The University of North Carolina at Chapel Hill

INSTITUTE of GOVERNMENT

# LOCAL GOVERNMENT LAW

BULLETIN

Number 70 August 1995 David M. Lawrence, Editor

## CHANGES IN THE PUBLIC RECORDS LAW

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The central provisions of the North Carolina public records statute are found in just two substantive sections, both short: the definition of public record in G.S. 132-1 and the statement of the public's right to inspect and receive a copy of public records in G.S. 132-6. The statute has left many questions unanswered, and the North Carolina courts have had few occasions to elaborate on it. For that reason, in interpreting the statute, local government attorneys have had to rely on cases decided under comparable statutes in other states and on their own determine what policies are furthered by the North Carolina statute.

With the enactment of Chapter 388 of the 1995 Session Laws (Senate Bill 426), which becomes effective October 1, 1995, the General Assembly has sought to provide answers to a range of questions involving the mechanics of access to and copying of public records, especially records that are maintained in electronic form. Several provisions of Chapter 388 are elaborations of the current statute that probably do not make substantive changes. Rather, these provisions confirm the interpretations that most attorneys and others working with the statute have reached based on the widespread agreement in the case law in other states. Other provisions in the act address questions on which courts in other states have split, providing a statutory answer for North Carolina.

Perhaps most important among this group of provisions is a statement of what costs may be recouped by charges for copies of public records. Finally, a few provisions impose new requirements, the most important a requirement that local governments and state agencies develop indexes for their computerized databases to facilitate public knowledge of and use of the databases. The remainder of this bulletin, which is being sent to attorneys for counties, cities, school administrative units, and other local agencies, details the provisions of Chapter 388, in the three categories posited just above.

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## Provisions That Do Not Change the Law

### Purpose of Inspection and Copying

Sometimes records custodians resist allowing access to or copying of public records because of concern or disapproval about how the requester will use the record. For example, the requester may intend a commercial use that the custodian believes will invade personal privacy. The courts of other states have consistently held, however, that such concerns may not be used to inhibit a person's right to examine or copy a public record. Chapter 388 confirms this interpretation and emphasizes it by adding a new G.S. 132-6(b) that prohibits a custodian from demanding, as a condition of access or copying, to be told the purpose for which the requester wishes a record. The better conduct is simply not to ask.

### The Time Within Which Copies Must Be Provided

Chapter 388 adds language to G.S. 132-6 requiring the custodian to respond to requests for copies "as promptly as possible." There has been no comparable language in the statute, but courts around the country have generally held that a records custodian is under a duty to respond to records requests within a reasonable time. It does not appear that the new statutory phrase goes much beyond the standard that these court decisions suggest was already in place.

### No Need to Create Records

Save for the new requirement that local governments and state agencies create indexes for computer databases, Chapter 388 expressly affirms the well-understood point that the public records law allows access to existing records but does not require creation of new records. Thus if it is possible to compile certain kinds of information from a set of public records, but the government maintaining the records does not itself make such a compilation, it is the requester's responsibility to do so and not the government's. The revised statute also makes clear that if a government maintains a record in nonelectronic form, the government cannot be forced to create an electronic version of the record. That is the responsibility of the person requesting a copy of the record.

## Provisions That Clarify Uncertainties in the Law

### Charges for Making Copies

The public records statute has been silent about charges for noncertified copies of records and as a result public agencies have been uncertain about how much they might charge for making copies of a public record. Apparently charging practices vary within the state government and among local governments. (In general it has been understood that, except in exceptional circumstances, there can be no charge for simply examining a public record.) Chapter 388 enacts a new G.S. 132-6.2 that addresses this question, although some uncertainty may continue and some variation will definitely continue.

The new G.S. 132-6.2 provides that a public agency may not impose a charge for a copy of a public record that exceeds the actual cost to the agency of making the copy. "Actual cost" is defined as "limited to direct, chargeable costs related to the reproduction of a public record as determined by generally accepted accounting principles and does not include costs that would have been incurred by the public agency if a request to reproduce a public record had not been made." Three elements of the quoted provision are noteworthy.

First, a local government may determine actual cost pursuant to generally accepted accounting principles. This indicates that a government may establish a cost accounting system associated with providing copies of records, and use that system as a basis for charges for such copies. Many local governments, of course, do not have such cost accounting systems in place, and the demand for copies is unlikely to justify establishing such a system. As long as a government's charges for copies are nominal—perhaps up to twenty-five cents per page for photocopies of paper records or the cost of materials for copies of computerized records—the lack of any accounting support for charges should not be a problem. Should a local government attempt to impose a charge that significantly exceeds these nominal levels, however, the statutory language suggests it must be able to support those higher charges by a developed cost accounting system.

