## Introduction

### The Term “Public Record”

Under the North Carolina General Statutes as interpreted by the appellate courts, there are at least three separate and somewhat distinct usages of the term “public record.” This section reviews those three usages.

### G.S. Chapter 121

The first usage, and the broadest, is found in Chapter 121 of the North Carolina General Statutes [hereinafter G.S.], especially G.S. 121-5. That section designates the Department of Cultural Resources as the official archival agency of the state and empowers the department to regulate the retention, preservation, and destruction of public records. The department has used this power to prepare and disseminate a variety of record retention and destruction...
schedules applicable to different sorts of governments and agencies. The department’s powers apply to public records as defined in G.S. 121-2(8), as follows:

“Public record” or “public records” shall mean 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 or in connection with the transaction of official business by any agency.

**G.S. Chapter 132**

The second usage, a little narrower than the first, is found in G.S. Chapter 132, which is the Public Records chapter of the General Statutes. The chapter regulates custody of public records, provides for public inspection and copying of records, and references the powers of the Department of Cultural Resources under G.S. Chapter 121. The chapter applies to public records as defined in G.S. 132-1, which contains the same definition as set out in G.S. 121-2(8), with one noteworthy exception. The “or” (which is italicized in the Chapter 121 definition set out above) is missing from the definition in G.S. 132-1. Although deletion of the “or” might be thought to narrow the definition, it has not done so in practice, and the appellate courts have drawn no attention to the difference. Despite the almost identical definitions of public record in Chapters 121 and 132, the practical coverage of Chapter 132—except as noted in the next paragraphs—is somewhat narrower. This is because a number of statutes that seem primarily intended to exempt certain classes of records from public inspection do so by providing that the subject classes are not public records under G.S. 132-1, thereby exempting the records from the entire chapter. An example of such an exemption is G.S. 132-1.4, which provides that criminal investigation and criminal intelligence records “are not public records as defined by G.S. 132-1.”

**The Right of Public Access**

The third usage refers to those records that members of the public are entitled to inspect and to copy. This is a narrower usage than the first two because a great many statutes exempt described classes of records from public access. The greater part of this book discusses the statutes of this sort that are most important to local governments.

In this book the first and second usages will be the focus of chapter 3. Otherwise, the book will focus on the third usage, either directly, in chapters 1, 2, and 4, or indirectly, in the chapters that discuss statutory exemptions from the right of public access.

**An Initial Summary of Public Records Law**

North Carolina law defines the term public record very broadly, and the state supreme court has held that “in the absence of clear statutory exemption or exception, documents falling within the definition of ‘public records’ in the Public Records Act must be made available for public inspection.” Therefore, if an item meets the definition of public record,

---

1. The statutes are set out in appendix 1A at the end of this chapter.
the custodian must allow public inspection unless the custodian can point to some North Carolina (or federal) statute that permits or requires denial of public access. A number of those statutes are the subject of Part II of this book, but in general the great bulk of material held by local governments is public record and open to public access. This point is elaborated in the remainder of this chapter.

The basic right of public access is set out in G.S. 132-6 and is two-fold. First, a person enjoys a right of inspection—that is, the right to read or otherwise examine the public record. Second, a person enjoys a right to make or have made a copy of the record. A government may charge the person for the direct cost of making a copy, but there is no charge authorized for the simple right of inspection or for the cost of locating the record preparatory to making the copy. Chapter 2 of this book discusses in detail the rights of inspection and copying.

**Agencies Subject to the Public Records Law**

**In General**

G.S. 132-1 extends the reach of the public records law to every agency of state or local government in North Carolina. The section defines the covered agencies to 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.” Thus, at the local level, the law extends to counties, cities, school administrative units, community colleges, special districts such as sanitary districts or metropolitan sewerage districts, and public authorities such as water and sewer authorities, hospital authorities, and regional public transportation authorities. It also extends to joint entities such as councils of government, district health departments, area mental health authorities, regional libraries, and joint agencies established by contracts between local governments. In *News & Observer Publishing Co. v. Poole*, the defendants argued that an agency that was exempt from the state’s open meetings law should, for that reason, also be exempt from the state’s public records law, but the court rejected the argument summarily. Therefore, for example, even though a particular board might not be subject to the open meetings law, the minutes of its meetings would still be a public record.

**Nonprofit Corporations and Other Private Entities**

G.S. 132-1 also reaches some agencies that are not formal parts of local government. Usually these are nonprofit corporations, and for that reason most of the discussion in this section focuses on this sort of entity. Some of the cases from other states, however, even

---

3. The possible impact of federal legislation on records held by North Carolina local governments is discussed *infra* in chapter 4.

4. 330 N.C. 465, 412 S.E.2d 7 (1992). The court wrote: “The Public Records Act and the Open Meetings Law are discrete statutes, each designed to promote in a different way openness in government. There is no suggestion in either statute that an agency not subject to one is, *ipso facto*, exempt from the other.” *Id.* at 478, 412 S.E.2d at 15 (emphasis in original).
subject for-profit entities to public records statutes, and that possibility should not be overlooked.

Local governments frequently contract with and appropriate money to nonprofit organizations in order for the nonprofit entity to carry on some activity on behalf of the local government. In many cases the nonprofit organization is clearly separate from the local government, and its relationship to the local government is that of independent contractor. In such a case the nonprofit organization is not an agency under the public records law, and its records are not subject to that law. This is true even when all or nearly all of the revenues of the nonprofit entity come from one or more governmental contracts. A good, common example of such a nonprofit is a volunteer fire department. But sometimes the nonprofit organization has ties to the local government beyond those of the usual independent contractor. The local government may appoint some or all of the members of the organization’s board of directors; the local government may possess power to approve the organization’s budget or the sale of the organization’s assets; employees of the local government may serve as staff to the organization; the local government may own the facilities that are operated by the organization; and so on. In the case of such a nonprofit organization, its private form of organization does not automatically exempt the organization from the public records law. Rather, at some point its ties to local government become so numerous and the activities of the organization so intertwined with the local government that the organization becomes an agency of the government for purposes of the public records law.

There are at least three different approaches by which the facts concerning a particular organization might be analyzed and lead to a conclusion that the nonprofit organization is a public agency for purposes of public record access.

The first approach focuses on the degree of supervision or control that one or more clearly governmental entities have over the nonprofit organization and is illustrated by the North Carolina Court of Appeals decision in News & Observer Publishing Co. v. Wake County Hospital System, Inc. In that case, the newspaper sought records of the nonprofit corporation that operated hospital facilities owned by Wake County. The court reviewed the entire relationship between the county and the corporation, as demonstrated in three documents: the corporation’s articles of incorporation, a lease agreement between the county and the corporation, and an operating agreement between the county and the corporation. It found that the county had clear supervisory responsibilities and control over the corporation, as indicated by the following factors: (1) upon its dissolution, all of the corporation’s assets would vest in the county; (2) the filling of all vacancies on the board of directors of the corporation had to be approved by the county; (3) county facilities were leased to the corporation for one dollar a year; (4) the board of county commissioners was empowered to review and approve the corporation’s annual budget; (5) the county was entitled to conduct

---

5. Although it is virtually certain that a volunteer fire department in North Carolina is not subject to the public records law simply because it contracts with a county or city to provide fire protection, at least one state court has reached a contrary conclusion under that state’s public records statute. See Yantic Volunteer Fire Co. v. Freedom of Info. Comm’n, 679 A.2d 989 (Conn. 1996).

6. A nonprofit corporation can also become subject to the public records law by specific statutory direction. See N.C. GEN. STAT. [hereinafter G.S.] § 55A-3-07, which makes two sorts of nonprofit corporations, both serving state government, subject to the public records law.

a supervisory audit of the corporation; (6) the corporation was required to report its rates and charges to the county; (7) county revenue bonds financed improvements to the facilities operated by the corporation; (8) revenues collected by the corporation were county revenues for purposes of revenue bond repayment; and (9) the corporation could not change its corporate existence or amend its articles of incorporation without county consent. The court found the pattern of supervision and control sufficient to hold that the corporation was an agency of the county for purposes of the public records law.8

A second case stands in helpful contrast to the Wake County Hospital System case. In Chatfield v. Wilmington Housing Finance & Development, Inc.,9 the plaintiffs sought access to the meetings and records of the defendant nonprofit corporation. At various times in the past, the defendant or a predecessor corporation had been subject to a variety of controls exercised by the county, the city, and the local housing authority, as follows: (1) the original stated purpose of the corporation was to assist the Wilmington Housing Authority in its operations, and the incorporator was the authority’s executive director; (2) the corporation’s accounting practices and finances were subject to annual review by the authority; (3) the corporation’s net earnings were to accrue to the authority, and the authority was to get the corporation’s assets upon dissolution; (4) the authority had to approve any changes in the corporation’s articles of incorporation; and (5) a majority of the corporation’s board of directors were appointed by the county, city, and authority. By the time the trial court finally ruled on the plaintiff’s suit, however, each of these controls had been removed, and the trial court granted summary judgment to the corporation. The court of appeals noted that none of the nine factors listed in the Wake County Hospital System case were any longer applicable in Chatfield and affirmed the trial court.

