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GENERAL STATUTES OF NORTH CAROLINA  
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\*\*\* Statutes current through the 2009 Regular Session \*\*\*  
\*\*\* Annotations current through September 18, 2009 \*\*\*

CHAPTER 143. STATE DEPARTMENTS, INSTITUTIONS, AND COMMISSIONS  
ARTICLE 33C. MEETINGS OF PUBLIC BODIES

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*N.C. Gen. Stat. § 143-318.11 (2009)*

§ 143-318.11. Closed sessions

(a) Permitted Purposes. -- It is the policy of this State that closed sessions shall be held only when required to permit a public body to act in the public interest as permitted in this section. A public body may hold a closed session and exclude the public only when a closed session is required:

(1) To prevent the disclosure of information that is privileged or confidential pursuant to the law of this State or of the United States, or not considered a public record within the meaning of Chapter 132 of the General Statutes.

(2) To prevent the premature disclosure of an honorary degree, scholarship, prize, or similar award.

(3) To consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, which privilege is hereby acknowledged. General policy matters may not be discussed in a closed session and nothing herein shall be construed to permit a public body to close a meeting that otherwise would be open merely because an attorney employed or retained by the public body is a participant. The public body may consider and give instructions to an attorney concerning the handling or settlement of a claim, judicial action, mediation, arbitration, or administrative procedure. If the public body has approved or considered a settlement, other than a malpractice settlement by or on behalf of a hospital, in closed session, the terms of that settlement shall be reported to the public body and entered into its minutes as soon as possible within a reasonable time after the settlement is concluded.

(4) To discuss matters relating to the location or expansion of industries or other businesses in the area served by the public body, including agreement on a tentative list of economic development incentives that may be offered by the public body in negotiations. The action approving the signing of an economic development contract or commitment, or the action authorizing the payment of economic development expenditures, shall be taken in an open session.

(5) To establish, or to instruct the public body's staff or negotiating agents concerning the position to be taken by or on behalf of the public body in negotiating (i) the price and other material terms of a contract or proposed contract for the acquisition of real property by purchase, option, exchange, or lease; or (ii) the amount of compensation and other material terms of an employment contract or proposed employment contract.

(6) To consider the qualifications, competence, performance, character, fitness, conditions of appointment, or conditions of initial employment of an individual public officer or employee or prospective public officer or employee; or to hear or investigate a complaint, charge, or grievance by or against an individual public officer or employee. General personnel policy issues may not be considered in a closed session. A public body may not consider the qualifica-

tions, competence, performance, character, fitness, appointment, or removal of a member of the public body or another body and may not consider or fill a vacancy among its own membership except in an open meeting. Final action making an appointment or discharge or removal by a public body having final authority for the appointment or discharge or removal shall be taken in an open meeting.

(7) To plan, conduct, or hear reports concerning investigations of alleged criminal misconduct.

(8) To formulate plans by a local board of education relating to emergency response to incidents of school violence.

(9) To discuss and take action regarding plans to protect public safety as it relates to existing or potential terrorist activity and to receive briefings by staff members, legal counsel, or law enforcement or emergency service officials concerning actions taken or to be taken to respond to such activity.

(b) Repealed by Session Laws 1991, c. 694, s. 4.

(c) Calling a Closed Session. -- A public body may hold a closed session only upon a motion duly made and adopted at an open meeting. Every motion to close a meeting shall cite one or more of the permissible purposes listed in subsection (a) of this section. A motion based on subdivision (a)(1) of this section shall also state the name or citation of the law that renders the information to be discussed privileged or confidential. A motion based on subdivision (a)(3) of this section shall identify the parties in each existing lawsuit concerning which the public body expects to receive advice during the closed session.

(d) Repealed by Session Laws 1993 (Reg. Sess., 1994), c. 570, s. 2.

**HISTORY:** 1979, c. 655, s. 1; 1981, c. 831; 1985 (Reg. Sess., 1986), c. 932, s. 5; 1991, c. 694, ss. 3, 4; 1993 (Reg. Sess., 1994), c. 570, s. 2; 1995, c. 509, s. 84; 1997-222, s. 2; 1997-290, s. 2; 2001-500, s. 2; 2003-180, s. 2.

#### CASE NOTES

**LEGISLATIVE INTENT OF SUBSECTION (A)(1).** --Legislature intended, in *G.S. 143-318.11(a)(1)*, to restrict the subject matter which may be considered by a public body in a closed session. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

**LEGISLATIVE INTENT OF SUBSECTION (A)(3).** --The legislature did not intend the reference to claims and settlements in the second half of the (a)(3) exception to create a limitation to the exception, but only to provide an illustration of what types of discussions can proceed in closed session. *Multimedia Publishing of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

**BURDEN OF PROOF REQUIRES OBJECTIVE INDICIA.** --The burden is on the government body to demonstrate that the attorney-client exception in (a)(3) applies, and the government body can only meet its burden by providing some objective indicia that the exception is applicable under the circumstances; mere assertions by the body or its attorney(s) in pleadings will not suffice. *Multimedia Publishing of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

**REMOVAL OF COUNTY OFFICIAL.** --Appeal from a judgment that a chairman of a county airport authority was improperly removed from his position by a board of county commissioners who convened in a closed session in violation of the North Carolina Open Meetings Law, *G.S. 143-318.11(a)(3)*, to discuss the chairman's qualifications, was rendered moot as the chairman's term had expired. *McClure v. County of Jackson*, 185 N.C. App. 462, 648 S.E.2d 546 (2007).