Governments are most likely to develop such systems for computerized records. Numerous local governments, for example, account for their centralized computer operations through internal service funds. By using such a fund, the local government can bill the full cost of the computer

operations to the departments or agencies that use those services. If the only reference in the statute were to generally accepted accounting principles, a local government that accounted for its central computer operations through an internal service fund would be able to charge citizens for copies of computerized records on the same basis it charged internal users of the system. But the other two elements of the definition of actual costs may make that impossible.

The second noteworthy element of the definition is the limitation of charges to "direct" costs. This appears intended to prohibit seeking return of indirect costs as part of the system of charges for copies of public records. That is, the cost accounting system for a centralized computer operation may include only the costs directly attributable to the operation and not such indirect costs as a pro rata share of the costs of the manager's office, the finance department, the personnel department, and so on.

The final noteworthy element of the definition prohibits including in the charge for a copy costs that the local government would have incurred whether the copy request was made or not. However, this provision may exclude from the charge calculation two important cost elements: personnel costs and depreciation of equipment. In general, the employees operating a computer system will be paid whether or not a request is made for a copy of a computerized record. Only if overtime is necessary to make the copy does it seem possible to charge for employee time. With depreciation, the method of depreciation used in the accounting system will determine the propriety of including that cost in the charge. If a local government depreciates equipment by the straight-line method, which calculates depreciation based on time not use, using the equipment for making a copy of a public record imposes no new cost. But some local governments depreciate on a unit-of-production basis, taking depreciation only as equipment is used. If a local government uses that method of depreciation, making a copy does impose new costs, and depreciation may be included in the charge.[1]

The new section also allows a public agency to make a somewhat higher charge for a copy than otherwise when "the request is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel of the agency involved." This appears to permit charging for equipment use or employee time when making the copy takes an extraordinary amount of either equipment or employee time. If the requester believes a fee is unreasonable, he or she may ask the Information Resource Management Commission to mediate the dispute, but the commission has no authority to order the public agency to reduce the fee.

One final point about charges: G.S. 132-6(a), as rewritten, states that the custodian must provide copies upon payment of "any fees as may be prescribed by law." This language suggests that any fees that are charged must be in some fashion "prescribed by law." Therefore, any fee schedule ought to be formally adopted, either by the governing board or by the custodian pursuant to some sort of delegation from the governing board.

## Who Pays for Separating Confidential from Open Material

Local governments often maintain records that include both material open to the public and material that is not open to the public. Perhaps the best example is employee personnel files, some part of which is open although the greater part is not. The consistent law elsewhere has been that such a merger of confidential and open records does not justify denying access to the open portion of the record and that the custodian must take whatever steps are necessary to make the open portion available for public access. The revisions confirm that this is also the law in North Carolina. What has not been consistent in other states is who pays for the cost of separating public from confidential materials. If the records are kept in electronic form, for example, such a separation may involve writing a new computer program. Who is to pay for writing the program, the records requester or the government maintaining the record? The statute also answers that question, requiring the government to do so, but not immediately. If separation is necessary after the following dates, the agency or government maintaining the record must bear the cost of separation:

- state agencies: after June 30, 1996
- cities of 10,000 or more and counties of 25,000 or more (and public hospitals within those units): after June 30, 1997
- smaller cities and counties and other local government agencies: after June 30, 1998

[1] When Chapter 388 was enacted, one newspaper commented that this actual cost provision would stop governments and agencies from charging for the electricity used to power the equipment making the copy. This is clearly incorrect. That electricity would not have otherwise been used by the government or agency and therefore may be included in the costs covered by the charge.

### The Form of Copies of Computerized Records

One issue that has been litigated in several states has involved the form in which copies are provided of records maintained in computerized format. A local government, for example, may maintain a very large database of names and addresses that a company seeks for use as a mailing list. The list is much less valuable if the local government refuses to provide the database in magnetic form but insists on providing it in a paper printout. A number of requesters who have been denied a magnetic copy of the record have brought suit, arguing that they are entitled to a copy of the record in the form in which the public agency maintains the record. Although the trend of decisions has been to support the requesters' position, the courts have been split and it has not been possible to state with assurance how the North Carolina courts would respond to a comparable question.

Chapter 388 resolves the question. The new G.S. 132-6.2(a) provides that a requester may seek a copy of a record in any medium in which the public agency is capable of providing it and that *the custodian may not deny a request for a copy in a particular medium simply because the custodian prefers to provide the copy in some other medium.*[2] Thus if a record is maintained in magnetic form, a requester may seek a copy in the same form or, assuming the agency has this capability, in hard copy form. In addition, and again assuming agency capability, a requester may demand that a record maintained on tape on a mainframe computer be copied to individual computer disks.