The Wake County Hospital System case is notable for the extensive degree of control and supervision that the county retained over the nonprofit corporation. Unfortunately, it is not greatly helpful in determining whether other nonprofit agencies, with somewhat different relationships to other local governments, are agencies of those local governments for public records purposes. The court acknowledged that each relationship of this type must be looked at individually, in its own context, and that point was repeated in Chatfield. Two other North Carolina hospital cases, though, decided in other contexts, suggest three factors that can be especially important—the power of one or more local governments to control the board of directors of the nonprofit corporation; the regular or eventual transfer of assets to one or more governments; and the power of one or more local governments to exercise significant control over the corporation’s fiscal affairs. In Coats v. Sampson County Memorial Hospital, Inc.,10 the defendant was a nonprofit corporation that operated a county-owned hospital under a ten-year lease. The county commissioners appointed the

---

8. The attorney general’s office relied directly upon the Wake County Hospital System case in concluding that the Northeast Partnership, a nonprofit corporation, was an “agency” within the meaning of the public records act. The partnership had been established by the Northeastern North Carolina Regional Economic Development Commission, a statutorily created agency; the commission’s board members were automatically the board members of the partnership; and the commission had handed over to the partnership its responsibilities and resources. Letter to Melanie Thompson, 9 March 1999, Advisory Opinion No. 414, available at www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions.aspx.
corporation’s board of directors, and the corporation’s charter provided that the county would succeed to all of the corporation’s assets should it be dissolved. The suit was brought in Harnett County, where the plaintiff electrical contractors resided. G.S. 1-77, however, requires that suits against public officers and agencies be brought in the county where the cause of action arose, and the North Carolina Supreme Court held that the hospital corporation was a county agency for purposes of this venue statute. In *Sides v. Cabarrus Memorial Hospital, Inc.*,\(^{11}\) the hospital corporation had been established pursuant to a special act of the General Assembly. Although the corporation was legally separate from the county, the county commissioners appointed the board of trustees, the county treasurer served as the corporation’s treasurer, and the corporation was directed to submit an annual financial report to the county commissioners. On these facts the North Carolina Supreme Court held that the corporation was a county agency for purposes of liability insurance coverage.\(^{12}\)

The second approach looks not so much at government control over the nonprofit but at whether the nonprofit is acting in the government’s stead and as its agent (rather than as a truly independent contractor). This approach is best exemplified by the case of *Memphis Publishing Co. v. Cherokee Children & Family Services, Inc.*,\(^{13}\) in which the Tennessee Supreme Court applied a test of “functional equivalency” to a company hired by the state

---

12. Some cases from other states that have used this approach to hold that nonprofit corporations are subject to public records laws include *Denver Post Corp. v. Stapleton Development Corp.*, 19 P.3d 36 (Colo. App. 2000), in which the defendant corporation was held subject to the state’s public records law in part because it had been created by Denver’s urban renewal agency and all members of the corporation’s board of directors were appointed by the mayor or the urban renewal agency and confirmed by the city council; *Andy’s Ice Cream, Inc. v. City of Salisbury*, 724 A.2d 717 (Md. Ct. Spec. App. 1999), in which the Salisbury Zoo Commission, a nonprofit corporation, was held to be a city agency for public records purposes because the mayor and city council appointed the corporation’s board of directors, the city council had to approve the corporation’s budget, the mayor and council could unilaterally change the corporation’s bylaws although the corporation itself could not, and the mayor and council could dissolve the corporation; and *Professional Firefighters of New Hampshire v. Healthtrust, Inc.*, 861 A.2d 789 (N.H. 2004), in which the defendant, which writes health insurance coverage for New Hampshire local governments, was held to be subject to the public records law in part because all its members were local governments and its governing board was composed entirely of public officials and employees. But see *State ex rel. Stys v. Parma Community General Hospital*, 755 N.E.2d 874 (Ohio 2001), in which the court held that the hospital corporation was not subject to the state’s public records law even though sixteen of eighteen directors were appointed by the mayors of the six municipalities that had established the corporation.

A number of other cases have used the same approach to conclude that certain nonprofit corporations are not subject to the state’s public records law, namely, *Dow v. Caribou Chamber of Commerce & Industry*, 884 A.2d 667 (Me. 2005), in which the corporation got 60 percent of its budget from grants from the city but only two of eleven board members represented the city; *Ervin v. Southern Tier Economic Development, Inc.*, 809 N.Y.S.2d 268 (App. Div. 2006), in which six of the corporation’s nine members were private individuals not appointed by or controlled by the city or county; *Rumore v. Board of Education*, 826 N.Y.S.2d 545 (App. Div. 2006), *leave to appeal denied*, 866 N.E.2d 454 (N.Y. 2007), in which the corporation’s budget was not approved by any public agency and its board was self-selected; and *Spokane Research & Defense Fund v. West Central Community Development Ass’n*, 137 P.3d 120 (Wash. Ct. App. 2006), *review denied*, 158 P.3d 614 (Wash. 2007), in which the association, which operates a community center located in a city park, was governed by a board of directors with no connection to the city.

13. 87 S.W.3d 67 (Tenn. 2002).
to help poor families find subsidized day care. Because the company had taken over a function theretofore performed by the state, received almost 100 percent of its funding from public sources, and was subject to significant state control in its operations, it was subject to the Tennessee public records statute. The court summarized its approach as follows:

As the facts of these cases [from other states] demonstrate, private entities that perform public services on behalf of a government often do so as independent contractors. Nonetheless, the public’s fundamental right to scrutinize the performance of public services and the expenditure of public funds should not be subverted by government or by private entity merely because public duties have been delegated to an independent contractor. When a private entity’s relationship with the government is so extensive that the entity serves as the functional equivalent of a governmental agency, the accountability created by public oversight should be preserved.14

Interestingly, the Tennessee court cited the Wake County Hospital System case as an example of this same approach from another state. The Memphis Publishing case involved the nature of an agency as a whole (as did the Wake County Hospital System case). This approach, however, has also been used to support public access to selected records of an otherwise apparently private organization, often a for-profit organization. Two cases illustrate this possibility.

First, in Stanfield v. Salvation Army,15 the Florida District Court of Appeals examined the relationship between a county and the Salvation Army. Under a contract between the two parties, the Salvation Army undertook the county’s statutory responsibility for the six-month period of supervision imposed on all misdemeanants placed on probation. It was responsible for job placement and for monitoring compliance with the conditions of probation, reporting probation violations, and collecting supervision fees. Under the contract, the Salvation Army was required to maintain a record on each person subject to supervision. The appellate court held that because the Salvation Army was providing probationary services on the county’s behalf, it was the county’s agent and, therefore, the probation records kept by the Salvation Army were subject to the public records law.16

Second, in State ex rel. Gannett Satellite Information Network v. Shirey,17 the Ohio Supreme Court considered a contract under which a private consultant assisted a city in

14. Id. at 78–79. A later Tennessee case that also illustrates this approach is Allen v. Day, 213 S.W.3d 244 (Tenn. Ct. App. 2006), in which the court held that records generated and held by a for-profit private management company that managed Nashville’s hockey arena were public records.
16. Another Florida case is Prison Health Services, Inc. v. Lakeland Ledger Publishing Co., 718 So. 2d 204 (Fla. Dist. Ct. App. 1998). In that case a county sheriff contracted with a private company to provide total health care services to the inmates and detainees in the county jail, and the court held that because the company was acting on behalf of the sheriff, its records with respect to the jail would be public records to the same extent as if the sheriff had generated them. See also Booksmart Enters., Inc. v. Barnes & Noble College Bookstores, Inc., 718 So. 2d 227 (Fla. Dist. Ct. App. 1998) (textbook request forms provided by public college faculty to private company operating on-campus book store; held, public records); Burkett v. UDS Mgmt. Corp., 741 So. 2d 838 (La. Ct. App. 1999) (records relating to publicly owned utility system held by private company managing utility system; held, public records).
17. 678 N.E.2d 557 (Ohio 1997).
hiring a department head. The court held that the consultant, by receiving and evaluating applications and presenting the city with a short list of finalists for the position, was carrying on the city’s business; thus the city could not escape the public records law by entering into such a contract. ¹⁸