**THE PRESENT ATTORNEY-CLIENT EXCEPTION IN SUBSECTION (A)(3)** does not require a claim to be pending or threatened before the privilege of a closed session may be invoked by the government body. *Multimedia Publishing of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

**DISCUSSIONS ALLOWED UNDER ATTORNEY-CLIENT PRIVILEGE IN (A)(3).** --Discussions regarding the drafting, phrasing, scope, and meaning of proposed enactments would be permissible during a closed session under

(a)(3), but as soon as discussions move beyond legal technicalities and into the propriety and merits of proposed enactments, the legal justification for closing the session ends. *Multimedia Publishing of N.C., Inc. v. Henderson County*, 136 N.C. App. 567, 525 S.E.2d 786 (2000), cert. denied, 351 N.C. 474, 543 S.E.2d 492 (2000).

Public body was entitled to hold a closed session to consult with an attorney employed or retained by the public body in order to preserve the attorney-client privilege between the attorney and the public body, in accordance with G.S. 143-318.11(a)(3). *Sigma Constr. Co. v. Guilford County Bd. of Educ.*, 144 N.C. App. 376, 547 S.E.2d 178 (2001).

**ATTORNEY-CLIENT EXCEPTION HELD APPLICABLE.** --As zoning appeals board held closed hearings solely in order to consult with its attorney on matters within the scope of the attorney-client privilege, and the aggrieved property owner failed to show any prejudice from the board's meeting in closed session, its challenge to the closed meetings was denied. *Carolina Holdings, Inc. v. Hous. Appeals Bd.*, 149 N.C. App. 579, 561 S.E.2d 541 (2002).

Closed session of board of county commissioners at which it met with its attorney to discuss the legalities of a proposed ordinance and during which no general policy matters were discussed was authorized by the attorney client privilege in G.S. 143-318.11(a)(3). *Multimedia Publ'g of N.C., Inc. v. Henderson County*, 145 N.C. App. 365, 550 S.E.2d 846 (2001).

**JUDICIAL APPLICATION OF SUBSECTION (D).** --Courts should ensure that the exception in subsection (d) of this section to the disclosure requirement should extend no further than necessary to protect ongoing efforts of a public body, respecting the policy against secrecy in government that underlies both the *Public Records Act and Open Meetings Law*. *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

"ADMINISTRATIVE PROCEDURE" AS USED IN SUBSECTION (A)(3) refers only to administrative proceedings instituted under the Administrative Procedure Act (N.C.G.S. G.S. 150B-1, et seq.), and does not include mere clerical or managerial instructions to terminate a contract. *H.B.S. Contractors v. Cumberland County Bd. of Educ.*, 122 N.C. App. 49, 468 S.E.2d 517 (1996), discretionary review improvidently allowed, 345 N.C. 178, 477 S.E.2d 926 (1996).

**SETTLEMENT OF CASE.** --Once the Board of County Commissioners authorized its attorney to settle the case, he was empowered to bind the board. *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991).

A Board of County Commissioners' oral offer, through its attorney, to settle voting rights litigation on specific, enforceable terms was sufficient to bind the board. Under North Carolina law, public bodies can give instructions to their attorneys to settle litigation, so long as the settlement terms are later entered into the minutes in open session. *Moore v. Beaufort County*, 936 F.2d 159 (4th Cir. 1991).

**MATTERS NOT SUBJECT TO NEGOTIATION.** --Under G.S. 143-318.11(a)(5), a city council erroneously refused to reveal in open session the location, proposed purpose, and owner of certain property it was considering acquiring for a public park, because none of those matters were subject to negotiation. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Language of G.S. 143-318.11(a)(5) does not permit a public body to deny the public access to information which is not a material term subject to negotiation regarding the acquisition of real property so a public body may not reserve for discussion in closed session, under the guise of G.S. 143-318.11(a)(5), matters relating to the terms of a contract for acquisition of real property unless those terms are material to the contract and also actually subject to negotiation. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

**CONSIDERATION OF PROSPECTIVE EMPLOYEE'S QUALIFICATIONS.** --Board of a substance abuse area authority properly entered a closed session and continued the closed session on later dates to evaluate and consider a prospective employee's qualifications; therefore, the board did not violate the North Carolina Open Meetings Law, G.S.143-318.9 et. seq., to warrant the employee's appointment to be declared null and void or a nullity. *Davis v. Durham Mental Health/Development Disabilities/Substance Abuse Area Auth.*, 165 N.C. App. 100, 598 S.E.2d 237 (2004).

