Open Meetings and Public Records

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UNC SCHOOL OF GOVERNMENT

Overview

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A few preliminary observations…

- Statute-based issue
  - Policy and practical concerns? Tell it to the legislature or gamble on judicial interpretation
- Legislation tends to be ad hoc
  - Tends to respond to specific situations rather than establish broad consistent policy
- Law has not kept pace with technology
  - Metadata, records in the cloud, text messages and email on private devices, electronic meetings; many questions to which there is not yet a clear answer

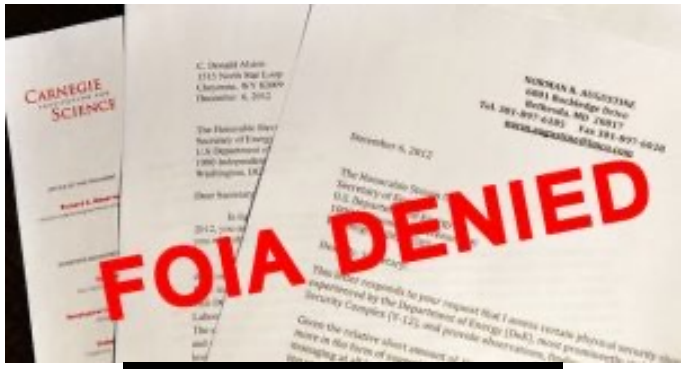
Transparency, Public Records and IT

- Managing digital information and communications
  - Social media
  - Virtual meetings
  - Remote participation
  - Use of private devices
  - Exponential increase in number of e-records
  - Records in the cloud
  - Searching, redacting, reviewing, copying and inspection
  - Cybersecurity

Public Records

NC Public Records Law is G.S. Chapter 132

- NOT the Freedom of Information Act (FOIA)
- If someone submits a request under FOIA, you must still respond.



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How to Respond to Public Records Requests

- 1) Does a record exist that corresponds to the request?
  - If yes, continue.
  - If no, respond that there are no responsive records to provide.
- 2) Is the record public?
  - If no, no need to provide.
  - If yes, continue.
- 3) Are there any exceptions?
  - If no, provide the record.
  - If yes, continue.
- 4) How do the exceptions apply?
  - Do they prohibit any disclosure at all or just inspection or copies?
  - Do they apply to the whole record?

1) Does a responsive record exist?

The public is entitled to *existing* public records.

- There is no requirement to compile or create a record that does not exist merely to respond to a public records request. *132-6.2(e).*
- If no corresponding record exists, no further response is required.
- If there is a corresponding record, continue to Question No. 2.

2) Is the record public?

- Is the record “made or received in the transaction of public business?”
- G.S. 132-1(a)
  - All documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, …, 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.
  - Includes local governing boards
- If yes, continue to Question No. 3. If no, no further response is required.

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NOTE!

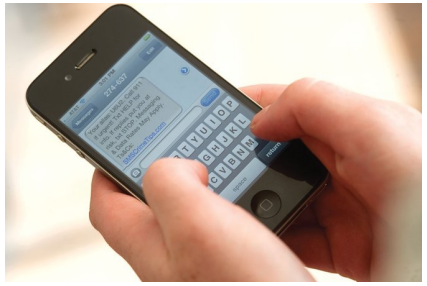
- The *content* not the location of a record determines whether it was "made or received in the transaction of public business."
- If the City Manager emails her daughter to wish her a happy birthday from her government account, is that email public?
- If the Town Attorney updates a councilmember on a specific quasi-judicial hearing in a text from his private phone, is that text public?

Is This a Public Record?

- The city has discovered that an employee has been viewing inappropriate web sites during work hours on his government issued computer. The employee has been suspended. The local news paper wants copies of the log history from his computer.
- Is that a public record?

Two Key Concepts

Records created on personal devices or accounts are public records if the content involves public business.



Records created on government devices or accounts are *not* public records if the content *does not* involve public business. The government may have access to these records for internal purposes depending on computer use policies in effect.

3) Are there any exceptions?

