

PUBLIC RECORDS IN NORTH CAROLINA
A Brief Guide for Government Agency Personnel
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I. DEFINITIONS AND GENERAL RULES REQUIRING DISCLOSURE

- A. Public Records are Very Broadly Defined and Include Virtually All Forms of Documentary Records or Materials in the Possession of Government.

"Public records," as defined by G.S. 132-1, include "all documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." Emphasis added.

This is a very comprehensive requirement, and absent a clear statutory exemption or exception, documents falling within the definition of "public records" must be made available for public inspection. News and Observer Publishing Co. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992).

- B. The Act Applies Broadly to Government at the State and Local Level.

The entities subject to the Act are "any agency of North Carolina government or its subdivisions." (G.S. 132-1) This includes every:

public office; public officer or official (State or local, elected or appointed); institution; board; commission; bureau; council; department; authority; or other unit of government

of the State, or of any county, unit, special district or other political subdivision of government.

- C. Persons Having Custody of Public Records Must Permit Them to be Inspected and Examined at Reasonable Times by Any Person, and Must Provide Copies on Payment of Fees.

In our view, persons requesting to examine or copy public records do not have to disclose the purpose of or motive for the request.

- D. Refusal by the Custodian of Public Documents to Permit Inspection and Examination Can Subject Him or Her to a Court Order Compelling Disclosure.

For this reason, any agency which is considering denying access to public documents should be careful to consult with the Attorney General's Office first. Any advice that materials may be withheld can only be given by our staff after consultation with senior attorneys in the Attorney General's Office.

- E. With a Few Specific Exceptions, Fees for Public Records Must Bear a Relationship to the Reasonable Costs of Copying.

A reasonable fee may be charged for copying public documents. The fee should bear some reasonable relationship to the actual cost of reproduction. [See G.S. 12-3.1(c)]

In a few instances, certain agencies have the authority to charge for a specified public record an amount in excess of the reasonable cost of copying. Examples include charges for DMV records [G.S. 20-26(c)&(d)] and certain N.C. Medical Database Commission information [G.S. 131E-211(k); 131E-212(b)(7)]. These

instances are the exception and exist only under specific statutory prescription.

F. Custody and Disposition

Insofar as possible, public records should be kept in fireproof safes, vaults, or rooms fitted with noncombustible materials and should be easily accessible. Worn or damaged record books should be copied or repaired, and the records should be kept in the buildings in which they are ordinarily used. (G.S. 132-7) The Department of Cultural Resources administers a records management and disposition system (G.S. 132-8, -8.1, -8.2), and destruction of public records in violation of the statute is a misdemeanor. (G.S. 132-3)

II. EXEMPTIONS, EXCEPTIONS AND MODIFICATIONS TO GENERAL RULE REQUIRING DISCLOSURE¹

The only restraints on disclosure found within the Public Records Act itself are in G.S. 132-1.1, 132-1.2, 132-1.4 and 132-6; however, numerous other statutes deal with disclosure, privilege, exemptions and fees. (See Appendix)

A. Attorney-Client

Section 132-1.1 exempts communications from a government attorney to an agency, made within the scope of the attorney-client relationship: i.e., communications by a government body's lawyer to the agency concerning prosecution, defense, or settlement of litigation, including any judicial action or

¹ NOTE: These examples are illustrative only and do not purport to be a comprehensive summary, even of the topics listed. For additional information consult the Appendix and/or the Attorney General's Office.

administrative proceeding. The privilege belongs to the client agencies, and the communications from counsel are not open to the public unless the agency chooses to make them public. Even these documents must become public record three years from the date the communication was received by the government body. (G.S. 132-1.1) Associated exemptions from disclosure exist for attorney work-product and for certain communications with legislators.

Settlement documents, however, are not exempt from public inspection. (G.S. 132-1.3) State agencies or anyone acting on their behalf are not permitted to approve, accept or enter into any settlement if the settlement terms call for the confidentiality of the agreement, unless the judge makes written findings of an overriding reason to seal the documents. Settlement actions for medical malpractice against a hospital facility constitute the only exception to this rule. [G.S. 132-1.3(a)]

B. Trade Secrets

The second specific exemption is for trade secrets. Section 132-1.2 exempts as confidential that information which is: (1) a trade secret as defined in G.S. 66-152(3)¹; (2) the property of a private person as defined in G.S. 66-152(2); (3) disclosed or furnished to the public agency in connection with the owner's performance of a public contract or in connection with a bid, application, proposal, industrial development project, or in

¹ "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique or process that: a) Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and (b) is the subject of efforts that are reasonable under the circumstances to maintain its secrecy." [G.S. 66-152(3)]

compliance with federal, state and local laws, regulations, rules, or ordinances; and (4) designated or indicated as "confidential" or as "trade secret" at the time of its disclosure to the public agency. Note that the information must meet all four of the criteria to be exempted from disclosure as a trade secret.

