



# Transparency: Public Records and Open Meetings Laws in NC

Shannon H Tufts

Professor of Public Law & Government



# Overview: Transparency

- North Carolina **public records** and **open meetings** laws provide broad public access to your meetings and records.
- These laws create obligations for the **unit** and for you as an **individual**.



# 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

# 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



# Definition of a Public Record (NCGS 132-1)

- All 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, 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.
- Agency of North Carolina government or its subdivisions shall mean and include 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.

# The Basics: Public Records

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



# True or False

- Text messages and emails sent from a privately-owned device or account are public records only if they relate to public business.



# 1. What is a 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 is a Public Record?

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

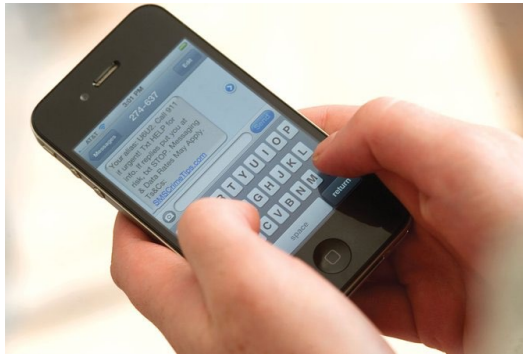


# Is This a Public Record?

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

# Rule to Remember

It's the **CONTENT** of the record, not its location, that determines whether it is a public record.



# What is the right of access?

## Provide records:

- to anyone who requests them
- to inspect or receive a copy
- regardless of why they want them
- in the medium requested if possible
- “as promptly as possible”



# Motive doesn't matter

# State residence doesn't matter



# New 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](#)



# What Can We Charge?

✓ Actual, direct costs only

✗ Not personnel time



# 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.



# What Are Some Key Exceptions?

Two types of exceptions:

1. *May release*, but not required to when the exception says “not public records”
  - Examples: Criminal investigation, economic development information
2. *Shall not release* when the exception says “confidential”
  - Examples: Personnel, trade secrets, law enforcement recordings

# 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.

# 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](#)



# A Framework For Responding to Public Records Requests

- 1. Does a record exist that corresponds to the request?**  
*If not, no disclosure is required. If so, continue to question 2.*
- 2. Is the record “made or received in the transaction of public business?”**  
*If not, no disclosure is required. If so, continue to question 3.*
- 3. Is there an exception that applies?**  
*If not, the requested access must be provided. If so, continue to question 4.*
- 4. Does the exception apply to the entire record, or only to certain information, and does it prohibit disclosure or does it deny the right of access?**  
*If a prohibition applies to the entire record, do not disclose; if it applies only to certain information, redact and disclose. If there is no right of access to some or all of the information, but release is not prohibited, determine whether or not to release the entire or a redacted record.*

# No Exception for Drafts



# 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.

# Records Retention

- State issued records retention schedules dictate what must be kept, and for how long
- These schedules provide the legal authority to destroy records



NORTH CAROLINA  
DEPARTMENT OF  
**CULTURAL**  
**RESOURCES**  

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# Records Retention Key Concepts

- Concept of “Administrative Value:  
Administrative value is defined as, “the usefulness of records to support ancillary operations and the routine management of an organization.” Records having administrative value are generally considered useful or relevant to the activities that caused the record to be created and/or during an audit of those activities. Traditionally, records managers have seen “administrative value” as transitory.
- Records of “transient” or “short term” value need not be retained  
The State Archives of North Carolina recognizes that many records exist that may have very short-term value to the creating agency. These records may be destroyed or otherwise disposed of when their reference value ends. However, all public employees should be familiar with specific records retention and disposition schedules and applicable guidelines for their office and the Public Records law (G.S. §132). When in doubt about whether a record has short-term value, or whether it has special significance or importance, retain the record in question.