- Section 132 excludes several types of documents from the definition of a public record.
- Some examples:
  - **Law enforcement agency recordings** (see 132-1.4A)
  - **Sensitive public security information**, such as blueprints of government buildings or security plans (see 132-1.7)
  - **Social security numbers** and other identifying information (see 132-1.10)
  - When in doubt, check Section 132 out!
- If there is no exception, provide the record.
- If there is an exception, continue to Question No. 4.

4) What does the exception do?

- Difference between confidential and not public record
- Does it apply to the whole record or just parts?
  - Some exceptions identify specific information that would fall within the exception, but that must nonetheless be made public.
    - Both the personnel file **(see G.S. 160A-168(b))** and criminal investigation information **(see G.S. 132-1.4(c))** exceptions contain these types of provisions.

Employee *Information* that IS Public

- Name
- Age
- Date of hire
- Terms of contract
- Current salary
- Date and amount of each increase and decrease (salary history)
- Date and type of certain personnel actions
- Date and general description of reasons for promotion
- Copy of notice of final dismissal for disciplinary reasons, setting forth basis for dismissal.

No Exception for Drafts

Custodians and Legal Obligation to Provide Access

- General Law: The public official in charge of an office having public records is the custodian of those records. *G.S. 132-2*

- Individual liability: Judge can require that attorneys' fees assessed must be paid "personally by any public employee or public official found by the court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of this Article." *G.S. 132-9.*

- Blog Post: Custodians of Public Records

Role of IT: Not a Custodian?

- An agency that physically stores records is not the custodian of those records if it only “holds the public records of other agencies for purposes of storage or safekeeping.” G.S. 132-6 (a).

- You may be the PHYSICAL custodian, but you are almost never the LEGAL custodian.
- As physical custodian and expert in technology, working knowledge of the public records law and retention requirements is an asset to your unit.

- **Know when to say NO**:
  - Avoid giving legal opinions
  - Consult your attorney if you're not sure.

How do I respond?

Request for inspection?

- Make documents available at reasonable times, under reasonable supervision
- Statute does not provide for any inspection fees

How do I respond?

Request for copies?

- Provide in medium requested if have the equipment necessary to do so
- As promptly as possible
- Can charge for actual cost of making copies

FAQ No. 1

- Citizen A has requested supervised access to the town's computer databases. In other words, Citizen A wants to come to town hall and watch a town hall employee search for the requested data. Does this request have to be honored?

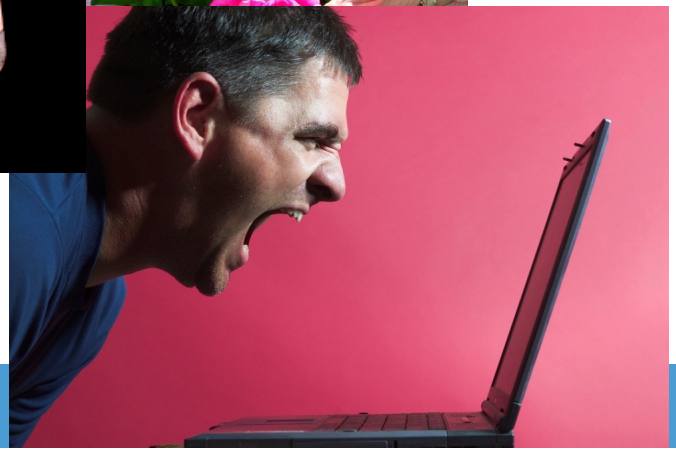
FAQ No. 2

- Citizen D wants the home phone numbers and addresses of all council members.
  - Must this information be released?

FAQ No. 3

- Does a public records request have to be in writing or in a specific format?
  - Does the requester have to identify him or herself?
- What about local policies requiring specific forms?

Motive and state residence don’t matter



FAQ No. 4

- Can the town/county charge additional fees if a request is so large that it is going to take extensive staff overtime and IT resources?

Special Service Fee

- Extensive use of information technology resources
- Extensive clerical or supervisory assistance
- Greater use of information technology resources
- NOTE: No clear authority to charge for substantive review of records.

