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Fired by Liars: Due Process Implications in the Recent Changes to North Carolina's Public Disclosure Laws

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INTRODUCTION

In July of 2010, the North Carolina General Assembly passed the Government Ethics and Campaign Reform Act of 2010.[1] Among its various changes to existing ethics and open records laws, the Act for the first time opened records of disciplinary action against public employees to public scrutiny. While the General Assembly's effort to increase transparency among public employees is commendable, some unintended consequences are likely to result from the relaxation of North Carolina's previously strict public disclosure laws. The new laws affect all state, county, and municipal entities, many of which are ill-equipped to provide their employees with the necessary protections to ensure that the disclosure of disciplinary action does not violate those employees' due process rights. Further, the changes leave open several questions that will not be answered until they are litigated in the courts, creating an additional burden on already cash-strapped public entities.

Imagine the following hypothetical scenario: Frank Johnson, a probationary officer in the Chapel Hill Police Department, is frequently the sole arresting officer of narcotics suspects who later claim at booking to be missing large amounts of cash that they contend they possessed when arrested. The department undertakes a brief internal investigation which confirms the allegations against Officer Johnson. The chief of police calls Johnson into his office the day after the investigation and hands him a memorandum stating that his employment with the Chapel Hill Police Department is terminated, effective immediately, for ethical indiscretions involving evidence. Johnson protests that he has no idea why the money was missing in any of the arrests and that the suspects are lying, but the chief will hear none of it. After Johnson leaves the office, the chief

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1. Government Ethics and Campaign Reform Act of 2010, 2010 N.C. Sess. Laws 638 (codified in scattered sections of N.C. GEN. STAT.). Governor Beverly Perdue signed the Act into law in August 2010. *Id.* at 665.

places a copy of the memorandum in Johnson's department personnel file.

In subsequent months, Johnson interviews for jobs at the Hillsborough, Durham, and Pittsboro police departments and receives rejections from all three. An otherwise outstanding candidate, Johnson has no idea why departments with vacancies would reject his application. He wonders if the other departments have seen the memorandum and decided not to hire him based on its contents.

Incensed, Johnson brings suit against the Chapel Hill Police Department and the police chief claiming they violated his Fourteenth Amendment due process rights by not giving him a name-clearing hearing to confront the false allegations of theft against him.[2] He asserts that the memo may be seen by future employers, which would negatively affect his future employment opportunities. The court rules he has a due process liberty interest in his good name and future employment opportunities that the town cannot infringe by spreading false information about him. However, the court holds that he must plead that the false information will "likely" be seen by potential employers, not that it merely "may" be seen by them, in order to establish his due process injury. Pleading "likely" dissemination of false information is more difficult than simply pleading that potential employers "may" see the information. The Fourth Circuit uses the higher "likely" dissemination standard, but does not require a showing that the information was *actually seen* by a potential employer, as do some other circuits.[3]

The hypothetical facts above mirror the facts of *Sciolino v. City of Newport News*,[4] except that this fictional case takes place in Chapel Hill, North Carolina rather than Newport News, Virginia. In *Sciolino*, Virginia's restrictive open records statute governing dissemination of records of disciplinary action against public employees made it extremely difficult for the officer in question, Sciolino, to show that the allegedly false record in his file would "likely" be seen by future employers.[5] The Virginia statute exempts from public disclosure "[p]ersonnel records containing information concerning identifiable

2. Plaintiffs tend to bring these suits under 42 U.S.C. § 1983, which allows relief for those who suffer a deprivation of rights as a result of state action. 42 U.S.C. § 1983 (2006).

3. The differing circuit courts' standards are discussed *infra* Part II.

4. 480 F.3d 642 (4th Cir. 2007).

5. *Id.* at 645; *see* Government Data Collection and Dissemination Practices Act, VA. CODE ANN. §§ 2.2-3801 to -3809 (2008).

individuals."[6] While there is a process in Virginia whereby police departments may share personnel files, the likelihood of dissemination in *Sciolino* was arguably low because the dissemination would be "unnecessary to accomplish any proper purpose" as required under Virginia privacy laws.[7]

By comparison, until October 1, 2010, the North Carolina statute governing public access to records of disciplinary action similarly restricted the amount and type of information that could be made available in such a situation.[8] However, after the passage of the Government Ethics and Campaign Reform Act of 2010, a significant change in due process implications is now underway in North Carolina.[9] Frank Johnson, in the example above, could now plead "likely" dissemination, opening not just every municipality in the state[10] to budget-busting administrative hearings and due process lawsuits,[11] but all public employers, including state agencies,[12] boards of education,[13] community colleges,[14] area authorities,[15] county governments,[16] and water and sewer authorities.[17]

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6. VA. CODE ANN. § 2.2-3705.1(1) (2008).

7. Brief of Appellees at 20, *Sciolino*, 480 F.3d 642 (No. 05-2229), 2006 WL 297238 at *20 (quoting Hinderliter v. Humphries, 297 S.E.2d 684, 689–90 (Va. 1982)). Prior to *Sciolino*, this issue was unsettled in the Fourth Circuit, so this change is also a relatively recent development. *See Sciolino*, 480 F.3d at 650.

8. *See, e.g.*, N.C. GEN. STAT. § 160A-168(b) (2009), *amended by* N.C. GEN. STAT. § 160A-168(b) (Supp. 2010) (requiring disclosure of the "date of the most recent promotion, demotion, transfer, suspension, separation, or other change in position classification").

9. N.C. GEN. STAT. § 126-23(a)(11) (Supp. 2010). The statute requires disclosure of the "[d]ate and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the [municipality]. If the disciplinary action was a dismissal, 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" must be disclosed. *Id.*

10. § 160A-168(b)(11) (Supp. 2010).

11. *See* Brief of Int'l Mun. Lawyers Ass'n et al. as Amici Curiae Supporting Petitioners at 8–12, City of Newport News v. Sciolino, 552 U.S. 1076 (2007) (No. 07-159), 2007 WL 3353427 at *8–12 (arguing that the "likely" dissemination standard will result in substantial additional costs to public entities by requiring administrative hearings and the defense of due process suits). Lawsuits for due process violations under § 1983 seek to compensate victims under a tort theory of compensation, which makes it possible to recover damages for loss of wages, loss of future earning capacity, emotional anguish and distress, loss of reputation, personal humiliation, and other compensatory damages in addition to litigation costs. Memphis Cnty. Sch. Dist. v. Stachura, 477 U.S. 299, 307 (1986).