# 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.

# 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”.

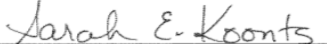
# Specific Language

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, Director  
Division of Archives and Records

## APPROVED

\_\_\_\_\_  
Head of Governing Body  
Title: \_\_\_\_\_

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

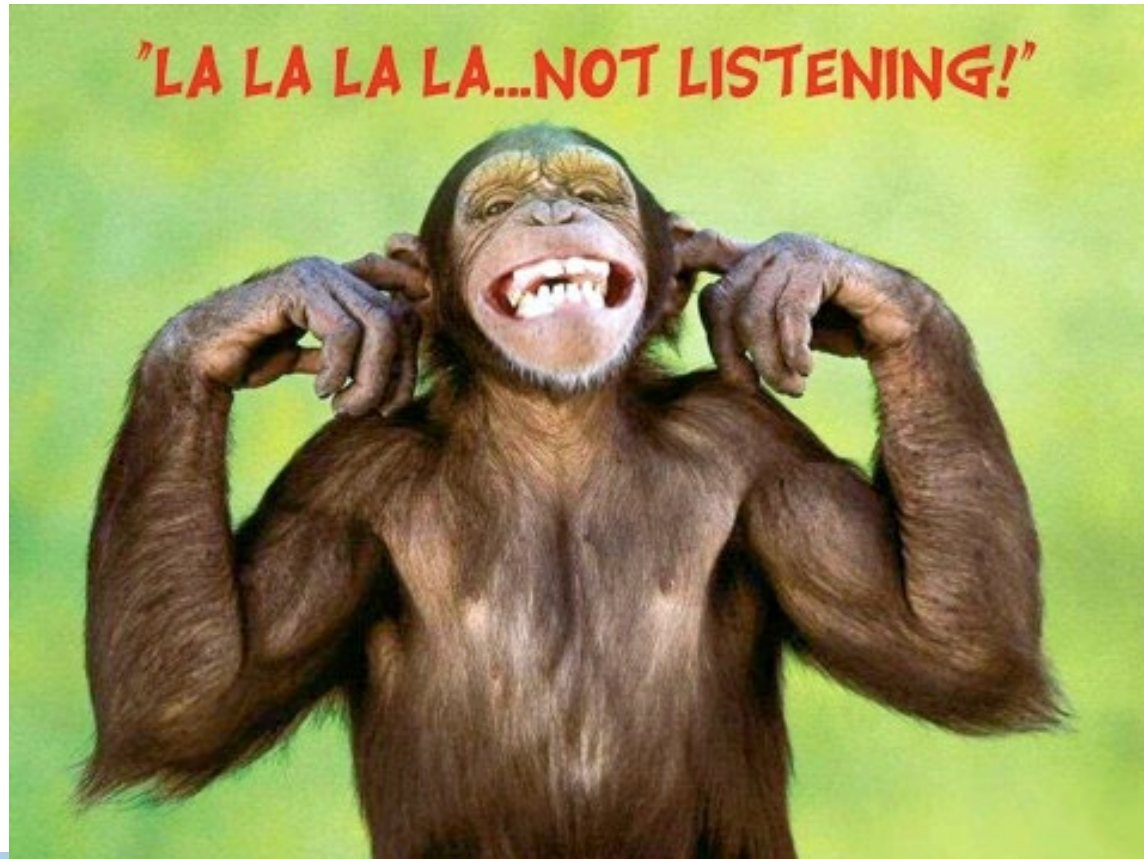
Municipality/County: \_\_\_\_\_

Effective: October 1, 2021

# Examples from 2021 LG Schedule

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

# 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.



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



Catawba County, North Carolina

Check out the new Catawba County Parks Spring eNewsletter!



Catawba County Parks

[enewsletter.catawbacountync.go](http://enewsletter.catawbacountync.go)

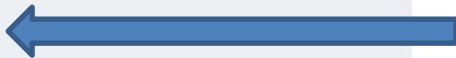
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Spring signals profound changes in both our flora and fauna here in the North Carolina foothills. Our area, which has seen an especially cold winter this year, is getting ready to burst into life! It is exciting to know that the natural world is about to come full circle and begin itself anew—and

Monday at 1:24pm · Like · Comment · Share

4 people like this.

Write a comment...



