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The Public Records Act:

What it means to you as University employees

Connecting the dots...

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North Carolina Public
Records Act
NCGS § 132-1 et seq.

All documents of any type “regardless of physical form or characteristics...**made or received in connection with the transaction of public business** by any agency of North Carolina.”

- Note: Basically, all records created or received in the course of university business in *whatever* format is considered a public record.

Note: FOIA (Freedom of Information Act) is *federal law* and applies to records in possession of federal agencies.



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Whatever format...regardless of location

FORMAT:

Papers, letters, maps, books, photographs, films, sound recordings, e-mail, text messages, voice mail messages, etc.

PHYSICAL LOCATION

Records on your personal devices
(*computers, smart phones, iPad, etc.*)



Note: The status of a record under the law is determined based on its content, not its location...

Remember: **Content AND does it involve the transaction of public business?**



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What is the State Human Resources Act?

“It defines the broad set of laws related to employment of state workers in North Carolina and creates an appointed commission to make other personnel rules as needed.”



Note: Personnel records are confidential under the North Carolina Human Records Act, but certain information about each employee is open to public inspection under NCGS §126-23.



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North Carolina State Human Resources Act defines a “personnel file” as “any employment related or personal information gathered by the University as an employer.”

**North Carolina State
Human Resources Act
NCGS § 126-1 et seq.**



- **Employment-related information:**

- Individual's application, selection, promotion, demotion, transfer, leave, salary, contract for employment benefits, suspension, performance evaluation, disciplinary actions, and termination.

- **Personal information:**

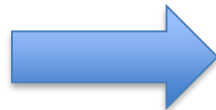
- Individual's home address, social security number, medical history, personal financial data, marital status, dependents, and beneficiary.



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What's public in my personnel file?

- Name
- Date of original employment/appointment
- Department
- Current title
- Age (**not** date of birth)
- Terms of any contract
- Current position
- Current salary



A few other exceptions...



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Personnel Information – Public

- Date and amount of each increase or decrease in salary
- Date and type of each personnel action (promotion, demotion, transfer, suspension, separation, or other change in position classification)
- Date and general description of the reasons for each promotion
- Copy of notice of final dismissal for disciplinary reasons, setting forth basis of the dismissal





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Does an employee have access to his/her personnel file?

- ***Yes.*** An employee may examine his/her entire personnel file with these exceptions....
 - Letters of reference solicited **prior** to initial employment.
 - Information concerning medical disabilities (mental or physical) that a physician might not have disclosed to the employee.

Note: Originals may not be borrowed and must be maintained in the file.





Exceptions to Public Records Law

- Student Records (such as academic, counseling records, and medical records) – Family Educational Rights and Privacy Act (FERPA) restricts information that can be released without consent (20 U.S. Code 1232g; 34 CFR Part 99)
- Personnel file (confidential under the State Human Resources Act, EXCEPT items listed under (NCGS § 126-23))
- Trade Secrets (NCGS § 66-152)
- Certain personally identifiable information – passwords, date of birth, signatures, SS#s, DL#s, admissions information (NCGS § 132-1.1(f))
- Certain criminal investigations and law enforcement records (i.e. security cameras) (NCGS § 132-1.4.(b)(1))





Exceptions to Public Records Law

- Bids for State contracts BEFORE the award of the contract (NCGS § 143.52)
- An attorney's written communications when the attorney is representing the State agency (NCGS § 132-1.1(a))
- Confidentiality of research data, records, and information of a propriety nature (NCGS § 116-43.17)
 - *Produced or collected by or for a state institution in the conduct of commercial, scientific, or technical research where the data records, or information **has not** been patented, published or copyrighted.*
- Other records made confidential by law





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Public Access...

What if a requester is denied access to a public record?

- Anyone who is denied access to a public record may seek a court action to compel the State agency to turn over the records (NCGS § 132-99(a))
- Burden is on the State (NCGS § 132-9(b))
- Presumption is that all State records are open to the public





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What about email communications?

- Email can be a public record, if it is **made or received** by a state employee **in connection with State business**.
- The status of a record under the law is determined **based on its CONTENT**, not its location.



Managing your Inbox: Email as a Public Record

- Emails can be a public record, if it is made or received by a state employee in connection with State business.
- Emails must be retained according to your retention schedule.
- **Note:**
 - Personal email is not a public record
 - Purely administrative emails that are transitory or have no real value may be destroyed or erased when you determine that it no longer is considered necessary or valuable. (*joke of the day, appointment confirmation, junk mail*)





Tips for Managing Email

- Use subject lines that are clear and informative (e.g. *instead of “meeting minutes” use “1/1/2014 Department Meeting Minutes”*).
- If a document is confidential, consider using “Confidential” in subject line. However, this label is mostly used for “flagging” item – whether it’s really confidential is a legal determination.
- Be mindful prior to sending your response to an email. (*i.e. use discretion*).
- Manage email based on its content and according to our record retention policy.



