

Open Meetings and Public Records

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Overview



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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

- 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.

More on Public Bodies...

- A committee of a public body is itself a separate public body.
- Advisory committees entirely composed of private citizens are public bodies.



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.

Majority vs. Quorum

- In most cases, a majority for purposes of “official meetings” is the same as a quorum under G.S. 160A-74 and 153A-43.
- Note: Special case for cities
 - *Five-member board plus non-voting mayor*
 - Quorum is four
 - *Majority* for official meeting purposes would be three
 - Three members can take action
 - Three is a functional majority for an official meeting under the open meetings law

Social gatherings are OK!

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



<http://tinyurl.com/lzvmazq>

Is This an Illegal Meeting?

Two members of the council's three-member police advisory board meet for coffee and discuss several agenda items for next month's regular meeting.



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.



More on the right of access...

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



Access: Meeting Location

- Must be of reasonable size and must be accessible, but there is no legal obligation to accommodate everyone if there is a larger than expected crowd.
- Problems:
 - Restaurants
 - Private homes
 - Gated communities
 - Site Visits
- Note limitation on county governing board meetings outside of the county

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 take up a matter not included in a special meeting 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)

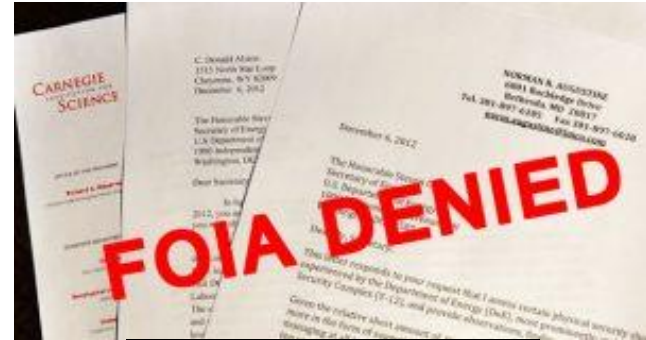


Public Records

A close-up photograph of a desk setup. In the foreground, a spiral-bound calendar is open, showing a grid of dates. A brown folder is placed over the calendar, and a silver pen lies across it. A laptop is visible in the background. The text "Public Records" is overlaid in a large, bold, blue font.

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.

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?

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.
- Does it prohibit copies, inspection, or both?
 - Some exceptions prohibit only inspection, not release of copies.
 - See 132-1.4(g) (criminal investigation information) and 132-6(d)(1) (economic development projects) for examples.
 - Other exceptions, like those involving **information in the personnel file** and **trade secrets** prohibit disclosure of any kind.

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
 - Actual cost is limited to direct, chargeable costs related to the reproduction of a public record as determined by generally accepted accounting principles and does not include costs that would have been incurred by the public agency if a request to reproduce a public record had not been made.

FAQ No. 1

- Citizen A has requested electronic copies of all applications for Citizen Advisory Boards for the last three years.
 - Assuming these records exist, do we produce them?
 - Do any exceptions apply?
 - When and in what format do we produce these records?

FAQ No. 2

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

- 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?

- 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?

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>

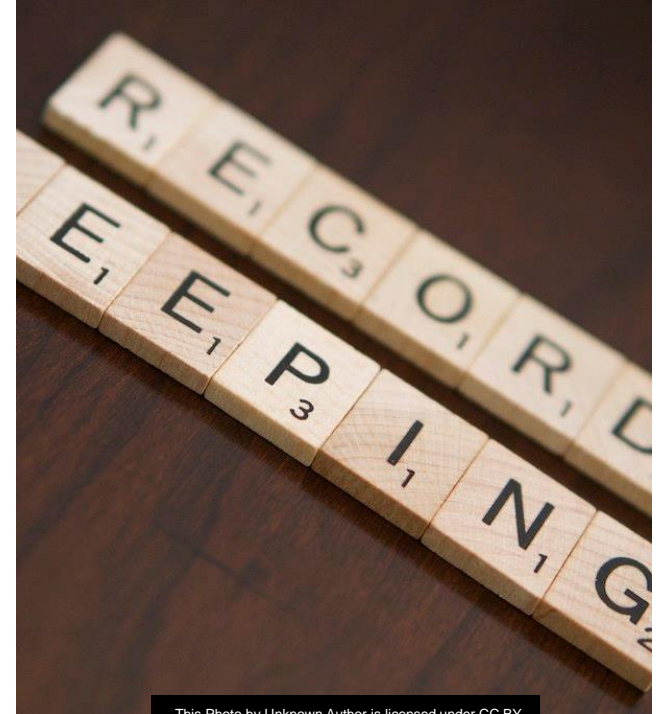
Board must formally adopt at a regular meeting and record adoption in the minutes.

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.

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/>



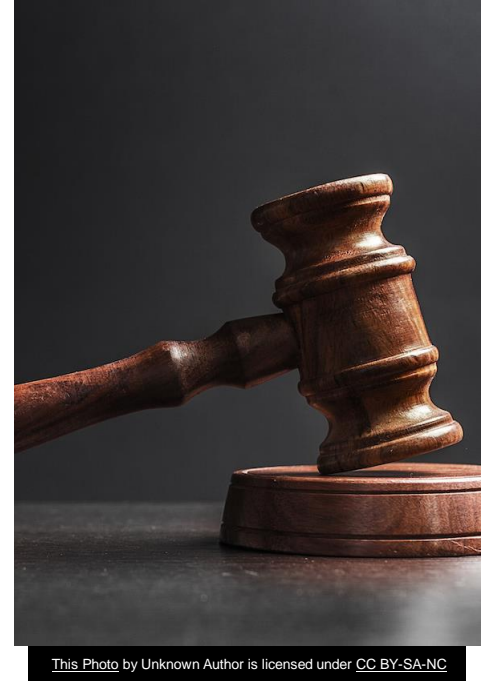
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Destruction/removal of records

- 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.



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



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.