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](http://www.catawbacountync.gov)

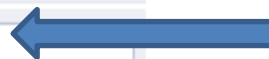
Monday at 9:04am · Like · Comment · Share



**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



**Catawba County, North Carolina**

UPDATE: Everette Hewitt is now in custody. Thanks to everyone for your tips!

March 16 at 9:24am · Like · Comment

40 people like this.



**Shane Lail** Big thanks to our sheriff's dept.!

March 16 at 9:31am · Like · 2 people



**Margaret Cavanagh Revis** Good news!

March 16 at 9:41am · Like · 1 person



**Kim Killian** Great job !!

March 16 at 9:41am · Like · 1 person



**Natasha Lynn Conley** Thank u!!! Such good news to hear!!

March 16 at 9:47am · Like



**Nellie Mcleod Green** Thank you! Now we can sleep better

March 16 at 10:05am · Like · 1 person



**M. David Brittain** Great job by all the departments involved with the search. Thank you for all your hard work!!

March 16 at 10:19am · Like



**Miya H Teague** Congratulations to Sh. Reid and his department and all the others who helped in this search. Hopefully this will put him away for a long time. Will be thinking and praying for the families of those who he shot.

March 16 at 10:34am · Like



**Roger Carmen Givens** Praise God!

March 16 at 10:43am · Like

Write a comment...



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.

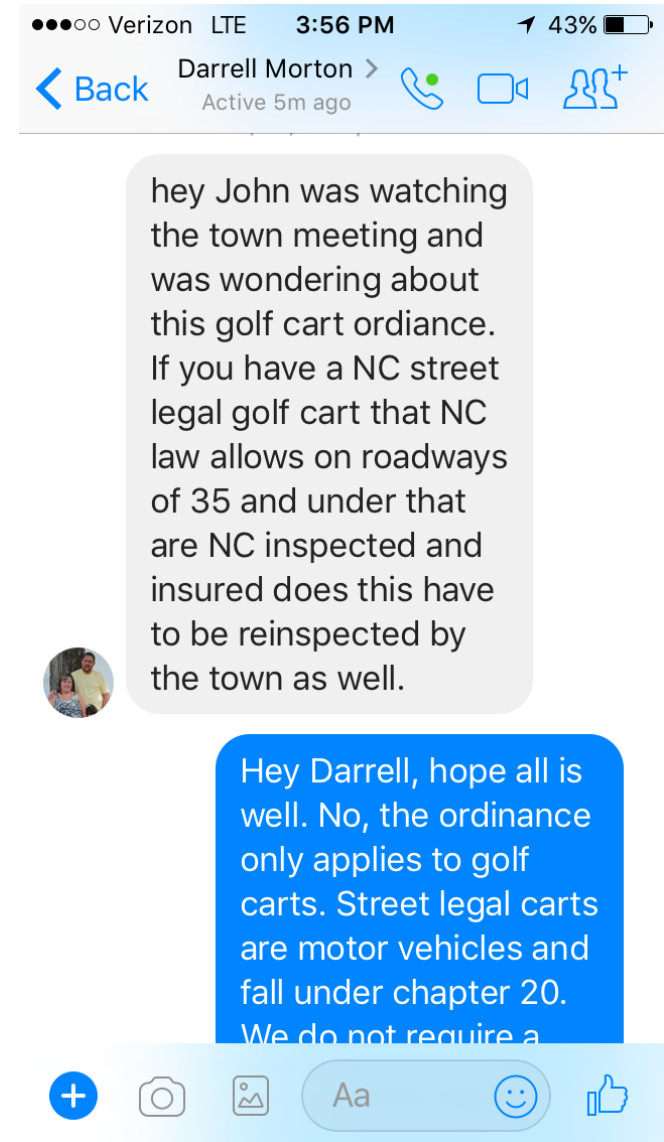
County/Municipal Management Schedule: pages x and 3

# 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.

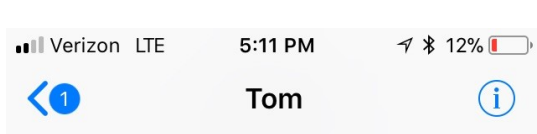


# What About My Personal Cell Phone Text Messages?





# Totally a Public Record!

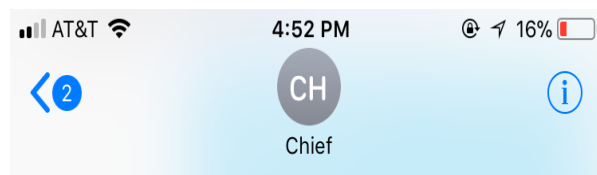


One of the residents has a lot of questions about traffic and why we don't have speed bumps. Would you be open to sit down for a cup of coffee with him and myself....