Special Service Fee – Real Life Example

- Public records request for all emails (personal or government accounts)relating to the Town of Pleasantville for the last 2 years.
- Refined request to just town manager's emails
- Charged special service fee of $9,400 for cost of IT services (around $300), cost of town manager reviewing and redacting of records ($7,900), cost of outside legal review ($1,200)
- Refused to produce records without payment

Special Service Fee – Real Life Example

- Requestor paid IT services fee under protest and filed lawsuit
- What did the court say?

Special Service Fee – Real Life Example

How much did the plaintiff win?

Law Regarding Records Available Online

- Records posted and available online in downloadable format do not have to be provided in any other way.

- Coates Canons Blog Post: New Rules for Online Access to Databases and Other Records

Part II: Retaining Records

- Retention
  - § 132-7. Insofar as possible, custodians of public records shall keep them in fireproof safes, vaults, or rooms fitted with noncombustible materials and in such arrangement as to be easily accessible for convenient use. All public records should be kept in the buildings in which they are ordinarily used.
- Disposal
  - Department of Cultural and Natural Resources provides schedule of when certain records can be destroyed.

Retention Schedules

2021 Schedule here:
https://archives.ncdcr.gov/media/1066/open

Board must formally adopt at a regular meeting and record adoption in the minutes.

Can adopt the schedule via resolution, consent agenda, or by other action.

Completed signature pages should be sent to the Records Analysis Unit, Government Records Section, 4615 Mail Service Center, Raleigh, NC 27699-4615 or faxed to 919-715-3627.

Records Retention

- Records retention schedules dictate what must be kept, and for how long and provide legal authority to destroy

- Records of “short term value” need not be retained
  - Personal messages (including electronic mail) not related to official business.
  - Records that do not contain information necessary to conduct official business, meet statutory obligations, carry out administrative functions, or meet organizational objectives.

- Governing board, must set retention policy for areas noted as “when reference value ends”.

Email As a Public Record:
As Described in the Local Retention Schedule

- Some examples of email messages that are public records and therefore covered by this policy include:
  - Policies or directives;
  - Final drafts or reports and recommendations;
  - Correspondence and memoranda related to official business;
  - Work schedules and assignments;
  - Meeting agendas or minutes
  - Any document or message that initiates, facilitates, authorizes, or completes a business transaction; and
  - Messages that create a precedent, such as issuing instructions and advice.

Specific Language

This local government agency and the Department of Natural and Cultural Resources agree that certain records series possess only brief administrative, fiscal, legal, research, and reference value. These records series have been designated by retention periods that allow these records to be destroyed when *"reference value ends."* The local government agency hereby agrees that it will establish and enforce internal policies setting minimum retention periods for the records that Natural and Cultural Resources has scheduled with the disposition instruction *"destroy when reference value ends."* If a local government agency does not establish internal policies and retention periods, the local government agency is not complying with the provisions of this retention schedule and is not authorized by the Department of Natural and Cultural Resources to destroy the records with the disposition instruction *"destroy when reference value ends."*

It is further agreed that these records may not be destroyed prior to the time periods stated; however, for sufficient reason they may be retained for longer periods. This schedule supersedes previous versions of this schedule and any localized amendments; it is to remain in effect from the date of approval until it is reviewed and updated.

