 2010?

No. The 2010 AG Opinion says that would be absurd. There is nothing, the attorney general said, "to indicate that the General Assembly intended to expand a public employer's obligations to create records of events which heretofore had gone undocumented." But, the attorney general said, if the public employer has the information concerning the reasons for an old promotion in its records, then it must make that information publicly available.

So, does a public employer have an obligation now to go back through all its records to determine whether it has information regarding old promotions? Presumably not.

But what if it receives a specific request for the reasons for an old promotion with respect to a particular employee or set of employees? Perhaps then it has an obligation to look in the record and determine whether there is information there from which a document containing a "general description" could be developed. If the answer is No, the inquiry is ended. If the answer is Yes, then an obligation presumably exists to create the document (but not to make public the underlying records).

Question 9: What is a "promotion" that triggers the requirement to create the "general description" document?

Damned if I know. Is it any job action that results in significantly greater responsibility, prestige, or pay? Who is to decide? The statute is silent on this question.

Question 10: What level of detail is sufficient to constitute a "general description" of the reasons for the promotion?

Damned if I know. Seemingly it would not be sufficient if, with respect to every promotion, a public employer maintained a record that said, "Most qualified candidate received

the promotion." Presumably, some personalization is required, but just how much detail is a mystery.

Questions Related to the Disciplinary Info Change

Question 11: If a public employee is suspended for clearly disciplinary reasons, what information must/may the employer make public?

The public employer must make available the information that the employee was "suspended for disciplinary reasons" and reveal no further information. Four considerations lead to this conclusion.

First, before the 2010 Amendments, all that would have been available was the *date* that some job action happened. The Job Action Info Change makes clear that for job actions generally, what must be made public is the date and *type* (that is, a suspension).

Second, the Disciplinary Info Change says that for job actions that happen for disciplinary reasons, both the date and the *type* must be made public. The "type" here, I believe, is not merely "suspension," but "suspension for disciplinary reasons." Otherwise there is no difference between what is required by Job Action Info Change and the Disciplinary Info Change. Why would the General Assembly have included the latter if it did not add anything?

Third, where the job action taken for disciplinary reasons is in fact a dismissal, the greater requirements of the Written Notice of Dismissal Change kick in. They do not in the case of a suspension.

And fourth, as we saw above in Question 7, the personnel file documents underlying the suspension are still confidential.

So what is publicly available is this information: "The employee was suspended on December 2, 2011 for disciplinary reasons."

Question 12: If an employee is dismissed, suspended, or demoted for poor performance (as opposed to any kind of objectionable conduct?), is that job action taken "for disciplinary reasons?"

Damned if I know. As my colleague Frayda Bluestein has written (in a blog post found here: http://sogweb.sog.unc.edu/blogs/localgovt/?p=3731) a lay person's understanding of a "disciplinary action" might typically involve an employee's personal misconduct, dishonesty, or criminal or ethical breach. In the world of human resources administration, however, adverse job consequences that turn on inadequate performance are commonly spoken of as "discipline."

The 2010 AG Opinion acknowledged that dismissals (and, by extension, other adverse actions) can be taken for reasons other than "disciplinary reasons." In that discussion, however, the only examples cited were separations from employed triggered by reductions in force or disability. The attorney general missed an opportunity to give us some guidance.

Questions Related to the Written Notice of Dismissal Change

Question 13: When an at-will employee is dismissed for disciplinary reasons, is the public employer obligated to create (and make available for public inspection) a written notice of dismissal setting forth the specific acts or omissions that are the basis of the dismissal?

Yes, according to the Attorney General and surely with respect to state agencies, public schools, and community colleges. The 2010 AG Opinion directly addresses this question, and speaks broadly about an obligation resting with all public employers (not just state agencies, community colleges, and schools) and applying to all public employees:

> "[P]ublic employers must now maintain for public inspection a copy of the final dismissal letter **regarding** each employee dismissed for disciplinary reasons." And, "public employers are required to document and maintain for public inspection a copy of the final decision of the public body dismissing each employee terminated for disciplinary reasons, *including employees who are not otherwise entitled to such information*."

