PUBLIC ACCESS TO COURT RECORDS

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Contents

I. Constitutional and Common Law Considerations.

A. U.S. Supreme Court. The United States Supreme Court has not decided whether there is a First Amendment right of access to court documents, but has decided there is a common law right of access. It is within the discretion of the trial court to decide whether to limit such common law access. Nixon v. Warner Communications, Inc., 435 U.S. 589 (1978).

B. Fourth Circuit. The Fourth Circuit has held that there is a First Amendment right of access to court documents when (i) the proceeding to which the documents pertain has historically been open to the public and (ii) public access plays a significant role in the process. Baltimore Sun Company v. Goetz, 886 F.2d 60 (4th Cir. 1989).

C. Applicable Standard. When the First Amendment right applies, access can be denied only to serve a compelling state interest, and the restriction on access must be narrowly tailored to serve that interest. When only the common law right of access applies, access may be denied when "essential to preserve higher values," and the restriction must be narrowly tailored. As a practical matter there does not appear to be a significant difference between the standard under the First Amendment and the common law standard.

D. North Carolina Law. The North Carolina Court of Appeals has followed the Fourth Circuit's *Baltimore Sun* analysis in determining whether a First Amendment right of access applies to court documents, holding that search warrants are subject only to the common law right of access. In re Investigation into Death of Cooper, 200 N.C. App. 180 (2009). The qualified right of access to court documents is based on Art. I, § 18 of the NC Constitution ("All courts shall be open . . . ."). The qualified right of access can be limited by a countervailing "higher interest" such as protecting the defendant's right to a fair trial, preserving the integrity of an ongoing investigation, or protecting witnesses or innocent third parties.

II. Public Records Law (G.S. Chapter 132).

A. Court Records as Public Records. Court records come under the broad definition of public record in G.S. 132-1 and, thus, most disputes about release of court records are resolved under the public records statutes and do not require consideration of constitutional issues.

Additionally G.S. 7A-109(a) reiterates that records maintained by the clerk of court pursuant to Administrative Office of the Courts rules are public.

B. Exempt Documents. The only court documents which Chapter 132 specifically exempts from disclosure are:

- Settlement documents in cases involving medical malpractice actions against public hospital facilities. *See* G.S. 132-1.3(a). [Settlement documents in actions against state and local public agencies other than hospitals are public records and may not be sealed except upon a finding that there is an overriding interest in sealing the document and that no measure short of sealing will protect that interest. *See* G.S. 132-1.3.]

- Arrest and search warrants before they have been returned by law enforcement agencies. *See* G.S. 132-1.4(k).

C. Definition of Public Record. The definition of a public record in G.S. 132-1 is broad and includes "all documents, papers, letters, maps, books . . . 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 . . . ." "Agency of North Carolina government" is further defined to include all public officers and public offices, thus encompassing court officials and employees. The statute indicates the legislature's intent that, as a general rule, the public will have liberal access to public records. News & Observer Publishing Co. v. Poole, 330 N.C. 465 (1992).

D. E-Mail and Other Documents in Electronic Form. E-mails and other documents in electronic form may be public records the same as paper documents.

1. **Applicable Rules.** As with paper records, the rules on which e-mails have to be retained and for how long are set by the records retention schedule of the Department of Cultural Resources.
2. **Email Regarding Public Business.** If an e-mail is sent or received in connection with public business, it is a public record regardless of whether it was transmitted and stored on a public or private computer.
3. **Personal Email.** Purely personal e-mail is not a public record just because it was sent or received on a public computer.
4. **Short-Term or Long-Term Value.** E-mail with only a short-term value such as reminders of meetings, inquiries about scheduling, news reports, etc., may be deleted as soon as their reference value ends, but other e-mails of more lasting interest must be retained according to the records retention schedule.

E. No Exemption for Judicial Department. Unlike some other states, there is no case law in North Carolina exempting the judicial department from the public records law based on separation of powers.

F. Other Resources. The best resource for information about the public records law is the 2009 School of Government publication Public Records Law for North Carolina Local Government by David M. Lawrence.

For a discussion of a potential claim of judicial privilege exempting from public disclosure the notes, drafts and similar documents created by judges and their law clerks and assistants, see "Access to Courts Records in North Carolina and Judicial Privilege," Administration of Justice Bulletin No. 2012/01 (UNC School of Government, June 2012).

III. Other Statutes Addressing the Confidentiality of Court Records. Statutes other than the public records law address the confidentiality of various kinds of court records. A number of the statutes concern juvenile proceedings in district court. The statutes applicable to superior court include:

- G.S. 1A-1, Rule 26(c) — The judge in a civil case may limit discovery and order that documents be sealed.
- G.S. 15-207 — Information obtained by a probation officer is privileged and is to be disclosed only to the court and Secretary of Correction and others authorized by them.
- G.S. 15A-623(e), (f) and (g) — Grand jury proceedings are secret; members of the grand jury and others present are prohibited from disclosing anything that transpired; the judge may direct that the indictment be sealed until the defendant is arrested; and anyone who wrongly discloses grand jury information is subject to contempt.
- G.S. 15A-908 — The judge may limit discovery in criminal cases and order the sealing of documents presented for in-camera review.
- G.S. 15A-1002(d) — A report on the capacity of the defendant to stand trial is to be sealed but copies provided to counsel.
- G.S. 15A-1333(a) — Presentence reports and information obtained by sentencing programs to prepare such reports are not public records and may be made available only to the defendant, the defendant's lawyer, the prosecutor and the court.
- G.S. 90-21.8(f) and (h) — In a district court proceeding relating to a minor's consent to abortion the court is to order that a confidential record of the evidence be maintained. If the minor appeals for a de novo hearing in superior court, the record of that hearing is confidential.
- G.S. 114-19.28 — The clerk of court is to create a "separate confidential file" for the petition of a convicted felon to have the right to possess firearms restored.
- G.S. 132-1.3 — Settlement documents in cases involving state or local agencies are public records except for medical malpractice actions against hospital facilities, and may be sealed only upon a finding by the court of an overriding interest and a determination that no measure short of sealing would protect that interest.

IV. Sealing Warrants.

A. Warrants Not Public Records Until Returned. As noted above, the Public Records Law provides in G.S. 132-1.4(k) that arrest and search warrants do not become public records until they are returned by law enforcement officers.

B. Procedure. Once returned, an arrest or search warrant may be sealed by court order. A warrant may be sealed only when doing so is "essential to preserve higher values" and when the order "is narrowly tailored to serve that interest." In re Investigation into Death of Cooper, 200 N.C. App. 180 (2009). Some

higher values that might be served by sealing include maintaining the integrity of an ongoing investigation, protecting the defendant's right to a fair trial, and protecting innocent third parties. A sealing order may be narrowly tailored by sealing only the portions that require confidentiality and by limiting the sealing to the minimum time needed to serve the purpose of sealing.

The trial court order sealing a warrant should include sufficiently detailed findings of fact for an appellate court to be able to review and determine whether the sealing was justified.

V. Inherent Authority to Limit Access to Court Documents.

A. Court's Authority. The court has inherent authority to seal documents when necessary to ensure that each side has a fair and impartial trial or to serve another overriding public interest. Virmani v. Presbyterian Health Services Corp., 350 N.C. 449 (1999).

B. Agreement by Parties Does Not Bind Court. An agreement by the parties to maintain confidentiality in any proceeding against each other does not bind the court and does not by itself establish a compelling reason for sealing court records. France v. France, 209 N.C. App. 406 (2011).