LOCAL GOVERNMENT LAW

Number 101 February 2002 **David M. Lawrence, Editor**

ATTORNEY-CLIENT CONFIDENTIALITY, MINUTES, AND GENERAL ACCOUNTS OF CLOSED SESSIONS: SOME QUESTIONS AND ANSWERS FROM *MULTIMEDIA II*

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Attorney-Client Closed Sessions

One of the most frequently cited reasons for public bodies to hold closed sessions is to preserve the attorney-client privilege between the public body and its lawyer.[1] This privilege of the client, which in its earliest form dates to England in the 1600's, allows it to talk with its lawyer confidentially, and in return to receive confidential legal advice. The legislature has specifically acknowledged that such a privilege exists.[2] Any conversations or other sharing of information that fall within the privilege are generally considered to be sealed forever, unless the client waives the privilege.

The privilege does not apply, however, to all conversations between attorneys and their clients. In the case of public bodies, moreover, there are countervailing statutes that point toward openness, since the people's business is involved. The public records law, for example, specifies that all correspondence from an attorney to a public body concerning litigation becomes subject to the public records law three years after it was created, regardless of whether there is still litigation pending.[3]

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

2. The above-cited statute now includes the phrase "which privilege is specifically acknowledged." This provision was likely added to the law in response to a suggestion by the North Carolina Supreme Court in News and Observer Publishing Co v. Poole, 330 N.C. 465, 482, 412 S.E.2d 7, 17 (1992) that the attorney-client privilege might not exist for public bodies.

3. G.S. 132-1.1(a).

As another example, the open meetings law requires that "full and accurate" minutes be kept of each closed session, and also that a general account of each such session be kept, "so that a person not in attendance would have a reasonable understanding of what transpired."[4] The law also specifies that closed session minutes and general accounts may only be sealed "so long as public inspection would frustrate the purpose of a closed session."[5]

In a 2000 case, *Multimedia Publishing of North Carolina v. Henderson County* (*Multimedia I*),[6] the Court of Appeals dealt with the tension between these policies of confidentiality and openness, observing that "in light of the general public policy favoring open meetings, the attorney-client exception is to be construed and applied narrowly. … This is so notwithstanding the countervailing policy favoring confidentiality between attorneys and clients. In this regard, our legislature has explicitly forbidden general policy matters from being discussed during closed sessions. … Furthermore, the privilege must be viewed in light of the traditional duties performed by attorneys; 'public bodies [cannot simply] delegate responsibilities to attorneys and then cloak negotiations and [closed] sessions in secrecy by having attorneys present.' [citations omitted]"[7]

The *Multimedia* Decision on Remand (*Multimedia II*)

The facts and decision in *Multimedia I* are discussed in David M. Lawrence, "The Court of Appeals Addresses Closed Sessions for Attorney-Client Discussions," *Local Government Law Bulletin* No. 93 (March 2000). The case involved the propriety of a closed session where Henderson County's attorneys advised it about a moratorium provision in a noise ordinance.

While the court of appeals decided several important questions concerning closed sessions and the attorney-client privilege in *Multimedia I*, it concluded that it had an insufficient record to determine whether the Henderson County Board of Commissioners was justified in closing the meeting at issue. The court remanded the case to the trial court to review the minutes of the closed session *in camera*. It stressed that the burden was on the county to establish that a closed session under the attorney-client privilege was needed, and if so, whether disclosure of the minutes would still frustrate the session's purpose.[8]

The trial court conducted the *in camera* review on motion of the plaintiff newspaper. The closed session minutes reviewed by the trial court follow. The sentences the court allowed to be redacted (the withheld minutes sought by the newspaper) are italicized.

Item Discussed Pursuant to NCGS § 143-318.11(a)(3)

CONSULT WITH ATTORNEY

Staff Attorney, Jennifer Jackson informed the Board that we have already been informed that action on a moratorium will be challenged. *She briefly explained the difference between a "Land Use Ordinance" and a "Police Power Ordinance."*

There was discussion about the legality of making the term longer than 90 days. It was decided that 90 days would be enough time to give staff time to complete the Noise Ordinance.

The County Attorney then suggested some wording changes to the Ordinance as follows:

under Moratorium paragraph it will now read: "There is hereby imposed a moratorium on the construction or operation of racetracks within the County of Henderson. No permits may be issued by any County department under the control of the Board of Commissioners during the moratorium. This moratorium shall continue in full force and effect for ninety (90) days expiring at midnight on February 9, 1999." (The underlined sentence was the added verbiage.) Also an additional paragraph was suggested entitled Enforcement which read "This Ordinance may be enforced by any legal and equitable remedies including but not limited to injunctive relief."

