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1997 CHANGES TO THE OPEN MEETINGS AND PUBLIC RECORDS LAWS

n David M. Lawrence

The 1997 General Assembly has enacted two session laws that make changes to the open meetings law and three, thus far, that affect public access to government records. The most important, and ambiguous, of these changes is the new requirement in the open meetings law that all public bodies prepare a "general account" of their closed sessions, and most of this bulletin will consider this new requirement. The other changes will be described in a more summary fashion.

This bulletin is being prepared and sent before the end of the current session of the General Assembly, because of the impending effective date of the open meetings changes. It is being sent to local government and public school attorneys, to county and city managers, and to county and city clerks.

"General accounts" of closed sessions

Session Law 1997-290 [Senate Bill 844], which becomes effective October 1, 1997, requires each public body, whenever it meets in closed session, to "keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired." This general account may take the form of a written narrative, or the public body may simply make a video or audio recording of the closed session. The public body may withhold the general account from public inspection, if necessary to avoid frustrating the purpose of the closed session, for as long as that need prevails.

The level of detail required in a general account of a closed session is uncertain, and litigation will probably be necessary before there can be widespread agreement on the issue. Nevertheless, it is possible to make some suggestions as to what would be adequate under the statute, based on events leading up to the legislation, on the changes made to the legislation as it moved through the General Assembly, and on applying the requirement to a number of common occasions for a closed session.

Background of the legislation. Before 1994 the open meetings law included no requirement for any minutes or other accounts of closed sessions. The statute did, however, recognize that a public body might occasionally need to prepare minutes of a closed session, in order to record action properly taken during the closed session; it permitted a public body to withhold such minutes and other records of a closed session from public inspection, for so long as was necessary to avoid frustrating the purpose of the closed session. In 1994 the General Assembly made a number of amendments to the open meetings law, including imposing an explicit requirement that a public body prepare "full and accurate minutes" of each closed session. Dispute then arose as to the proper meaning of *full and accurate minutes*, and that issue was resolved by the state Supreme Court in *Maready v. City of Winston-Salem*, in which the Court held that the statutory meaning was driven by the purpose of minutes– "to reflect matters such as motions made, the movant, points of order, and appeals--not to show discussion or absence of action." Therefore, the Court held, a set of minutes that was comprised of the single word, "discussion," met the statutory requirement.

It is clear that the 1997 requirement of a general account of each closed session was enacted in response to the *Maready* decision and that therefore a public body must prepare a fuller narrative than was upheld in that case. The more difficult question, of course, is how much fuller a narrative?

Changes in the 1997 proposal. The statutory language imposing the requirement of a general account of closed sessions underwant a number of changes as the bill–Senate Bill 844–worked its way through the General Assembly. Some attention to these changes will be helpful in furthering an understanding of the requirement.

As introduced, the proposed requirement read as follows:

> When a public body meets in closed session, it shall keep an account of the closed session in a written narrative form such that a person not in attendance would have a reasonable understanding of what transpired, including a record of positions taken by public officials during discussion by the public body. Such accounts, at the option of the public body, may be in the form of sound or video recordings.

The enacted version, however, reads as follows:

> When a public body meets in closed session, it shall keep a general account of the closed session so that a person not in attendance would have a reasonable understanding of what transpired. Such accounts may be a written narrative, or video or audio recordings.

Apart from some reorganizing of the language, there were two significant modifications made to the original language in the course of the legislative process. First, and most important, the original requirement that the account include "a record of positions taken by public officials during discussion by the public body" was deleted. It seems reasonable, therefore, to conclude that the final statutory requirement of a general account does not require inclusion of such a record of positions. A general account need not be that specific. Second, the word *general* was placed before account. One should not place too much emphasis on this change, but it does reinforce the conclusion that the final language contemplates a less particularized, less specific, account than did the original language.