12. § 126-23(a)(11) (Supp. 2010).

13. § 115C-320(a)(11) (Supp. 2010).

14. § 115D-28(a)(11) (Supp. 2010).

15. § 122C-158(b)(11) (Supp. 2010).

16. § 153A-98(b)(11) (Supp. 2010).

17. § 162A-6.1(b)(11) (Supp. 2010).

The convergence of the recent changes to North Carolina's open records laws with the Fourth Circuit's standard for deprivation of a liberty interest in employment reputation signals a major shift in due process cases brought by public employees who have been subject to disciplinary action. A case like Officer Sciolino's—or Officer Johnson's—may not be particularly common, but the changes reach far beyond police departments to many more state and local entities. Further, the changes will likely give rise to litigation on several fronts if the legislature does not enact clarifying amendments. While the General Assembly continues to introduce legislation that further opens public employee personnel records to public inspection[18]—including a proposed constitutional amendment in support of a general policy of open access known as the "Sunshine Act" or "Sunshine Amendment"[19]—it does not seem to recognize that its rush toward "sunshine" may be opening public entities to increased liability. In the current economic climate, state and local government entities cannot afford to settle or engage in litigation on these various newly opened fronts.

Part I of this Recent Development describes the recent changes to North Carolina's public disclosure laws concerning dissemination of information about public employee disciplinary actions. Part II reviews the history of the due process liberty interest in potential future employment and the circuit split over what state employer activity rises to a due process violation. In Part III, this Recent Development examines the recent changes to the law in light of the Fourth Circuit's "likely" dissemination standard and identify ambiguities that the General Assembly should address in amendments to the legislation. Finally, Part IV proposes some

18. H.B. 685, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H685v1.pdf; S.B. 344, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S344v1.pdf. The bills are virtually identical and both eliminate the requirement for disclosure of the "[d]ate and type of each dismissal, suspension, or demotion for disciplinary reasons taken by the department, agency, institution, commission, or bureau." H.B. 685 § 1; S.B. 344 § 1. However, the bills also include a new provision requiring disclosure of "[t]he performance of the employee, to the extent that the agency has performance records in its possession." H.B. 685 § 1; S.B. 344 § 1. Disclosure of performance records could create further problems with respect to the public disclosure of false information, but it is premature to discuss the consequences of this pending legislation at the time of publication of this Recent Development.

19. H.B. 87, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncga.state.nc.us/Sessions/2011/Bills/House/PDF/H87v5.pdf; S.B. 67, 2011 Gen. Assemb., Reg. Sess. (N.C. 2011), *available at* http://www.ncga.state.nc.us/sessions/2011/bills/senate/pdf/s67v1.pdf.

amending language that would help ensure the General Assembly is clearly articulating its policy of openness while erring on the side of protecting employee due process rights.

I. CHANGES IN NORTH CAROLINA'S DISCLOSURE LAWS

The personnel privacy statutes amended in the Government Ethics and Campaign Reform Act are actually exceptions to the generally permissive policy of disclosure set out in the Public Records Act,[20] which governs access to public records in North Carolina. The Public Records Act provides a wide-ranging definition of what constitutes a "public record."[21] Even though North Carolina courts have never precisely defined "public record," they generally give the statutes a broad reading.[22] Further, public entities must permit inspection of public records and provide copying upon payment of a minimal fee.[23] The exceptions carved out in the personnel privacy statutes govern access to employee personnel records regardless of whether the Public Records Act would ordinarily allow disclosure.[24] If a document falls under the ambit of the exceptions governing public entities, then the disclosure of the document is "not governed by . . . the Public Records Act."[25] Therefore, this Recent Development does

20. *See* N.C. GEN. STAT. §§ 132-1 to -10 (2009) (comprising the North Carolina Public Records Act).

21. *See* § 132-1(a). Records are anything "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." *Id.* The word "agency" 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." *Id.*

22. DAVID M. LAWRENCE, PUBLIC RECORDS LAW FOR NORTH CAROLINA LOCAL GOVERNMENTS 11 (2010); *see also* News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 481, 412 S.E.2d 7, 16 (1992) (indicating that unless falling under a specific exception, public records, including the meeting minutes of deliberative bodies, must be disclosed).

23. § 132-6(a).

24. *See, e.g.*, N.C. GEN. STAT. § 160A-168(a) (Supp. 2010) ("*Notwithstanding the provisions of G.S. 132-6* or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and *may be disclosed only as provided by this section.*") (emphasis added). The Act repeats this or similar language with regard to all public entities affected by the recent statutory changes. Language identical to that in section 160A-168(a) has been interpreted by North Carolina courts as an exception to the Public Records Act. *See* Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 490, 616 S.E.2d 602, 605 (2005) (holding that identical language in another statute "clearly and unambiguously limits what and when information . . . can be disclosed publicly, notwithstanding the Public Records Act").

25. News Reporter Co. v. Columbus Cnty., 184 N.C. App. 512, 515, 646 S.E.2d 390, 393 (2007) (internal quotation marks omitted).

not examine the Public Records Act under Chapter 132, but addresses only the scattered statutes recently amended by the General Assembly codified in the chapters governing public entities.

Before the passage of the Government Ethics and Campaign Reform Act, North Carolina's personnel records statutes only required disclosure of the "date of the most recent promotion, demotion, transfer, suspension, separation or other change in position classification."[26] The meaning of this phrase has been the subject of much speculation, but the appellate courts have never ruled on whether the information required is merely the date of the action, or instead includes the nature of the action as well.[27] Generally, the literal language indicates that only the date of the action need be disclosed, but the practice of many government entities has been to include the nature of the action as well.[28] In fact, a judge in New Hanover County Superior Court has ordered the nature of the action to be disclosed in some situations.[29]

Under the old statutes, records of disciplinary action against public employees other than the date and, occasionally, the nature of the action could only be released to potential future employers under particular circumstances: after employee consent or the clearing of procedural hurdles.[30] Accordingly, it was almost certainly not "likely" that potential employers could access information in a discharged public employee's personnel record that might negatively affect the employee's employment prospects. In the hypothetical case above, even if Officer Johnson did not receive adequate opportunity to refute the charges of theft against him in a disciplinary hearing, he would have a difficult time showing under the old statutes that

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26. N.C. GEN. STAT. § 160A-168(b) (2009), *amended by* N.C. GEN. STAT. § 160A-168(b) (Supp. 2010).

