LOCAL GOVERNMENT LAW

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THE COURT OF APPEALS ADDRESSES CLOSED SESSIONS FOR ATTORNEY-CLIENT DISCUSSIONS

■ David M. Lawrence

In *Multimedia Publishing of North Carolina, Inc. v. Henderson County*,[1] decided on February 15, 2000, the North Carolina Court of Appeals explored the contours of the open meetings law provision that allows a public body to hold a closed session to "consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body." The Court held that this authorization for a closed session is *not* restricted to situations in which there is a threatened or pending claim against the public body. Rather, a public body may meet in closed session with its attorney to discuss any matter legitimately within the attorney-client privilege. The Court went on, however, to hold that if the legitimacy of such a closed session is challenged, the public body must present some sort of *objective* indication that the session was properly held, and the Court suggested that the minutes of the closed session are the best means of doing so. This Local Government Law Bulletin reviews this recent decision of the Court of Appeals and suggests some practical implications of the Court's holding.

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1. No. COA99-250. This Bulletin is based on the opinion as set out on the web site for the North Carolina Court of Appeals.

The Statutory Background and the Facts of the Case

Before 1994, the open meetings law contained separate authorizations for closed sessions for (1) discussions of threatened or pending litigation[2] and (2) confidential discussions with a public body's attorney.[3] In 1994 the General Assembly enacted a number of amendments to the statute, including combining these two separate authorizations into a single provision. That new provision now permits a closed session:

"To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. . . . The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. . . ."[4]

The issue before the Court of Appeals was whether the second quoted sentence limits the first, restricting closed sessions held to preserve the attorney-client privilege to situations in which the public body is considering the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure.

Multimedia arose from a closed session held by the Henderson County Board of Commissioners. The board had been considering in open session a proposed noise ordinance, as well as a moratorium on construction or operation of motor speedways until the ordinance could be completed and adopted. The board interrupted its open session to hold a closed session with the county attorney and the county's staff attorney, to obtain legal advice. When the closed session adjourned, the board reconvened the open session, read two amendments to the proposed moratorium, and then enacted the moratorium as amended. A month later a local newspaper brought suit, arguing that the open meetings law did not authorize a closed session in those circumstances. Rather, the newspaper argued, a public body may not hold a closed session with its attorney, *except* to "consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure." The trial court rejected the newspaper's reading of the statute, and the newspaper appealed.

The Scope of the Attorney-Client Authorization for Closed Sessions

The authorization is not limited to discussions of threatened or pending claims or litigation

The Court of Appeals agreed with the trial court that the current statutory authorization for closed sessions for discussions with the public body's attorney is not limited to discussions involving threatened or actual claims or litigation. The Court reviewed the progress of the 1994 open meetings amendments through the General Assembly, showing how the provision on claims and litigation changed as it moved through committees and the floor of each house. The language of the original bill clearly supported the newspaper's reading of the statute, but the court concluded that the changes evidenced the General Assembly's intention to allow a public body to discuss a broader range of legal issues with its attorney or attorneys. "Accordingly, we hold that the present attorney-client exception in section 143-318.11(a)(3) does not require a claim to be pending or threatened before it may be invoked by the governmental body."[5]

The Court cautioned, however, that the scope of this exception to openness must be read narrowly. Using the Henderson County facts as an illustration, the Court wrote that "discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session. Discussions regarding their constitutionality and possible legal challenges would likewise be so included. But as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends."[6]

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2. The statute permitted closed sessions "to consider the validity, settlement, or other disposition of a claim against or on behalf of the public body . . . ; or the commencement, prosecution, defense, settlement, or litigation of a potential or pending judicial action or administrative proceeding in which the public body or an officer or employee of the public body is a party." G.S. 143-318.11(a)(4) (pre-1994 version).

3. The statute permitted closed sessions "to consult with an attorney employed or retained to represent the public body, to the extent that confidentiality is required in order to preserve the attorney-client privilege between the attorney and the public body." G.S. 143-318.11(a)(5) (pre-1994 version).

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

5. Multimedia Pub. of North Carolina, Inc. v. Henderson County, *supra* note 1, at page 4.

6. *Id.*, page 5.

There is no separate authorization for discussions of threatened or pending claims or litigation

In *Multimedia* the county argued that the current closed session provision actually created two separate authorizations for closed sessions: one for confidential discussions with an attorney, and a second for consideration of claims, judicial actions, and the like. (This position is also taken in the Institute's book on open meetings,[7] and in a Local Government Law Bulletin discussing the 1994 changes to the open meetings law.[8]) The Court disagreed with this argument as well. Although this part of the Court's opinion is technically dicta,[9] we should assume the Court's reading of this part of the statute will be adopted by other courts.

The Court concluded that discussions regarding claims and judicial actions were examples of attorney-client discussions and were not an independent authorization for closed sessions. In reaching its conclusion, the Court noted that the statutory language is part of a single paragraph in the current statute a paragraph that replaced two clearly separate paragraphs in the earlier version of the statute. The practical effect of the Court's reading is that a public body may not hold a closed session to discuss claims, judicial proceedings, and the like, unless the public body's attorney is present and the discussion is undertaken within the confines of the attorney-client privilege.

