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Public Records After *Poole*

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On January 10, 1992, the North Carolina Supreme Court decided News and Observer Publishing Co. v. Poole,[1] the court's first extended look at the public records statute since that statute's enactment in 1935. The litigants raised several questions about the statute and its application to the records at issue, and the court responded with a broad-ranging opinion that has implications far beyond the facts of this particular dispute. This *Local Government Law Bulletin* discusses the *Poole* decision and its implications for local government records.

The Factual Background

As is well known throughout North Carolina, the men's basketball program at North Carolina State University came under intense scrutiny in 1988. In January, 1989, the president of the sixteen-campus University of North Carolina system appointed a commission, chaired by Samuel Poole, a member of the system's board of governors, to investigate and report on certain allegations about the program. The investigation yielded three categories of records that were at issue in *Poole*.

For assistance in its work, the commission had asked the State Bureau of Investigation (SBI) to assign agents to conduct an investigation. Three agents had interviewed about 160 people, prepared written summaries of the interviews, and submitted the summaries and other written information to the commission. These materials from the SBI were one of the three kinds of records at issue.

Near the end of the investigation, two of the commission members had prepared "draft" reports that they submitted to the University system president for his review. These drafts apparently had not been carried through to final form. These two reports are the second kind of record at issue in *Poole*. The third kind of record is the minutes of commission meetings, which the commission had kept throughout its proceedings.

Each of the three categories of records—SBI materials, draft reports, and commission minutes—were sought by reporters for the *Raleigh News and Observer*. When the commission refused to release the records, the newspaper brought suit, naming the commission members and one staff member as defendants. After the trial court ruled that all three categories of records were subject to public inspection, the State Supreme Court accepted discretionary review, bypassing the court of appeals.

The Court's General Approach: No Judge-Made Exceptions

The North Carolina public records statute, codified as General Statutes [hereinafter G.S.] Chapter 132, was enacted in 1935. A review of the statute makes clear that the primary impetus for its enactment was a concern for the retention and preservation of public documents—a concern, that is, that centered on archival and historical interests. To be sure, the statute does grant a right of public access to public records, but that right seems secondary to

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1. 330 N.C. 465 (1992).

the statute's principal goals. Given those goals, it is not surprising that the statute defines "public records" in the broadest possible language: G.S. 132-1 states that a public record is any document, in whatever form, "made or received pursuant to law or ordinance in connection with the transaction of public business" by any agency of state or local government. As originally enacted, and until 1975, the statute contained no explicit limitations on public access. The statutory right of access was as broad as the statutory definition of public record.

North Carolina was not alone in adopting such a public records statute; many states appear to have adopted comparable statutes at roughly the same time. Courts in some of those states, when faced with demands under such statutes for access to records, have sometimes recognized that the statutes were not primarily concerned with public access to public records and that the issues involved with access had not been subject to much debate when the statutes were enacted. Therefore, these courts have tended to treat the statutes, in their application to public access questions, as codifications of the common law and have felt it appropriate to create, by judicial action alone, exceptions to the right of access based on the courts' conceptions of public policy.[2]

Before the *Poole* case, the North Carolina courts had been ambivalent about their capacity to create public policy exceptions to the right of access. In one decision, a panel of the court of appeals seemed to argue that only the General Assembly could create exceptions.[3] In a more recent decision of that court, however—*S.E.T.A. UNC-CH v. Huffines*—another three-judge panel clearly indicated that it thought courts could create exceptions without legislative warrant. In *Huffines*, the court excluded from public inspection certain information included on federal research grant applications prepared by University employees.[4] Although the court held that the applications were public records, it also said that "public policy" (rather than any cited statute) required that certain items of information on the applications be kept private.

In *Poole*, however, the North Carolina Supreme Court clearly came down on the side of the earlier panel. The defendants made several attempts to justify denial of access to the records at issue on grounds of public policy, and in each case the court replied that it was the province of the General Assembly, and apparently the General Assembly alone, to create exceptions to the right of access.

There are, however, important categories of public records that have generally been thought to be exempt from access even though no statute expressly creates such an exemption. The most prominent of these categories comprises the active investigation files of local government law enforcement agencies. Files similar to these do enjoy statutory exemption: SBI records are exempted from all public records laws by G.S. 114-15; and the personnel privacy statutes[5] exempt from access criminal investigations of public employees. But no statute exempts from inspection the general run of investigation files in police and sheriffs' departments. Unless the courts are willing to hold that such files are not public records at all, which would distort the statutory definition of public records in unforeseen ways, there seems to be no current bar to someone's seeking to look at the records of any active criminal investigation.