### The Form of Copies and Who Must Make Them

G.S. 132-6 has required that the custodian of records make a certified copy upon request, but it has not imposed on t90-he custodian a direct duty to make noncertified copies. It has been clear that citizens are entitled to a noncertified copy of a public record, but it was possible to argue that the burden of making the copy could be placed on the citizen rather than the custodian. As rewritten by Chapter 388, G.S. 132-6 now makes clear that the custodian must make a copy on request, and that the citizen has the option of requesting either a certified or noncertified copy.

## Provisions That Add New Requirements

### Computer Databases

When a local government or state agency "creates or compiles" a computer database, the new G.S. 132-6.1(b) requires that it also prepare an index to the database containing the following information: (1) a list of data fields; (2) a description of the format or record layout; (3) information as to the frequency with which the database is updated; (4) a list of any data fields to which public access is restricted; (5) a description of each form in which the database can be copied or reproduced using the agency's or government's computer facilities; and (6) a schedule of fees for such copies. The statute directs the Division of Archives and History to develop the "form, content, language, and guidelines for the index and the databases...in consultation with officials at other public agencies."

The statute phases in this new requirement on the same schedule as the new requirement for paying the cost of separating confidential from open material in a single record or set of records. The statute also provides that "electronic databases compiled or created prior to the date by which the index must be created...may be indexed at the public agency's option." This provision appears to apply only to databases (1) created before the statutory date that (2) no longer have data being added to them. If data continues to be added to a database, that database is still being compiled and therefore would need to be indexed after the statutory date.

The statutory requirement of an index applies to databases created and compiled "by a public agency." The quoted language seems to require that such a database have some official standing and be one that is maintained to serve some purpose of the agency as a whole. Many public employees with personal computers maintain a variety of small databases to help them with their jobs: an employee may maintain a list of telephone numbers on computer or establish a temporary database to help in preparing a report for a supervisor. These kinds of databases are almost certainly public record because they are kept by public employees on publicly owned computers, but they are

[2]The new G.S. 132-6.1(a) seems to require that computerized records be maintained on equipment and with software that permits some form of copying of those records in electronic form. Effective June 30, 1996, the new section prohibits a public agency from acquiring hardware or software unless the agency determines the acquisition "will not impair or impede the agency's ability to permit the public inspection and examination, and to provide electronic copies of [public] records."

not created by a public agency. Therefore, the indexing requirement does not appear to apply to such personal-assistance databases.

## Written Requests for Copies; Written Explanations When Requests Are Denied

The new G.S. 132-6.2(c) expressly permits a public agency to require written requests for copies of computer databases. It makes no other provision about written requests, either to inspect records or for copies of noncomputerized records. The express statutory authorization for written requests for one kind of record may suggest that a local government may not require written requests for other sorts of records. Nevertheless, if a local government receives a large volume of requests and if a requirement of a written request is not imposed or implemented in order to impede the right of inspection, courts probably would sustain such a requirement. Requiring written requests when there is a heavy demand for an agency's records can maintain order in a potentially chaotic situation and can also assist in finding the records and filling the requests.

If an agency denies a request for a copy of a computer database, the new statutory provision requires the custodian to explain the basis for the denial. If the requester asks, the explanation must be made in writing.

## Geographic Information Systems

Over the last several years, the General Assembly has enacted a number of local acts that limit, in the governments covered by the acts, a citizen's right to a copy of records from a computerized geographic information system. Chapter 388 extends the general provisions of those local acts statewide. Local governments must still make available electronic copies of such systems, but only if the recipient agrees in writing not to resell or otherwise use the information for trade or commercial purposes. (Publication or broadcast by the news media is stated as not being for trade or commercial purposes, as is use of the information, without resale, by a licensed professional in the course of his or her work.) If someone wishes to resell the information or otherwise use it for trade or commercial purposes, the agency may charge whatever price for the copy that it wishes to.

## Remedies

Chapter 388 adds enforcement provisions to the public records law that parallel those added to the open meetings law in 1994. If a person is denied access to a record or is denied a copy of a record, he or she may bring an action that will then receive accelerated treatment in the court system. If a plaintiff prevails in such an action, the court may award attorney fees to the plaintiff if it finds the agency "acted without substantial justification" and that "there are no special circumstances that would make the award...unjust." The court may also order that some or all of such an award of attorney fees be paid by the employee or official denying access or a copy, if the individual defendant "knowingly or intentionally" violated the statute. If the employee or official sought and followed the advice of an attorney, however, no such award can be made against the individual.

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