If a matter under discussion is to be covered by the attorney-client privilege, the discussion must be limited to the attorney and the client. If others are present, the privilege is lost, and a closed session would be impermissible. In this respect, it is important to note that under the Code of Professional Responsibility, an attorney for a corporation or similar entity (including a local government) represents the entity and not some person or persons connected with the entity.[10] Therefore a city attorney's client is the city, not the city council; a county attorney's client is the county, not the board of county commissioners; and a school attorney's client is the school administrative unit and not the board of education. This means that officers or employees of the governmental unit may attend a closed session without loss of the attorney-client privilege. (The clerk, for example, was present in the Henderson County closed session; and almost certainly the county manager as well.) But if outsiders are present, even persons contracting with the governmental unit, the privilege is lost. A recent trial court decision involving Hyde County illustrates this point.[11] In the Hyde County case, the closed session also included the county's independent auditor, and the trial court held that the closed session had been improperly held.

Proving that the Authorization was Properly Used: Records of the Closed Session

If a public body holds a closed session to discuss a legal issue with its attorney, and if the propriety of that closed session is challenged in court, the Court of Appeals held that "the burden is on the governmental body to demonstrate that the attorney-client exception applies. . . . [I]n meeting its burden, governmental bodies may not simply treat the words 'attorney-client privilege' or 'legal advice' as some talisman, the mere utterance of which magically casts a spell of secrecy over their meetings. . . . Rather, the government body can only meet its burden by providing some *objective* indicia that the exception is applicable under the circumstances. Mere assertions by the body or its attorney in pleadings will not suffice."[12]

In the case itself, the county sought to support the propriety of the closed session by presenting affidavits from the county's staff attorney and the clerk to the board of commissioners. The Court of Appeals rejected these as "self-serving" and insufficiently objective. Rather, the Court stated that an "in camera review by the trial court of the minutes of the closed session provides the easiest and most effective way for the government body to objectively demonstrate that the closed session was in fact warranted. Such review affords the benefits of an impartial arbiter without the risks accompanying public disclosure of the minutes."[13]

The Court's reliance of the minutes of the closed session, for the necessary information about whether the session was properly held, raises two questions.

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7. DAVID M. LAWRENCE, OPEN MEETINGS AND LOCAL GOVERNMENTS IN NORTH CAROLINA, SOME QUESTIONS AND ANSWERS 20 (question 73) (5th ed. 1998).

8. DAVID M. LAWRENCE, *1994 Changes to the Open Meetings Law*, LOCAL GOV'T LAW BULLETIN NO. 64 (Sept. 1994).

9. The closed session in question did not involve a claim or litigation, and the county's attorneys were present in any event; therefore, the issues raised by the county's argument were not before the court.

10. Code of Professional Responsibility of the North Carolina State Bar, EC5-18.

11. Pamlico News Inc. v. Hyde County Board of Commissioners, Hyde County Superior Court No. 99-CVS-76, decided January 14, 2000.

12. Multimedia Pub. of North Carolina, Inc. v. Henderson County, *supra* note 1, at page 5.

13. *Id.*

First, the *minutes* of a closed session normally will not contain any detail at all about the nature of discussions in the closed session. In *Maready v. City of Winston-Salem*[14] (which was not cited by the Court of Appeals), the Supreme Court held that minutes of a closed session essentially were necessary only when the public body took action within the closed session. In *Maready* the public bodies took no action in their closed sessions, and the Court held that the single word "Discussion" was adequate as minutes. If a public body holds a closed session with its attorney and takes no action in the session, comparably succinct minutes would satisfy the statutory requirement for minutes – but would not provide the objective demonstration of the scope of the session demanded by the Court of Appeals.

After the *Maready* decision, the General Assembly amended the open meetings law to require, in addition to minutes, that a public body prepare a "general account" of each closed session. The statute does not specify the degree of detail necessary in a general account, beyond saying that such an account is intended to give "a person not in attendance . . . a reasonable understanding of what transpired" in the closed session.[15] This document is much more amenable to serving the purposes demanded by the Court of Appeals of minutes, and perhaps the Court understood the general account to be the minutes for closed sessions.[16] Second, however, even if we substitute "general account" for "minutes," it is difficult to see how this more complete document provides the *objective* demonstration of the scope of the closed session demanded by the Court of Appeals. The Court rejected affidavits from the county's staff attorney and clerk of the board of commissioners, because it thought those documents were self-serving and therefore non-objective. But how is a general account of a closed session any more objective, inasmuch as it will normally be prepared by the participants in the closed session, such as a staff attorney or clerk to the board? Perhaps because the general account is a formal public document (even if sealed from public access), required by statute, the Court is willing to accord it an objectivity that an affidavit submitted as part of the pleadings in litigation does not have.

14. 342 N.C. 708, 467 S.E.2d 615 (1996).

15. G.S. 143-318.10(e).

16. The statute might be read in such a way that its requirement of a general account of closed sessions intends that the general account be the minutes of a closed session. The last sentence of the subsection requiring minutes and general accounts, however, distinguishes between the two, and so they appear to be independent requirements.

There is one other possible interpretation of the Court's reliance on minutes (or the general account). The open meetings law states that both minutes and general accounts may take the form of written narratives or of *video or audio recordings*. Obviously, a recording of the closed session will provide definitive and objective evidence of what was discussed during the closed session, and perhaps the Court anticipated that public bodies would make such recordings of their closed session discussions with attorneys. But the statute clearly does not require that public bodies use recordings for their minutes or general accounts, nor does the Court explicitly state that it expects recordings to be made. Therefore, it does not seem necessary that public bodies begin recording their closed sessions.

What does seem necessary under the Court's opinion, though, is that public bodies prepare relatively detailed general accounts of their closed sessions, at least those held pursuant to the exception for attorney-client discussions. These general accounts should specify the legal issues discussed by the attorney and the public body; if documents are prepared and distributed during the closed session, these might be attached to the general account as further evidence of the nature of the discussion. In any event, the public body and attorney should be careful to limit the closed session to discussion of legal issues and not allow the discussion to spread to policy and other non-legal issues.

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