APPROVAL RECOMMENDED

_____
Municipal/County Clerk or Manager
Title: _____

Sarah E. Koonts
Sarah E. Koonts, Director
Division of Archives and Records

APPROVED

_____
Head of Governing Body
Title: _____

D. Reid Wilson
D. Reid Wilson, Secretary
Department of Natural and Cultural Resources

Municipality/County: _____

Effective: October 1, 2021

Examples from 2021
LG Schedule

ITEM #	STANDARD 5: INFORMATION TECHNOLOGY RECORDS		
	RECORDS SERIES TITLE	***DISPOSITION INSTRUCTIONS***	***CITATION***
5.15	**SYSTEM MAINTENANCE RECORDS: HARDWARE REPAIR OR SERVICE** Records documenting inspections, maintenance, and repairs of agency computer systems that are owned or leased. Includes computer equipment inventories and service records. SEE ALSO: Equipment and Vehicle Maintenance, Repair, and Inspection Records (STANDARD 1: ADMINISTRATION AND MANAGEMENT RECORDS).	a) Destroy in office records documenting routine inspections and maintenance of equipment after 1 year. b) Destroy records documenting all other equipment maintenance and repairs upon the final disposition of the equipment.	
5.16	**SYSTEM MAINTENANCE RECORDS: RECORDS BACKUPS** Records documenting regular or essential system backups. Includes backup tape inventories, relevant correspondence (including e-mail), and related documentation. See also *Security Backup Files as Public Records in North Carolina: Guidelines for the Recycling, Destruction, Erasure, and Re-use of Security Backup Files*, available on the State Archives of North Carolina website.	Destroy in office in accordance with your office's established, regular backup plan and procedures.± Agency Policy: Destroy in office after _____	
5.17	**TECHNICAL PROGRAM DOCUMENTATION** Records concerning program code, program flowcharts, program maintenance logs, systems change notices, and other related records that document modifications to computer programs.	Destroy in office 1 year after superseded or obsolete.	

5: IT

Social Media Posts, Direct Messages & Text Messages: Are They Public Records?

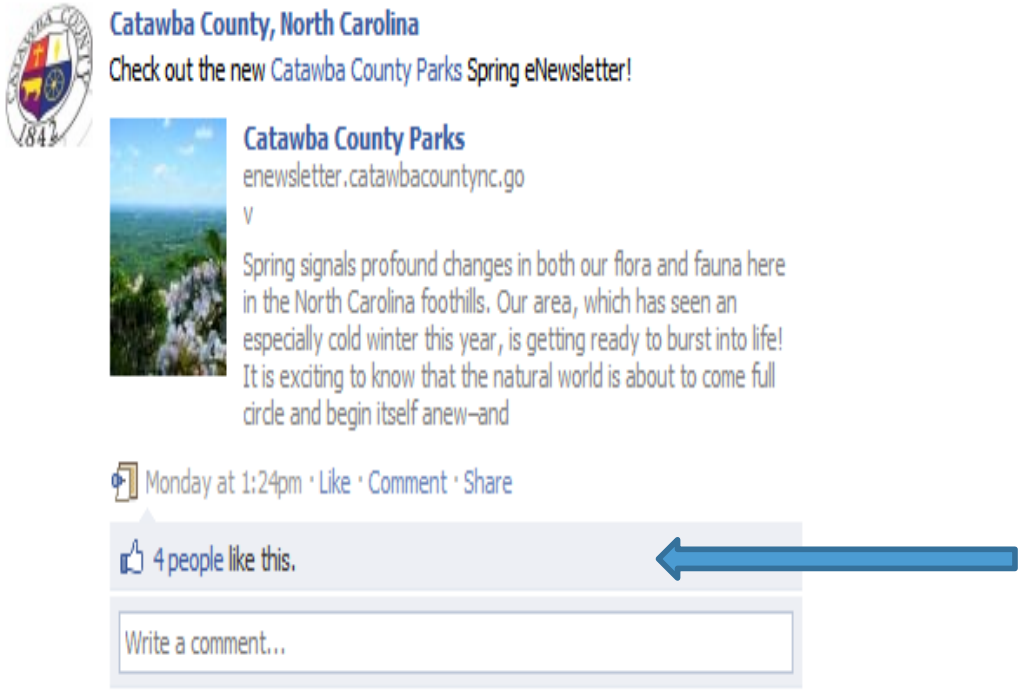
Basic Information

- Government social media postings are public records.
- The retention period for the record is determined by the content of the posting (not the type of media).
  - The schedule related to website retention does not apply to Facebook postings.
  - There is no requirement to retain secondary copies of content.
- Most social media postings will be of short-term value & considered under the Routine Correspondence and Memoranda, with the retention period being set by the organization.

