

A NORTH CAROLINA MEDIA LAW PRIMER



Hugh Stevens
hugh@smvt.com
C. Amanda Martin
amartin@smvt.com
K.. Matthew Vaughn
matt@smvt.com
Michael J. Tadych
mike@smvt.com



SMVT QUICKSHEET: OPEN GOVERNMENT

ACCESS TO COURT PROCEEDINGS AND COURT RECORDS

- In addition to the cases that recognize a Constitutional right of access to court files and court proceedings, North Carolina's Constitution provides that all courts shall be open. N.C. CONST. art. I, § 14; N.C. CONST. art. I, § 18. State law also specifies that court records are public records. G.S. § 7A-109.
- North Carolina law also provides a statutory mechanism to object when a party seeks to seal a court record or close a hearing in a civil case. G.S. § 1-72.1.
- North Carolina has a law that prohibits any court from issuing an order that bans or otherwise restricts publication of open court proceedings. G.S. § 7A-276.1.

OPEN MEETINGS LAW

- Applies to all elected or appointed bodies that have two or more members and exercise virtually any governmental function, including providing advice or oversight. Also applies to committees of public bodies.
- Applies anytime there is a meeting of a majority of the public body.
- Requires three things: (1) notice of the meeting; (2) opportunity for the public to attend unless there is a specifically identified, statutory exemption; and (3) minutes of open and closed sessions.
- Minutes of closed sessions may only be withheld from public view as long as necessary to preserve the confidential issue served by the closed session.

PUBLIC RECORDS LAW

- Applies to all three branches of the government.
- **Unless a document is specifically exempted from disclosure by statute, it must be produced upon request.**
- With limited exception (which has been the subject of recent, unresolved litigation), you can only be charged the actual cost to produce a public record. "Staff time" and other types of overhead cannot be charged.
- You need not say why you want a document.
- With limited exception, your use of a public record cannot be restricted.
- The law is very narrow with regard to what personnel information is public. However, almost all personnel statutes permit the public agency to release personnel information when doing so is necessary to maintain public confidence in the integrity of the agency.
- The law is very narrow with regard to what criminal information is public. That is spelled out in G.S. § 132-1.4.



A BAKER'S DOZEN OF THINGS TO KNOW ABOUT THE N.C. PUBLIC RECORDS LAW

1. You can specify the format in which you want a public record, assuming it can be provided in that format. N.C. Gen. Stat. § 132-6.
2. You may only be charged the actual cost for copies of public records, which can include such items as paper, a computer disk, or the like but not overhead items such as staff time, equipment rental or office space. G.S. § 132-6.2. There are some exceptions to this spelled out by statute.
3. You have a right to salary information about public employees, and “salary” is defined to include “salary” includes “pay, benefits, incentives, bonuses, and deferred and all other forms of compensation paid.”
4. If public employment is terminated for disciplinary reasons, you have a right to “a copy of the written notice of the final decision of the municipality setting forth the specific acts or omissions that are the basis of the dismissal.”
5. “The use of a public record in connection with a criminal investigation or the gathering of criminal intelligence shall not affect its status as a public record.” N.C. Gen. Stat. § 132-1.4 (f). This means that law enforcement agencies cannot deny you access to information or documents by stating “That’s part of the investigation.” If it started as a public record, it stays public even when placed in “the criminal investigation file.”
6. Search and arrest warrants are public records once they are served and “returned.” Indictments and criminal summons are public records from the time they are created. These documents may only be withheld if a court orders them sealed. G.S. § 132-1.4 (k).
7. Under federal and North Carolina law, DMV records may be released to only a limited group of individuals, not including reporters. However, the statute applies only to the release of records by the DMV, not law enforcement. G.S. § 20-43.1. Therefore, don’t accept a denial from law enforcement agencies that driving or motor vehicle records are not public.
8. Executive Orders signed by Governors Perdue and McCrory provide that employees of certain executive branch employees have no expectation of privacy in any of their emails made or received on public computers, regardless of the content of the email.
9. The law prohibits an agency from buying or starting to use a data-processing system that makes electronic records *less* accessible. If you are having trouble accessing records you previously received, consider a challenge based on this provision. N.C. Gen. Stat. § 132-6.1(a).

10. Public records are public from the time they are created. They need not be final, and the fact that a record is in draft form is irrelevant to its status as a public record.
11. The fact that a document has confidential information commingled with non-confidential is irrelevant. The public agency must remove the confidential information and release the non-confidential. N.C. Gen. Stat. § 132-6 (c).
12. “No person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request.” N.C. Gen. Stat. § 132-6 (b).
13. Criminal investigative records are not public records. However, some information is public as a matter of law, unless law enforcement gets a court order:
 - The time, date, location, and violation or apparent violation of the law reported.
 - The name, sex, age, address, employment, and alleged violation of law of a person arrested, charged, or indicted.
 - Circumstances surrounding an arrest, including time and place of the arrest, whether the arrest involved resistance, possession or use of weapons, or pursuit, and a description of any items seized in connection with the arrest.
 - "911" and other emergency calls other than information that reveals the name, address, phone number, or other identifying information of the caller, victim, or witness.
 - Communications among law enforcement agencies broadcast over the public airways.
 - Name, sex, age, and address of a complaining witness.

