

# Public Records and Transparency in the Age of eCourts

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# The Basics: Public Records

Any record made or received in the transaction of public business is subject to public access unless an exception applies.



# Definition of Public Record: Format

**Types and forms of records defined:** Documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, artifacts, or other documentary material, *regardless of physical form or characteristics.*



# What We Do Know

- Any type of medium that stores information related to public business is covered by the statute and is potentially subject to retention requirements.



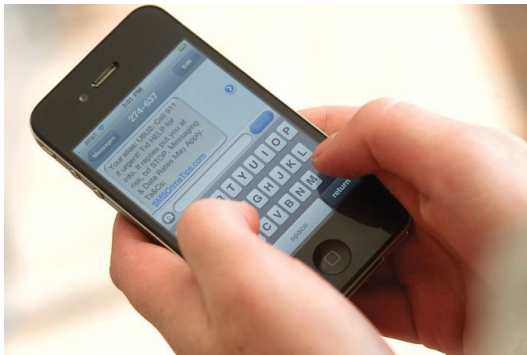
# What We Do Know: Content

**Content of records defined:** Made or received in the transaction of public business.



# What We Do Know: Devices and Accounts

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 involves public business.** The government may have access to these records for internal purposes depending on computer use policies in effect.

# What We Do Know: Custodians

- The custodian of the record is required to provide access to public records.
- “The public official in charge of an office having public records shall be the custodian thereof.”  
*GS 132-2*
- Individuals can be personally liable for failure to provide access to records in their possession. *GS 132-9 (c)*



# What We Don't Know

- Who is the custodian of an email that the mayor sent from her personal phone on her Gmail account to a developer regarding a pending permit application?
- Who is the custodian of a comment made by a public official on a social media site of a nonprofit organization explaining a new policy her agency has just adopted? Is this a public a record?



# What We Do Know: Access

- Public access:
  - Copies, in the medium requested if the agency has the capacity to provide it
  - Inspection at reasonable and places
  - No authority to require request in writing except for requests for databases
  - Copies must be provided “as promptly as possible”
  - Actual costs maybe be charged: Costs that would not otherwise be incurred

# What We Don't Know

- Is an agency required to:
  - Send copies to the requester
  - Search records to provide copies in response to a request for records containing certain words or subjects?
- Is an agency allowed to:
  - Charge for the time it takes for the review of the records to identify records or information on records that are confidential or nonresponsive to the request?



# What We Don't Know

- Exactly what does the special service charge actually allow:
- If the request is such as to require extensive use of information technology resources or extensive clerical or supervisory assistance by personnel..., or if producing the record in the medium requested results in a greater use of information technology resources than that established by the agency for reproduction of the volume of information requested, then the agency may charge, in addition to the actual cost of duplication, a special service charge, which shall be reasonable and shall be based on the actual cost incurred for such extensive use of information technology resources or the labor costs of the personnel providing the services, or for a greater use of information technology resources that is actually incurred by the agency or attributable to the agency. *GS 132-6 (b)*



# What We Don't Know

- When is a record finished enough to be a completed draft?
- Possible answer based on the facts in the case: When it is circulated to others for review.
- What about draft judicial memos and decisions?
- Likely covered by judicial privilege.



[See, Access to Court Records in North Carolina and Judicial Privilege, Michael Crowell](#)

# What We Do Know

- Public records, including court records, [contain sensitive personal information](#).
- Exceptions in state and federal laws protect some, but not all personal information.
- E-filing rules and practices must incorporate protections for Personal Identifying Information (PII)

# Examples of PII in North Carolina

## Personal numbers

- Social security
- Employer taxpayer identification
- Drivers license
- State identification
- Passport

## Financial numbers

- Checking account
- Savings account
- Credit card
- Debit card
- Personal identification (PIN) code
- Passwords

Personal email addresses are not protected

G.S. 132-1.10(d)

# What We Don't Know

- A superior court judge receives an email from a citizen regarding a case pending before the judge. The email address is an alias but the metadata discloses the name of the sender. The press wants a copy of the email, in digital format, including the metadata.
- May the judge provide a hard copy?



# What We Do Know

- The law provides access to records that exist. “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.” *GS 132-6.2(e)*
- A request must be for records that exist, not information that would need to be compiled.

# What We Don't Know

- Records in databases: Must the agency query a database?
- Probably required to provide if possible without reprogramming.



# What We Do Know

- The right of access wouldn't be very useful if we could destroy records at will
- Records retention schedules are promulgated by the State Division of Archives and History
- Records with **historical value** must be retained
- Records that have **transient value** may be destroyed
- Records that could have been destroyed must be provided if they exist when a request is received.



# What We Don't Know

- In a world where government officials and employees are texting, posting, tweeting on multiple accounts, platforms, and devices, including social media or other outlets, who is the custodian of these records, and how can they be archived?
- The Government Records Branch has [guidance on this](#)

# Relevant Blog Posts

- [Email as Public Record: Five Things You Should Know](#)
- [Custodians of Public Records](#)
- [Databases Under the Public Records Law](#)
- [Draft Records Under the Public Records Law](#)
- [Citizen Information as Public Record](#)