

N.C. House Passes Bill Strengthening Attorney Fee

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Last week the North Carolina House passed H. 1134, a bill that would make it easier for private citizens and media organizations who prevail in public records disputes with government agencies to recover their legal fees. Although the bill is still up for consideration in the North Carolina Senate, having been received and referred to the Judiciary I committee, passage of H. 1134 in the House represents a significant breakthrough. Past efforts to strengthen the fee recovery provision of North Carolina's Public Records Act foundered in the House.

The bill, co-sponsored by Rep. Deborah Ross, would make several changes to the Public Records Act. Under the current state of the law, if a court concludes that a losing government agency acted with "substantial justification" in withholding the records at issue, attorneys' fees are not to be awarded to the prevailing plaintiff. In particular, G.S. 132-9(c) provides as follows:

In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court shall allow the prevailing party to recover its reasonable attorneys' fees if attributed to those public records, unless the court finds the agency acted with substantial justification in denying access to the public records or the court finds circumstances that would make the award of attorneys' fees unjust.

The substantial justification provision in G.S. 132-9(c) has proved a difficult hurdle for prevailing plaintiffs to overcome. Under H. 1134, the grounds for denying recovery of attorneys' fees to a prevailing plaintiff would be narrowed to three specific bases:

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 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: (1) A judgment or an order of a court applicable to a governmental unit or governmental body; (2) The published opinion of an appellate court; or (3) A written opinion, decision, or letter of the Attorney General.

N.C. House Passes Bill Strengthening Attorney Fee Provision of Public Records Act

The bill would also create an Open Government Unit of the North Carolina Department of Justice. The new division would be charged with the responsibility of mediating public records disputes informally before they reach the courts. The Open Government Unit would also develop and implement education programs designed to educate public agencies of their rights and responsibilities under the Public Records Act, and it would make resources concerning public records available electronically.

H. 1134, entitled the Open Government Act, passed with overwhelming support on the House floor, carrying by a margin of 107-5. The lopsided margin contrasts with the drama that occurred in the House Finance committee, where an amendment that would have also required losing plaintiffs to pay the attorneys' fees of the winning government agency, failed by a 13-13 margin.

We will monitor the progress of H. 1134 in the North Carolina Senate.