After conferring with the County Attorney, it was the consensus of the Board to amend the Moratorium Ordinance as recommended by the County Attorney.[9]

After its review, the trial court ruled that Henderson County had failed to keep "full and accurate minutes,"

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

5. G.S. 143-318.11(e).

6. 136 N.C. App. 567, 525 S.E.2d 786 (2000), review denied, 351 N.C. 474, 543 S.E.2d 492 (2000) (Multimedia I).

7. Id. at 575, 525 S.E.2d at 791.

8. "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." Multimedia I, 136 N.C. App. at 576, 525 S.E.2d at 792.

9. Multimedia Publishing of North Carolina v. Henderson County, 145 N.C. App. 365, 366–67, 550 S.E.2d 846, 848 (2001) (Multimedia II).

of the closed session, making it impossible to determine completely whether either the Open Meetings or the Public Records Law was violated by the board of commissioners when it held its closed session. It also found that the minutes contained "conclusory statements of the nature of discussions that were conducted in the…closed session, rather than a general account of the closed session so that a person not in attendance would have a general understanding of what transpired."[10]

The trial court stated further that "any public agency conducting a closed session should keep full, complete and accurate minutes of that closed session rather than a general account," if a judge was to conduct the *in camera* review required by the Supreme Court. It held that the county had violated both the Open Meetings Law and the Public Records Act to the extent that it conducted discussions in closed session that should have been held in open session, and that it violated G.S. 143-318.10(e) of the open meetings provisions by not keeping full and accurate minutes of the closed session.[11]

However, the court did find that some of what was recorded in the minutes was privileged, and it ordered the minutes delivered to the plaintiff with that part redacted (see italized portion of the minutes that are quoted above). It also found the plaintiff to be the prevailing party, and it charged the county with the plaintiff's costs, including attorney's fees, as the open meetings law allows. The board of commissioners responded to the court's order by voting to unseal the minutes. It gave the plaintiff a copy of its resolution so doing and an unredacted, full copy of the minutes, as well as a copy of the minutes as redacted by the trial court.[12]

Use of the Attorney-Client Privilege: The Court of Appeals Decision

The board of commissioners appealed the decision, raising two issues with the court of appeals. "[T]he only violations of the Open Meetings Law and the Public Records Act at issue are the Board's alleged abuse of its attorney-client privilege and whether the Board maintained full and accurate minutes and a general accounting of its closed session meeting."[13]

The board alleged that the lower court had not followed the court of appeals' instructions in reviewing its minutes, and that the trial court's determination of whether certain discussions fell within the attorney-client exception and others did not was a conclusion of law involving the exercise of judgment or the application of legal principles. Since a question of law was involved, the board argued, the court of appeals was free to review that determination on appeal. The court of appeals agreed, and undertook its own review of the case. Disagreeing with the trial court, it found that the board of commissioners had met its burden of showing that the attorney-client privilege applied to all of the board's discussions.

Quoting from the decision in Multimedia I, the court explained 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*."[14] [italics added by Multimedia II court]

Applying this standard, the court of appeals reviewed the board's minutes. The minutes with the redacted portions removed revealed that the staff attorney told the board that a moratorium on new racetracks enacted under its noise ordinance would be challenged. Two additional sentences that were redacted stated that the board's staff attorney briefly explained the difference between a land use ordinance and a police power ordinance, and that there was discussion about the legality of making the term of a moratorium on new racetracks longer than 90 days.

The court found that "*the record reflect[ed] no discussion of general policy matters or the propriety of the moratorium at issue.*" [italics in original][15] Therefore, it agreed with the board of commissioners and concluded that "the discussion [described] falls completely within the privilege of N.C. Gen. Stat. § 143-318.11 and that the Board minutes sufficiently describe the Board's interaction within the closed session to overcome the plaintiff's challenge." Quoting Multimedia I, it explained that "we find the minutes '[]sufficient[ly] allow this Court] to determine…it was

10. Multimedia II, 145 N.C. App. at 369, 550 S.E.2d at 849.

11. Multimedia II, 145 N.C. App. at 369, 550 S.E.2d at 849–50.

12. Multimedia II, 145 N.C. App. at 370, 550 S.E.2d at 850.

13. Id.

14. Multimedia I, 136 N.C. App. at 575, 525 S.E.2d at 791–92.

15. Multimedia II, 145 N.C. App. at 372, 550 S.E.2d at 851.

appropriate to close the session here.' Multimedia, 136 N.C. App. at 576, 525 S.E.2d at 792."[16]