The third approach focuses on the creation of the nonprofit corporation and on daily operating connections between government and the corporation. For example, if a government agency was instrumental in creating the nonprofit corporation, the corporation is housed in a government building, and the corporation is staffed by government employees, these ties might well be sufficient to cause a court to label the corporation a public agency for public records purposes. For example, in *Macon Telegraph Publishing Co. v. Board of Regents*,¹⁹ the plaintiff newspaper sought the records of the University of Georgia Athletic Association, a private corporation that was the apparent employer of the university’s football coach and other athletic personnel. The court noted that the university’s president was head of the association, the university’s vice president of business and finance was treasurer of the association, and state statutes imposed on the university president the responsibility of supervising intercollegiate athletics, which he did through the association. It concluded that the association’s records were therefore subject to the state’s public records law.²⁰

---

¹⁸. The Ohio courts have explicitly accepted the functional equivalency test as the most appropriate approach to these sorts of cases. See *State ex rel. Oriana House, Inc. v. Montgomery*, 854 N.E.2d 193 (Ohio 2006), and *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 859 N.E.2d 936 (Ohio 2006). In the Ohio cases, the court sets out four factors that should be considered in a functional equivalency test: (1) whether the private entity performs a governmental function, (2) whether the level of government funding is significant, (3) the extent of government involvement in or regulation of the private entity’s operations, and (4) whether the entity was created by the government.

In *Durham Herald Co. v. North Carolina Low-Level Radioactive Waste Management Authority*, 110 N.C. App. 607, 430 S.E.2d 441 (1993), the court held that material gathered by a contractor for the authority was not a public record until turned over to the authority. This decision, however, depended on the particular language of the statute under which the authority operated and did not establish a more general rule applicable to all contractors for public agencies in North Carolina.

An interesting question raised by this line of reasoning is the status of the records of a North Carolina political party’s county executive committee when it is exercising its statutory right to, as a practical matter, appoint replacements to certain vacant positions in county government. Under G.S. 153A-27.1, the appropriate county executive committee in some forty-two counties is authorized to nominate a person to fill a vacancy in the board of county commissioners, and the board of commissioners is directed by statute to appoint the person so nominated. Under G.S. 162-5.1, the appropriate county executive committee in some forty-five counties is given the same power with respect to vacancies in the sheriff’s office. The cases discussed in this section certainly lend weight to the conclusion that a committee’s records in fulfilling these responsibilities are public records.

¹⁹. 350 S.E.2d 23 (Ga. 1986).

²⁰. *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 602 N.E.2d 1159 (Ohio 1992), might be thought to combine the second and third approaches. Predecessor foundations to the defendant had been housed in university buildings without paying rent, and university employees served as staff to these earlier foundations. The earlier foundations had complied with the public records law. The current foundation, however, paid rent for its office space, and its employees were no longer university employees. The court noted, however, that the university continued to pay state retirement system benefits for the employees and that the foundation’s role was to accept all donations made to the university. On that basis the court held that the foundation continued to be subject to the state’s public records law.
What Documents and Other Items Are Included within the Meaning of “Public Record”?

In General

G.S. 132-1 establishes a very broad definition of “public record,” generally unlimited by the form of the material in question or by the circumstances under which it was received or created. The statute begins by including within the definition not only documents and other papers but also “maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, [and] artifacts, . . . regardless of physical form or characteristics.” The statute then goes on to state that public record means the listed items “made or received pursuant to law or ordinance in connection with the trans-
action of public business.”

Litigants have sometimes argued that the latter part of the definition—“made or received pursuant to law or ordinance”—contains words of limitation and that only those records whose receipt is specifically required by statute or local ordinance are public records. The court of appeals rejected such a limiting reading in *News & Observer Publishing Co. v. Wake County Hospital System, Inc.* Among the records sought in that case were expense account records submitted to the agency by members of its staff and governing board. In holding that these were public records, the court stated that “[t]he phrase in G.S. 132-1, ‘pursuant to law or ordinance in connection with the transaction of public business,’ should include, in addition to those records required by law, those records that are kept in carrying out lawful duties.” The North Carolina Supreme Court did not specifically address the definition of public record in *News & Observer Publishing Co. v. Poole*, its leading discussion of the public records statute. But the court obviously accepted a broad reading of the statutory language, consistent with the statement by the court of appeals. A number of the documents involved in *Poole* were not required by any law, yet the court held they were public records.

---

21. A few states have narrower definitions of public records, and the difference in definition can lead to a difference in outcome. For example, in *State ex rel. Dispatch Printing Co. v. Johnson*, 833 N.E.2d 274 (Ohio 2005), the newspaper was seeking the home addresses of employees. The court noted that the Ohio statute defines a record as any document “which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office,” and then held that the employee addresses, collected for payroll purposes, did not meet the definition. The addresses would clearly meet the North Carolina definition of public record, although they would be shielded from public access as part of the employees’ personnel files. Similarly, in *Argus Leader v. Hagen*, 739 N.W.2d 475 (S.D. 2007), the South Dakota Supreme Court read that state’s statute to restrict the right of access to records whose maintenance or retention is required by law; therefore, an invitation list to a gubernatorial function was held not to be a public record, because it was not required by law to be maintained. Such a list would be open to public access in North Carolina. The larger point, however, is that someone relying on cases from other jurisdictions must be sure that the other jurisdiction’s definition of public record is comparable to North Carolina’s.

23. Id. at 13, 284 S.E.2d at 549.
25. For example, the plaintiffs sought minutes of the Poole Commission, a body established and appointed by the president of the university system, and copies of draft reports written by two commission members at the conclusion of its work. The commission was a nonstatutory body, not subject to the state’s
It may sometimes be that a record has not been received by a public agency, or perhaps not received quite yet. In *Salt River Pima-Maricopa Indian Community v. Rogers*, the court held that a document that belonged to a private bank but that was found, for unexplained reasons, in the office of the state treasurer, was not a public record. The document had not been used by the treasurer's office, nor had it been generated for any responsibility of the office; it seems, rather, simply to have been inadvertently left in the office. The court held that a document's mere presence in a public office, without anything more, is insufficient to make the document a public record. A number of North Carolina cities accept payment for private utility bills, collecting on behalf of the private company. This case suggests that the records associated with such an arrangement are not public, despite their presence in the city's offices and the city's involvement in the collection process. The records were not received for any public business of the public agency. In a related vein, local governments sometimes begin contracting processes by issuing a request for proposals. Typically the proposals are submitted in a sealed form, to be opened only after the deadline for submissions. It seems reasonable to conclude that the proposals have not been “received” and therefore are not open to the public until at least the envelope or other enclosure has been opened.

Sometimes public officials and private parties seek to avoid a document's becoming a public record by attempting to keep the document always in private possession. For example, a private person or entity might bring a document along to a meeting with a public official or agency, and the document might be used during the meeting, but the private person or entity would then take it away after the meeting so that the public official or agency had no copy of the document. This probably would not serve to prevent the document from becoming a public record. In *Times Publishing Co. v. City of St. Petersburg*, for instance, the city was in discussion with the Chicago White Sox about a possible move by the team to the Florida city. To avoid disclosure of the negotiations, or even of the existence of the talks, the baseball team claimed ownership of all documents, such as draft leases, and retained sole possession of them. The team retained Florida counsel and sent copies of documents to that private attorney. The city officials could inspect the documents only at the lawyer's office and were not permitted to make copies, but the documents evolved as a result of the meetings between the team and city officials. In a suit by the newspaper for copies of the documents, the Florida court held that once a document had been presented to the city and revised during meetings between the city and the team, it was a public record, and the arrangements made by the team and the city were to no avail. It seems likely a North Carolina court would agree.

