High Court Ruling Expands North Carolina's Public Records Law

by Liz Clarke

The state Supreme Court, in a landmark decision in 1992, broadly interpreted North Carolina's Public Records Law—making it harder for government agencies to withhold records from the public. The Court ruled that the Poole Commission, a panel appointed by UNC President C.D. Spangler Jr. to investigate charges of wrongdoing in N.C. State University's basketball program, could not withhold its records from the press. The case, News & Observer v. Poole, *could have important implications for state and local governments.*

In 1983, North Carolina State University's basketball team won the national champion ship, defeating Houston 54–52 in one of the greatest upsets in NCAA history. Now, the former Wolfpack team has another claim to fame: It has helped enhance the meaning and stature of the state's Public Records Law.[1]

On Jan. 10, 1992, the N.C. Supreme Court unanimously affirmed a broad policy of government openness by ruling that three categories of records compiled during a six-month investigation of N.C. State's basketball program were public, and by ordering those records disclosed for public inspection.[2] The 7–0 decision was the state Supreme Court's first comprehensive review of the Public Records Law since the state legislature enacted the statute in 1935.

Until *News & Observer v. Poole*, some would argue that North Carolina courts felt some degree of flexibility in crafting exceptions to the Public Records Law.[3] The Supreme Court, however, made it clear that a record is public as long as there is no statute specifically exempting that record from public inspection. The Court, despite arguments based on public policy and common law, refused in *Poole* to create new exceptions to the Public Records Law. That, the Court held, is strictly the province of the General Assembly.

Ruling a Victory for the Press

The case was a victory for the plaintiffs, which included The News & Observer Publishing Co., the North Carolina First Amendment Foundation, and the North Carolina Press Association. But its resolution highlights the shortcomings of using the deliberative nature of the court process to seek quick remedies for violations of the Public Records Law. By the time the records were released, public interest in the matter had waned. The NCSU investigation had been closed nearly three years. NCSU Chancellor Bruce Poulton had been fired, and Jim Valvano had been forced from his coaching job with a $613,000 contract buyout.

As far as the newspapers were concerned, the time it took for the case to make its way through the courts stripped the decision of much of its impact. "In many respects, the thing was a net loss," says Raleigh attorney Hugh Stevens, who represented the plaintiffs. "I really think the citizenry was entitled to know not only what they found out, but to know it in a more timely fashion. This case is proof of the old adage that a delay can be tantamount to defeat, if you delay long enough. Justice delayed is justice denied."

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Gene Furr, The News & Observer

Sam Poole, chair of Poole Commission and current chair of UNC Board of Governors.

Concerns over delays in the release of records, along with other issues raised in the *Poole* case, helped prompt the General Assembly to review the Public Records Law in its 1993 session.[4] Although the Supreme Court decision strongly affirmed the presumption of openness in dealing with public records, it left murky implications for exceptions based on the attorney-client privilege—causing confusion and unease about what the Court did and didn't say about the attorney-client privilege.

In fact, Earl Mac Cormac, the science advisor to former Gov. Jim Martin, urged legislators in 1992 to create a "Fair Information Practices Commission" to review the law.[5] Mac Cormac's primary goal was to define what kinds of information should be considered public among the state's burgeoning computer data bases.[6] In arguing for such a commission, however, he said the *Poole* decision would undermine the attorney-client privilege within government.

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—N.C. Supreme Court

Case Prompted by Book, Newspaper Probes

The case involves *The News & Observer*'s attempt to obtain documents compiled during the investigation of the N.C. State University basketball program. The investigation began in late January 1989, when C.D. Spangler Jr., president of the University of North Carolina system, appointed a four-member panel to look into allegations of wrongdoing and corruption raised by promotional material for a forthcoming book, *Personal Fouls*.[7]

Spangler appointed Samuel H. Poole, then vice chair and now chair of the UNC Board of Governors, to lead the commission.[8] The Poole commission, on the advice of Deputy Attorney General Andy Vanore, retained three agents from the State Bureau of Investigation to do its legwork.

Over the next six months, the agents interviewed 160 people—several more than once. They submitted and discussed written summaries of their interviews at periodic meetings with the commission. Those SBI reports, which stood more than a foot high, formed one part of *The News & Observer*'s request, first made July 26, 1989, in a letter from newspaper publisher Frank A. Daniels Jr. to Spangler. The newspaper also sought minutes of the Poole Commission's 13 meetings and copies of draft reports prepared by two commission members.