27. Robert Joyce, *Disclosing Employee Discipline*, COATES' CANONS: NC LOC. GOV'T L. BLOG (Sept. 10, 2009, 11:12 AM), http://sogweb.sog.unc.edu/blogs/localgovt/?p=684.

28. *See* LAWRENCE, *supra* note 22, at 164–65.

29. *See* Lakeland Ledger Publ'g Corp. v. City of Wilmington, No. 03CVS2482, 2003 WL 23221345, at *2 (N.C. Super. Ct. Nov. 29, 2003) ("N.C. GEN. STAT. § 160A-168(b) is properly interpreted to require disclosure of a city employee's most recent promotion, demotion, transfer, suspension, separation, or other change in position classification, together with the date of such action."); *see also* Joyce, *supra* note 27 (describing another New Hanover County Superior Court case from 2009).

30. LAWRENCE, *supra* note 22, at 175–76 (referring to existing statutes prior to the passage of the Government Ethics and Campaign Reform Act). Under the old law, the employee could waive her right to confidentiality, the government agency could release the information if necessary for the proper functioning of a requesting government agency, or, if the requesting entity was private, the chief administrator or governing board could release the information as long as it complied with the statute. *Id.*

potential employers would be "likely" to see the memorandum of discharge in his employment file. Absent the procedural, judicial, or consensual exceptions described above, the most information that could be disseminated would be the date and nature of change in employment status, not the reason for that change in status or any details surrounding the discharge.

The recent changes to the law of public disclosure of disciplinary actions against public employees considerably increase the amount of information that is potentially available through information requests.[31] The General Assembly clarified the relevant language to explicitly require disclosure of both the date and type of disciplinary action.[32] In addition, in the event of a dismissal, "a copy of the written notice of the final decision," detailing the basis for the dismissal, must be disclosed.[33] With so much more information available, it is much more "likely" that unfavorable details that will affect future employment opportunities will be released. As a result, it will be easier for litigants to meet the Fourth Circuit's pleading standard and bring due process actions against public entities.[34]

II. THE LINEAGE AND THE CIRCUIT SPLIT: *ROTH*, *BISHOP*, AND THE LIBERTY INTEREST IN FUTURE EMPLOYMENT

The Fourteenth Amendment guarantees that states will not "deprive any person of life, liberty, or property without due process of law."[35] The Supreme Court first entertained the concept of an occupational component to the liberty interest embodied in the Fifth and Fourteenth Amendments in 1923 in *Meyer v. State of Nebraska*.[36] Then, in 1971, the Supreme Court ruled that "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him, notice and an opportunity to be heard are essential."[37] The Court elaborated on this principle in *Board of*

31. Dan Kane, *N.C. Ethics Reform Law Signed, Opening State Workers' Records*, NEWS & OBSERVER (Raleigh, N.C.), Aug. 3, 2010, at 1A. For a discussion of the amount and type of information that the government must disclose, see *infra* Part III.

32. Government Ethics and Campaign Reform Act of 2010, § 18(a), 2010 N.C. Sess. Laws 638, 654 (codified at N.C. GEN. STAT. § 126-23(a)(11) (Supp. 2010)) (requiring the disclosure of the "[d]ate and type of each dismissal, suspension, or demotion for disciplinary reasons").

33. *Id.*

34. Of course, whether a given action would succeed or fail under the new statutes remains to be seen. Therefore, this Recent Development does not speculate as to the merits of any particular due process claim.

35. U.S. CONST. amend. XIV, § 1.

36. 262 U.S. 390, 399 (1923).

37. Wisconsin v. Constantineau, 400 U.S. 433, 437 (1971).

Regents of State Colleges v. Roth,[38] writing that if the State imposes a stigma or disability, such as a badge of dishonesty, upon an employee that affects her ability to take other employment, then the employee must have an opportunity to refute the charges.[39] This opportunity to be heard generally provides adequate process for the State to be able to burden the employee with disclosure of the details of dismissal.

Four years later, the Court in *Bishop v. Wood*[40] again intimated that a violation of the liberty interest could occur if the stigmatizing information were made public.[41] The Court explained, however, that since the "Due Process Clause of the Fourteenth Amendment is not a guarantee against incorrect or ill-advised personnel decisions,"[42] a person's liberty interest is not violated, even if the reasons given for discharge were false, unless the reasons are publicly disclosed.[43] In essence, the litigation theory operates something like a constitutionally-rooted defamation claim in that the State may not stigmatize an employee by publicly distributing false information about her.[44]

The public disclosure requirement in *Bishop* triggered a three-way split among the circuits as to when information has been "made public."[45] The First and Seventh Circuits adhere to an "actual

38. 408 U.S. 564 (1972).

39. *Id.* at 573–74. The *Roth* court ultimately held that the State did not violate Roth's liberty interest because its failure to renew his contract did not stigmatize him in such a way that would affect his future employment opportunities. *Id.* at 574–75.

40. 426 U.S. 341 (1976).

41. *Cf. id.* at 348 ("Since the former communication was not made public, it cannot properly form the basis for a claim that petitioner's interest in his 'good name, reputation, honor, or integrity' was thereby impaired.").

42. *Id.* at 350.

43. *Id.* at 348–49.

44. J. MICHAEL MCGUINNESS, PUBLIC EMPLOYEE DUE PROCESS CLAIMS (2007), *reprinted in* CONSTITUTIONAL CONSIDERATIONS IN NORTH CAROLINA ADMINISTRATIVE LAW, at VII-15 (N.C. Bar Ass'n Found., 2007); Katherine Crytzer, Comment, *You're Fired!* Bishop v. Wood*: When Does a Letter in a Former Public Employee's Personnel File Deny A Due Process Liberty Right?*, 16 GEO. MASON L. REV. 447, 462 (2009). Actual tort defamation claims would be impeded by North Carolina law, which grants immunity to employers who disclose job history information to potential employers. *See* N.C. GEN. STAT. § 1-539.12 (2009). However, section 1-539.12 does not affect the operation of the personnel privacy statutes addressed here and does not afford protection for employers who violate Due Process rights. *See* LAWRENCE, *supra* note 22, at 176. Indeed, the Fourth Circuit has articulated that "the constitutional harm 'is not the defamation' itself; rather it is 'the denial of a hearing at which the dismissed employee has an opportunity to refute the public charge.' " Sciolino v. City of Newport News, 480 F.3d 642, 649 (4th Cir. 2007) (quoting Cox v. N. Va. Transp. Comm'n, 551 F.2d 555, 558 (4th Cir. 1976)).