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



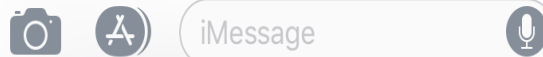
I think for law-enforcement the focus should be dispelling the myths about what actually constitutes a public record

And

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

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

And



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



# What is the Retention Period?



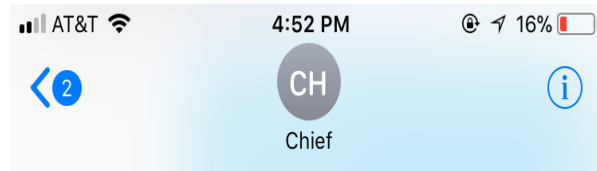
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**1 year from resolution**

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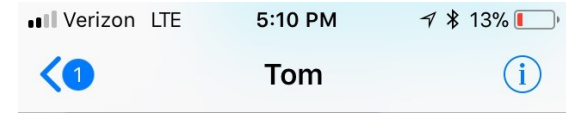
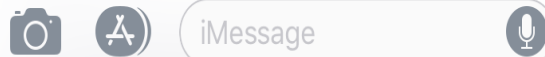
**When reference value ends**

And

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**1 year from resolution**

way ng in

MUN, FEB 12, 7:23 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



# 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



# 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.

# Cybersecurity Incident Reporting Requirement

G.S. 143B-1379(c), amended by SL2021-180

(c) Local government entities, as defined in **G.S. 143-800(c)(1)**, shall report cybersecurity incidents to the Department. Information shared as part of this process will be protected from public disclosure under G.S. 132-6.1(c). Private sector entities are encouraged to report cybersecurity incidents to the Department.

**GS143-800(c)(1):** Local government entity. – A local political subdivision of the State, including, but not limited to, a city, a county, a local school administrative unit as defined in G.S. 115C-5, or a community college.

# Article 84, Various Technology Regulations.

## GS143-800: State entities and ransomware payments.

- (a) No State agency or local government entity shall submit payment or otherwise communicate with an entity that has engaged in a cybersecurity incident on an information technology system by encrypting data and then subsequently offering to decrypt that data in exchange for a ransom payment.
- (b) Any State agency or local government entity experiencing a ransom request in connection with a cybersecurity incident shall consult with the Department of Information Technology in accordance with G.S. 143B-1379. **(Reporting requirement)**
- (c) The following definitions apply in this section:
  - (1) Local government entity. – A local political subdivision of the State, including, but not limited to, a city, a county, a local school administrative unit as defined in G.S. 115C-5, or a community college.
  - (2) State agency. – Any agency, department, institution, board, commission, committee, division, bureau, officer, official, or other entity of the executive, judicial, or legislative branches of State government. The term includes The University of North Carolina and any other entity for which the State has oversight responsibility."

# New Cybersecurity Incident Language

- **G.S. 143B-1320(a)(14a)** Ransomware attack. – A cybersecurity incident where a malicious actor introduces software into an information system that encrypts data and renders the systems that rely on that data unusable, followed by a demand for a ransom payment in exchange for decryption of the affected data.
- **G.S. 143B-1379(c)** Local government entities, as defined in G.S. 143-800(c)(1), shall report cybersecurity incidents to the Department. Information shared as part of this process will be protected from public disclosure under G.S. 132-6.1(c). Private sector entities are encouraged to report cybersecurity incidents to the Department.
- **G.S. 143B-1322(c)** Administration. – The Department shall be managed under the administration of the State CIO. The State CIO shall have the following powers and duty to do all of the following: ...
  - (22) Coordinate with the Department of Public Safety to manage statewide response to cybersecurity incidents, significant cybersecurity incidents, and ransomware attacks as defined by G.S. 143B-1320.