Cities and counties have a good argument, however, with respect to at-will employees that the attorney general has gone too far in his interpretation of the statute. The very nature of at-will employment is that an employee is subject to dismissal at any time with notice or without notice. Surely, the argument goes, if the General Assembly had meant to impose on all public employers a requirement of a written statement of reasons for dismissal for at-will employees, it would have directly done it, not impose it through an amendment to the public records privacy statutes. Cities and counties must now decide for themselves whether they are to consider themselves bound by this aspect of the 2010 AG Opinion.

For state agencies, community colleges, and public schools, however, there is much less room to argue that the attorney general's opinion is not applicable. That is because of the Record Creation Requirement in their personnel privacy statutes ("shall maintain a record of each of its employees showing the following information with respect to each employee"). As amended the statutes for the state, community colleges, and public schools appear to say that these employers "shall maintain a record" of the specified information, and that specified information includes "the written notice of the final decision." The 2010 AG Opinion, whatever its weakness with respect to the statutes governing cities and counties, was directly interpreting the state statute that contains the Record Creation Requirement in language identical to the schools and community colleges statutes.

Question 14: If an employee is dismissed for poor performance, is the public employer required to create (and make available for public inspection) a written notice of dismissal?

Unclear. See Question 12.

Question 15: The statute requires the creation (and public availability) of the notice of "the final decision of the [public employer]." What constitutes such a final decision?

The statutes are similar, yet different:

- the municipal statute speaks to a "final decision of the municipality"
- the county statute speaks to a "final decision of the county"
- the community colleges statute speaks to a "final decision of the board of trustees"
- the public schools statute speaks to a "final decision of the local board of education"
- the state agency statute speaks to a "final decision of the head of the department"

The 2010 AG Opinion discusses what constitutes a "final decision," but it does so strictly in the context of the 2010 Amendments to the state agencies statute, a part of the State Personnel Act, which has a very specific and unique series of steps involved in the dismissal of covered employee. In that context, the attorney general said that a final decision is

- a decision from which the employee has no right to further review within the agency
- a decision on which the highest authority has passed judgment
- a decision made by an agent to whom decision-making authority has been delegated
- a decision that might have been appealed but, due to the passage of time, no longer is eligible for appeal.

"In all those cases," the attorney general said, "the decision is properly deemed 'the final decision' of the agency because there is nothing further that the employee can do to change the employer's decision without recourse to a superior administrative or judicial forum."

The Highway Patrol recently had occasion to interpret this "final decision" provision, in the firing of two officers. As reported in the *News & Observer* on May 7, 2011, the dismissal of the officers was apparently ordered by the patrol commander. The newspaper asked to see the "written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal." The Highway Patrol would not give the newspaper the written notice, on the grounds that the patrol commander is not the "head of the department." That is the Secretary of Crime Control and Public Safety, they said, and the matter will come to him only if the fired officers appeal. Therefore, the patrol seems to say, unless the officers appeal, the "written notice" will never be made public. This argument, if the news account is reporting it correctly, appears not to fully account for the final of the four bullets above: a "final decision" includes "a decision that might have been appealed but, due to the passage of time, no longer is eligible for appeal."

Suppose a city or county manager dismisses an employee for disciplinary reasons and that employee makes no appeal to the city council or the county commissioners. Can the city or county make the same argument: the statute speaks to a final decision "of the municipality" or "of the county." Can the argument be that unless the employee appeals, the action is not yet a "final decision of the city" or of the county? I am not persuaded. And anyway, as discussed in Question 13, cities and counties must decide for themselves whether, in light of the 2010 AG Opinion, they are bound to create these written notices at all.

Question 16: For disciplinary dismissals made before October 1, 2010, must the public employer retroactively create (and make publicly available) written notices of dismissal?

