

GENERAL ASSEMBLY OF NORTH CAROLINA  
SESSION 2005

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SENATE BILL 856  
Judiciary I Committee Substitute Adopted 5/31/05  
House Committee Substitute Favorable 8/11/05

Short Title: Access to Public Trial Preparation Material. (Public)

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Sponsors:

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Referred to:

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March 23, 2005

1 A BILL TO BE ENTITLED  
2 AN ACT REGARDING ACCESS TO A PUBLIC RECORD THAT IS ALSO TRIAL  
3 PREPARATION MATERIAL.

4 The General Assembly of North Carolina enacts:

5 SECTION 1. Chapter 132 of the General Statutes is amended by adding a  
6 new section to read:

7 **"§ 132-1.9. Trial preparation materials.**

8 (a) Scope. – A request to inspect, examine, or copy a public record that is also  
9 trial preparation material is governed by this section, and, to the extent this section  
10 conflicts with any other provision of law, this section applies.

11 (b) Right to Deny Access. – Except as otherwise provided in this section, a  
12 custodian may deny access to a public record that is also trial preparation material. If the  
13 denial is based on an assertion that the public record is trial preparation material that  
14 was prepared in anticipation of a legal proceeding that has not commenced, the  
15 custodian shall, upon request, provide a written justification for the assertion that the  
16 public record was prepared in anticipation of a legal proceeding.

17 (c) Trial Preparation Material Prepared in Anticipation of a Legal Proceeding. –  
18 Any person who is denied access to a public record that is also claimed to be trial  
19 preparation material that was prepared in anticipation of a legal proceeding that has not  
20 yet been commenced may petition the court pursuant to G.S. 132-9 for determination as  
21 to whether the public record is trial preparation material that was prepared in  
22 anticipation of a legal proceeding.

23 (d) During a Legal Proceeding. –

24 (1) When a legal proceeding is subject to G.S. 1A-1, Rule 26(b)(3), or  
25 subject to Rule 26(b)(3) of the Federal Rules of Civil Procedure, a  
26 party to the pending legal proceeding, including any appeals and  
27 postjudgment proceedings, who is denied access to a public record that  
28 is also claimed to be trial preparation material that pertains to the

1 pending proceeding may seek access to such record only by motion  
2 made in the pending legal proceeding and pursuant to the procedural  
3 and substantive standards that apply to that proceeding. A party to the  
4 pending legal proceeding may not directly or indirectly commence a  
5 separate proceeding for release of such record pursuant to G.S. 132-9  
6 in any other court or tribunal.

7 (2) When a legal proceeding is not subject to G.S. 1A-1, Rule 26(b)(3),  
8 and not subject to Rule 26(b)(3) of the Federal Rules of Civil  
9 Procedure, a party to the pending legal proceeding, including any  
10 appeals and postjudgment proceedings, who is denied access to a  
11 public record that is also claimed to be trial preparation material that  
12 pertains to the pending legal proceeding may petition the court  
13 pursuant to G.S. 132-9 for access to such record. In determining  
14 whether to require the custodian to provide access to all or any portion  
15 of the record, the court or other tribunal shall apply the provisions of  
16 G.S. 1A-1, Rule 26(b)(3).

17 (3) Any person who is denied access to a public record that is also claimed  
18 to be trial preparation material and who is not a party to the pending  
19 legal proceeding to which such record pertains, and who is not acting  
20 in concert with or as an agent for any party to the pending legal  
21 proceeding, may petition the court pursuant to G.S. 132-9 for a  
22 determination as to whether the public record is trial preparation  
23 material.

24 (e) Following a Legal Proceeding. – Upon the conclusion of a legal proceeding,  
25 including the completion of all appeals and postjudgment proceedings, or, in the case  
26 where no legal proceeding has been commenced, upon the expiration of all applicable  
27 statutes of limitations and periods of repose, the custodian of a public record that is also  
28 claimed to be trial preparation material shall permit the inspection, examination, or  
29 copying of such record if any law that is applicable so provides.

30 (f) Effect of Disclosure. – Disclosure pursuant to this section of all or any  
31 portion of a public record that is also trial preparation material, whether voluntary or  
32 pursuant to an order issued by a court, or issued by an officer in an administrative or  
33 quasi-judicial legal proceeding, shall not constitute a waiver of the right to claim that  
34 any other document or record constitutes trial preparation material.

35 (g) Trial Preparation Materials That Are Not Public Records. – This section does  
36 not require disclosure, or authorize a court to require disclosure, of trial preparation  
37 material that is not also a public record or that is under other provisions of this Chapter  
38 exempted or protected from disclosure by law or by an order issued by a court, or by an  
39 officer in an administrative or quasi-judicial legal proceeding.

40 (h) Definitions. – As used in this section, the following definitions apply:

41 (1) Legal proceeding. – Civil proceedings in any federal or State court.  
42 Legal proceeding also includes any federal, State, or local government  
43 administrative or quasi-judicial proceeding that is not expressly subject

1 to the provisions of Chapter 1A of the General Statutes or the Federal  
2 Rules of Civil Procedure.

3 (2) Trial preparation material. – Any record, wherever located and in  
4 whatever form, that is trial preparation material within the meaning of  
5 G.S. 1A-1, Rule 26(b)(3), any comparable material prepared for any  
6 other legal proceeding, and any comparable material exchanged  
7 pursuant to a joint defense, joint prosecution, or joint interest  
8 agreement in connection with any pending or anticipated legal  
9 proceeding."

10 **SECTION 2.** G.S. 132-9 reads as rewritten:

11 "**§ 132-9. Access to records.**

12 ...

13 (c) In any action brought pursuant to this section in which a party successfully  
14 compels the disclosure of public records, the court ~~may, in its discretion,~~ shall allow the  
15 prevailing party to recover its reasonable attorneys' fees ~~if~~ if attributed to those public  
16 records, unless the court finds

17 (1) ~~The court finds that~~ the agency acted ~~without~~ with substantial  
18 justification in denying access to the public ~~records;~~ and records or

19 (2) ~~The~~ the court finds ~~that there are no special~~ circumstances that would  
20 make the award of attorneys' fees unjust.

21 Any attorneys' fees assessed against a public agency under this section shall be  
22 charged against the operating expenses of the agency; provided, however, that the court  
23 may order that all or any portion of any attorneys' fees so assessed be paid personally by  
24 any public employee or public official found by the court to have knowingly or  
25 intentionally committed, caused, permitted, suborned, or participated in a violation of  
26 this Article. No order against any public employee or public official shall issue in any  
27 case where the public employee or public official seeks the advice of an attorney and  
28 such advice is followed.

29 (d) If the court determines that an action brought pursuant to this section was  
30 filed in bad faith or was frivolous, the court ~~may, in its discretion,~~ shall assess a  
31 reasonable attorney's fee against the person or persons instituting the action and award it  
32 to the public agency as part of the costs."

33 **SECTION 3.** This act becomes effective October 1, 2005.