**Retention requirements under litigation holds (e-discovery) are different than public records requirements.

Examples of Facebook Postings and Retention Requirements

“Short-Term Value” or “Routine Correspondence and Memoranda” Categories



The “likes” would either be considered public records of “Short-Term Value or “Routine Correspondence and Memoranda” per the County/Municipal Agency retention schedules. The record can be destroyed when administrative value or reference value ends.

Sheriff Office Retention Schedule: pages x and 3

Citizen Complaints & Service Requests

Catawba County, North Carolina

Public Health brings flu immunization to 2500 students after cases increase in schools.

In early February, after flu cases in school spiked in late January, Public Health worked with all three local school systems to offer flu vaccines free of charge to children enrolled in pre-kindergarten through twelfth grade.

http://www.catawbacountync.gov/events/schoolflu.pdf
www.catawbacountync.gov

Monday at 9:04am · Like · Comment · Share

April Williams Seems like it would have been nice to have offered the shots before the spike in flu. By the time they were given, my child already had the flu and missed 3 days of school.
Monday at 9:38am · Like

Write a comment...

This comment could be considered a citizen complaint and would be categorized under "Citizen Complaints and Service Requests". The record can be destroyed one year after resolution of the complaint.

Sheriff Office Retention Schedule: page 4

Correspondence and Memoranda

The comments and “likes” would either be considered public records of “Short-Term Value or “Routine Correspondence and Memoranda” per the County/Municipal Agency retention schedules. The record can be destroyed when administrative value or reference value ends.

County/Municipal Management Schedule: pages x and 3

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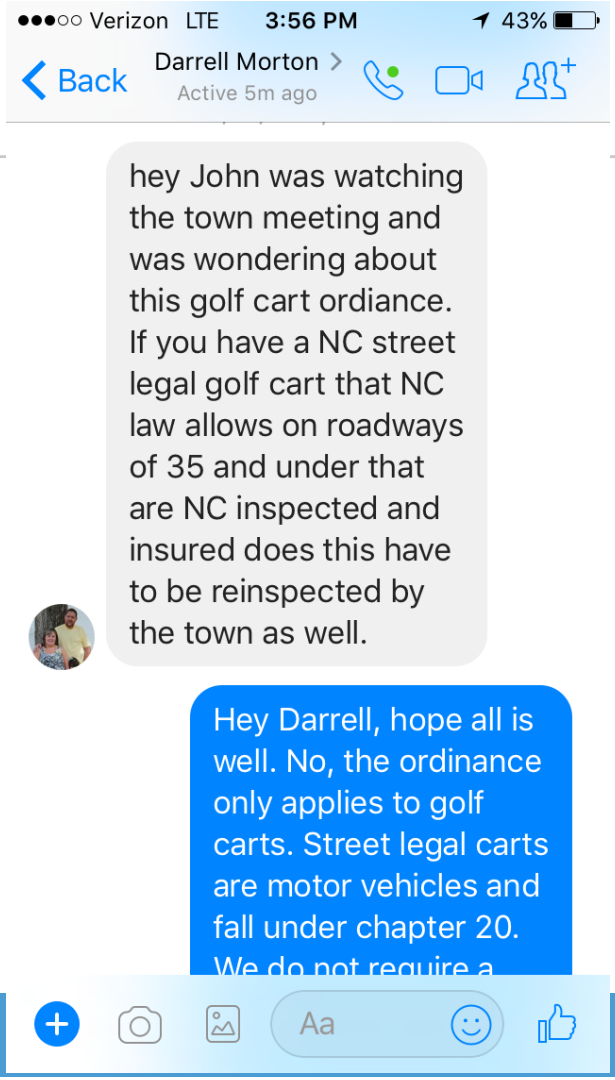
What About My Personal FB Account?

And here we go…

- If you are transacting public business, then it constitutes a public record, be it a FB post and comments, private message, etc.



What About My Personal Cell Phone Text Messages?

Totally a Public Record!

Verizon LTE 5:11 PM 12%

Tom

One of the residents has a lot of questions about traffic and why we don't have speed bumps. Would you be open to sit down for a cup of coffee with him and myself....

Sure. Did you relay the info that Kendra emailed...and he still has questions?