No. The 2010 AG Opinion says that public employers "are not required to retroactively attempt to create dismissal letters where former employees were terminated without being provided specific reasons."

But if such a document exists, it is probably now publicly available. See Question 17.

Question 17: There exists in the personnel file of a former employee a written notice of dismissal, created before October 1, 2010, setting out the misconduct of the employee. Is the public employer obligated to make that notice publicly available?

Yes. The 2010 AG Opinion says with respect to the requirement that written notices of disciplinary dismissal be made publicly available: "We cannot conclude that this requirement, even if applied to notices of dismissal written prior to the effective date of the Act, violates clearly established rights of former employees dismissed for disciplinary reasons."

The attorney general notes, however, that in some cases the employee may be entitled to a liberty-interest name-clearing hearing. See Question 18.

Question 18: When is an employee who is being dismissed for disciplinary reasons entitled to a name-clearing hearing?

It appears that the employee is entitled to the opportunity for a name-clearing hearing before the copy of the written notice of the final decision of dismissal is in fact made public. Here are the considerations at stake:

> a. Public employees enjoy, as citizens, the liberty "to engage in any of the common occupations of life."
>
> b. If the public employer speaks ill of a person in a way that seriously damages the person's "good name, reputation, honor, or integrity," that person is entitled to due process—that is, the opportunity for a hearing at which the person can clear her good name, reputation, honor and integrity.

c. The adverse information about the person must rise to the level of stigma. It is not enough simply that the public employer has documented poor performance.

d. The constitutional harm, if it arises, is not from the making public of the stigmatizing information. Rather, the constitutional harm is in not providing the opportunity for a name-clearing hearing.

e. The hearing, to be effective, must be afforded before the stigmatizing information comes to the hands of prospective employers.

These principles can be distilled from two recent Fourth Circuit decisions: *Sciolino v. City of Newport News, Virginia*, 480 F.3d 462 (4th Cir. 2007), and *Harrell v. City of Gastonia*, 392 Fed.Appx. 197 (4th Cir. 2010).

So, the best tact, it seems to me, is this: When an employee is dismissed for disciplinary reasons and the written notice "setting forth the specific acts or omissions" is created and will be publicly available, the employee should, at the time of dismissal be informed that she has the right to a hearing if she wishes it. The point of the hearing, she can be told, will not be to review the wisdom or correctness of the dismissal decision, but to give her the opportunity, if she wishes to pursue it, to tell her side of the story.

It seems to me that

a. few employees will at this point request a hearing, so the cost of this approach is low

b. even if employees sometimes request the hearing, it can be a simple and modest affair

c. the public employer is protected from constitutional liability when the stigmatizing information becomes public, even if the employee has not exercised her right to a hearing; she will likely be entitled to request the hearing after the information has become public, however.

Careful attention will be required with respect to former employees. If there exists in the file a written notice of the final decision on disciplinary dismissal setting out the acts and omissions leading to the dismissal, it is subject to being made public (see Question 18). How can the employer at that point offer the opportunity for a name-clearing hearing? I suppose the employer should undertake a good faith effort to reach the former employee to offer a hearing.

Question 19: If a written notice is prepared and handed to the employee but the employee asks for and is granted the opportunity to resign rather than be dismissed, does the written notice become publicly available?

No. A written notice in a disciplinary action becomes available "if the disciplinary action was a dismissal." When an employee resigns, there is no dismissal.

Question 20: What level of detail is required in "setting forth the specific acts or omissions that are the basis of the dismissal?

Damned if I know.

Further Reading

My colleague Frayda Bluestein of the School of Government has thought a lot about the 2010 Amendments and has posted a number of very helpful posts to the School's Coates Canons blog:

http://sogweb.sog.unc.edu/blogs/localgovt/?p=2798
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3041
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3487
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3595
http://sogweb.sog.unc.edu/blogs/localgovt/?p=3731