Other references to trade secrets are found in: G.S. 53-231, -232.17, -240, and -252, trade secrets in records on appeal in Banking Commission matters.; G.S. 58-56-16, trade secrets in records maintained by Third Party Administrators; G.S. 95-110.14, information obtained by Department of Labor (DOL) under Elevator Safety Act; G.S. 95-111.17, information obtained by DOL under Amusement Device Safety Act; G.S. 95-152, information obtained by DOL under OSHA; G.S. 95-197, hazardous substance trade secret claim; G.S. 106-579.11, antifreeze trade secrets; G.S. 143-52 & -53(9), confidentiality of trade secrets in bidding procedure; and G.S. 143-215.3(a)(2) & -215.19(e), Environmental Management Commission's limits on disclosure of trade secrets.

C. Criminal Investigative Records

The 1993 session of the General Assembly amended Chapter 132 by adding a provision concerning criminal investigative records. Records of criminal investigations conducted by public law enforcement agencies or records of criminal intelligence information compiled by public law enforcement agencies are not public records as defined by G.S. 132-1. Such records may, however, be released by court order. G.S. 132-1.4. [Note that the portion of G.S. 114-15 that pertained to SBI records has been deleted, as G.S. 132-1.4 now controls.]

D. Industrial Development

The fourth exception in Chapter 132 pertains to protection of public records relating to the proposed expansion or location of specific business or industrial projects in the State. They may be withheld so long as their inspection, examination, or copying would frustrate the purpose for which they were created. (G.S. 132-6) If there is an action in court to compel disclosure of these records, the burden falls on the governmental custodian to show that disclosure would frustrate the purpose of attracting that particular business or industrial project. (G.S. 132-9) Note carefully that public records relating to general economic development policies or activities may not be withheld. (G.S. 132-6)

E. Minutes of Closed Sessions

The minutes of closed sessions of official meetings are public records within the meaning of G.S. 132-1. However, those minutes are not open to public inspection if "public inspection would frustrate the purpose of the executive session." [G.S. 143-318.11(d)]

F. Personnel Files

Pursuant to G.S. 126-22, personnel files are generally not subject to inspection under G.S. 132-6; items open to inspection are enumerated in G.S. 126-23. They include general information such as name, age, date of employment, current position, title, and salary, dates of most recent salary adjustment, information about classification, and office assignment. All other information in personnel files is confidential and exempt from disclosure except to specified people and in specified

circumstances. (G.S. 126-24) Disclosure or access in violation of the statutes is a misdemeanor punishable by a \$500 fine. (G.S. 126-27 and -28)

G. Medical Records

All privileged medical records in the possession of the Department of Insurance are confidential. (G.S. 58-2-105) The Medical Database Commission is required to assure the confidentiality of patient records by G.S. 131E-212(5) and -213, and applicable federal laws afford protection as well. Similarly, the State Center for Health Statistics is restrained by requirements of confidentiality in its use of medical records of individual patients. (G.S. 130A-374)

H. Department of Insurance Investigations and Evaluations

Records compiled by the Department in the course of investigations for the crimes of arson, unlawful burning or fraud are not public and may be made available to the public only by court order. (G.S. 58-2-100) Also, records of certain financial evaluation programs are not public records, pursuant to G.S. 58-2-220.

I. Juveniles

Records and files maintained by the Division of Youth Services shall be withheld from the public and are open only to specified categories of people involved in the juvenile's case. (G.S. 7A-675) See also: G.S. 7A-586 (guardian ad litem); G.S. 7A-639, predisposition investigation and report; and G.S. 7A-652(d1), commitment of juvenile to Division of Youth Services.

J. Records of Child Abuse

Notification by the Director, Department of Social Services, to the Child Day Care Commission of evidence of child abuse or neglect must be done in a way to maintain the confidentiality of DSS records. [G.S. 7A-548(a1)]

K. Taxpayers

Pursuant to the provisions of G.S. 105-259, it is unlawful for officers, employees, or agents of the State, who have access to tax information concerning the liability of a taxpayer, to disclose the information unless the disclosure is made for express statutory purposes. These provisions apply to current and former employees and officials. Violation of the statute is a misdemeanor punishable by a fine of from \$200.00 to \$1,000.00 and/or imprisonment for up to two years, and by dismissal from office if the violator is an officer or employee.

III. FORM OF RETENTION OF CONFIDENTIAL INFORMATION

Where records contain both public and confidential information, the presence of some confidential information in the record normally does not justify denying access to the entire record. In our view, except for extremely costly situations, confidential and non-confidential materials should be separated by the agency and access to the public records should be available at the cost of copying.

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Again, this list is illustrative only and is not comprehensive. A lengthier listing of statutes dealing with records, including disclosure, exemptions, privileges, and fees, is attached as an Appendix.