Yes

Let me know when you might have time next week. Also this is the 25 yr celebration of the Dallas Cowboys last Super Bowl. They will

iMessage

AT&T 4:52 PM 16%

CH

Chief

I think for law-enforcement the focus should be dispelling the myths about what actually constitutes a public record

And

Ok, makes sense. I think I have that part covered pretty well

What's protected; speech vs consequences of the protected speech

And

iMessage

Verizon LTE 5:10 PM 13%

Tom

When you have a second I need to speak with you about Arbor Creek and rush hour traffic

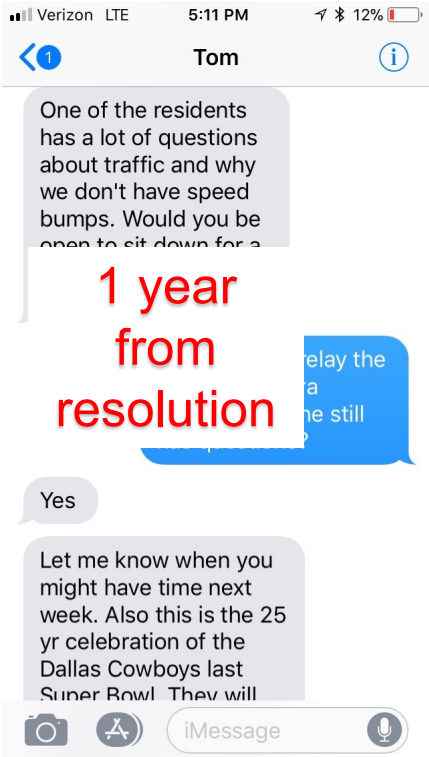
Call me. I'm on the way back from a meeting in Garner

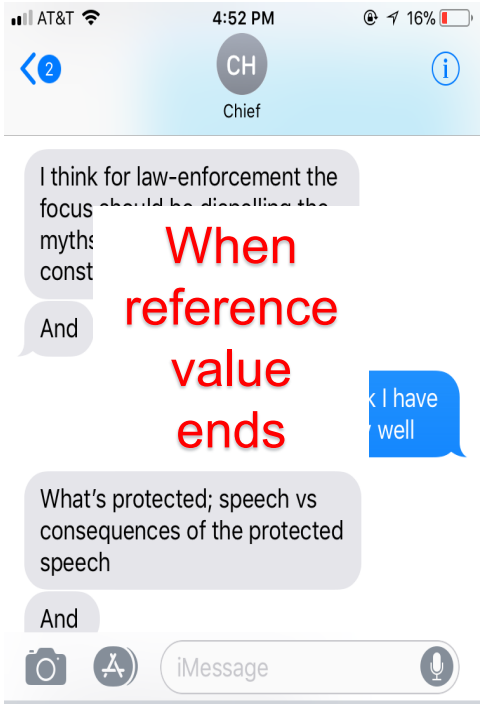
Mon, Feb 19, 7:29 AM

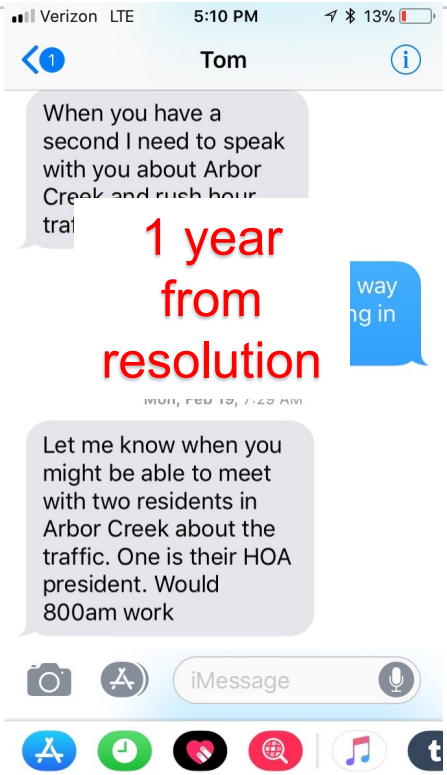
Let me know when you might be able to meet with two residents in Arbor Creek about the traffic. One is their HOA president. Would 800am work

iMessage

What is the Retention Period?