On Aug. 4, 1989, Vanore denied Daniels' request. That led the newspaper to file suit against the commission and its staff on Oct. 23, 1989. The suit contended that the commission was violating the Public Records Law, which provides: "Every person having custody of public records shall permit them to be inspected and examined at reasonable times . . . "[9]

On April 8, 1990, Judge Henry V. Barnette of the Superior Court of Wake County ruled that all of the requested records—including SBI reports, commission minutes, and draft reports—were subject to public inspection. The defendants appealed, and the state Supreme Court accepted the case for discretionary review, bypassing the N.C. Court of Appeals. The upper court modified and affirmed the trial court's judgment. Two months later, after Judge Barnette had excised privileged material—to protect the privacy of student athletes—the documents were released. They revealed that:

- N.C. State basketball players enrolled between 1980 and 1989 averaged 735 out of a possible 1600 points on the Scholastic Aptitude Test (SAT), or about 300 points less than the average N.C. State undergraduate.[10]
- N.C. State athletes registered positive in 42 drug tests between 1985 and 1988. The commission was told that Valvano feared one player would try to lose an NCAA tournament game in order to avoid the drug test administered only to the winning team.

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ATTORNEY FOR PLAINTIFFS

Karen Tam

- One commission member, businessman William A. Klopman of Greensboro, concluded that Valvano's program was "a system that is rotten, stinks."
- Commission Chair Poole, in a draft report, wrote Spangler: "The [N.C. State] administration deserves no credibility with the press, the public, the faculty, and this commission. We can cite several instances where public statements were not based on fact. They were either an attempt to cover realities or a lack of awareness of what was occurring. Neither should be acceptable from a public university."

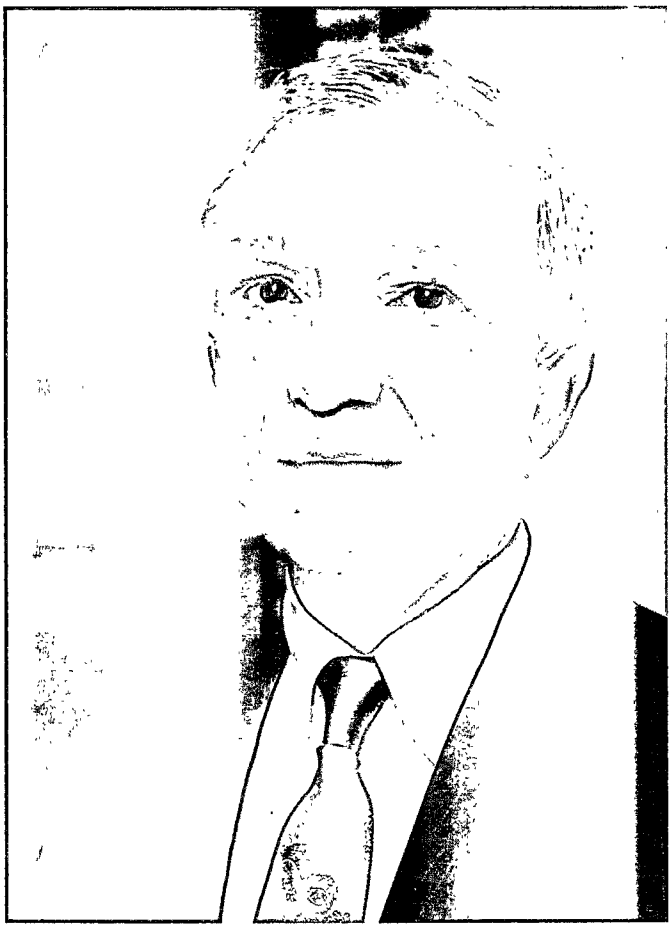
On the positive side, the investigation found *no* evidence supporting several serious charges listed on the promotional book jacket for *Personal Fouls*—allegations that newspapers had widely reported before the book was published. For example, the documents showed no evidence that NCSU basketball players had received improper payments or that the Wolfpack Club had funneled money to team members through Coach Valvano.

Case Focuses on SBI Probe

The SBI's investigative reports, which formed the bulk of the commission's work, became the focus of most of the attention in the court case. Both sides agreed that the Poole Commission was a "public agency," as defined by the Public Records Law. Both acknowledged, as well, that G.S. 114-15 exempts SBI investigative reports from the law.[11] But they disagreed about whether that exemption applied to the reports that the SBI compiled for the commission.

In seeking release of those reports, *The News & Observer* argued that they were not SBI records at all—and thus were not exempt from the Public Records Law. Instead, the newspaper contended that the SBI reports were records of the Poole Commission, which was a public agency and subject to the law. The newspaper based its argument on four factors: 1) the SBI agents answered to the commission; 2) their expenses were paid by the UNC system; 3) they were not conducting a criminal investigation; and 4) their reports were sent directly to commission members and shared with persons not usually entitled to see SBI records and evidence.[12]

Lawyers with the Attorney General's Office argued that the records



Gene Furr, The News & Observer

"THE VERY NATURE OF THESE INVESTIGATIONS DEMANDS CONFIDENCE. . . . IT'S ABSOLUTELY LUDICROUS TO THINK A LAY COMMISSION LIKE THE POOLE COMMISSION COULD CONDUCT THE KIND OF INVESTIGATION THAT WAS ABSOLUTELY ESSENTIAL TO THE INTEGRITY OF N.C. STATE UNIVERSITY. IT HAD TO BE DONE BY PROFESSIONALS—BY A GROUP THAT KNEW EXACTLY WHAT THEY WERE DOING."

