

**Who Wins:
Social Services Confidentiality Laws or Public Records Laws?**

In a Nutshell: Public Records Law

- General rule is that members of the public have a legal right of access to public records.
- There are many exceptions to the general rule.
 - An exception may apply to certain “information” in a record (i.e., requires release with redaction) or to an entire “record” (i.e., prohibits release).
 - Depending on how the exception is worded, it may prohibit disclosure entirely or it may allow the agency to withhold the record.
- A helpful framework for analyzing a public records request is described in a 2010 blog post by Frayda Bluestein¹
 - Does a record exist that corresponds to the request?
 - Is the record “made or received in the transaction of public business?”
 - Is there an exception that applies? For example, information or records that are designated “confidential” by state statute are excepted.
 - If so, does the exception apply to the entire record, or only to certain information? Does it prohibit disclosure or does it deny the right of access?

In a Nutshell: Social Services Confidentiality Law²

- Most information DSS collects is a “public record” because it is “made or received pursuant to law or ordinance in connection with the transaction of public business.”
- Any information that is confidential under federal or state law is excepted from the right of access.
- Several laws make DSS information confidential.
 - Some apply to “information”
 - Some apply to “records”
- Some laws require information to be made public.

¹ <https://canons.sog.unc.edu/is-this-a-public-record-a-framework-for-answering-questions-about-public-records-requests/>

See also David Lawrence, PUBLIC RECORDS LAW FOR NC LOCAL GOVERNMENTS, 2nd edition (<https://www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition>)

² For detailed discussion, see DISCLOSING PROTECTIVE SERVICES RECORDS: A GUIDE FOR NC SOCIAL SERVICES AGENCIES (<https://www.sog.unc.edu/publications/books/disclosing-protective-services-information-guide-north-carolina-social-services-agencies>) and Section 14.1 of ABUSE, NEGLECT, DEPENDENCY AND TERMINATION OF PARENTAL RIGHTS (<https://www.sog.unc.edu/resources/microsites/abuse-neglect-dependency-and-termination-parental-rights/chapter-14-confidentiality-and-information-sharing>)

How Should DSS Respond?

Case Problem #1

A candidate running for local office submits a public records request to DSS asking for information about APS cases investigated by the agency. The requester has asserted that the agency is biased and screens out reports related to disabled adults from minority populations. The requester asks for the race, gender, and zip code of every subject of an APS report.

Case Problem #2

Your county agency receives a letter from an advocacy organization wanting to know how many children in the agency's custody are in a psychiatric residential treatment facility (PRTF) and whether the director has consented to the children receiving anti-psychotic medications.

Case Problem #3

A child is hospitalized after having been severely abused. She has brain damage and may not survive. The child is now in non-secure custody and the 7B case is underway. Law enforcement is contemplating pressing charges. The local newspaper contacts DSS and explains that a neighbor of the family called and said he had called DSS multiple times because he was worried about the safety of the children in that family. The newspaper asks DSS for (1) all records related to the current investigation, (2) a list of how many times DSS has responded to reports related to this child or other children in the family, (3) a summary of how the other reports were resolved.

Case Problem #4

A protective services case has gotten a lot of attention in the media and there is some speculation that the case worker involved was negligent. The local news station contacts DSS and asks for the name of the case worker and whether the case worker was disciplined by the director.

Selected Statutes and Regulations

§ 132-1. "Public records" defined.

(a) "Public record" or "public records" shall mean all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions. Agency of North Carolina government or its subdivisions shall mean and include every public office, public officer or official (State or local, elected or appointed), institution, board, commission, bureau, council, department, authority or other unit of government of the State or of any county, unit, special district or other political subdivision of government.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, "minimal cost" shall mean the actual cost of reproducing the public record or public information.

§ 153A-98. Privacy of employee personnel records.

(a) Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section. For purposes of this section, an employee's personnel file consists of any information in any form gathered by the county with respect to that employee and, by way of illustration but not limitation, relating to his application, selection or nonselection, performance, promotions, demotions, transfers, suspension and other disciplinary actions, evaluation forms, leave, salary, and termination of employment. As used in this section, "employee" includes former employees of the county.

(b) The following information with respect to each county employee is a matter of public record:

- (1) Name.
- (2) Age.
- (3) Date of original employment or appointment to the county service.
- (4) The terms of any contract by which the employee is employed whether written or oral, past and current, to the extent that the county has the written contract or a record of the oral contract in its possession.
- (5) Current position.
- (6) Title.
- (7) Current salary.
- (8) Date and amount of each increase or decrease in salary with that county.
- (9) Date and type of each promotion, demotion, transfer, suspension, separation or other change in position classification with that county.