How Do You Keep These Records?

1. A good policy is essential & training is mandatory
2. Technology is not the definitive answer
3. Providers don’t keep texts for long

A few easy options (once you have a good policy & training in place):

- Plain old print (POP) method
- Forwarding requirement for any personally owned devices that transact some public business
- Android easily backs up texts to Gmail for free
- iPhone is more difficult (and cost $$) but there are tools available

What is IT's Role re: Personal Devices and Public Records?

Electronic Records – NC Archives

- NC Local Government Records Retention Schedule
- Digital Records Policies and Guidelines – State Archives Resources
- Resources for Website and Social Media Archiving
- Best Practices for Electronic Communications Usage in North Carolina: Text and Instant Messages
  - Archived text messages should include metadata (phone numbers, time stamp, and format)
  - Archives should capture “conversations”
  - Archives default to the longest retention.

Many Legal Issues Remain Untested

- Status of Metadata (it's a public record but…)
- Text messages of limited administrative value but newsworthy (have a clear documented schedule)
- Private vs. public social media sites (policy is important)
- The extent to which public agencies are required to search for records and compile information in databases (avoid setting a precedent)

Department of Cultural and Natural Resources

- Great resource for questions!
- **North Carolina Department of Natural and Cultural Resources,**109 E. Jones Street,
  Mail Service Center 4601,
  Raleigh, NC 27601
- Ph: (919) 814-6800
- Blog: https://ncrecords.wordpress.com/

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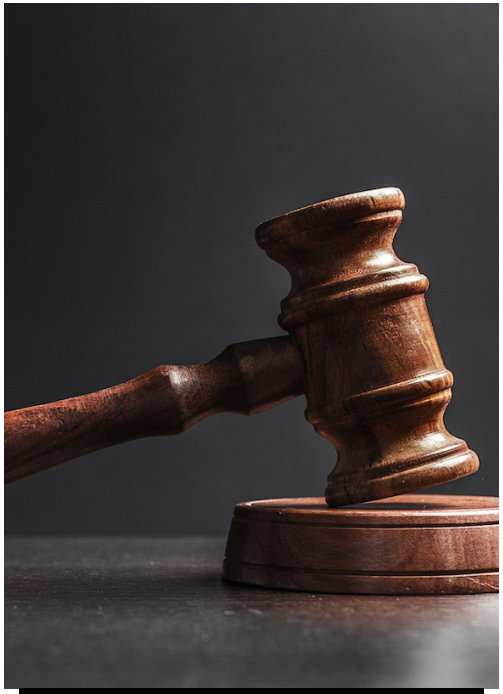
Destruction/removal of records

- Destroying, removing, mutilating, or otherwise defacing public records without the consent of the State Archives is a Class 3 misdemeanor. G.S. 132-3.
- Public officials must return any public records in their custody to their successor at the end of their term (or to the State Archives if there is no successor). If they fail to do this within 10 days of a written request to return the records, they are guilty of a Class 1 misdemeanor. G.S. 132-4.

Remedies for denial of access to public records

- Person denied access to records can bring suit in General Court of Justice requesting a court order releasing the records.
- If a court finds that a record was improperly withheld, can award attorneys' fees to be charged against the public agency withholding the records.
- Fees can only be assessed against an individual if the individual knowingly or intentionally withheld a record in violation of public records law.



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When do penalties attach?

- Complete failure to provide public records
- Providing public records only after a lawsuit is filed
- Failure to provide *all* responsive records
- Delay?
  - NCPRA provides no remedy for “mere delay.”
  - What about significant delay?
    - 3 months?

Failure to Provide All Records

Lawsuit claims San Jose mayor violated public records laws

By JOCELYN GECKER February 3, 2022

Source

Proving a Negative…

- Plaintiff, an investigative reporter, requested several documents related to his taxes.
- Defendant produced over 13,000 pages of records and asserted that no additional records existed.
  - Included sworn statements from employees detailing the search process they undertook and certifying that no further records existed.
- Plaintiff believed there were additional personal emails and texts that had not been produced and sued under G.S. 132-9.