# 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)



# OPEN MEETINGS

# 5 Questions About Open Meetings

1. What meetings are subject to open meetings requirements?
2. What is an “official meeting” of a “public body?”
3. What is the right of access?
4. When is closed session allowed?
5. What are the sanctions for violations?

# 1. What meetings are subject to open meetings requirements?

“Official meetings” of “public bodies”



# 2a. What's a Public Body?

## Public Body

- 2 or more members
- Intentionally created or appointed
- Governmental (not private)
- Exercising any one of 5 functions

## Functions

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

Does **not apply** to meetings **solely** among staff.

# Is This a Public Body?

- ? The mayors of all the cities in Wake County meet for lunch once a month.
- ? The mayor, the manager, and the clerk comprise the agenda committee and meet monthly to prepare the meeting agenda.
- ? The manager appoints a committee of employees to organize employee appreciation day events.

## 2b. What's an Official Meeting?

- A majority of the members
- Gathering simultaneously in person or electronically
- To conduct a hearing, deliberate, vote, or otherwise conduct public business.



A purely social occasion is not an official meeting.





# Are These “Official Meetings”?

- ? Seven-member board designates members A, B, and C as a committee to make recommendations on an issue. A calls B on the phone to discuss the issue.
- ? One board member sends email to the others, proposing a new policy. The members comment, using “reply all,” and the board member then emails a modified proposal.
- ? A majority of the board travels together to Raleigh for Town Hall Day.

# Technology Can Cause Issues

Majority of a public body interacting in an electronic conversation that is essentially simultaneous may constitute a meeting.



# 3. What is the Right of Access?

Law requires notice and opportunity to attend

Type of Meeting	Notice Requirements
Regular	Notice filed, posted, on website
Special	48 hour notice to “sunshine list”; posted on website
Emergency	Notice to news media who have requested it, in same manner as given to members of the public body
Recessed	Post on website

# Right of Access

- No Open Meetings Law requirement to publish notice in the newspaper
- Right to attend does not include right to be heard. Public comment period required monthly under separate law.
- Public and press can record, video, photograph meetings

# Minutes and General Accounts

- Public bodies must create and retain minutes of meetings and general accounts of closed sessions.
- Minutes legal function is to document actions taken; typically provide a summary
- General Accounts: So that a person not in attendance would have a reasonable understanding of what transpired. May be withheld from public as long as necessary to avoid frustrating the purpose of the closed session.

# 4. When Are Closed Sessions Allowed?

Limited authority to meet in closed session

Process: Motion made in open session, stating purpose of closed session

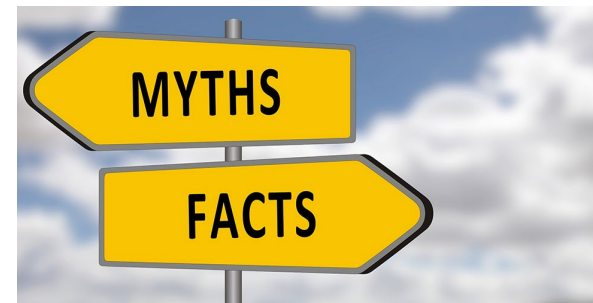


# Closed Session Purposes

## (Partial List)

- Consider performance, qualifications, appointment, of individual public employees and public officers (not members of the board itself or other boards)
- Preserve attorney client privilege/consider handling of claims
- Discuss economic development
- Discuss bargaining position for property acquisition
- Matters involving alleged criminal misconduct
- Preserve confidentiality of records

# Closed Session Myths



**Myth:** Council cannot vote or take action in closed session.

**Truth:** Some closed session provisions specifically allow it.

**Myth:** It's illegal to talk publicly about what happens in closed session.

**Truth:** Statute doesn't prohibit it, but some topics are confidential under other laws.



# 5. What Are the Sanctions for Violations?



## Court Order:

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

# Other Common Questions