- (10) Date and general description of the reasons for each promotion with that county.
 - (11) Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the county. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the county setting forth the specific acts or omissions that are the basis of the dismissal.
 - (12) The office to which the employee is currently assigned.
- (b1) For the purposes of this subsection, the term "salary" includes pay, benefits, incentives, bonuses, and deferred and all other forms of compensation paid by the employing entity.
- (b2) The board of county commissioners shall determine in what form and by whom this information will be maintained. Any person may have access to this information for the purpose of inspection, examination, and copying, during regular business hours, subject only to such rules and regulations for the safekeeping of public records as the board of commissioners may have adopted. Any person denied access to this information may apply to the appropriate division of the General Court of Justice for an order compelling disclosure, and the court shall have jurisdiction to issue such orders.
- (c) All information contained in a county employee's personnel file, other than the information made public by subsection (b) of this section, is confidential and shall be open to inspection only in the following instances:
- (1) The employee or his duly authorized agent may examine all portions of his personnel file except (i) letters of reference solicited prior to employment, and (ii) information concerning a medical disability, mental or physical, that a prudent physician would not divulge to his patient.
 - (2) A licensed physician designated in writing by the employee may examine the employee's medical record.
 - (3) A county employee having supervisory authority over the employee may examine all material in the employee's personnel file.
 - (4) By order of a court of competent jurisdiction, any person may examine such portion of an employee's personnel file as may be ordered by the court.
 - (5) An official of an agency of the State or federal government, or any political subdivision of the State, may inspect any portion of a personnel file when such inspection is deemed by the official having custody of such records to be inspected to be necessary and essential to the pursuance of a proper function of the inspecting agency, but no information shall be divulged for the purpose of assisting in a criminal prosecution of the employee, or for the purpose of assisting in an investigation of the employee's tax liability. However, the official having custody of such records may release the name, address, and telephone number from a personnel file for the purpose of assisting in a criminal investigation.
 - (6) An employee may sign a written release, to be placed with his personnel file, that permits the person with custody of the file to provide, either in person, by telephone, or by mail, information specified in the release to prospective employers, educational institutions, or other persons specified in the release.

- (7) The county manager, with concurrence of the board of county commissioners, or, in counties not having a manager, the board of county commissioners may inform any person of the employment or nonemployment, promotion, demotion, suspension or other disciplinary action, reinstatement, transfer, or termination of a county employee and the reasons for that personnel action. Before releasing the information, the manager or board shall determine in writing that the release is essential to maintaining public confidence in the administration of county services or to maintaining the level and quality of county services. This written determination shall be retained in the office of the manager or the county clerk, is a record available for public inspection and shall become part of the employee's personnel file.

(c1) Even if considered part of an employee's personnel file, the following information need not be disclosed to an employee nor to any other person:

- (1) Testing or examination material used solely to determine individual qualifications for appointment, employment, or promotion in the county's service, when disclosure would compromise the objectivity or the fairness of the testing or examination process.
- (2) Investigative reports or memoranda and other information concerning the investigation of possible criminal actions of an employee, until the investigation is completed and no criminal action taken, or until the criminal action is concluded.
- (3) Information that might identify an undercover law enforcement officer or a law enforcement informer.
- (4) Notes, preliminary drafts and internal communications concerning an employee. In the event such materials are used for any official personnel decision, then the employee or his duly authorized agent shall have a right to inspect such materials.

(c2) The board of county commissioners may permit access, subject to limitations they may impose, to selected personnel files by a professional representative of a training, research, or academic institution if that person certifies that he will not release information identifying the employees whose files are opened and that the information will be used solely for statistical, research, or teaching purposes. This certification shall be retained by the county as long as each personnel file so examined is retained.

(c3) Repealed by Session Laws 2016-108, s. 2(g), effective July 22, 2016.

(c4) Even if considered part of an employee's personnel file, the following information regarding any sworn law enforcement officer shall not be disclosed to an employee or any other person, unless disclosed in accordance with G.S. 132-1.4, or in accordance with G.S. 132-1.10, or for the personal safety of that sworn law enforcement officer or any other person residing in the same residence:

- (1) Information that might identify the residence of a sworn law enforcement officer.
- (2) Emergency contact information.
- (3) Any identifying information as defined in G.S. 14-113.20.