Two Standards

- Defendant may show "the adequacy of its search by submitting reasonably detailed, nonconclusory affidavits describing its efforts."
- Plaintiff must show a "reasonable inference" that some responsive documents had not been provided and identify specific reasons.

Open Meetings law applies to…

"Official meetings" of "public bodies"

143-318.10

What is a public body?

- 2 or more members
- Elected, appointed, or otherwise intentionally created
- Governmental (not private)
- Authorized to exercise any one of 5 public functions

Functions

- Legislative
- Policy-making
- Quasi-judicial
- Administrative
- Advisory

Is this a public body?

- ? Five private citizens meet once a week to discuss different resolutions their governing board is considering.
- ? Three members of the board of commissioners comprise the board's Historic Preservation committee which meets monthly to review historic preservation plans for different districts.
- ? The county manager appoints a committee of five employees to organize employee appreciation day events.

What is an official meeting?

- A majority of the members of a public body…
- …gathering simultaneously in person or electronically…
- …to conduct a hearing, deliberate, vote or otherwise transact public business.

Social gatherings are OK!

There must be no discussion of public business among a majority of the public body.

http://tinyurl.com/lzymazq

Is This an Illegal Meeting?

An entire board of county commissioners gathers for a required ethics training session.

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Is This an Illegal Meeting?

A commissioner calls each other commissioner individually to discuss a matter that will come before the board and to urge them to support his proposed approach. The board is comprised of five commissioners.

Is This an Illegal Meeting?

A majority of council members engage in an email discussion, responding directly to each other in a nearly real time electronic conversation.

NEW CASE ALERT!

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More on the right of access…

- Attend the meeting
- May record or video tape
- No right to speak except at monthly public comment period

Closed Sessions

- Limited authority to meet in closed session

- ***Process:*** Motion in open session, stating general purpose of closed session
  - ***Special rules*** for:
    - Preservation of confidential records: Must cite the law that makes the record confidential.
    - Attorney-client privilege: If there is litigation, must identify the parties.

Closed Session Purposes

- Preserve confidentiality of records
- Prevent premature disclosure of scholarship, prize, honorary degree, or similar award
- Preserve attorney-client privilege
- Discuss economic development
- Discuss bargaining position for property acquisition
- Consider performance, qualifications, appointment, of public employees and public officers (not members of the board itself or other boards)
- Matters involving alleged criminal misconduct
- Discuss local board of education emergency response and safety
- Public safety as it pertains to terrorism
- To view a recording released pursuant to 132-1.4A (body cam footage from law enforcement)

Closed Session Myths

Myth	Truth
Boards cannot vote or take action in closed session.	Some closed session provisions specifically allow it.
It's illegal to talk publicly about what happens in closed session.	Statute doesn't prohibit it, but some topics are confidential under other laws.

Law requires **notice** and **opportunity** to attend.

Type of Meeting	Definition
Regular	Official meetings that happen according to a set schedule
Special	Meetings that occur at any other time, date, or location than what is listed on the regular meeting schedule
Emergency	Meetings that are required to address an unexpected circumstance that needs immediate attention
Recessed	Meetings that are continued to another date, time, and/or place

Law requires **notice** and **opportunity** to attend.

Type of Meeting	Definition
Regular	File schedule with the clerk and post on website
Special	Send notice to sunshine list, post on website, and post on principal bulletin board at least 48 hours before the meeting
Emergency	Send notice to sunshine list, post on website, and call, email, or otherwise notify members
Recessed	Make motion to recess in open session stating the time, date, and location of recessed meeting and post on website

Violations of the Law: What Happens?

Scenarios:

- Board takes action in a closed session to increase the manager's salary.
- Email records indicate that a majority of the board discussed a pending rezoning matter in a near real time exchange.
- Board members hold a special meeting with 24 hours of notice.

Are they automatically void?

Court Order

1. Declaring that a violation occurred
2. Prohibiting future violations
3. Invalidating actions taken
4. Personal liability (intentional action; not following attorney's advice)

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