No Exception for Records within Attorney-Client Privilege

As was noted above, one of the categories of records sought by the plaintiff was the minutes of commission meetings. The defendants argued that those minutes included confidential communications from the commission to its attorneys and therefore were within the attorney-client privilege. That being the case, the defendants argued, the minutes should be exempt from public inspection.[6]

In resolving this question, the court applied its general principle that the only exceptions to the right of access are those created by the legislature. The

2. Examples of courts explicitly creating such public policy exceptions are State *ex rel.* Newsome v. Aralarid, 90 N.M. 790, 568 P.2d 1236 (1977); KUTV, Inc. v. Utah St. Bd. of Educ., 689 P.2d 1357 (Utah, 1984); and International Union, UAW v. Gooding, 251 Wis. 362, 29 N.W.2d 730 (1947).

3. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981).

4. 101 N.C. App. 292, 399 S.E.2d 340 (1991).

5. G.S. 153-98(c1)(2) for counties and G.S. 160A-168(C1)(2) for cities.

6. If the Poole Commission had been a public body under the open meetings law, such communications could have been made in executive session and, as part of the minutes of such a session, would be exempt from public inspection. As will be seen below, however, the court held that because the commission was not subject to the open meetings law, it could not take advantage of the provisions of that law either.

public records statute itself contains no general exemption of records generated within the attorney-client relationship, and the court did not find one elsewhere. It did acknowledge that G.S. 132-1.1 grants a limited exemption for communications *from* an attorney *to* a client, in the context of litigation, but it pointedly noted that this is the sole statutory exemption involving the attorney-client privilege.[7]

This portion of the court's opinion has a potentially momentous effect on cities and counties. Because city councils and boards of county commissioners are subject to the open meetings law, confidential communications from their attorneys to them, made at official meetings, may be made in executive session, and the minutes of that session may be closed to the public. So the direct holding of *Poole*, that the minutes in question were open to public access, is irrelevant to city councils and county commissions. But by holding that there is no general exception to the public records law for matters falling within the attorney-client privilege, the case has brought into question the confidentiality of a public attorney's work product during litigation. Although some commentators disagree,[8] work product confidentiality is often viewed as a part of the basic attorney-client privilege.[9] If it is part of the privilege, the question then arises whether the protection of attorney work product from discovery, found in Rule of Civil Procedure 26(b)(3), extends to government attorneys or whether the attorneys' files are public records open to any citizen.

There is no provision in the public records law that generally exempts attorney work product from public access. G.S. 132-1.1 exempts attorney work product that is communicated to the local government client, and perhaps that statute is based on an assumption that work product remaining in the attorney's files is otherwise exempt. It may be that the Rule 26 itself protects work product in the files of a local government attorney, but unfortunately we cannot be sure of that. First, there is no reason to think that a private attorney's work product loses its insulation from discovery simply because it has been communicated to the client. If Rule 26 extends to government attorneys, it ought to apply whether the work product is in the attorney's file cabinet or the client's file cabinet. Furthermore, there are cases from other states in which courts have allowed access under public records statutes to public materials that were specifically not available under general rules of discovery, and have allowed that access to persons litigating against the public agency whose records were sought.[10] These cases suggest, then, that general rules limiting discovery do not create exceptions to the broad entitlements of public records laws.

No Exception for Preliminary Drafts

A second category of record sought by the *News and Observer* comprised "preliminary drafts" of reports prepared by two commission members and given to the University system president. The defendants made two arguments in support of denying access to these reports. First, they argued for the existence of a "deliberative process privilege" that would shield from public access records that were part of a not-yet completed governmental process. Second, they argued that disclosure of the drafts would in some fashion contravene the separation of powers mandated in the state constitution. The North Carolina Supreme Court rejected the first argument on the now-familiar ground that the proffered privilege is not created by statute and therefore does not exist. It rejected the second argument on the ground that whatever the scope of the constitutional separation of governmental branches, the separation has no application to the relationship between citizens and a single branch of government.

In deciding that these drafts were open to public inspection, the court followed what appears to be the weight of authority from elsewhere.[11] But one should not read too much into this part of the decision.

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7. Indeed, the court raised, and did not resolve, the question of whether government agencies are protected by the attorney-client privilege at all.

8. The author of *Note, Attorney-Client Privilege for the Government Entity*, 97 YALE L.J. 1725 (1988), which was cited by the court in *Poole* in connection with its questioning whether there even is such a privilege in government, asserts that the work product doctrine is technically separate from the attorney-client privilege. *Id.*, at 1743.