(c5) Notwithstanding the requirements of this section, information shall be provided to the State Board of Elections from employee personnel records as provided in G.S. 163-22.

(d) The board of commissioners of a county that maintains personnel files containing information other than the information mentioned in subsection (b) of this section shall establish procedures whereby an employee who objects to material in his file on grounds that it is inaccurate or misleading may seek to have the material removed from the file or may place in the file a statement relating to the material.

(e) A public official or employee who knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file, except as is permitted by this section, is guilty of a Class 3 misdemeanor and upon conviction shall only be fined an amount not more than five hundred dollars (\$500.00).

(f) Any person, not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully examine in its official filing place, remove or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars (\$500.00).

§ 108A-80. Confidentiality of records.

(a) Except as provided in subsections (b) and (b1) of this section, it shall be unlawful for any person to obtain, disclose or use, or to authorize, permit, or acquiesce in the use of any list of names or other information concerning persons applying for or receiving public assistance or social services that may be directly or indirectly derived from the records, files or communications of the Department or the county boards of social services, or county departments of social services or acquired in the course of performing official duties except for the purposes directly connected with the administration of the programs of public assistance and social services in accordance with federal law, rules and regulations, and the rules of the Social Services Commission or the Department.

(b) The Department shall furnish a copy of the recipient check register monthly to each county auditor showing a complete list of all recipients of Work First Family Assistance in Standard Program Counties and State-County Special Assistance, their addresses, and the amounts of the monthly grants. An Electing County whose checks are not being issued by the State shall furnish a copy of the recipient check register monthly to its county auditor showing a complete list of all recipients of Work First Family Assistance in the Electing County, their addresses, and the amounts of the monthly payments. These registers shall be public records open to public inspection during the regular office hours of the county auditor, but the registers or the information contained therein may not be used for any commercial or political purpose. Any violation of this section shall constitute a Class 1 misdemeanor.

(b1) The Department may share confidential information concerning a person receiving public assistance or social services with a local school administrative unit and with the Department of Public Instruction. Disclosure is limited to that information necessary to establish, coordinate, or maintain appropriate educational services for the person receiving public assistance or social services.

(c) Any listing of recipients of benefits under any public assistance or social services program compiled by or used for official purposes by a county board of social services or a county

department of social services shall not be used as a mailing list for political purposes. This prohibition shall apply to any list of recipients of benefits of any federal, State, county or mixed public assistance or social services program. Further, this prohibition shall apply to the use of such listing by any person, organization, corporation, or business, including but not limited to public officers or employees of federal, State, county, or other local governments, as a mailing list for political purposes. Any violation of this section shall be punishable as a Class 1 misdemeanor.

(d) The Social Services Commission may adopt rules governing access to case files for social services and public assistance programs, except the Medical Assistance Program. The Secretary of the Department of Health and Human Services shall have the authority to adopt rules governing access to medical assistance case files.

§ 7B-302. Assessment by director; military affiliation; access to confidential information; notification of person making the report.

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(a1) All information received by the department of social services, including the identity of the reporter, shall be held in strictest confidence by the department, except under the following circumstances:

- (1) The department shall disclose confidential information to any federal, State, or local government entity or its agent, or any private child placing or adoption agency licensed by the Department of Health and Human Services, in order to protect a juvenile from abuse or neglect. The disclosure of confidential information pursuant to this subdivision shall include sharing information with the appropriate military authority if the director finds evidence that a juvenile may have been abused or neglected and the parent, guardian, custodian, or caretaker of the juvenile alleged to have been abused or neglected has a military affiliation. Any confidential information disclosed to any federal, State, or local government entity or its agent under this subsection shall remain confidential with the other entity or its agent and shall only be redisclosed for purposes directly connected with carrying out that entity's mandated responsibilities.
- (1a) The department shall disclose confidential information regarding the identity of the reporter to any federal, State, or local government entity or its agent with a court order. The department may only disclose confidential information regarding the identity of the reporter to a federal, State, or local government entity or its agent without a court order when the entity demonstrates a need for the reporter's name to carry out the entity's mandated responsibilities.
- (2) The information may be examined upon request by the juvenile's guardian ad litem or the juvenile, including a juvenile who has reached age 18 or been emancipated.
- (3) A district or superior court judge of this State presiding over a civil matter in which the department of social services is not a party may order the department to release confidential information, after providing the department with reasonable notice and an opportunity to be heard and then

determining that the information is relevant and necessary to the trial of the matter before the court and unavailable from any other source. This subdivision shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law, before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The department of social services may surrender the requested records to the court, for in camera review, if the surrender is necessary to make the required determinations.