N.C. Gen. Stat. § 132-1.4 (c)



SMVT QUICKSHEET: REPORTER'S PRIVILEGE

- North Carolina has a robust reporter's privilege. G.S. § 8-53.11. The privilege applies regardless of whether information is confidential or nonconfidential, published or not published and applies to all aspects of a news operation.
- **A journalist can waive the privilege by answering any questions posed by a party looking for information.** The appropriate response when receiving an inquiry about a story – particularly if the inquiry comes from a lawyer – is that the caller needs to talk with the editor or publisher. The editor or publisher should “hear out” the caller, receive any question, and then refer the matter to legal counsel.
- **If a journalist gets a subpoena, it is important to act quickly.** The Rules of Civil Procedure permit response by Objection – rather than a motion to quash – within the first 10 days after receipt of the subpoena. After that, a newspaper will have to file a motion to quash, which will be far more time consuming and costly.
- The privilege can be avoided or overcome if it is waived by the journalist or if the party seeking documents or testimony can prove that the information is essential to the outcome of the case and unavailable from any other source.



SMVT QUICKSHEET: DEFAMATION & PRIVACY

DEFAMATION

- North Carolina's libel law is fairly standard.
- The most significant defense against libel claims for newspapers is the fair report privilege. This privilege applies to reporting on official records of the government and arguably also applies to statements made by public official and statements made related to official proceedings.
- **To enjoy the fair report privilege, a report of an official record or report must be substantially fair, accurate and complete.**

INVASION OF PRIVACY

- What is most noteworthy about North Carolina's invasion of privacy laws is that our courts have explicitly rejected two of the four traditional invasion of privacy torts. We do not recognize invasion of privacy for public disclosure of private facts, nor do we recognize false light.
- The two invasion of privacy torts that persist are (1) misappropriation – using someone's name or likeness for a commercial purpose without consent and (2) intrusion – intruding, physically or otherwise, into the space in which someone has a reasonable expectation of privacy.
- Because most information is now published online, we cannot be cavalier in our reliance on North Carolina law to define the scope of potential liability. However, courts generally confer jurisdiction only when the publisher of information has deliberately and "purposefully" published in another state, not mere incidental publication through the internet.

RECORDING PHONE CALLS

- North Carolina is a one-party consent state, meaning that one party has the power to consent to a call being recorded.
- **You must take care when calling individuals in other states, because some states require all parties' consent before a call may be recorded.**

SMVT QUICKSHEET: INTELLECTUAL PROPERTY

PATENTS

Think Round-Up and Round-Up-Ready Seed

Patentable subject matter is any "new and useful" process, machine, manufacture or composition of matter. Round-Up is a spray-on liquid that kills weeds. Round-Up-Ready seeds are bioengineered seeds that will survive treatment with Round-Up. Both are protected by patents. Patents are acquired through registration and approval by the US Patent Office. It's a lengthy and expensive process, but there is no other way to get a patent. Patents have a finite life, after which anyone is free to create and market the previously patent-protected creation.

TRADEMARKS

Think Nike's name, swoosh and Just Do It

Trademarks are all about designating or identifying a point of origin for a product or service. That is why Apple (technology) can exist in the same world as Apple Records (Beatles). That is why Anheuser-Busch lost their lawsuit against the Florists Association of Greater Cleveland over their use of the phrase "This bud's for you." In both cases, the secondary users have different products with different markets, thus there is no confusion. Trademarks are acquired through use. They can be local, national or global. They can be registered for greater reach and greater monetary protection, but they don't have to be. Trademarks have a potentially infinite duration, but they can be lost through abandonment. Thus, they need to be policed. Aspirin was once a trademark.

TRADE SECRETS

Think formula for Coke

Trade secrets are protected entirely by being secret. The essence of a trade secret is that it is something of value that keeps its value by being secret. Coca-Cola expends enormous money and energy to keep secret the formula for Coke. Once the cat is out of the bag, all the value is gone. Trade secrets have a potentially infinite duration -- they last as long as the owner can keep them secret.

COPYRIGHT

Think "Blurred Lines" and "Pretty Woman"

Copyrights protect the expression of ideas (as opposed to the ideas themselves). Facts cannot be protected through copyright. Titles and short phrases cannot be protected by copyright. ("Just do it" is a trademark, not a copyrighted phrase.) A copyright owner has essentially all rights to distribute, perform, and create derivative works. The mere fact of creating some original work creates a copyright, but unlike in the TM world, you must register to sue for copyright infringement. A few key things to know: Works that are very old likely are in the public domain. Materials that appear online likely are not in the public domain. The biggest and hardest question about a secondary use of material is whether it constitutes fair use (a statutory exception to copyright protection). A transformative use -- creating something entirely new and different -- is likely to tip the scale to fair use. Copyrights have a long but finite duration (generally, life of the author + 70 years).

RIGHTS OF PUBLICITY/MISAPPROPRIATION

Think Katie Heigl & Duane Reade

Though not exactly intellectual property, individuals who have value in their name or image have the right both to control the use of their images and to reap the financial benefits of their fame. Duane Reade Tweeted a photo of Katherine Heigl with the message: "Love a quick #DuaneReade run? Even @KatieHeigl can't resist shopping #NYC's favorite drugstore <http://bit.ly/1gLHctI>" The facts were true. The photo was authentic. But she sued for \$6 million. They settled.