**WAKE COUNTY HOSPITAL SYSTEM AS A "PUBLIC BODY".** --By virtue of the definitions in G.S. 143-318.10(b) and 159-39(a), the Wake County Hospital System is a "public body" that must, by law, record settlement terms considered in executive sessions; in addition, the public has the right to know the terms of settlements made by the system in actions for wrongful terminations of its agreements, since the funds from which the settlements are paid must be consid-

ered the county's funds. *News & Observer Publishing Co. v. Wake County Hosp. Sys.*, 55 N.C. App. 1, 284 S.E.2d 542 (1981), cert. denied, 305 N.C. 302, 291 S.E.2d 151, appeal dismissed and cert. denied, 459 U.S. 803, 103 S. Ct. 26, 74 L. Ed. 2d 47 (1982).

UNDERGRADUATE COURT WAS ENTITLED TO HOLD A CLOSED SESSION to prevent the disclosure of education records protected by FERPA (Family Educational and Privacy Rights Act). *DTH Publishing Corp. v. University of N.C.*, 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

Closed session of Undergraduate Court was authorized under this section and the recordings of the closed session may be withheld from public inspection pursuant to subsection G.S. 143-318.10(e). *DTH Publishing Corp. v. University of N.C.*, 128 N.C. App. 534, 496 S.E.2d 8 (1998), cert. denied, 348 N.C. 496, 510 S.E.2d 382 (1998).

CONSIDERATIONS WHERE PROCEEDINGS NO LONGER ONGOING. --The nature and purpose of the meetings at issue are relevant in determining the extent of protection, if any, provided in subsection (d) of this section for minutes of proceedings that are no longer ongoing. *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

HOSPITAL "CREDENTIALING RECORDS" PERTAINING TO A PHYSICIAN were confidential and privileged. *Whisenhunt v. Zammit*, 86 N.C. App. 425, 358 S.E.2d 114 (1987).

COMMITMENT OF WATER LINE IN EXECUTIVE SESSION. --Even if water line commitment made at an executive session violated open meetings law, it did not prevent defendant city from later committing itself to furnish water to citizen's property. After lengthy public hearings all facts pertinent to the case were publicly presented, including the city's proposal to furnish water line. *Coulter v. City of Newton*, 100 N.C. App. 523, 397 S.E.2d 244 (1990).

DISCLOSURE OF MINUTES. --Even though they are public records, minutes or an account of a closed session conducted in compliance with G.S. 143-318.11 may be withheld from public inspection so long as public inspection would frustrate the purpose of a closed session, under G.S. 143-318.10(e). *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

Plain language of G.S. 143-138.10 requires that a closed session be conducted in compliance with G.S. 143-318.11 in order for the minutes of such session to be withheld from public inspection. *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002).

DISCLOSURE HELD NECESSARY WHERE PROCEEDINGS NOT ONGOING. --Where Commission formed to investigate improprieties in a university athletic program had completed its proceedings and had reported to the university system's chief executive officer, and no further action or disposition by any higher ranking university officer was pending, the Commission's work, or any results depending on that work, could not have been compromised by public inspection of minutes of its meetings. *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

PROPRIETY OF CLOSED SESSION. --Pursuant to G.S. 143-318.11(c), county board of elections violated the North Carolina Open Meetings Law, G.S. 143-318.9 et seq., by going into closed session without a vote of the board or stating its purpose for such a session. The board's failure to consider a recusal motion in a public setting also violated the *Open Meetings Law*. *Knight v. Higgs*, 189 N.C. App. 696, 659 S.E.2d 742 (2008).

CITED in *Dockside Discotheque, Inc. v. Board of Adjustment*, 115 N.C. App. 303, 444 S.E.2d 451, cert. denied, 338 N.C. 309, 451 S.E.2d 635 (1994); *Cohn v. Wilkes Gen. Hosp.*, 127 F.R.D. 117 (W.D.N.C. 1989); *Durham Herald Co. v. County of Durham*, 334 N.C. 677, 435 S.E.2d 317 (1993); *Maready v. City of Winston-Salem*, 342 N.C. 708, 467 S.E.2d 615 (1996); *Boney Publishers, Inc. v. Burlington City Council*, 151 N.C. App. 651, 566 S.E.2d 701 (2002), cert. denied, 356 N.C. 297, 571 S.E.2d 221 (2002); *MCI Constr., LLC v. Hazen & Sawyer, P.C.*, 213 F.R.D. 268 (M.D.N.C. 2003).

#### OPINIONS OF THE ATTORNEY GENERAL

CLOSED SESSIONS OF TAX REVIEW BOARD. --The Tax Review Board may enter into a closed session for the limited purposes enumerated in this section. See opinion of Attorney General to The Honorable Richard H. Moore, Treasurer, State of North Carolina, 2004 N.C.A.G. 10 (10/12/04).