- (4) A district or superior court judge of this State presiding over a criminal or delinquency matter shall conduct an in camera review prior to releasing to the defendant or juvenile any confidential records maintained by the department of social services, except those records the defendant or juvenile is entitled to pursuant to subdivision (2) of this subsection.
- (5) The department may disclose confidential information to a parent, guardian, custodian, or caretaker in accordance with G.S. 7B-700 of this Subchapter.

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§ 7B-2901. Confidentiality of records.

(a) The clerk shall maintain a complete record of all juvenile cases filed in the clerk's office alleging abuse, neglect, or dependency. The records shall be withheld from public inspection and, except as provided in this subsection, may be examined only by order of the court. The record shall include the summons, petition, custody order, court order, written motions, the electronic or mechanical recording of the hearing, and other papers filed in the proceeding. The recording of the hearing shall be reduced to a written transcript only when notice of appeal has been timely given. After the time for appeal has expired with no appeal having been filed, the recording of the hearing may be erased or destroyed upon the written order of the court or in accordance with a retention schedule approved by the Director of the Administrative Office of the Courts and the Department of Natural and Cultural Resources under G.S. 121-5(c).

The following persons may examine the juvenile's record maintained pursuant to this subsection and obtain copies of written parts of the record without an order of the court:

- (1) The person named in the petition as the juvenile;
- (2) The guardian ad litem;
- (3) The county department of social services; and
- (4) The juvenile's parent, guardian, or custodian, or the attorney for the juvenile or the juvenile's parent, guardian, or custodian.

(b) The Director of the Department of Social Services shall maintain a record of the cases of juveniles under protective custody by the Department or under placement by the court, which shall include family background information; reports of social, medical, psychiatric, or psychological information concerning a juvenile or the juvenile's family; interviews with the juvenile's family; or other information which the court finds should be protected from public inspection in the best interests of the juvenile. The records maintained pursuant to this subsection may be examined only in the following circumstances:

- (1) The juvenile's guardian ad litem or the juvenile, including a juvenile who has reached age 18 or been emancipated, may examine the records.
 - (2) A district or superior court judge of this State presiding over a civil matter in which the department is not a party may order the department to release confidential information, after providing the department with reasonable notice and an opportunity to be heard and then determining that the information is relevant and necessary to the trial of the matter before the court and unavailable from any other source. This subsection shall not be construed to relieve any court of its duty to conduct hearings and make findings required under relevant federal law before ordering the release of any private medical or mental health information or records related to substance abuse or HIV status or treatment. The department may surrender the requested records to the court, for in camera review, if surrender is necessary to make the required determinations.
 - (3) A district or superior court judge of this State presiding over a criminal or delinquency matter shall conduct an in camera review before releasing to the defendant or juvenile any confidential records maintained by the department of social services, except those records the defendant or juvenile is entitled to pursuant to subdivision (1) of this subsection.
 - (4) The department may disclose confidential information to a parent, guardian, custodian, or caretaker in accordance with G.S. 7B-700.
- (c) In the case of a child victim, the court may order the sharing of information among such public agencies as the court deems necessary to reduce the trauma to the victim.
- (d) The court's entire record of a proceeding involving consent for an abortion on an unemancipated minor under Article 1A, Part 2 of Chapter 90 of the General Statutes is not a matter of public record, shall be maintained separately from any juvenile record, shall be withheld from public inspection, and may be examined only by order of the court, by the unemancipated minor, or by the unemancipated minor's attorney or guardian ad litem.

§ 7B-2902. Disclosure in child fatality or near fatality cases.

- (a) The following definitions apply in this section:
 - (1) Child fatality. - The death of a child from suspected abuse, neglect, or maltreatment.
 - (2) Findings and information. - A written summary, as allowed by subsections (c) through (f) of this section, of actions taken or services rendered by a public agency following receipt of information that a child might be in need of protection. The written summary shall include any of the following information the agency is able to provide:
 - a. The dates, outcomes, and results of any actions taken or services rendered.
 - b. The results of any review by the State Child Fatality Prevention Team, a local child fatality prevention team, a local community child protection team, the Child Fatality Task Force, or any public agency.

c. Confirmation of the receipt of all reports, accepted or not accepted by the county department of social services, for investigation of suspected child abuse, neglect, or maltreatment, including confirmation that investigations were conducted, the results of the investigations, a description of the conduct of the most recent investigation and the services rendered, and a statement of basis for the department's decision.