General Accounts and Minutes: The Court of Appeals Decision

The other significant issue addressed by the court of appeals was what it means for a public body to keep a "general account" of a closed session, and how that general account differs from the "full and accurate minutes" that are also required. The court noted that the legislature added the requirement that a general account of closed sessions be kept in 1997, after the North Carolina Supreme Court's 1996 holding in *Maready v. City of Winston-Salem*, that "full and accurate minutes" are a record of what is done at a meeting, not a record of the discussion that occurred.[17]

The court of appeals relied on University of North Carolina at Chapel Hill School of Government faculty member David M. Lawrence's book, *Open Meetings and Local Governments in North Carolina: Some Questions and Answers*[18] to explain the difference between minutes and a general account. According to Professor Lawrence,

> The purpose of *minutes* is to provide a record of the actions taken by a board and evidence that the actions were taken according to proper procedures. If no action is taken, no minutes (other than a record that the meeting occurred) are necessary. The purpose of a *general account*, on the other hand, is to provide some sort of record of the discussion that took place in the closed session, whether action was taken or not. A public body must always prepare a general account of a closed session, even if minutes of that closed session are unnecessary. As a practical matter, the general account of a meeting at which action is taken will usually serve as the minutes of that meeting as well, if the account includes a record of the action.[19]

Following this standard, the court of appeals agreed with the board of commissioners that the minutes of the closed session reproduced above met both the "general account" and the "full and accurate minutes" requirements. It found that the board had kept a sufficient general account of the closed session "so that a person not in attendance would have a reasonable understanding of what transpired," and that this account sufficed as minutes for the closed session as well.

The court also had something to say about unsealing minutes and general accounts of closed sessions, which the open meetings law specifies must be done once the public body can do so without frustrating the purpose of the closed session. The court of appeals found that the time for unsealing was reached in the Henderson County case once the board had reassembled in public session after the closed session and made an announcement. County officials announced that the county attorney had suggested in closed session amendments to the draft moratorium already presented. Since the county did not disclose the minutes at that time, the court held that it violated the Public Records Act.[20]

Conclusion and Implications

Multimedia II teaches at least three important lessons. First, the court of appeals recognizes the difficulty of drawing a line between the public policy of openness in government and the policy favoring attorney-client confidentiality. It notes that this determination is a matter for the state legislature.

Second, the case reaffirms the statements in Multimedia I that the attorney-client closed session provision authorizes several types of discussions in closed session regarding ordinances, including consideration of their constitutionality and of possible legal challenges to them, as well as of their drafting, phrasing, scope, and meaning. At the same time, as noted in Multimedia I, a meeting cannot be closed for discussion of the propriety and merits of ordinance proposals that move beyond legal technicalities.[21] Both courts cite the statutory rule[22] that "[g]eneral policy matters" are not among the subjects that may be considered in attorney-client closed sessions. Note that "the burden is on the government body to demonstrate that the attorney-client exception applies."[23]

Third and perhaps most importantly, the decision clarifies the difference between minutes and general accounts of closed sessions, a distinction that had not

16. Id.

17. 342 N.C. 708, 733–34, 467 S.E.2d 615, 631 (1996).

18. 5th ed., 1998, published by the school.

19. Lawrence, supra, at 33 (emphasis in original), quoted in Multimedia II, 145 N.C. App. at 372–73, 550 S.E.2d at 851–52.

20. Multimedia II, 145 N.C. App. at 374, 550 S.E.2d at 852.

21. See Multimedia I, 136 N.C. App. at 575, 525 S.E.2d at 792; Multimedia II, 145 N.C. App. at 371, 550 S.E. 2d. at 851.

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

23. Multimedia II, 145 N.C. App. at 371, 550 S.E.2d at 851 (citation omitted).

been made in Multimedia I. The court of appeals in Multimedia II explains that minutes are a record of *actions*, if any, taken by a board during a closed session, following the definition of minutes used by the North Carolina Supreme Court in *Maready v. City of Winston-Salem*.[24] The court of appeals contrasts general accounts, which provide a record of the *discussion* that took place during the closed session. In addition, by approving the Henderson County board's minutes and general account, the court of appeals shows that it is acceptable to combine the two records in a single document, and it provides local officials with a useful guideline for the level of detail that a general account requires.