9. *E.g.*, NORTH CAROLINA STATE BAR, *Comment to Canon IV*, in ANNOTATED RULES OF PROFESSIONAL CONDUCT (1992).

10. *E.g.*, Hillsborough County Aviation Auth. v. Azzarelli Const. Co., 436 So.2d 153 (Fla. App. 1983); M. Farbman & Sons, Inc. v. New York City Health and Hosp. Corp., 62 N.Y.2d 75, 464 N.E.2d 437 (1984).

11. Some recent examples of cases reaching comparable conclusions are Times Pub. Co., Inc. v. City of St. Petersburg, 558 So.2d 487 (Fla. App. 1990) and Missouri Protection and Advocacy Services v. Allan, 787 S.W.2d 291 (Mo. App. 1990).

That these drafts were held to be open to public access does not mean that every scrap of paper in a governmental office is therefore a public record. The two reports in question may have been labeled preliminary, but they were far enough developed that their authors were willing to submit them to the University system president for review. A document that is sufficiently final to be distributed to others is quite different from a first draft of the same document, or from the rough notes upon which the document is based. Courts have rejected access to such early, undistributed drafts or to such notes on the ground that these items are not *records* of any sort,[12] at least not yet, and nothing in the *Poole* opinion forecloses a North Carolina court from reaching the same conclusion.

The Significance of the Location of Confidential Records

The third category of records considered by the court was the materials developed and compiled by the State Bureau of Investigation and then turned over to the Poole Commission. The defendants cited G.S. 114-15:

> All records and evidence collected and compiled by the Director of the Bureau [of Investigation] and his assistants shall not be considered public records within the meaning of G.S. 132-1, and following, of the General Statutes . . . .

Therefore, argued the defendants, the records of the SBI investigation were exempt from public access. The court disagreed.

The court limited the reach of the statute to those "records and evidence" *in the possession of* the SBI. Once the SBI turned the materials over to the Poole Commission, those records became the commission's records. At that point, ruled the court, the relevant statutes were only those that dealt with the *commission's* records, and the only such statute was the public records law itself. Because it contains no exemption for such investigative materials, they are open to public access.

It should be stressed that there is nothing in G.S. 114-15, the SBI statute, specifying that that section's exemption from the public records law applies only when the records are held by the SBI. Rather, the court fastened on the fact that the statute contains no explicit language that extends the exemption *beyond* the SBI. Thus to comprehend fully the effect of this holding on local government records, the language of each express exemption of records from public access must be examined, to determine if it contains language that would protect the exemption regardless of a record's location. A cursory review of such statutes suggests that some records other than those of the SBI may also be affected by the *Poole* holding.

The city and county personnel privacy acts, for example,[13] apply to personnel files "maintained by a city" or "maintained by a county." This holding suggests that if the information in such a file is released to another governmental entity, it would no longer be "maintained" by the appropriate city or county and therefore might be subject to public access. For example, a county might release such records to the State Personnel Commission if a personnel action affecting a merit system employee were appealed to that commission. Do the records then become the commission's? If so, there does not appear to be any statutory provision exempting the *commission's* records from public access. Similarly, G.S. 125-18 and G.S. 125-19 restrict public access to certain library circulation information "retained by a library." Does the information lose its exemption from access if retained by some other governmental entity, such as a central data processing agency?

The Personnel Privacy Statutes

Over the last fifteen or so years, the General Assembly has enacted a set of personnel privacy statutes, each protecting a different group of government employees: state employees;[14] county employees;[15] city employees;[16] public school employees;[17] district health department employees;[18] and area mental health employees.[19]

12. *E.g.*, Sibilk v. Federal Reserve Bank of New York, 770 F.Supp. 134 (S.D.N.Y. 1991), decided under the federal freedom of information act, holding that an employee's handwritten notes of a meeting were not records of that employee's agency; Shevin v. Byron, Harless, Schaffer, Reid and Assoc., 379 So.2d 633 (Fla. 1980), holding that handwritten notes of interviews were not public records.

13. G.S. 160A-168 (cities) and G.S. 153A-98 (counties).
14. G.S. 126-22 through G.S. 126-30.
15. G.S. 153A-98.
16. G.S. 160A-168.
17. G.S. 115C-319 through G.S. 115C-321.
18. G.S. 130A-42.
19. G.S. 122C-158.

By and large these different statutes follow a common pattern, but there are some apparently minor differences from statute to statute. Because the *Poole* decision focused on some of the differences, they may more important than might have been previously thought. The location of a record, who gathered it, and for what purpose it was gathered may all be significant.