(3) Near fatality. - A case in which a physician determines that a child is in serious or critical condition as the result of sickness or injury caused by suspected abuse, neglect, or maltreatment.

(4) Public agency. - Any agency of State government or its subdivisions as defined in G.S. 132-1(a).

(b) Notwithstanding any other provision of law and subject to the provisions of subsections (c) through (f) of this section, a public agency shall disclose to the public, upon request, the findings and information related to a child fatality or near fatality if:

(1) A person is criminally charged with having caused the child fatality or near fatality; or

(2) The district attorney has certified that a person would be charged with having caused the child fatality or near fatality but for that person's prior death.

(c) Nothing herein shall be deemed to authorize access to the confidential records in the custody of a public agency, or the disclosure to the public of the substance or content of any psychiatric, psychological, or therapeutic evaluations or like materials or information pertaining to the child or the child's family unless directly related to the cause of the child fatality or near fatality, or the disclosure of information that would reveal the identities of persons who provided information related to the suspected abuse, neglect, or maltreatment of the child.

(d) Within five working days from the receipt of a request for findings and information related to a child fatality or near fatality, a public agency shall consult with the appropriate district attorney and provide the findings and information unless the agency has a reasonable belief that release of the information:

(1) Is not authorized by subsections (a) and (b) of this section;

(2) Is likely to cause mental or physical harm or danger to a minor child residing in the deceased or injured child's household;

(3) Is likely to jeopardize the State's ability to prosecute the defendant;

(4) Is likely to jeopardize the defendant's right to a fair trial;

(5) Is likely to undermine an ongoing or future criminal investigation; or

(6) Is not authorized by federal law and regulations.

(e) Any person whose request is denied may apply to the appropriate superior court for an order compelling disclosure of the findings and information of the public agency. The application shall set forth, with reasonable particularity, factors supporting the application. The superior court shall have jurisdiction to issue such orders. Actions brought pursuant to this section shall be set down for immediate hearing, and subsequent proceedings in such actions shall be accorded priority by the appellate courts. After the court has reviewed the specific findings and information, in camera, the court shall issue an order compelling disclosure unless the court finds that one or more of the circumstances in subsection (d) of this section exist.

(f) Access to criminal investigative reports and criminal intelligence information of public law enforcement agencies and confidential information in the possession of the State Child Fatality Prevention Team, the local teams, and the Child Fatality Task Force, shall be governed by G.S. 132-1.4 and G.S. 7B-1413 respectively. Nothing herein shall be deemed to require the disclosure or release of any information in the possession of a district attorney.

(g) Any public agency or its employees acting in good faith in disclosing or declining to disclose information pursuant to this section shall be immune from any criminal or civil liability that might otherwise be incurred or imposed for such action.

(h) Nothing herein shall be deemed to narrow or limit the definition of "public records" as set forth in G.S. 132-1(a).

10A NCAC 69 .0504 Disclosure Pursuant to Other Laws

(a) Client information may be disclosed without the consent of the client for purposes of complying with the rules of this Section, court orders, and any applicable State and federal regulations.

(b) When information is released without the client's consent, the client shall be informed of the disclosure in writing to explain what information was released, how it was released, and how to contact the privacy official. The writing informing the client of the disclosure shall be documented in the record.

10A NCAC 70A .0113 Confidentiality of County DSS Protective Services Records

(a) The county director shall not allow anyone outside of the county department of social services other than state and federal agency personnel carrying out their lawful responsibilities for program audit and review to examine a protective services case record as described in Rule .0112 of this Subchapter unless: (1) the judge orders the county director to allow examination; or (2) the child or the child's attorney requests to examine his own record.

(b) The county director in carrying out his duties may share information and a summary of documentation from the case record without a court order with public or private agencies or individuals that are being utilized to provide or facilitate the provision of protective services to a child.

(c) The county director shall allow the District Attorney or his designee access to the case record, including any information or documentation therein, which he needs to carry out his mandated responsibilities that result from a report of confirmed abuse or from the county director's decision not to file a petition.

10A NCAC 71A .0803 Specific Findings (*Adult Protective Services*)

Specific findings of the evaluation shall be kept confidential and shall not be released without consent of the disabled adult or court order, except that the department of social services at its discretion may share information about the adult with other persons or agencies without the adult or caretaker's consent to the extent necessary to provide protective services. When evidence of abuse, neglect, or exploitation is found, and upon request of the district attorney or

law enforcement agencies, such information shall be sent to help with a criminal investigation or prosecution of abuse, neglect or exploitation.