45. *See Bishop*, 426 U.S. at 348. While some commentators argue that an "actual publication" standard is the correct interpretation of the holding in *Bishop*, others argue

publication" standard whereby the plaintiff must show that a potential employer either requested the stigmatizing information or that the previous employer divulged the stigmatizing information.[46] This standard is the most stringent because it forces the plaintiff to prove actual injury—a burden the Fourth Circuit is unwilling to place on plaintiffs because "the information would have already been communicated to a potential employer, the employee's job opportunities foreclosed, and his reputation damaged *before* any possibility for a name-clearing hearing."[47]

The Tenth and Eleventh Circuits use the lenient "presence" or "possibility" standard.[48] The Fourth Circuit refuses to apply this standard due to concern that communication between employer and employee might be inhibited if the mere presence of information in a personnel file or the slightest possibility of its dissemination will result in a constitutional cause of action.[49]

The intermediate standard, adopted by the Second, Fourth, and Fifth Circuits, attempts to strike a balance between the harsh results that can occur from application of the "actual" or "presence" dissemination standards. The Second, Fourth, and Fifth Circuits have held that the plaintiff must show a "likelihood" that the stigmatizing information will be disseminated to potential employers.[50] The Fourth

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that a "likely" dissemination standard is correct. *Compare* Crytzer, *supra* note 44, at 448–49 (arguing that the "actual publication" standard is more accurate and more easily justiciable), *with* Jenny S. Brannan, Comment, *The Publication Debate in Deprivation of Occupational Liberty Claims*, 47 U. KAN. L. REV. 171, 183–85 (1998) (arguing for the adoption of a "likely" standard as a compromise between the "actual publication" standard and the "presence" standard).

46. *See, e.g.*, Burton v. Town of Littleton, 426 F.3d 9, 15 (1st Cir. 2005) ("[T]he stigmatizing statements or charges must have been intentionally publicized by the government."); Johnson v. Martin, 943 F.2d 15, 16–17 (7th Cir. 1991) ("[P]otentially stigmatizing information which remains in a discharged employee's personnel file and has not been disseminated beyond the proper chain of command within the police department had not been made public.").

47. *Sciolino*, 480 F.3d at 649–50.

48. *See, e.g.*, Buxton v. City of Plant City, 871 F.2d 1037, 1045–46 (11th Cir. 1989) ("[T]he presence of stigmatizing information placed into the public record by a state entity, pursuant to a state statute or otherwise, constitutes sufficient publication to implicate the liberty interest . . . ."); Bailey v. Kirk, 777 F.2d 567, 580 n.18 (10th Cir. 1985) (agreeing with the idea that "the presence of false and defamatory information in an employee's personnel file may constitute 'publication' if not restricted for internal use").

49. *Sciolino*, 480 F.3d at 649.

50. *See, e.g.*, *id.* at 650; Whiting v. Univ. of S. Miss., 451 F.3d 339, 347 (5th Cir. 2006) (requiring a showing that the government "made or is likely to make" the stigmatizing information public (internal quotation marks omitted)); Donato v. Plainview-Old Bethpage Cent. Sch. Dist., 96 F.3d 623, 631–32 (2d Cir. 1996) (ruling that the "requirement is satisfied where the stigmatizing charges are placed in the discharged employee's

Circuit prefers this standard to the "actual" and "presence" standards because it does not impose large costs on the employer or significantly compromise public administrative procedures.[51] The standard ensures that the agency will be required to provide a hearing only if it will be making available potentially false information about the former employee.[52]

In order to state a cause of action in the Fourth Circuit for a due process "defamation" violation, a plaintiff must show that the claims made by the employer "(1) placed a stigma on his reputation; (2) were made public by the employer; (3) were made in conjunction with his termination or demotion; and (4) were false."[53] According to the Fourth Circuit:

> A plaintiff can meet this standard in two ways. First, the employee could allege (and ultimately prove) that his former employer has a practice of releasing personnel files to all inquiring employers. Second, the employee could allege that although his former employer releases personnel files only to certain inquiring employers, that he intends to apply to at least one of these employers.[54]

Since North Carolina is in the Fourth Circuit, the "likely" dissemination standard controls in cases concerning the release of potentially false and stigmatizing information by public employers.[55]

III. NEW CONSTITUTIONAL CAUSES OF ACTION: NORTH CAROLINA'S UNANSWERED QUESTIONS

Under the Fourth Circuit's "likely" dissemination standard, the recent changes to North Carolina's statutes governing the dissemination of personnel information will probably open up a multitude of potential constitutional challenges. How can public

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personnel file and are likely to be disclosed to prospective employers" (internal quotation marks omitted)).

51. *Sciolino*, 480 F.3d at 650.

52. *Id.*

53. *Id.* at 646. North Carolina courts also recognize that "where a state agency publicly and falsely accuses a discharged employee of dishonesty, immorality, or job related misconduct, considerations of due process demand that the employee be afforded a hearing in order to have an opportunity to refute the accusation and remove the stigma upon his reputation." Wuchte v. McNeil, 130 N.C. App. 738, 743, 505 S.E.2d 142, 146 (1998). Plaintiffs in state courts can establish a violation of a liberty interest by showing that a governmental entity infringed the plaintiff's "freedom to seek further employment." *Id.* at 742, 505 S.E.2d at 145 (quoting Presnell v. Pell, 298 N.C. 715, 724, 260 S.E.2d 611, 617 (1979)).

54. *Sciolino*, 480 F.3d at 650.

55. *Id.*

entities best address the problems that may arise? The changes in the statutes are open to several interpretations that may infringe on public employees' due process rights, leading to litigation that could harm the operation and budgets of state, county, and municipal governments and agencies.