Record Location

In justifying its holding about the SBI materials, the court pointed out that the state personnel privacy act extends its protections to state employee records "wherever located." The city and county personnel privacy acts, however, do not contain parallel language. Rather, as noted just above, those statutes protect employee records "maintained by" the city or county.

"Gatherer" of the Record

The state personnel privacy act, in G.S. 126-22, defines a personnel file as comprising information "*gathered* by the department, division, bureau, commission, council, or other agency . . . which employs" the person in question. The court emphasized the italicized word and held that information about a state employee "gathered" by some agency other than that employee's employing agency is not part of the confidential personnel file. Thus, because the employees involved in *Poole* were employees of North Carolina State University, only information gathered by that university was part of their personnel files. Information gathered by the SBI or by the Poole Commission about those employees was not part of a confidential file.

Here the local government statutes seem broader than the state statute. If the statutes were parallel, the local statutes would define the personnel file as comprising information gathered by the employee's department, agency, etc. But instead, the local statutes speak of information gathered by the city or by the county. That usage would appear to cover any information in an employee's file; if the information is in the city's or county's possession, it perforce has been gathered by the city or county.

Purpose for Gathering the Information

The act applying to state employees, again in G.S. 126-22, further defines the nature of a personnel file by stating that the information in question "relates to the individual's application, selection or nonselection, promotions, demotions, transfers, leave, salary, suspension, performance evaluation forms, disciplinary actions, and termination of employment." The court read the statute as *requiring* that the information relate to one of the listed personnel activities. Here again the statutes applying to local employees are slightly different. They include an almost identical list of personnel activities, but the list is prefaced with the words "by way of illustration but not limitation." Therefore, a local government may include other personnel-related information in a personnel file, even if it relates to some sort of personnel activity not explicitly listed in the statute.

The Interplay of Open Meetings and Public Records

Finally, the court dealt with two issues that involved the interplay of the public records law with the open meetings statute.[20] All parties conceded that the Poole Commission was not a public body under the open meetings law and therefore not subject to that law. The two issues involved what effect that status had on the public's right of access to the Poole Commission's minutes.

Minutes of Nonpublic Bodies

The defendants first argued that because the commission was not a public body, and therefore there was no right of public notice of or attendance at its meetings, its minutes were not public records. The court rejected the argument out of hand, holding that exemption from the one statute had no spillover effect on the other. Therefore, the simple fact that an entity is not subject to the open meetings law does not exempt its records from inspection under the public records law.

Minutes of Meetings That Might Have Been Closed

The defendants' fallback argument was that some of the minutes were of meetings that, had the commission been subject to the open meetings law, could have been held in executive session. Because the open meetings law allows a board to seal the minutes of an executive session, the defendants argued, the Poole Commission should be able to seal the minutes of those meetings that could have been held in executive session.

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20. The open meetings law is codified at G.S. 143-318.9 through G.S. 143-318.18.

The trial court rejected this argument on the ground that the meetings in question would not have qualified as executive sessions. The supreme court affirmed, but on the alternative ground that "not being burdened by this law's provisions, the commission is not entitled to its benefits." That is, a group that is not subject to the open meetings law may not take advantage of that law's policies to deny access to its minutes.

Because very few local government boards are exempt from the open meetings law, this holding will probably have little practical impact on local government. Many boards in state government, however, are exempt, and the holding will be important to them.

Conclusion

To summarize, the State Supreme Court in *Poole* did the following:

- Required that any exception to the public right of access to public records be created by the General Assembly rather than by the courts.
- Held that there is no general exception to the right of access for records that would, in nongovernmental work, be covered by the attorney-client privilege.
- Held that preliminary drafts circulated to other public officials are public records.
- Required that any statutory exception to the public right of access to records specify if it is to apply to records in the possession of an agency that did not create the records.
- Interpreted the state personnel privacy act, but with respect to provisions as to which the local personnel privacy acts differ.
- Held that the public records law applies to minutes of groups not subject to the open meetings law.
- Held that the minutes of groups not subject to the open meetings law may not be closed even when the subject of the meeting is one that could have been discussed in executive session had the group been subject to the law.

This decision may well increase pressure for enactment of some sort of North Carolina freedom of information act, in which the legislature expressly and comprehensively balances the need for public access against privacy and other interests that sometimes are thought to justify limitations on access. Such an act often establishes an administrative agency to review state and local government decisions or access to records and gives the agency authority to order the governments to permit access.

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