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If we scan and image our records, can we shred the paper version?

- *Not at this time.* You should not scan documents and then destroy the hard until an imaging policy is in place.
- State law requires that we have an imaging policy to address these practices.
- The university is currently working on an imaging policy to address practice of some departments on campus to image/scan documents that are public records then destroy the hard copies.





Can an “official meeting” take place via email?

- Yes, in some circumstances.
 - Members discuss government business by participating in “chat rooms” or online discussions (responding nearly the same time and all in “real-time”)
 - A majority of the members were participating

Note: Courts may consider a “conversation” an official meeting, if one member emails the other members, and the others respond even if not simultaneous.



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Text Messages/Facebook Messenger

Public or not?

Remember: CONTENT matters





Text Messaging/Facebook IM

- Text/Instant messaging has increased in the workplace due to the efficient and accessible access
 - Texting vs. e-mail or conventional letter
- Be mindful and professional in your communications
- Don't mix personal with business-related content
 - Political purposes
 - Personal business activities
 - Private commercial transactions

Remember CONTENT matters...



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Social Media Guidelines



<https://monopearl.com>

- EVERYTHING is public
- EVERYTHING lasts forever
- Be careful not to reveal protected student information when writing a blog, tweeting, or posting to other social media
- Content NOT format applies, but risks are greater
- Once posted – it's out there, posts go viral
- Pay close attention



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Google Chats/Hangouts

- By default, Google chats are turned off (not archived)
- Use only for non-substantive work (e.g. phone calls; transitory, short-term value)





Considerations for use of messaging technologies in public agencies

1. How is text messaging/IM used in your office?
2. How often?
3. How are text messages and instant messages stored and retained currently by you or your unit?
4. **How secure are these platforms?**
5. Do you use workplace-issued devices for this type of communication?



Retention of Text Messages/Facebook IM

- Like all other records, text messaging and Facebook IM relating to public business **MUST** be retained and managed according to our records retention policy

Recommendation: Strongly encourage employees **NOT** to send text messages/Facebook IM as a platform in conducting public business.



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Professional vs. Personal Use of workplace-issued devices



<https://people-results.com>

- Be professional in your communications
- Even if texting is easier and quicker, you should:
 1. Keep personal and work-related messages separate
 2. Apply same standards you would when typing text message as you would an e-mail or letter
 3. You are responsible for the retention of these messages (regardless of format) so they can be produced either by responding to a records request or litigation

Your message may become PUBLIC



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Your Duty to Retain Records

- If using text messages for transacting public business forward the message to an e-mail address.
- Some steps to retain your text message:
 - Identify which conversation or message should be retained
 - Figure out how to retain these messages (forward to your email)
 - Retain the record in printed or electronic format according to the records retention schedule



<https://ramarrecords.com>



UNC General Records Retention and Disposition Schedule

This Schedule applies to records in all media, unless otherwise specified.

Items – a sample listing of items found within a series. Other related records not listed may also be part of a series.

Disposition – all dispositions are minimum requirements and include, where applicable, transfer to the custody of the University Archives for appraisal and final disposition.

Destruction – takes place in the office. Any record with confidential or sensitive information shall be properly destroyed by shredding or by means to ensure that the records cannot be physically recreated.

Original and Reference Copy – original copy (also known as a record copy) is the official authorized copy kept by the office charged with creating or maintaining the record copy. Reference copies (also known as convenience copies) are preserved for the convenience of reference or ease of access.

No destruction of records may take place if litigation or audits are pending or reasonably anticipated or foreseeable.

Refer to prefatory material for additional instructions or contact your university's records officer for clarification.

LIBRARY RECORDS

Series #	Series Title	Series Description	Items	Disposition
GU4	Administrative	Administrative and official operations of an individual office.	reports, memorandums, correspondence, directives	Original: Transfer to University Archives after 5 years. Reference: Destroy in office when reference value ends.
GU5	Administrative Reference	Convenience and reference records of transitory value.	Subject / reference file, memorandums, duplicates, announcements	Destroy in office when reference value ends.
GU6	Agreements, Contracts, and Leases	With consultants, vendors and other firms concerning services, equipment and obligations.	correspondence, memorandums	Original: Destroy in office 5 years after expiration of all rights and obligations. For sealed agreements, destroy in office 10 years after expiration of all rights and obligations. Reference: Destroy in office when reference value ends.



Public Records and FERPA

- The Family Educational Rights and Privacy Act (FERPA) IS AN EXEMPTION under the public records law.
- FERPA protected documents ARE STILL A PUBLIC RECORD.
- Primary purpose of FERPA is to protect the privacy of student information.



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What is a student education record?

- Personal information (other than Directory Information) directly related to the student
- Maintained by the University
 - (i.e. personal information excluding “directory information”, grades, schedules, disability status, academic standing, social security #, student ID #, etc.)