A. Has the General Assembly Created a "Practice of Releasing" Information?

First, the statutes now make the date and type of disciplinary action, along with "a copy of the written notice of the final decision of the [entity] setting forth the specific acts or omissions that are the basis of the dismissal,"[56] a matter of public record. Does this mean that all public agencies now have a "practice of releasing personnel files to all inquiring employers," as was the concern in *Sciolino*,[57] under the "likely" dissemination standard? The answer is not completely clear. While actual disclosure of information merely between individual public agencies is not enough to trigger a violation of the liberty interest, dissemination to the wider public can result in a violation.[58] The amended statutes require that the information be made available to the public, not that a particular agency share the information with another agency.[59] Certainly, since the document is now a public record under the law, and "[a]ny person may have access to this information for the purpose of inspection, examination, and copying during regular business hours,"[60] the change to the statutes indicates a strong possibility that this new "practice" could be enough to trigger constitutional causes of action that previously would not have been possible. The North Carolina Attorney General recognizes this as a possible consequence of the new statutes.[61] With a lack of case law and a prohibition on public entities bringing suit for

56. Government Ethics and Campaign Reform Act of 2010, § 18(a), 2010 N.C. Sess. Laws 638, 654 (codified at N.C. GEN. STAT. § 126-23(a)(11) (Supp. 2010)).

57. *Sciolino*, 480 F.3d at 650.

58. *See* Bell v. Town of Port Royal, 586 F. Supp. 2d 498, 519 (D.S.C. 2008).

59. *See* §§ 18(a)–(g), 2010 N.C. Sess. Laws at 654–58 (codified as amended in scattered sections of N.C. GEN. STAT.).

60. § 18(d), 2010 N.C. Sess. Laws at 656–57 (codified at N.C. GEN. STAT. § 122C-158(b2) (Supp. 2010)).

61. N.C. DEPT. OF JUSTICE LEGAL OPS., PERSONNEL INFORMATION REQUIRED TO BE MADE AVAILABLE FOR INSPECTION BY PUBLIC EMPLOYERS 5 (Nov. 8, 2010) [hereinafter N.C. DOJ ADVISORY OPINION], *available at* http://www.ncdoj.com/About-DOJ/Legal-Services/Legal-Opinions/Personnel-Information-Required-to-Be-Made-Availabl.aspx.

declaratory judgment[62] to answer this question, there is little guidance on this issue, and it will have to be resolved through costly litigation if legislators fail to act first.[63]

B. What About Records that Don't Exist?

A constitutional cause of action can arise if an employer creates and then disseminates a document containing false and stigmatizing information.[64] But if the information exists, and a document does not, do the new changes indicate that public entities must now create the documents? Further, if the documents did exist at one time and have since been destroyed, it is equally unclear whether they should be recreated.

Generally, North Carolina does not require public agencies to create records that do not exist simply because they receive an information request.[65] Indeed, several of the statutes simply require the public entity to "maintain a record of each of its employees" showing the requisite information about each employee.[66] Those records are public.[67] However, other statutes state that "[t]he following *information* . . . is a matter of public record."[68] The focus on the "information" as a matter of public record creates some ambiguity about whether agencies will need to create records.[69] Furthermore, the personnel privacy statutes are outside the scope of the Public Records Act, so the statutory protection against creation of records does not apply in these situations.[70] If the "information" is

62. McCormick v. Hanson Aggregates Se., Inc., 164 N.C. App. 459, 463, 596 S.E.2d 431, 434 (2004) (holding that allowing an agency to bring an action for declaratory judgment to prevent disclosure circumvents the legislative intent of the Public Records Act).

63. Frayda Bluestein, *Waiting for Interpretations of the New Personnel Privacy Provisions: What Options Do Local Governments Have?*, COATES' CANONS: NC LOC. GOV'T L. BLOG (Sept. 15, 2010, 2:23 PM), http://sogweb.sog.unc.edu/blogs/localgovt/?p=3183.

64. *See* Codd v. Velger, 429 U.S. 624, 628 (1977) (per curiam) (stating that due process requires a hearing "if the employer creates and disseminates a false and defamatory impression about the employee in connection with his termination").

65. N.C. GEN. STAT. § 132-6.2(e) (2009) ("Nothing in this section shall be construed to require a public agency to respond to a request for a copy of a public record by creating or compiling a record that does not exist.").

66. N.C. GEN. STAT. §§ 115C-320(a), 115D-28(a), 126-23(a) (Supp. 2010).

67. §§ 115C-320(a), 115D-28(a), 126-23(a) (Supp. 2010).

68. §§ 122C-158(b), 153A-98(b), 160A-168(b), 162A-6.1(b) (Supp. 2010) (emphasis added).

69. Frayda Bluestein, *Personnel Privacy Law Changes*, COATES' CANONS: NC LOC. GOV'T L. BLOG (July 14, 2010, 2:45 PM), http://sogweb.sog.unc.edu/blogs/localgovt/?p=2798 [hereinafter *Personnel Privacy Law Changes*].

70. *Id.*

public—and not necessarily just the "record"—an agency may need to disseminate the information itself regardless of whether a record currently exists.[71] Presumably, the information could be in any form and would not necessarily have to be in a document. For example, information could also be transmitted orally or through a recording. Indeed, in the statutes requiring the information to be disclosed, "an employee's personnel file consists of any information in any form."[72] On the other hand, courts have historically been reluctant to require government agencies to create records where there are none.[73] Additionally, while there is no specificity regarding the form of the other "information" to be disclosed, the statutes clearly contemplate that, with respect to a dismissal, only a physical copy will be disclosed.[74]

Moreover, the same questions arise regarding the disposal of personnel records. Government agencies have their own schedules governing the disposition of public records.[75] Certainly, if a record should have been destroyed and was not, it would still be subject to inspection.[76] For example, state agencies destroy disciplinary records five years after a final resolution unless permitted by law to destroy them earlier.[77] If the record no longer exists, but the "information" about the employee still exists—perhaps in a supervisor's memory, an email, or some other less formal format—it may still be open to dissemination. Thus, the agency may still need to transmit the information to the requesting party, opening itself to due process claims as a consequence.