—*ANDREW VANORE*
DEPUTY ATTORNEY GENERAL

were privileged precisely because they were prepared by SBI agents. They argued that the SBI agents conducted the investigation under their regular chain of command, and that G.S. 114-15 applied to all records compiled by SBI agents. They also cited an earlier Supreme Court decision, *The News & Observer Publishing Co. v. State*, which held that criminal investigative records gathered by the SBI are exempt from the Public Records Law.[13]

The Court didn't address either argument directly. Rather, the Court held that the SBI reports became subject to the Public Records Law when the Poole Commission obtained them. In other words, regardless of the status of the records when compiled, they effectively became public records once the SBI gave them to a public agency—such as the Poole Commission.

"To extend the statutory exemption to SBI investigative reports which have been placed in the public domain is like un-ringing a bell—a practical impossibility," the Court wrote. " . . . When the SBI investigative reports here became Commission records, they, as Commission records, ceased to be protected by section 114-15. They became subject to disclosure under the Public Records Law to the same extent as other Commission reports."[14]

If the legislature had intended broader protection, the Court said, it would have included the clause "wherever located and in whatever form" in its statutory exemption for SBI reports. "Where the legislature has not included such broad protection for SBI records in section 114-15, we will not engraft it," the Court said.[15]

A Loophole in the Ruling?

Vanore is critical of the decision, calling it "somewhat unique and simplistic." The Court's decision, he says, also could have important public policy implications: people could be more reluctant to testify freely in investigations, fearing that their statements would be published; and innocent people could be hurt through the publication of false allegations and unsubstantiated charges by those questioned in investigations.

"The very nature of these investigations demands confidence," Vanore says. "These are all interesting arguments that were made to the trial court and the Supreme Court. And they didn't pay much attention to them. . . . The Court said, 'We're going to interpret the Public Records Law not only liberally, but very exactly.'"

But Stevens, understandably, is pleased with the victory. Nevertheless, he calls the rationale "quirky" and wishes the Court instead had addressed the broader issue of the proper use of SBI agents.

"We had argued from the start that this whole effort to characterize the records as, quote, SBI records, was a sham—a smoke screen," Stevens says. "Ironically, the only reason the SBI got involved at all was so they could try to find a way to hide the records from the Public Records Law. If they could make them look like SBI records, maybe they could hide them. We argued all along that that was just a subterfuge. They brought in the SBI not because that was the only place they could get experienced investigators, but because that was the only hope they had of escaping the Public Records Law."

Vanore denies that SBI agents were retained expressly to circumvent the Public Records Law. "It's absolutely ludicrous to think a lay commission like the Poole Commission could conduct the kind of investigation that was absolutely essential to the integrity of N.C. State University," he says. "It had to be done by professionals—by a group that knew exactly what they were doing."

Because SBI agents are rarely used in non-criminal matters, the finding in *Poole* probably will have narrow implications. Already, it's clear that state agencies may attempt to circumvent the ruling simply by not taking possession of SBI reports they want to keep confidential. Instead, they can request oral reports or go to the SBI's office to review its reports. Vanore advised former N.C. Labor Commissioner John Brooks to do just that in 1992, when SBI agents completed an investigation of the fire in a chicken-processing plant in Hamlet, in which 25 workers were killed.

Stevens considers that tactic a dodge, and anticipated such a maneuver. The next time a similar situation arises, Stevens says, the SBI would "try to do the very same thing." But, instead of delivering its report to the commission, he says, the SBI would say to the commission: "Mr. Poole, we've got your records ready. We can't give them to you. You've got to come look at them."

Implications Unclear for Attorney-Client Privilege

The *Poole* decision also touched on the attorney-client privilege, and how that fits into the Public Records Law. The defendants, in seeking to deny access to the minutes of the Poole Commission's meetings, argued that those records were exempt from the Public Records Law be-

cause they included confidential talks between the commission and its attorneys.

Although the Court did not find such a broad exemption in the attorney-client privilege, it did find a limited exemption for written communications "from an attorney to a client." But it apparently found no exemption for communication from a state agency to its attorney.[16]

The implications for local and state agencies are unclear, according to David Lawrence of the UNC Institute of Government.[17] "The lack of any exemption for the attorney-client privilege could conceivably be quite important," Lawrence says. "That has a number of local government and state government attorneys concerned. They feel they might be in a position that they might not be able to communicate with their clients in a way that they would like."

