

## N.C. General Assembly Amends Public Records Law

### Digital Media and Data Privacy Law Blog

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In the early morning hours of July 10, the North Carolina General Assembly closed the 2009 session by passing a bill that adopts two important changes to North Carolina's Public Records Act. Both represent positive developments for government transparency in North Carolina. These changes begin with Section 18.(a) of House Bill 961.

The first set of changes expands an exception to the "personnel file" exception to the Public Records Act. The "personnel file" exception shields from public view certain documents relating to public employees in North Carolina. By expanding the "exception to the exception," the bill makes more information about public employees available.

In particular, the prior version of the "personnel file" exception provided that among the information that remained a matter of public record notwithstanding the exception was each public employee's "date of most recent promotion, demotion, transfer, suspension, separation, or other change in position classification." Certain public bodies maintained that this provision required them to disclose only a date to the public, without indicating what change occurred on that date.

Although that argument has twice been rejected by Superior Court judges in North Carolina, House Bill 961 eliminates this position once and for all. The new language requires the following to be a matter of public record:

Date and type of each promotion, demotion, transfer, suspension, separation, or other change in position classification with that department, agency, institution, commission, or bureau.

The bill also adds two new provisions, which expand the range of information available about public employees:

Date and general description of the reasons for each promotion with that department, agency, institution, commission, or bureau.

Date and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the department, agency, institution, commission, or bureau. If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal.

Although North Carolina still allows for substantially more secrecy concerning public employees than a number of other states, these changes are a step in the right direction.

House Bill 961 also makes positive changes to the fee recovery provision of the Public Records Act. Whereas the old version of the bill permitted judges to decline to award fees to a prevailing public records plaintiff if they found the agency acted "with substantial justification in denying access to the public records or [found that there were] circumstances that would make the award of attorneys' fees unjust."

The ratified language narrows the circumstances in which a prevailing plaintiff would not recover its fees. In addition to putting in place a mechanism by which public records disputes could mediated prior to litigation, House Bill 961 amends G.S. 132-9 to read:

In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court shall allow a party seeking disclosure of public records who substantially prevails to recover its reasonable attorneys' fees if attributed to those public records. The court may not assess attorneys' fees against the governmental body or governmental unit if the court finds that the governmental body or governmental unit acted in reasonable reliance on any of the following:

- (1) A judgment or an order of a court applicable to the governmental unit or governmental body.
- (2) The published opinion of an appellate court, an order of the North Carolina Business Court, or a final order of the Trial Division of the General Court of Justice.
- (3) A written opinion, decision, or letter of the Attorney General.

By enhancing the ability of a prevailing plaintiff to recover its fees, the bill reduces a substantial deterrent to bringing public records lawsuits -- the costs involved. The new fee recovery provision also puts a greater incentive in place for government agencies to comply with their public records obligations rather than resort to expensive litigation. The new provision applies to lawsuits initiated after October 1, 2010.