Additionally, even if the agency creates a written notice, it still needs a hearing procedure in place so that dismissed employees may confront the allegations against them. An adequate hearing proceeding includes the following: "oral or written notice of the charges against [the employee], an explanation of the employer's evidence, and an opportunity to present [the employee's] side of the

71. *Id.*

72. §§ 122C-158(a), 153A-98(a), 160A-168(a), 162A-6.1(a) (Supp. 2010).

73. LAWRENCE, *supra* note 22, at 32–33.

74. *See* §§ 115C-320(a)(11), 115D-28(a)(11), 122C-158(b)(11), 126-23(a)(11), 153A-98(b)(11), 160A-168(b)(11), 162A-6.1(b)(11) (Supp. 2010).

75. *See* LAWRENCE, *supra* note 22, at 68–69.

76. *Id.* at 15.

77. GOV'T RECORDS BRANCH, N.C. DEP'T OF CULTURAL RES., GENERAL SCHEDULE FOR STATE AGENCY RECORDS 27 (2009), *available at* http://www.records.ncdcr.gov/schedules/GS_2009_updateamendment_20090831B.pdf.

story."[78] Municipal and county governments and other smaller public entities can hardly hope to provide meaningful hearing procedures such as this without significantly cutting into their already waning budgets.[79]

C. *What is "Written Notice of the Final Decision?"*

The new statutes make "a copy of the written notice of the final decision" a matter of public record.[80] By saying that "*the* written notice" should be made available rather than "*a* written notice," the language seems to assume that all public entities have a procedure for creating written notices. However, this is not the case.[81] Statutes exist that require the production of a final written notice,[82] but particularly in the case of probationary and at-will employees, many agencies do not create written documentation of the reasons for dismissal.[83] The question becomes: do the new statutes create a duty for agencies to

78. Cleveland Bd. of Educ. v. Loudermill, 470 U.S. 532, 546 (1985); *see also* Harrell v. City of Gastonia, 392 F. App'x 197, 204 (4th Cir. 2010) (finding that a public employee had been provided "all of the process that is due him" when he was given a memorandum detailing the reason for dismissal, representation at a hearing in which counsel presented evidence and examined witnesses, and "a full opportunity to present his side of the story"). The Supreme Court does not require a full evidentiary hearing for a public employee to confront the charges. *See Loudermill*, 470 U.S. at 545–46 (contrasting Loudermill's case with a case that involved termination of welfare payments where a more formal hearing was required). In *Harrell*, the court held that the memorandum was not subject to likely dissemination to the public under the old North Carolina personnel privacy statutes. *Harrell*, 392 F. App'x at 204. *Harrell* is another case in which the plaintiff would almost certainly be able to meet the "likely" pleading standard due to the amendments to the statutes, although this issue did not ultimately determine the outcome of the case. *See id.* Under the new statutes, the memorandum in that case probably would have constituted a "written notice of the final decision" and likely *would* have been available to the public. *See* § 160A-168(b)(11) (Supp. 2010).

79. *See, e.g.*, *Counties Grapple with Another Painful Budget Process*, COUNTYLINES, Apr. 2011, at 10, 10, *available at* http://www.ncacc.org/countylines/2011/04/print.pdf (discussing the continuing budget problems facing fifteen North Carolina counties).

80. *See, e.g.*, § 126-23(a)(11) (Supp. 2010) ("If the disciplinary action was a dismissal, a copy of the written notice of the final decision of the head of the department setting forth the specific acts or omissions that are the basis of the dismissal.").

81. *See Personnel Privacy Law Changes*, *supra* note 69 ("When not required to [do] so, public agencies typically do not create documents specifying the reasons for dismissals, especially of at-will employees, who may be dismissed with or without cause.").

82. *See, e.g.*, N.C. GEN. STAT. § 126-35(a) (2009) (establishing a requirement for presenting the employee with written reasons for dismissal).

83. *See Personnel Privacy Law Changes*, *supra* note 69 ("Local governments with policies that require termination only for cause will regularly prepare written notice of the type called for in the new legislation for those employees to whom the policy applies. But for employees of public agencies that are not subject to any statutory or self-imposed requirement for notice, there simply may not be a written notice of dismissal to copy and provide to the public . . . .").

begin creating final written notices of dismissals, even for their probationary employees? If "the written notice" must be made public, it may be that agencies will have to create a document because they no longer have the option of using more informal procedures to create "a written notice." This reading is consistent with the Attorney General's interpretation of the language.[84]

Further, the statutes also require that in the event of a promotion, the agency must disclose a "general description of the reasons for each promotion."[85] By contrast, the disciplinary action section requires disclosure of the written notice "setting forth the specific acts or omissions that form the basis of the dismissal."[86] The General Assembly could have worded the disciplinary action section of the statutes as it worded the promotion section if it merely had wanted to make the general reasons for dismissal public; instead, it specified that this particular information must be contained in a written document.[87] This indicates that the General Assembly worded the statute in a way that assumes that this particular information should be contained in a document that entities must create.

What is unclear, though, is whether the General Assembly intended to do away with employment at-will by requiring a disclosure of "specific acts or omissions" that led to the dismissal. Employment at-will allows for termination without cause. The new statutes require that a specific reason be given for the termination. Therefore, does this mean that employment at-will no longer exists for public employees in North Carolina?

Also, "specific acts or omissions"[88] is vague. Can the letter simply say, using the earlier example, that Officer Johnson was dismissed for "moral impropriety," or must it be more specific? Should the letter say "theft" or "dishonesty," or should it lay out in detail the events

84. *See* N.C. DOJ ADVISORY OPINION, *supra* note 61, at 4 (interpreting "the written notice" as the "clear intent of the legislature that public employers must now maintain for public inspection a copy of the final dismissal letter regarding each employee dismissed for a disciplinary reason").

85. § 126-23(a)(10) (Supp. 2010).

86. § 126-23(a)(11) (Supp. 2010).

87. *See Personnel Privacy Law Changes*, *supra* note 69. However, proposed legislation would expand this "general description" requirement to "each promotion, demotion, transfer, suspension, separation, or other change in position classification" as well as requiring disclosure of any "performance records" the public entity has on hand. H.B. 685, 2011 Gen. Assemb., Reg. Sess. § 1 (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/House/PDF/H685v1.pdf; S.B. 344, 2011 Gen. Assemb., Reg. Sess. § 1 (N.C. 2011), *available at* http://www.ncleg.net/Sessions/2011/Bills/Senate/PDF/S344v1.pdf. These provisions would greatly increase the amount of information being made public.