*Format: Essentially any format that exists.



What is NOT a student education record?

- Campus police records
- Employment records (*unless dependent on status as a student*)
- Non-circulating faculty or staff records made for personal use (personal notes)
 - *Sole possession of maker*
 - *Are used only as a personal memory aid; and*
 - *Are not accessible or revealed to any other person except a temporary substitute for the maker of record*
- Peer-graded assignments BEFORE collection



What about treatment records?

“*Treatment records*” under FERPA are:

- Records on a student 18 years or older
- Attending a postsecondary institution
- Made or maintained by a physician, psychiatrist, or other medical doctor/counselor **ONLY** in connection with the provision of treatment to the student
- **ARE NOT** available to anyone other than persons providing such treatment, except to the extent they can be reviewed by a physician or other appropriate professional of the student’s choice



Can an eligible student review his/her own treatment records?

- Yes, if the university chooses to do so.
- Remember that “treatment records” by definition **ARE NOT** available to anyone other than professionals providing treatment to the student.
- However, once the university chooses to do so, **SUCH RECORDS** are **NO LONGER** excluded from the definition of “education records” and **ARE NOW SUBJECT** to other FERPA requirements.



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May treatment records be shared with third parties?

- Not without written consent, if the university chooses to do so.
- BUT remember that “treatment records” by definition **ARE NOT** available to anyone other than professionals providing treatment to the student.
- Once “treatment records” are provided to the student or any other individual except for the treating physician, those records are now part of the student’s education record and subject to FERPA.



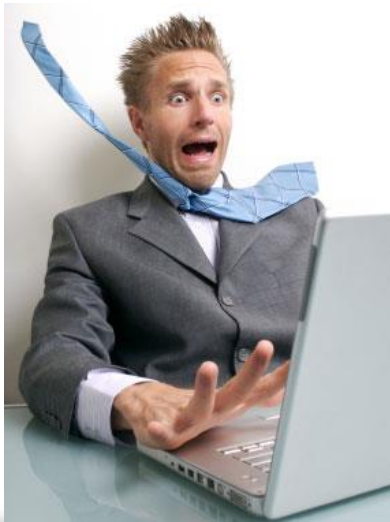
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What is E-Discovery?

- Electronic discovery or ESI (electronically stored information) refers to the process of “retrieving, saving, and producing electronically stored information in anticipation of and during litigation.”

(Fed. R. Civ. P. 34)





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Legal Holds (aka “Litigation Holds”)

- Issued and enforced when circumstances, usually pending or threatened litigation, requires you to suspend normal and routine destruction of records under your established record retention and disposition schedule.





Legal Hold ... *Now What?*

- Upon notice you are required to:
 - Immediately suspend deletion of relevant records
 - Preserve any electronic records generated OR received after receipt
 - Preserve hard copies of documents under your control
 - Recipient must acknowledge receipt
 - Must continue to monitor compliance



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Violation of a Legal Hold

- It is a violation of law to destroy, alter, withhold, or obscure “evidence” once a legal hold has been initiated.
- This is “spoliation.”





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Public Record or Not?

Example #1:

TD: “Reviewed K between XYZ and the University...okay, but we’ll need to push back on the indemnification clause. What about the COI? I don’t see it.”

AS: Ok, as for COI, but it may take a few days to get. I’ll confirm they name University as insured. If not, can we remove that language from agreement...understand that there may be heightened exposure involved should an injury or property damage during project.

Retain or delete? Why?



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Public Record or Not?

Example #2:

TD: I scheduled mtg for this Friday, 7/21 at 2:00 p.m. in my office to review the final investigative report on Dadio.

AS: Okay, I'll be there. Do I need to complete anything prior to then?

Retain or delete? Why?



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Public Record or Not?

Example #3:

TD: Don't forward...keep confidential. I met with the student Dadio, after 1 hr. appears she disagrees with my evaluation of her. Though, examples I gave her are clearly behavioral and not opinion. I do believe she may have some family issues. Disability may be a stretch. Her grades have suffered.

AS: Got it. Let's discuss when I return to office. Did she already meet with Disability Services?

TD: I'll check.

Retain or delete? Why?



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Public or Not



* Note: Pressing the “send” button can have unintended consequences. Be mindful when forwarding emails with jokes that contain derogatory stereotypes during work hours on your university computers. Remember, even if you don’t intend to offend anybody, it may subject to the public records law.



RECAP AND TAKEAWAYS

- Remember CONTENT matters not media or format
- Texts/IM/Emails can be a public record
- Avoid using personal resources, including private emails accounts for public business
- Comply with University Records Retention Policy
- Remember NOT to destroy, alter, withhold, or obscure evidence once legal hold in place
- “Embarrassment” is not an exception.



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QUESTIONS...