---

28. Accord *Journal/Sentinel, Inc. v. School Bd.*, 521 N.W.2d 165 (Wis. Ct. App. 1994). The school superintendent sued the district and the school board and the suit was settled, with the settlement memorialized by a memorandum of understanding. A draft of the memorandum had been passed out to school board members but then retrieved and retained by the attorney representing the district. The court held that the memorandum was a public record. *But see State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 788 N.E.2d 629 (Ohio 2003). The school board was interviewing finalists for superintendent and informed the applicants that they could bring application materials with them to the interview and then take those materials away with them. The court held that the materials that were taken away were
In summary, then, the definition of a public record is quite broad. Here is an informal and incomplete listing of some of the many sorts of documents that are clearly public records under the statutory language:

- Animal adoption records
- Bank statements and other financial records
- Citizen complaints about services
- Contracts
- Correspondence between a government agency and others—private citizens, contractors, other governments, and so on
- Documents from private contractors showing compliance with contract terms
- Documents obtained through discovery in litigation
- Donation records, including the names and addresses of donors
- Electronic mail
- Grant applications
- Inspection reports and supporting materials
- Insurance policies purchased by the government and related materials
- Leases
- License and permit applications and copies of issued licenses and permits
- Names of persons participating in recreational leagues and other activities
- Property transaction documents, including deeds, land-sale contracts, and appraisals
- Video tapes
- Voice mail

not public records. It relied, however, on language in the Ohio statute that applied the public records law to documents “kept by any public office,” holding that the school board had not kept these application materials. The North Carolina statute applies to documents that have been “received” by the public agency, and a North Carolina court might easily distinguish the Ohio case by holding that comparable documents had in fact been received by the interviewing agency.

29. Bank account numbers, however, are not public records. G.S. 132-1.10.
31. See, e.g., Sapp Roofing Co., Inc. v. Sheet Metal Workers’ Int’l Ass’n, Local Union No. 12, 713 A.2d 627 (Pa. 1998) (roofing contractor payroll records, submitted to public agency to demonstrate compliance with prevailing wage statute, are public records).
33. In Letter to W.A. “Doc” Hoggard III, 15 August 1997, Advisory Opinion No. 319, available at www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions.aspx, the attorney general’s office concluded that in general an application for a license issued by a state licensing board was a public record, as were supporting materials.
34. See, e.g., Hemeyer v. KRCG-TV, 6 S.W.3d 880 (Mo. 1999) (video tapes made of various locations in sheriff’s office).
35. In Letter to Ann W. Spragens, 18 April 1996, Advisory Opinion No. 255, available at www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions.aspx, the attorney general’s office opined that in general voice mail records are public records.
Preliminary Drafts

Public officials sometimes argue that although a specific document will be a public record once it is finished, it is not a public record until that point is reached. They contend that early versions of the document, still being worked on by its author or perhaps being circulated to others for comment, need not be made available to the public for inspection or copying. How have courts, in North Carolina and elsewhere, responded to this argument?

A version of the argument was made to the North Carolina Supreme Court in the *News & Observer Publishing Co. vs. Poole* decision. Two members of the Poole Commission drafted reports on the commission's work, and versions of these reports were submitted to the president of the university system. The court held that the reports, in this form, were public records and available to the public, rejecting the defendants’ argument that preliminary drafts should be excepted from the access provisions of the law.\(^{36}\) It is possible to argue that the “draft” reports in question were not really preliminary drafts, inasmuch as it does not appear that the commission or its members ever submitted final versions of the reports to the president. Other courts, when faced with such an apparent attempt at subterfuge, have had no problem characterizing the reports in question as actually final and therefore open to public access.\(^{37}\) It would be possible, therefore, to attempt to distinguish *Poole* on its facts if a records request involved a draft that was legitimately still in the preliminary stage. Unfortunately for such an argument, the court’s language in *Poole* is broad and makes no distinction between real and sham drafts.

Much of the case law from other states also mandates access to preliminary material. In *Missouri Protection & Advocacy Services v. Allen*,\(^{38}\) the plaintiffs sought a copy of a preliminary draft report sent by a federal agency to a state agency for the latter’s review and comment. The court ruled for the plaintiffs, holding that a report need not be in final form to be a public record. In *Times Publishing Co. v. City of St. Petersburg*,\(^{39}\) the plaintiff sought a copy of drafts of leases still being negotiated between the city and another party. There, too, the court ruled for the plaintiffs.\(^{40}\) And in *MacEwan v. Holm*,\(^{41}\) the court held that data collected by a state agency in order to prepare a report were public records, “irrespective of [the data’s] tentative or preliminary character.”\(^{42}\)

The *Poole* decision and the Missouri and Florida cases cited above each involved documents that were in printed form, even if the form was not yet the final form. The Oregon case involved raw data, but the data could be made available to the public without that interfering with the preparation of the report for which it was collected. There do not appear to be any reported decisions in which plaintiffs sought records in the midst of their preparation, before any draft had been circulated to others and at a time at which

---

40. It should be noted, however, that the Florida Supreme Court in *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980), wrote that “rough drafts” “obviously would not be public records.” *Id.* at 640. That case involved handwritten notes rather than rough drafts, however, and so the quoted language is perhaps dicta.
41. 359 P.2d 413 (Or. 1961).
42. *Id.* at 420.
the content of the draft might be changing daily or even more often. It remains possible
that a court might exclude such a draft from the definition of public record, at least until
the authority begins to circulate it to others, but there appears to be little other room for
excluding from public access documents that are closer to completion. Thus, for example,
it is virtually certain that the public has a right of access to such documents as a board’s
draft minutes or departmental budget requests made to the manager or budget officer.

It also should be noted that a draft remains public record even after the final version has
been prepared. Although it is permitted to destroy such drafts once there is a final version, if a draft has not been destroyed it retains its character as a public record even though there
is a final version.

**Records That Could Have Been Disposed Of**

Chapter 3 discusses the rules that govern retention and disposition of public records. Many
local governments retain various sorts of records well past the time that they are permit-
ted to dispose of the records. A city clerk, for example, might retain several years’ worth
of audio tapes of council meetings, even though the tapes can be erased or written over
as soon as the council approves the minutes of the taped meeting. That the records could
have been disposed of, but have not been, has no effect on whether they are open to public
access. As long as the records remain in existence, they remain public records and open to
public inspection and copying.

**Data, Surveys, and Other Source Materials**

As they do with preliminary drafts, public officials sometimes argue that the source mate-
rials upon which completed reports or other records are based are not themselves public
records. Source materials include items such as scientific or economic data, surveys or
questionnaires, interview summaries, and audit working papers. In general the courts have
rejected such arguments.

---

43. In an opinion letter written in 1994, after the *Poole* decision, the attorney general’s office suggested
that a court might hold that documents in an earlier stage of preparation than had been the case in *Poole*
were not yet public records. Letter to Deborah Crane, 29 August 1994, Advisory Opinion No. 140, available
(N.Y. Sup. Ct. 1969), the court ordered access to the city’s master plan, even though city officials argued that
it was not yet complete. The court rejected the defendants’ argument on the facts of the case, but because
the plan was in a “finalized state” and was scheduled for publication in a few weeks, the court did indicate
that access would have been denied had the plan been in a significantly earlier stage of preparation. It
should be repeated that in *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla.
1980), the Florida Supreme Court emphatically stated that rough drafts were not public records under the
test developed by that court; there were no rough drafts at issue in the case, however.

44. See Government Records Branch, N.C. Dep’t of Cultural Resources, Public Records

45. The North Carolina attorney general’s office has also concluded that such materials are public
www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions.aspx. The department concluded that
questionnaires and answer sheets circulated to and filled out by employees of the department of
administration were public records and therefore, except as they might involve specific employees, were
open to the public.
Public Records Law

MacEwan v. Holm,\textsuperscript{46} which was briefly mentioned in the discussion of preliminary drafts, is a leading case on this question. The Oregon State Board of Health collected a variety of data on the amounts of radioactive substances in the air and in rainwater, which the board then used to prepare summary reports. In MacEwan the Oregon Supreme Court held that the foundation data were public records as well, and that they were public records from the time they were collected. The court rejected arguments that premature release of the data might be misleading. In the years since MacEwan was decided, other courts have followed the Oregon court’s lead. In Legislative Joint Auditing Committee v. Woolsey,\textsuperscript{47} the Arkansas Supreme Court held that the working papers of a government audit were public records. In Laplante v. Stewart,\textsuperscript{48} the Louisiana Court of Appeal held that the foundation data for a state study comparing student performance at individual schools were public records. In Moser v. Kanekoa,\textsuperscript{49} and Yacobellis v. City of Bellingham,\textsuperscript{50} the Washington Court of Appeals held that summaries of interviews conducted as part of a jail administration study and individual questionnaires received as part of a golf course administration study were all public records. And in Veltri v. Charleston Urban Renewal Authority,\textsuperscript{51} the West Virginia Supreme Court held that the meeting tapes from which the authority’s clerk prepared minutes were public records.\textsuperscript{52}

Can Access to Preliminary Drafts or Backup Material Be Delayed?