88. § 126-23(a)(11) (Supp. 2010).

leading to the dismissal? Something as general as "an incident with a citizen at 5:23 PM on October 17, 2010" could, simply by its vagueness, allow for a claim of falsity or misrepresentation since a description so general could imply an excessive force problem rather than theft. The possibility that such a description may be "specific" enough to comply with the statute underscores this problem.

Finally, when exactly does a "final decision" occur? Is it measured at the time the agency receives the request, or when the entire appeal process has run its course? For example, state agencies are among the few public entities that have appeal processes that allow dismissed employees to challenge their termination.[89] If a records request arrives after the termination decision has been made, but before the time limit for requesting an appeal has run, is the termination document the "final decision" even though there may be a later, "more final" decision?[90] State agency decisions on dismissals may be appealed to the Office of Administrative Hearings.[91] The administrative law judge then holds a hearing and makes a ruling that goes back to the state agency, which makes a final decision.[92] If the agency cannot make a decision within the specified amount of time, the administrative law judge's decision becomes the final decision.[93] This is only the procedure for state agencies, and it illustrates the wildly varied results that can occur due to the required procedures and extensions. When dealing with municipal and county governments, operations and hearing procedures are much less streamlined and may not have any formal appeal proceedings at all, making it even more difficult to determine when exactly a "final decision" has been made.[94]

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89. *See, e.g.*, N.C. GEN. STAT. § 126-34 (2009) (describing the grievance procedure for career state employees).

90. Interview with Frayda S. Bluestein, Assoc. Dean for Faculty Dev., Professor of Pub. L. and Gov't, N.C. Sch. of Gov't, in Chapel Hill, N.C. (Sept. 30, 2010).

91. § 126-34.1(a)(1).

92. § 150B-44 ("An agency . . . has 60 days from the day it receives the official record in a contested case from the Office of Administrative Hearings or 60 days after its next regularly scheduled meeting, whichever is longer, to make a final decision in the case. This time limit may be extended by the parties or, for good cause shown, by the agency for an additional period of up to 60 days.").

93. Teague v. N.C. Dept. of Transp., 177 N.C. App. 215, 220, 628 S.E.2d 395, 399 (2006).

94. *See, e.g.*, Dan Kane, *N.C. Groups Try to Curb Public Records Access*, CHARLOTTE OBSERVER, May 15, 2011, at 1A, *available at* http://www.charlotteobserver.com/2011/05/15/2297749/nc-groups-try-to-curb-public-records.html (describing the varying agreements school districts make with terminated employees regarding disclosure of the terms of dismissal).

Indeed, the Attorney General indicates that "[a] 'final decision' may be one on which the highest authority in the employing agency has passed judgment or a 'final decision' may be an action of an agent to whom final agency decisionmaking authority has been delegated."[95] This would mean that if the entity has not created a formal written notice, any kind of written document may qualify as "the final written notice." This is particularly relevant since, as discussed below, the statutes probably open up existing records created prior to October 1, 2010,[96] as a record that contains any indication by a supervisor of dismissal may constitute "the final written notice." This may mean that a final notice could be an email sent by a supervisor expressing displeasure with employee performance, a post-it note left on an employee's desk to discuss a particular problem, or any one of a number of much more informal written modes of communication that are the "final" communications from a supervisor of the reasons for the employee's dismissal.

D. Do the Provisions Apply Retroactively to Former Employees?

Do the new requirements reach only those records created on or after October 1, 2010, or do they open records that were previously closed as long as they still existed on October 1, 2010? The personnel privacy statutes amended by the Government Ethics and Campaign Reform Act apply to both current employees and former employees.[97] The statutes require that the public entity disclose the required information with regard to "each employee."[98] The amendments do not specify whether the referenced "employee" includes both current and former employees, or only applies to current employees. Due to the absence in six of the seven of the amended statutes[99] of a provision specifically barring access to former employees' disciplinary files, there is every indication that the personnel privacy statutes treat current and former employee files identically. While the statutes most likely do not require retroactive

95. N.C. DOJ ADVISORY OPINION, *supra* note 61, at 7–8.

96. *See infra* Part III.D.

97. *See* LAWRENCE, *supra* note 22, at 146. The section applies to both current and former employees, as demonstrated by the definition of "employee" or other direct statements. *Id.*

98. *See* N.C. GEN. STAT. §§ 115C-320(a)(11), 115D-28(a)(11), 122C-158(b)(11), 126-23(a)(11), 153A-98(b)(11), 160A-168(b)(11), 162A-6.1(b)(11) (Supp. 2010).

99. The state personnel privacy statute maintains the privacy of former employee disciplinary records. *See* N.C. GEN. STAT. § 126-22(c) (2009).

creation of nonexistent dismissal letters for former employees,[100] the new amendments probably open existing, previously closed files to public inspection.[101] Indeed, the changes sent many city and county officials scrambling for an answer to this question.[102]

Due to the potential retroactive opening of a large number of employee records to public inspection, this is perhaps the most important and consequential question the new amended statutes raise. Retroactive application could generate a barrage of due process claims not only because of the newly available information, but also because of what was most likely an employee's expectation of privacy at the time of dismissal. To compound the problem, hearing procedures will need to be available for former employees; public entities would presumably have to provide notice to past employees of their right to a hearing. The hearing requirement creates the logistical problem of tracking down former employees.

The Attorney General recognizes that release of the information would most likely trigger even a former employee's due process right to a name-clearing hearing.[103] If the courts agree with the Attorney General's interpretation of this provision, public entities may be on the hook for even more administrative costs than before.

IV. PROPOSED CLARIFICATIONS

While the practice of opening records to public inspection furthers the General Assembly's laudable goal of increasing public trust in government, lawmakers must not overlook the due process implications of the changes. If the General Assembly is unwittingly opening state and local agencies and governments to a host of potential lawsuits, it must act in order to preempt potentially problematic judicial interpretation of the new statutes. Indeed, the

100. N.C. DOJ ADVISORY OPINION, *supra* note 61, at 4. Creation of dismissal letters of former employees would lead to "absurd" results that North Carolina courts seek to avoid. *See* Rhyne v. K-Mart Corp., 358 N.C. 160, 189, 594 S.E.2d 1, 20 (2004).