The language applied to some closed sessions. Applying the statutory requirement of a general account to three specific, fairly common, closed sessions should also help in understanding just what level of detail is necessary. Three kinds of closed sessions are set out below and, after each, two possible forms that a *general account* might take:

1. A local board of education holds a closed session to hear an appeal from a student who has been disciplined by her school principal. A detailed general account might name the student, set out the nature of the conduct that led to the disciplining, identify the discipline imposed, and state the board's action on the appeal. A shorter general account might simply note that the board met to hear and resolve a student disciplinary matter.
2. A city council holds a closed session to conduct its annual review of the city manager. A detailed general account might summarize the board's comments on the manager's performance and set out any program for change in the manager's behavior agreed upon by the board. A shorter general account might state that the board reviewed the manager's performance for the past year and established goals for change for the upcoming year.
3. A board of county commissioners holds a closed session to discuss with the county attorney whether the county should bring a lawsuit, seeking to enjoin a land use arguably in violation of the county zoning ordinance. A detailed general account might identify the

> property in question and the alleged violation, identify the issues considered by the board in determining whether to bring an enforcement action, and state the board's conclusion and direction to its attorney. A shorter general account might note that the board considered whether to bring suit to enforce the zoning ordinance and that it gave appropriate instructions to the county attorney.

Does the statute require detailed accounts, something like the three suggested above, or is it satisfied by the shorter examples? A return to the statutory language might help in resolving that issue. The statute requires a general account in such detail "that a person not in attendance would have a reasonable understanding of what transpired." Although the statute permits withholding the general account from public inspection, so long as inspection would frustrate the purpose of the closed session, it seems clear from the quoted language that the statute intends that ultimately the account be made available to the public.

With the first two closed session examples set out above, however, the more detailed general accounts suggested could never be made available for public inspection. A general account of a student disciplinary hearing that named the student, identified the student's conduct and the discipline imposed, and set out the board's action would clearly qualify as a student record. Under G.S. 115C-402, such a record must be kept confidential; therefore, such a detailed account of the closed session could never be made available to the public. The account would in no way serve the statutory intention of providing information to the public about the closed session. Similarly, a general account of a city manager review that summarized board comments on the manager's performance would be part of the manager's personnel file, and under G.S. 160A-168 that too is not available for public inspection. Again, an account so detailed would not serve the statutory purpose of providing information about the closed session to the public. If any kind of account of these two closed sessions is to be public, it must be one very much like the shorter versions suggested. The situation is different, however, with the third closed session example, on litigation. There, no public records concerns are present. If the more detailed account were prepared, no records statute would require that it be sealed, and therefore it could be made available to the public.

These examples suggest a couple of possibilities as to interpreting the general account requirement. First, it would be possible to read the language as requiring something like the more detailed accounts, as long as those accounts could in relatively short order be made available to the public. Only if such a detailed account could never be made public, as with the student discipline session and the manager review session, would a shorter version suffice. This possibility clearly better serves the statutory goal of giving the public a reasonable understanding of what happened at the closed session. The more detail there is in the general account, the better the public understanding. On the other hand, it would be possible to read the language as requiring only something like the shorter versions, in all cases. The versions are clearly all that is possible for certain closed sessions, and because such versions suffice for those sessions, the argument is that they must suffice for all sessions. This possibility establishes a single standard for all closed sessions, one that would be much more administratively manageable for the board clerks and other persons who must prepare these general accounts. Otherwise, the clerk would have to make a judgment for each different closed session of just how much detail could be included without causing the account to become permanent unavailable to the public. Until a court interprets the new language, however, it will remain impossible to assert with certainty just what level of detail the statute requires.

Closed sessions for economic development

The second change effected by SL 1997-290 adds language to G.S. 143-318.11(a)(4), which has permitted closed sessions to "discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body." The new language specifies that a public body may, in closed session, reach "agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations." It goes on, however, to require that the "action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session."

The existing provision on economic development was allso reviewed by the Supreme Court in *Maready v. City of Winston-Salem*, but in this instance the legislative changes appear to do no more than insert the Court's conclusions into the statute. Plaintiffs and amici made two arguments about this provision of the statute. The first was that it did not authorize consideration of whether to grant economic

development incentives to specific companies but only more general discussions of economic development policy. The Court rejected this argument, and the new statutory language confirms that discussion of company-specific incentives are indeed permitted.