In some instances public officials have acknowledged that early drafts and various forms of backup material are public records, but they have argued that custodians should not have to open such records to public inspection until the final draft or report is completed or until the transaction for which the materials were prepared has occurred. For example, a county might argue that departmental budget requests need not be made public until the manager has presented a budget to the board of commissioners, or a city might argue that consulting proposals received in response to a request for proposals need not be made public until they have been analyzed by staff and presented to (and perhaps acted upon by) the governing board.

By and large these sorts of arguments have not succeeded when made to courts in other states. For example, in Gannett Co. v. Goldtrap,\textsuperscript{53} the Florida Court of Appeals held that written appraisal reports, prepared for a county in the midst of land negotiations, were public when received by the county; public access did not have to await completion of the

\textsuperscript{46} 359 P.2d 413 (Or. 1961).
\textsuperscript{47} 722 S.W.2d 581 (Ark. 1987).
\textsuperscript{48} 470 So. 2d 1018 (La. Ct. App. 1985).
\textsuperscript{50} 780 P.2d 272 (Wash. Ct. App. 1989).
\textsuperscript{51} 363 S.E.2d 746 (W. Va. 1987).
\textsuperscript{52} See also Atlantic City Convention Center Authority v. South Jersey Publishing Co., 637 A.2d 1261 (N.J. 1994), which held that such tapes were public records under the common law. Two cases held that field record cards produced during the process of property tax appraisal and on which notes about individual properties were entered were not public records: Dunn v. Board of Assessors, 282 N.E.2d 385 (Mass. 1972), and Kottschade v. Lundberg, 160 N.W.2d 135 (Minn. 1968). In both cases, however, the courts were interpreting a statutory definition of public record much narrower than North Carolina’s.
\textsuperscript{53} 302 So. 2d 174 (Fla. Dist. Ct. App. 1974).
negotiations. In *Bartels v. Rousell*, the Louisiana Court of Appeals held that departmental budget requests in the mayor’s office were public at that time, and public access did not have to await adoption of the parish’s annual budget. And in *Conover v. Board of Education*, the Utah Supreme Court held that a board’s minutes were public records from the time the clerk finished preparing them, and public access need not await approval by the board itself.

**Internal Communications**
The federal Freedom of Information Act (FOIA) exempts from public access communications within and among federal agencies. In the absence of such an express statutory provision, however, there is no ground for arguing that intraoffice and interoffice communications are anything but public records in North Carolina. What small amount of case law there is in other states regarding such communications consistently holds that they are public records.

**Personal E-Mail, Personal Notes, and Other Personal Material**
A number of cases throughout the country have held that a variety of materials, even though kept or found in government offices or stored on government equipment, are not public records because they involve the private affairs of officials or employees rather than government or agency business. The *Salt River* case, discussed above in the context of the meaning of the word “received” in the definition of public records, is an example of this line of cases; it involved a private document that appeared to have been left inadvertently in a governmental office. The two most common sorts of records illustrating this principle, however, are personal e-mail and personal notes.

**Personal E-Mail**
A number of cases have held that personal e-mail messages on the government-owned computer of a government employee are not public records, despite their location. The Ohio case of *State ex rel. Wilson-Simmons v. Lake County Sheriff’s Department* is a good example of this group of cases. The petitioner in that case was a corrections officer with the sheriff’s department who had allegedly been the victim of racist e-mails sent by other departmental employees. She sued for copies of the e-mails under the Ohio public records statute. The Ohio Supreme Court rejected her suit, holding that the e-mails were not public records because they had nothing to do with the operation of the sheriff’s department.

---

55. 267 P.2d 768 (Utah 1954).
56. See also *State ex rel. Halloran v. McGrath*, 67 P.2d 838 (Mont. 1937), in which the court held that referendum petitions were public in the hands of the county clerk and that a citizen did not have to wait until the clerk had certified the signatures and sent the petitions on to the secretary of state to gain access to the petitions.
58. 693 N.E.2d 789 (Ohio 1998).
The court wrote that “although the alleged racist e-mail was created by public employees via a public office’s e-mail system, it was never used to conduct the business of the public office and [therefore] did not constitute records” subject to the public records law.\(^{59}\) A comparable case is *Griffis v. Pinal County*,\(^{60}\) which began when a newspaper sought all the e-mail messages to and from the county manager over a specific period of time. Originally the county and the manager agreed that many of the e-mails were personal in nature, but once the newspaper threatened suit, the county was prepared to turn over even the personal e-mails. The manager thereupon brought suit to enjoin the release, and eventually the Arizona Supreme Court held that personal e-mail messages, even on a government-owned computer, were not subject to the public records law. In supporting its conclusion, the court wrote:

> To hold otherwise would create an absurd result: Every note made on government-owned paper, located in a government office, written with a government-owned pen, or composed on a government-owned computer would presumably be a public record. Under that analysis, a grocery list written by a government employee while at work, a communication to schedule a family dinner, or a child’s report card stored in a desk drawer in a government employee’s office would be subject to disclosure. The public records law was never intended to encompass such documents; the purpose of the law is to open government activity to public scrutiny, not to disclose information about private citizens.\(^{61}\)

The outcome in these two cases and other, comparable cases conforms with the guidelines of the North Carolina Department of Cultural Resources, which is charged by statute with the responsibility for supervising public records practices by state and local governments. The department’s guidelines for retaining and disposing of e-mail note that “[p]ersonal e-mail is not a public record.”\(^{62}\)

If personal records do not become public records simply because they are found in a governmental office or on a government-owned computer, it logically follows that material that is otherwise a public record because of its substance does not lose that status simply because it is found in a private home or office or on a privately owned computer. It is not location but rather content that is dispositive. Thus, for example, official e-mail sent or

\(^{59}\) *Id.* at 793.

*See also* Denver Publ’g Co. v. Bd. of County Comm’rs, 121 P.3d 190 (Colo. 2005) (romantic e-mails between public employees on government-owned computer not public records); State v. City of Clearwater, 865 So. 2d 149 (Fla. 2003) (private e-mail on government-owned computer not public record). *Contra* Capital Newspapers v. Whalen, 505 N.E.2d 932 (N.Y. 1987) (personal and party documents found in public official’s office after his death are public records because found in public office). *See* Cowles Publ’g Co. v. Kootenai County Bd. of County Comm’rs, 159 P.3d 896 (Idaho 2007) (court held that personal e-mails between two county employees were public records because it had become a public issue as to whether one of the employees defended the performance of the other on merit or because of their relationship; in other circumstances, such e-mails might not be public records).

\(^{60}\) 156 P.3d 418 (Ariz. 2007).

\(^{61}\) *Id.* at 421 (emphasis in original).

received by a county manager would be a public record even if sent to a computer owned by the manager and kept at his or her home.\(^6\)

**Personal Notes**

One category of documents that has frequently, though not always, been held not to be public record is rough notes written and kept by a public employee or officer—notes made at an interview with a prospective employee or during a telephone call, notes made at a meeting and retained to help the note taker recollect what happened there, notes jotted down by a police officer investigating a crime or by an assessor appraising a lot, notes made in preparation for a presentation, or notes made by the clerk or secretary of a board and used to prepare the formal minutes. An illustrative case is *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*,\(^6\) in which the Florida Supreme Court held that the rough notes made at interviews of prospective public employees were not public records. Interpreting a statutory definition of public records almost identical to North Carolina’s, the Florida court stated that records were only those materials “intended to perpetuate, communicate, or formalize knowledge of some type,” and that rough notes did not meet that standard.\(^6\) Rough notes, in effect, were not records.\(^6\) Similarly, in *Conover v. Board of Education*,\(^6\) the Utah Supreme Court held that notes made by the clerk made at a board of education at board meetings, to be used to prepare the board’s minutes, were not public records. To hold otherwise would, in the court’s phrase, “deify doodling.”\(^6\)

---

\(^6\) See *Media General Operation, Inc. v. Feeney*, 849 So. 2d 3 (Fla. Dist. Ct. App. 2003), which involved records of telephone conversations by public officials involving public business but on private telephones. The court ordered that the records be produced; but because the private provider of the phones voluntarily produced the records the court did not reach the issue of whether it was required to do so.