101. N.C. DOJ ADVISORY OPINION, *supra* note 61, at 5 ("It is therefore our opinion that written notices of dismissal as to each employee terminated for disciplinary reasons, including those written prior to October 1, 2010, must now be made available for public inspection.").

102. Nicole Cartrette, *Employee Records Not So Private Anymore*, NEWS REPORTER (Whiteville, N.C.), Aug. 10, 2010, http://whiteville.com/articles/2010/08/12/news/doc4c60093a96d5d105066209.txt (indicating several concerns and interpretations of the North Carolina League of Municipalities, the North Carolina Association of County Commissioners, and Columbus County officials).

103. N.C. DOJ ADVISORY OPINION, *supra* note 61, at 5 (suggesting that public disclosure of the reasons for dismissal without an opportunity for a hearing may trigger a liberty interest protected by due process).

courts interpret all public disclosure statutes in favor of disclosure wherever possible.[104]

First, the General Assembly should clarify whether it intended to create a regular practice of releasing information about disciplinary actions against public employees to those employees' future employers. If it wants the information to be easily available in order to inspire public trust in the competency and moral soundness of police officers, teachers, and other public employees, then every public entity will need to provide a substantive hearing procedure for disciplinary dismissals. This could be as simple as requiring public entities to develop their own hearing procedures if they have not already done so. Currently, there is no uniform standard or requirement to develop hearing procedures. Of course, this would lead to a slight increase in operating expenses, but the cost in this regard is probably miniscule in comparison to the potential settlements or litigation arising from due process violations.[105]

Second, the statutes should state whether public entities will be required to create public records that do not already exist. While there is a general presumption against requiring the creation of records under the Public Records Act, the personnel statutes fall outside of that Act and are not necessarily subject to the same presumption.[106] In order to make this clear, the General Assembly should amend the provision requiring disclosure of certain "information" and state whether it refers to records containing the information or the information itself. If the legislative intent is to prevent agencies from having to create new records upon request, the statutes should clarify that it is not the information itself that is public, but rather, the existing documents containing such information. The General Assembly should also clarify whether "information" is referring merely to recorded information or to a more esoteric idea of "knowledge obtained."[107] Finally, it should consider whether the effective abolishment of employment at-will was within the contemplation of the drafters of the statutes. If the statutes

104. *See* News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992).

105. *See supra* note 11 for the types of damages available in a due process lawsuit.

106. *Cf.* News Reporter Co. v. Columbus Cnty., 184 N.C. App. 512, 515, 646 S.E.2d 390, 393 (2007) ("Our Supreme Court has held that if a document falls within the scope of [a personnel privacy statute], then it is 'not governed by N.C.G.S. § 132-6 of the Public Records Act because [the personnel privacy statutes] provide[] such inspection and disclosure may only be done as provided by that section.' " (quoting Elkin Tribune, Inc. v. Yadkin Cnty. Bd. of Cnty. Comm'rs, 331 N.C. 735, 736, 417 S.E.2d 465, 466 (1992))).

107. MERRIAM WEBSTER COLLEGIATE DICTIONARY 641 (11th ed. 2003).

require public entities to provide reasons for terminating employees, the statutes imply that every termination is now "for cause."

Third, the statutes should indicate what an agency or government entity should do in the event that it does not provide "written notice of the final decision" when it terminates employees, whether probationary, at-will, or otherwise. If the General Assembly wishes to mandate that all entities create a written notice procedure, the statutes should clearly state this requirement. In addition, the statutes should provide that public entities cannot avoid liability simply by refusing to create a written notice. If entities can circumvent the statutes by verbally giving reasons for dismissal, the policy of increasing government openness will be compromised.[108] Also, with regard to the "specific acts or omissions" that led to a dismissal, the statute should specify whether the acts can be described by type, or whether a narrative account of the situation is required. Logically, the more specific the information required by the statutes, the better the probability that the allegations will contain inaccurate statements. This could further open public entities to liability. Additionally, the statutes should delineate when exactly a final decision occurs. If worded as the "written notice of the final available decision at the time of the request," the statutes would more clearly direct public entities to which documents must be released.

Finally, if the General Assembly intends the public disclosure provisions to apply only to dismissals that occur on or after the effective date of the Government Ethics and Campaign Reform Act, it needs to say so clearly. While limiting disclosure to current employees would be contrary to the policy of openness, it would solve many potential problems that would arise if the requirements applied retroactively. If this question reaches the courts, they will most likely interpret the statutes in favor of openness, applying the statutes to dismissals occurring prior to enactment, and allowing access to former employees' files that were once confidential.[109]

Therefore, if the General Assembly did not intend to open previously confidential records to the public, it should act quickly to amend the language. If it intends the statutes to apply to former employees, the General Assembly must understand the serious

108. Whether oral disclosures satisfy the "likely" standard for due process violations is a subject beyond the scope of this Recent Development.

109. The Attorney General has indicated that this interpretation is likely. *See* N.C. DOJ ADVISORY OPINION, *supra* note 61, at 5.

potential for frequent due process suits against public agencies and state and local governments throughout North Carolina.

CONCLUSION

The North Carolina General Assembly passed the Government Ethics and Campaign Reform Act in order to achieve the admirable goal of increasing the transparency of and public trust in state government; however, these changes may have unforeseen consequences with regard to liberty interests protected by the Due Process Clause of the Fourteenth Amendment. In light of the Fourth Circuit's "likely" dissemination standard for determining a violation of an employee's liberty interest in securing future employment and not being falsely maligned by one's previous employer,[110] the General Assembly should revisit some of the language in the public disclosure laws by passing clarifying amendments regarding administrative record creation and hearing procedures, the application of the statutes to former employees' records, and what constitutes a "written notice of the final decision." A few such amendments would plug many of the holes in the new statutes, but action should be taken quickly before due process claims begin moving through the courts and the added administrative costs of providing notice and hearings increase government operating expenditures. Given that North Carolina courts will interpret ambiguities in the statutes with a presumption in favor of disclosure,[111] due process violations from these disclosures are more "likely" than ever before.

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110. *See supra* text accompanying notes 50–55.

111. *See* News & Observer Publ'g Co. v. Poole, 330 N.C. 465, 475, 412 S.E.2d 7, 13 (1992).