The case also leaves one question unanswered. As noted above, the court of appeals held that Henderson County violated the public records law in not disclosing the minutes and general account of the closed session once it discussed in public what went on in the session. "[W]hen the [Henderson County] Board [of Commissioners] reconvened the public session and 'explained that the county attorney had [in the closed session] suggested amendments to the draft of the moratorium previously presented,' the Board then had a duty to disclose the minutes of the closed session to the public since it 'would [no longer] frustrate the purpose of [the] closed session.' N.C. Gen. Stat. 143-318.10(e)."[25]

Does this holding mean that all matters discussed by local government boards in closed sessions with their attorneys are eventually subject to disclosure, even if the governmental client wishes to keep them confidential? In *Multimedia II*, the holding is actually much narrower. Disclosure of the minutes and general account of the attorney-client closed session was required in that case because the client had already revealed the contents of the closed session. Thus, there was nothing left for the attorney-client privilege to protect.

This does not mean, however, that the privilege cannot continue to operate if there is something to be protected. The law has long recognized that the attorney-client privilege is the client's to waive or not as it chooses, and there are cases where a government client might for legitimate reasons serving the public good want to reveal matters to its attorney that need to be protected for long periods of time, if the purpose of the closed session is not to be frustrated. If a governmental client does not wish for the privilege to be waived by disclosure of the minutes and general account of an attorney-client privilege closed session under the open meetings law, there is a policy argument that the usual privilege rule should apply and the minutes and general account should not be opened.

A Court of Appeals case decided in June 2001 seems to support this conclusion. In *Sigma Construction Co. v. Guilford County Board of Education*,[26] the trial court found after an *in camera* review of the minutes of a school board's closed sessions held to consult with its attorneys that the board "'did in fact receive legal advice' from its attorneys, there was no 'discussion…of any general policy matters,' and, indeed, 'no discussion of any matter which was *not* subject to the attorney client privilege." Importantly for our purposes, "[t]he trial court also found that release of the minutes of the closed sessions would 'destroy the attorney-client privilege.'[27]

While the trial court's findings were not reviewed by the court of appeals because the record on appeal did not contain the closed session minutes, the court nevertheless did not call into question the general principle announced. That is, the court assumed that attorney-client closed session minutes (and presumably general accounts) may remain sealed for an indefinite period of time in order not to destroy the attorney-client privilege.[28]

On the other hand, G.S. 132-1.1(a), also discussed above, makes clear that written statements from a public attorney to his or her client respecting litigation that are within the scope of the attorney-client relationship become public records subject to disclosure three years after they are produced.[29] Does this suggest that the legislature prefers a three-year limitation generally on withholding the minutes and general accounts of attorney-client closed sessions? As noted at the beginning of this bulletin, the court of appeals panel in *Multimedia I* has warned "in light of the general public policy favoring open meetings, [that] the attorney-client

24. 342 N.C. at 732–34, 467 S.E.2d at 630–31.

25. Multimedia II, 145 N.C. App. at 374, 550 S.E.2d at 852.

26. 144 N.C. App. 376, 547 S.E.2d 178 (2001).

27. Id. at 380, 547 S.E.2d at 180–81.

28. "Accordingly, the trial court did not err in finding the closed sessions were entirely for the purpose of protecting [the school board's] attorney-client privilege, and that a release of any part of the minutes of the closed sessions for public inspection would destroy the attorney-client privilege." Id. at 380, 547 S.E.2d at 181.

29. "The statute provides that even those communications [written statements from public attorney to public client concerning litigation] shall become public records subject to disclosure three years after the communication was received by the public agency. [G.S. 132-1.1(a)]" News and Observer Publishing Co. v. Poole, 330 N.C. 465, 482, 412 S.E.2d 7, 17 (1992). This is apparently the case even if the local government is still using the records in an adversarial situation.

exception is to be construed and applied narrowly"[30] where public entities are involved. The public body has the burden of demonstrating that the exception applies, by supplying some objective indicia such as *in camera* review.[31]

In sum, Multimedia II answers some important questions about closed sessions minutes and general accounts, and will provide helpful guidance to those who take minutes of meetings of public bodies. By examining this case together with the earlier *Sigma* decision and applicable statutes such as G.S. 132-1.1(a), we can also begin to define more clearly when and if the minutes and general accounts of closed sessions held under the attorney-client privilege exception to the open meetings law must be opened. However, a final answer to this question awaits further developments in the legislature or the courts.

30. Multimedia I, 136 N.C. App. at 575, 525 S.E.2d at 791(citation omitted).

31. Sigma Construction Co. v. Guilford County Board of Education, 144 N.C. App. at 379–80, 547 S.E.2d at 180, citing Multimedia I.

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