\(^6\) 379 So. 2d 633 (Fla. 1980).

\(^6\) Id. at 640.

\(^6\) In *Coleman v. Austin*, 521 So. 2d 247 (Fla. Dist. Ct. App. 1988), the court held that preliminary notes written by a state’s attorney, to himself and for his personal use, were not public records.

\(^6\) 267 P.2d 768 (Utah 1954).

\(^6\) Id. at 770. An appellate court in New Jersey reached the same conclusion about the clerk’s handwritten notes, taken to help prepare minutes. O’Shea v. West Milford Bd. of Educ., 918 A.2d 1291 (N.J. Super. Ct. App. Div. 2007), *certif. denied*, 927 A.2d 1291 (N.J. 2007). In supporting its conclusion, the court wrote:

*We reject O’Shea’s contention that the Secretary’s handwritten notes, jotted down as a memory aid to assist in preparing the formal minutes, are a public record merely because they were “made” by a government official. Under that rationale any Board member’s personal handwritten notes, taken during a meeting to assist the member to recall what occurred, would be a public record because the member might arguably refer to them later in reviewing the Secretary’s draft of the formal minutes. Taken further, every yellow-sticky note penned by a government official to help him or her remember a work-related task would be a public record. Such absurd results were not contemplated or required by OPRA.*

*Id.* at 738.

The Ohio courts have also held that rough notes and other personal papers are not public records. *State ex rel. Cranford v. Cleveland*, 814 N.E.2d 1218 (Ohio 2004) (handwritten notes of city department head, made during hearing before civil service commission); *State ex rel. Steffen v. Kraft*, 619 N.E.2d 688 (Ohio 1993) (trial judge’s handwritten notes, made during trial); *UAW v. Voinovich*, 654 N.E.2d 139 (Ohio 1995) (governor’s personal calendar and appointment books). In *Wick Communications Co. v. Montrose County Board of County Commissioners*, 81 P.3d 360 (Colo. 2003), the court held that a county manager’s personal diary was not a public record. See also *Asbury Park Press, Inc. v. State*, 558 A.2d 1363 (N.J. Super. Ct. App. Div. 1989), in which the court analogized a spreadsheet used to help prepare a presentation to rough notes.
The federal courts have taken a similar position in interpreting the federal Freedom of Information Act. In *Sibille v. Federal Reserve Bank of New York*, the plaintiff sought handwritten notes of meetings and telephone calls. The notes were made for the use of the employee making them and were never used by other employees. In these circumstances the court held that the notes were not agency records and therefore not subject to FOIA. The court stated that in determining the status of other handwritten notes, one should look at the purpose for which the notes were made, whether they were circulated to others, and whether they were stored in a way that was conducive to use by others. Other federal courts reached the same result in *Porter County Chapter, Izaak Walton League of America, Inc. v. United States Atomic Energy Commission* and in *British Airports Authority v. Civil Aeronautics Board*.71

Not all courts agree with this characterization of rough notes, however. In *Fox v. Estep*, the Idaho Supreme Court refused to hold, as a matter of law, that the notes of a clerk, used to help prepare minutes, were not a public record. The court argued that because the notes were taken in order to allow the clerk to fulfill her statutory duty of preparing minutes, they could not be characterized as personal. In *People v. Pearson*, the California appellate court held that notes prepared by a police officer to assist in testifying in cases were a public record for purposes of a criminal statute that prohibited removing public records from public offices.74 In *Oregon School Employees Association v. Lake County School District*, a school principal had kept notes on the performance of two employees for several months, which he retained in a “problem file” in his office. Eventually the school district discharged the two employees, using material in the notes as partial support for the personnel action. Under the school district’s collective bargaining agreement the union was granted access to personnel records, and the union brought suit to inspect the notes in question. The Oregon court held that because the notes were used in evaluating the employees they were therefore

---

70. 380 F. Supp. 650 (N.D. Ind. 1974).
71. 531 F. Supp. 408 (D. D.C. 1982). In *Bureau of National Affairs, Inc. v. United States Department of Justice*, 742 F.2d 1484 (D.C. Cir. 1984), the court held that the appointment calendars of agency officials and telephone message slips given to an agency official were not agency records and therefore were not subject to FOIA. The court emphasized that both the calendars and the message slips were created for the convenience of the officials in question and were not generally distributed to others within the agency. By contrast, the same court later held that certain electronic calendars that were used by other persons to schedule meetings were agency records and therefore subject to FOIA. Consumer Fed’n of Am. v. Dep’t of Agric., 455 F.3d 283 (D.C. Cir. 2006).
74. In North Carolina the same General Statutes chapter that governs access to public records prohibits unlawful removal of such records from public offices, and the same definition of public record applies in both contexts. See G.S. 132-3.
75. 726 P.2d 955 (Or. Ct. App. 1986).
personnel records subject to the agreement. Because these handwritten notes were used to inform official action, they differed from the notes at issue in the other cases discussed in this section.

In summary, there is significant support in decisions from other jurisdictions, including some with statutory language quite similar to North Carolina’s, for concluding that rough personal notes are not public records for purposes of G.S. Chapter 132, even though an employee prepared them to assist in his or her work. There is also case law support, however, for a contrary position, although probably a minority of cases. To the extent that personal notes are placed in a common file and used by others or are the basis for official action, these contrary cases are more likely to predict the outcome in North Carolina.76

Correspondence and Other Material Held by or about Elected Officials

Local elected officials send and receive a variety of communications—to or from constituents, local government staff, other elected officials, state or national organizations, and so on. Sometimes they receive or send these communications through the facilities of the local government; at other times they do so at or from their homes or private offices. Increasingly, these kinds of communications are made by electronic mail and may be routed through the local government’s server or stored on a computer provided by the local government. In addition, elected officials also sometimes generate materials in the process of preparing proposals for the boards on which they serve. This section discusses which of these communications and materials are public records. It should be noted that the North Carolina public records statute does not address these issues directly, nor have the state’s appellate courts considered them. Indeed, there is almost no case law on these issues from any U.S. jurisdiction. As a result, the following discussion is inevitably somewhat speculative.

As a way of framing the discussion, it is important to recall the lesson set out in the section just above: material that is personal in nature does not become a public record simply because it is found in a public facility or on a government-owned computer, but material that involves public business does not lose its public record status simply because it is found in a private facility or on a privately owned computer. Clearly, at least some of the communications to or from an elected official or some of the materials prepared by an elected official are personal in nature and therefore not public records. The difficulty lies in determining where to place the line between public and personal records. The following paragraphs delineate a variety of communications or other materials and offer my suggestions on whether they are public records.

76. Some of the personnel privacy statutes (e.g., G.S. 153A-98 and 160A-168) contain a specific provision concerning notes. These provisions state that even if part of a personnel file, “notes” are not open to inspection even by the employee, unless they are the basis of a personnel action. G.S. 153A-98(c1)(4); G.S. 160A-168(c1)(4). This language might be understood to imply that in its absence such notes are public record, but it might also be understood as nothing more than a clarification; that is, that notes used as a basis for a personnel action are part of the personnel file and, like almost all else in the file, are open to the employee.
Communications with Local Government Staff

E-mail and other communications between local government staff and an elected official are almost always public record. (An elected official could, of course, have a personal relationship with a staff member, and some of their communications could therefore be personal in nature, but that would be relatively unusual.) Presumably, communications in this category relate to local government business and therefore are public records for both the official and the staff member.

Communications with State or National Organizations

Some elected officials are active in state or national organizations representing local governments, such as the North Carolina Association of County Commissioners or the National League of Cities. Although they become involved in such organizations because of their elected positions, their activities within the organizations are personal to them and are not part of their official responsibilities. Therefore, any communications with or about these kinds of organizations and any materials associated with these organizations presumably are personal rather than public records.

Communications with Constituents

It is much more difficult to be categorical about this set of communications. At one end, many are clearly public in nature—a citizen may be seeking help with respect to a local government service, petitioning for some governing board action, and so on. Although probably not conclusive, the fact that such constituent communications are routed through a local government’s mailroom or through an e-mail address belonging to the local government strongly suggests that these are public rather than personal records. But messages to or from constituents can also be political in nature, particularly if the constituent is personally acquainted with the elected official or the communication is sent to the official’s home or private e-mail address. And if they are political, the messages are probably per-

---

77. The North Carolina attorney general’s office has advised the General Assembly that communications between a legislator and a member of the public on the issue of legislative redistricting appear to be public records. Although the opinion does not make this explicit, it appears that the communications in question were made through the General Assembly’s mail facility or its e-mail server. Letter to Terrence D. Sullivan, 14 February 2002, Advisory Opinion No. 529, available at www.ncdoj.gov/About-DOJ/Legal-Services/Legal-Opinions.aspx.