The second argument in the case was that the city and county had taken actions in closed session that were improper. As described in the opinion, the general pattern in both governments was for the governing board to give informal approval to a package of incentives to be offered a company, but the company was told that final approval would have to come at an open meeting and only after then could a contract be signed or funds expended. The Supreme Court upheld these procedures as being within the terms of the statute, and the new statutory language does no more than codify the same procedures.

Closed sessions to consider mediations and arbitrations

Session Law 1997-222 [Senate Bill 366] modifies the arbitration procedure for budget disputes between school boards and county commissioners. Among the changes is an authorization to either board to request that the dispute be mediated by a trained mediator. The act specifies that the mediation itself is to take place privately, expressly stating that the open meetings law does not apply to mediation proceedings. In addition, the act amends the open meetings law, to specifically allow closed sessions to consider and give instructions to an attorney concerning mediations and arbitrations.

Public records changes

Informal bids. Session Law 1997-174 [Senate Bill 891], which was the subject of Local Government Law Bulletin 79, published in June, makes a variety of amendments to the purchasing and contracting laws. One of the changes provides that informal bids received pursuant to G.S. 143-131 may be kept confidential until the bid is awarded. Formal bids, however, remain public once they are opened, as specified in G.S. 143-129.

Telephone subscriber information in 911 systems. In developing their 911 systems, local governments receive telephone number and other subscriber information from the local telephone company. G.S. 62A-9 has required the telephone company to provide, upon request, subscriber telephone numbers, names, and service addresses; it provides that this information remains the property of the telephone company. G.S. 62A-9 has specifically prohibited local governments from releasing telephone numbers, but it has said nothing about release of subscriber names and addresses, and that has led to uncertainty about whether that information is subject to general public access under the public records law. Session Law 1997-287 [House Bill 852] clarifies the matter.

It enacts a new G.S. 132-1.5, which provides that subscriber names, addresses, and telephone numbers contained in a 911 database are confidential and not a public record IF the agreement between the telephone company and the local government requires that the information be kept confidential. Presumably, the telephone companies will insist upon such a provision in their agreements. Even if they do not, however, G.S. 62A-9 is still in effect. Therefore, even if there is no agreement requiring confidentiality, the local government is still prohibited from releasing a subscriber's telephone number.

GIS records and MLS uses. G.S. 132-10 establishes special rules for copying public records that are part of geographic information system (GIS) databases. In general a local government with a GIS may require a person requesting an electronic copy to agree not to use the material for trade or commercial purposes. One exception to this requirement has allowed licensed professionals to use the information in the practice of their professions. The exception, however, has not been thought to reach to realtors, on the ground that they, while licensed, are not within the term *professionals*. Session Law 1997-193 [House Bill 499] recognizes this fact and independently creates an exception for certain real estate broker interests.

The act provides that publication or broadcast of GIS information received electronically by a real estate trade association or by a Multiple Listing Service is not a resale or use for a trade or commercial purpose. In addition, resale of the information at cost by a real estate trade association or by Multiple Listing Services does not constitute a resale or use for trade or commercial purposes. The effect of the amendment is to entitle real estate trade associations or Multiple Listing Services to an electronic copy of GIS databases, for a reasonable charge.

Other public record legislation. Two other bills were introduced this year affecting access to public records, and each has been passed in one house of the General Assembly. Senate Bill 799 would open a larger part of a public employee's personnel file to public inspection, including information about job qualifications and information about certain events leading to disciplinary actions. It has passed the Senate but, at this writing, remains in a House committee.

House Bill 898 as introduced would have made numerous changes to the public records and open meetings laws; as it passed the House, however, it simply stated that private letters in the possession of public officials were not public records. There has been some discussion in the Senate of broadening the bill, but it also remains in committee.

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