Vanore calls the situation "a little scary." He asks, "What does it do as far as a public attorney is concerned? What about his work product? His files? Are they confidential, or open for public dissemination?"

Legislature Must Spell Out Exceptions to Law

Although the Supreme Court didn't go as far as some had hoped it would in the *Poole* ruling, the Court did make clear that any exceptions to the public records law must be created by the General Assembly—not the courts. "In conclusion," the Court wrote in its decision, "we hold that in the absence of clear statutory exemption or exception, documents falling within the definition of 'public records' in the Public Records Law must be made available for public inspection. . . . We refuse to engraft upon our Public Records Law exceptions based on common-law privileges, such as a 'deliberative process privilege,' to protect items otherwise subject to disclosure." The Court held that once an otherwise exempted public record is given to a public agency or public body, it loses its protection and becomes public.[18]

Lawrence considers that ruling significant. "There really has never been a comprehensive attempt to think about the wide variety of public records and whether they ought to be exempt from the Public Records Law," he says. "Until this decision, it was possible to believe that the courts would feel some flexibility to create these kinds of exemptions themselves. Courts in other states have done that same thing. If there is no statute [exempting a record], it appears it's open."

FOOTNOTES

[1] N.C.G.S. Chapter 132.

[2] *News & Observer v. Poole*, N.C. Supreme Court, 330 NC 465, 412 SE 2nd 7 (1992).

[3] For more on the Public Records Law and exceptions to it, see Robert Conn and Bill Finger, "Open Records—The Key to Good Government," *North Carolina Insight*, Vol. 9, No. 4 (June 1987), pp. 2–13. Also see Fred Harwell, *The Right To Be Able To Know*, N.C. Center for Public Policy Research, 1978, 85 pp.; the report was summarized in *North Carolina Insight*, Vol. 2, No. 1 (Winter 1979), p. 19.

[4] Legislators introduced three bills in the 1993 General Assembly that would amend the Public Records Law. House Bill 121 and Senate Bill 418 would amend sections of G.S. 132 dealing with the inspection and examination of records, and access to records. The identical bills also would add sections dealing with electronic data-processing records, provision of copies of public records, and fees. The bills were lodged in the House Finance Committee and the Senate Judiciary II Committee when the legislature adjourned.

In addition, the legislature enacted S.B. 860 (chapter 461 of the 1993 Session Laws), which clarifies the Public Records Law with respect to criminal investigative records. It also deletes a section of G.S. 114-15 that exempts State Bureau of Investigation records from the public records law.

[5] For more on the commission's recommendations, see Earl R. Mac Cormac, "North Carolina Technological Information Study," Governor's Office, June 1992, 172 pp.

[6] H.B. 121 and S.B. 418, identical bills that failed to clear committees during the 1993 session of the General Assembly, would broadly define computer data bases as public records.

[7] Peter Golenbock, *Personal Fouls*, New York: Carroll & Graf Publishers Inc., 1989.

[8] Other members of the Poole Commission were C. Clifford Cameron of Charlotte, William A. Klopman of Greensboro, and Dean W. Colvard of Charlotte.

[9] N.C.G.S. 132-6.

[10] N.C. State's basketball team has improved in recent years with regard to SAT scores. The Wolfpack's 1990–91 incoming team members (which included two players) had an average score of 1,070 on the SAT, while its 1991–92 incoming team members (with four players) had an average score of 890. However, only 25 percent of the players entering the 1984–85 year had graduated within six years—less than half the graduation rate for NCSU students overall (59 percent) or for students at all Division I-A colleges (56 percent). See Chip Alexander, "New numbers are in State's favor," *The News & Observer*, Raleigh, N.C., Feb. 20, 1993, p. 1C.

[11] During the 1993 session, the legislature enacted a bill, S.B. 860, which clarifies the Public Records Law with respect to criminal investigative records and repeals the section of G.S. 114-15 that exempts SBI records from the law.

[12] Plaintiffs' appellee's brief, pp. 19–20.

[13] *The News & Observer v. State ex rel. Starling*, 312 N.C. 276 (1984).

[14] *News & Observer v. Poole,* 330 N.C. at 8.

[15] *Ibid.*

[16] N.C. G.S. 132-1.1. Also see *News & Observer v. Poole,* 330 N.C. at 20, in which the Court said: "We need not decide here whether public agencies in North Carolina enjoy the traditional attorney-client privilege in all contexts. That issue is not before us."

[17] For more on the legal implications of the case, see David Lawrence, "Public Records After *Poole*," *Local Government Law Bulletin*, No. 41 (April 1992), pp. 1–6.

[18] *News & Observer v. Poole,* 330 N.C. at 25–26.