On the other hand, a superior court judge has ruled that constituent letters sent to a member of a board of county commissioners are not public records. Boney Publishers, Inc. v. Sharpe, No. 00 CVS 569 (N.C. Super. Ct., Alamance County, Mar. 20, 2000). The complaint and briefs in the case do not make clear whether the correspondence was received through the county’s facilities or at the commissioner’s home, and it may not have made any difference to the court. The decision was not appealed.

In State ex rel. Glasgow v. Jones, 894 N.E.2d 686 (Ohio 2008), a retired state employee sought copies of a state legislator’s e-mails to and from constituents about legislation that would have affected investments in the state’s pension fund. The Ohio court held that in general e-mail exchanges with a legislator’s constituents were public records. The legislator had conceded that such messages on her home computer were no different than those on the state’s computer system, but the court cautioned that because of the concession, “we need not address the issue whether an e-mail message sent from or to a private account can be a public record.” Id. at 691.
sonal to the officeholder. It might be necessary to judge each such message individually to
determine from its content whether it is public or personal.78

**Communications with Other Elected Officials**

Again, there may be distinctions among these messages based on such factors as the num-
ber of officials involved and whether they might be considered a caucus of the entire gov-
erning board. For example, if a city council member sends an e-mail message to each of
the other members of the council making a proposal about an upcoming agenda item,
the message is probably a public record. But if the communication is only between two
minority party members of a board of county commissioners, it might be more about the
fortunes of their party than about county business and therefore a personal rather than a
public record. Here again, categorical assertions are impossible.

**Materials Associated with a Proposal Still in the Planning or Draft Stage**

If an elected official is working with local government staff in preparing a proposal for
eventual presentation to the governing board, materials associated with that effort are
clearly public records. But if, instead, the elected official is working with a community
group or a set of political advisers, any materials associated with that effort are probably
personal in nature and therefore not public records. In this latter case, the materials might
be considered comparable to personal notes prepared by a public employee to assist in his
or her job; or they might be considered political in nature. Either way, they would not be
public records unless they were included in the official’s eventual presentation of the pro-
posal to the governing board.

**Elected Officials’ Telephone Numbers**

Sometimes elected officials will give their unlisted home telephone numbers or their private
cell phone numbers to the government to assist in reaching. Once the government has this
information, there is no exception that keeps it from being a public record.79

**Computer Programs**

Government agencies sometimes develop computer software programs that might be use-
ful to other governments or might have commercial value. Is the source coding for such
a program subject to the public records law, or may the government agency that devel-
oped the software retain control over its distribution and use? A relatively recent federal
decision and an opinion from the North Carolina Attorney General both held that such

---

78. In *Tribune-Review Publishing Co. v. Bodack*, 961 A.2d 110 (Pa. 2008), the newspaper sought the
cell phone records of council member cell phones paid for by the city. The court held that the bills were
presumptively open to the public but then held that the phone numbers of persons called by or calling the
council members should be redacted before the bills were open to public access. The court relied, however,
on specific provisions of the Pennsylvania statute that favored private security and privacy interests and
cited the privacy of individuals who might have called or been called by the council members. There are no
comparable provisions in the North Carolina statute, so the case is not particularly relevant to this state.

79. In this respect, information about elected officials is different than information about employees. The
same information from a public employee is probably part of that person’s personnel file and therefore not
open to the public. See chapter 7.
software is not subject to access under public records statutes. In *Gilmore v. U.S. Department of Energy*, a citizen invoked the federal Freedom of Information Act to seek a copy of software held by the department. The software had been developed by a private company that operated a federally owned research laboratory, and the copyright was nominally in the company’s name. The court held, however, that even if the software were owned and controlled by the federal government, it would not be an agency record because it did not “illuminate the structure, operation, or decision-making structure” of the federal agency.

Similarly, in a 1998 advisory opinion involving software developed by the state Division of Motor Vehicles, the attorney general’s office argued that the North Carolina public records law distinguishes between, on the one hand, software and computer systems and, on the other, the records generated by those systems. The opinion concluded that software standing alone is not a public record.

**Records in Private Hands**

Local governments make frequent use of private contractors in carrying out their public responsibilities. They retain attorneys in private practice, engage consultants to assist in studying public operations, hire firms to manage public property, and so on. When, if ever, are records held by these private contractors subject to the public records law and therefore open to public inspection? Although these questions have not been extensively litigated in North Carolina, courts in other states have decided a significant number of cases, and two consistent principles emerge from those cases.

First, and perhaps most importantly, if the arrangements between the local government and the private contractor provide that the records developed during the contract work belong to the local government, or if they provide that the local government has essentially complete access to the records, or if a court finds that the government in effect owns the records, then the courts have uniformly determined that the records in question are public records and therefore open to public access. Two cases illustrate these principles. In *Pathmanathan v. St. Cloud State University*, the plaintiff was appointed to an administrative position with the university, subject to a background investigation. The university employed a private investigator to conduct the background check, and as a result of the investigation the university revoked the appointment. The plaintiff then sought access to all the documents collected by the investigator, including tape recordings and field notes. Although these documents were held by the investigator, his contract with the university gave the university ownership of all the materials he collected. On that basis the court held

---

80. 4 F. Supp. 2d 912 (N.D. Cal. 1998).
81. Id. at 920.
83. Rogers v. Hood, 906 So. 2d 1220 (Fla. Dist. Ct. App. 2005), is perhaps comparable. The plaintiffs wanted to take possession of unused ballots from the 2000 presidential election, but the court held that they were no more than boxes of blank paper held in a public office and did not become public records until used. The same logic would extend to stationery.
84. 461 N.W.2d 726 (Minn. Ct. App. 1990).
that the records were subject to the state's public records law. And in Daily Gazette Co. v. Withrow, the plaintiff newspaper sought a copy of a settlement of a Section 1983 lawsuit between a former sheriff’s deputy and the county. The county’s retained attorney held possession of the settlement, but the court found that fact irrelevant. It held that the settlement was a public record, which the county could reclaim from the attorney at any time, and that the county could not avoid its obligations to permit access simply by moving possession of the record to a private actor.

85. Accord State ex rel. Cincinnati Enquirer v. Krings, 758 N.E.2d 1135 (Ohio 2001) (construction records in hands of private project manager under contract with county were public records because county had full access to the records); State ex rel. Medina County Gazette v. City of Brunswick, 672 N.E.2d 1070 (Ohio Ct. App. 1996) (city council employed private consultant to help evaluate manager, and as part of the process the consultant collected questionnaires from each council member in which the members gave individual evaluations; because questionnaires were prepared for city to carry out public responsibility and because city had full access to the questionnaires, they were public records); Baytown Sun v. City of Mont Belvieu, 145 S.W.3d 268 (Tex. App. 2004) (contract under which private company manages city recreation complex gave city right to inspect books and records of the complex; therefore those books and records were public records).

By contrast, the American Institute of Architects’ model contract between owner and architect provides that all drawings and specifications remain the property of the architect and gives the owner only a limited right to copies. The American Institute of Architects, AIA Document B101-2007, Standard Form of Agreement Between Owner and Architect, in The Architect’s Handbook of Professional Practice app. D at 973, art. 7 (Joseph A. Demkin, executive ed. 14th ed. 2008). “The Architect and the Architect’s consultants shall be deemed the authors and owners of their respective Instruments of Service, including the Drawings and Specifications, and shall retain all common law, statutory and other reserved rights, including copyrights. Submission or distribution of Instruments of Service to meet official regulatory requirements or for similar purposes in connection with the Project is not to be construed as publication in derogation of the reserved rights of the Architect and the Architect’s consultants.” Id. § 7.2. “[T]he Architect grants to the Owner a nonexclusive license to use the Architect’s Instruments of Service solely and exclusively for purposes of constructing, using, maintaining, altering and adding to the Project . . . . The license granted under this section permits the Owner to authorize the Contractor . . . to reproduce applicable portions of the Instruments of Service solely and exclusively for use in performing services or construction for the Project.” Id. § 7.3. This language may limit public records access to the drawings and specifications.

See also the rules on professional ethics and conduct adopted by the North Carolina Board of Certified Public Accountant Examiners, which make clear that client records belong to the client. 21 N.C. Admin. Code § 8N .0305 (2008).

The federal position may be somewhat different. In Forsham v. Harris, 445 U.S. 169 (1980), the U.S. Supreme Court held that records generated by a federal grantee as part of its grant-supported work were not “agency records” with the Freedom of Information Act, even though the granting agency did have a right of access to the records and a contractual right (which had not been exercised) to acquire the records in its sole discretion. Perhaps this case can be distinguished because the records were those of a grantee studying a matter that the government thought worthwhile, as opposed to a contractor studying actual government operations.

86. 350 S.E.2d 738 (W. Va. 1986).

87. In Journal/Sentinel, Inc. v. School Board, 521 N.W.2d 165 (Wis. Ct. App. 1994), which involved a copy of a memorandum of settlement of a lawsuit that was in the possession of the school board’s law firm, the court stated: “The school board appellants’ argument thus resolves to whether a public body may avoid the public access mandated by the public-records law by delegating both the record’s creation and custody to an agent. Posing this question provides its answer: it may not.” Id. at 170. Other cases reaching similar conclusions include International Brotherhood of Electrical Workers Local 68 v. Denver Metropolitan Major League Baseball Stadium District, 880 P.2d 160 (Colo. App. 1994) (prequalification documents and a bid proposal from an electrical subcontractor, in hands of general contractor, held to be public records because district had full access to the documents and used them in deciding whether to approve the subcontractor);
Local Government Attorneys

A specific application of this first principle has been established by the court of appeals for attorneys who represent local governments and their agencies. In *Womack Newspapers, Inc. v. Town of Kitty Hawk*, the newspaper sought a variety of records associated with oceanfront condemnations undertaken by the town; these included records related to engineering, surveying, and other professional services rendered in connection with the condemnation litigation. The town argued that these were not public records because they were in the possession of the town’s attorney, a law firm engaged in private practice, and therefore were not subject to the public records law. The court rejected the argument, setting out three alternative rationales for its decision.

First, the court reiterated earlier holdings that a city attorney is a public officer, because the position is created by statute. (G.S. 160A-173 provides that the city council “shall appoint a city attorney to serve at its pleasure and to be its legal adviser.”) Because the public records law extends to records in the possession of any public officer, these records were therefore public records. This specific rationale would reach records held in the private law offices of persons or firms designated as city or county attorneys, but attorneys who represent school boards and other local government entities are not mentioned by statute and therefore do not appear to be public officers. Therefore, this first rationale would not reach these other attorneys.

Second, the court looked to the rules of professional conduct applicable to an attorney’s files, which the court summarized by saying that “[i]n North Carolina, anything in a client’s file, which is in the hands of the client’s attorney, belongs to the client, with the exception only of the attorney’s notes or work product.” Therefore, the court went on, the client

---

89. G.S. 153A-114 provides that the “board of commissioners shall appoint a county attorney to serve at its pleasure and to be its legal adviser.”
90. 181 N.C. App. at 13, 639 S.E.2d at 104. The court mentions that the attorney’s notes and work product do not belong to the client and therefore are not public records. The same would presumably apply to an attorney’s trust account records, which also do not belong to the client.
town, not the law firm town attorney, owned the contested documents. Obviously, this rationale reaches beyond city and county attorneys to reach any attorney who represents a local government entity in a specific transaction or specific litigation.\footnote{A number of cases in other states have dealt with records held by an attorney retained by an insurance company to handle matters pursuant to an insurance policy issued to a local government. By and large the cases held that the attorney is, as a practical matter, representing the insured (the local government) and not the insurer (the insurance company), even though he or she was actually retained by the company. Therefore, the records have been held to belong to the government insured and to be public records. \textit{E.g.}, Knightstown Banner, LLC v. Town of Knightstown, 838 N.E.2d 1127 (Ind. Ct. App. 2005), \textit{transfer denied}, 860 N.E.2d 585 (Ind. 2006); Tribune-Review Publ’g Co. v. Westmoreland County Hous. Auth., 833 A.2d 112 (2003). In the latter case the insurance company retained complete control of the defense of an action and did not communicate with the insured, and the settlement documents were retained by the insurance company; nevertheless the court held that the settlement documents were public records.}

Third, the court pointed out the policy implications of a contrary result:

Allowing defendants to prevail on their argument that these documents were the private property of the Town Attorney, and not property of the Town itself, would be permitting the Town to place documents such as these in the hands of a so-called independent contractor in order to escape the public records disclosure requirements. If an argument such as this were to prevail there would be nothing to prevent municipalities and other governmental agencies from skirting the public records disclosure requirements simply by hiring independent contractors to perform governmental tasks and to have them retain all documents in conjunction with the performance of those tasks that municipalities and agencies chose to shield from public scrutiny.\footnote{181 N.C. App. at 14, 639 S.E.2d at 105.}

This third rationale might easily be extended beyond attorneys to other professionals performing work for local governments; how far it can be extended may have to await future litigation, but the general principle set out at the beginning of this section is probably relevant.

The second principle that emerges from the national case law, in contrast to the first, is that if the conditions of ownership or access set out above do not apply, the private records of private contractors are generally not subject to the public records law. For example, in \textit{News \& Sun-Sentinel Co. v. Schwab, Twitty \& Hanser Architectural Group, Inc.},\footnote{596 So. 2d 1029 (Fla. 1992).} a school board employed an architectural firm to design a public school. The Florida Supreme Court held that the firm was not acting on behalf of the school system but rather was an independent actor. Its records were therefore not subject to the Florida public records law. A similar result was reached in \textit{State ex rel. Tindel v. Sharp},\footnote{300 So. 2d 750 (Fla. Dist. Ct. App. 1974).} which involved the files of a personnel consultant who had been employed to assist a school board in selecting a new superintendent of schools. The consultant had developed an extensive file of various professional educators through his work for other counties, and the court held that these files were not public records.\footnote{596 So. 2d 1029 (Fla. Dist. Ct. App. 1974).}
This second principle probably holds true even if the government has some ability to gain access to or have a copy made of these private records. For example, both the telephone company and a local government customer of the company will have records of each call made from phone numbers assigned to the local government. If the local government appropriately disposes of its copy, the telephone company will probably be willing to provide another copy, as it would to any customer—but the records in such a case are clearly those of the telephone company. Although the local government can receive records on request, if it has no need to do so it probably cannot be forced to seek the records simply because a citizen would like to review them.96 After all, the basic premise of the public records law is that public access rights attach to those records that the government has, because of its own needs, generated or collected. With one important exception, the law does not require the government to generate or collect records that the government has no independent need for simply because a citizen wishes to have access to those records.97

---

96. See, e.g., Affiliated Constr. Trades Found. v. Reg’l Jail & Corr. Facility Auth., 490 S.E.2d 708 (W. Va. 1997) (although authority had right to receive payroll records from subcontractor on construction project, it had not done so, and the court held that a citizen could not demand that it do so); Forsham v. Harris, 445 U.S. 169 (1980) (The federal “FOIA applies to records which have been in fact obtained, and not to records which merely could have been obtained.” id. at 186 (emphasis in original.).) In Kissinger v. Reporters Committee for Freedom of the Press, 445 U.S. 136 (1980), the committee sought records that Kissinger had generated as secretary of state and, toward the end of his term, had deeded to the Library of Congress as his private papers. (The library is not subject to the federal FOIA.) One argument the committee made was that the State Department was obliged to demand the return of the papers from the library. The Court rejected the argument, writing:

If the agency is not required to create or to retain records under the FOIA, it is somewhat difficult to determine why the agency is nevertheless required to retrieve documents which have escaped its possession, but which it has not endeavored to recover. If the document is of so little interest to the agency that it does not believe the retrieval effort to be justified, the effect of this judgment on an FOIA request seems little different from the effect of an agency determination that a record should never be created, or should be discarded.

Id. at 152–53.

The Idaho Supreme Court took a different position, however. In Idaho Conservation League v. Idaho State Department of Agriculture, 146 P.3d 632 (Idaho 2006), the league sought certain plans that cattle feedlot operators were required to submit to the department for approval; once the plans were approved they were returned to the feedlot operators, although the plans were to be available to the department upon its request. On that set of facts the court held that the plans were public records and that the department was required to retrieve them from the operators and provide them to the league.

97. The exception involves indexes of computer databases, discussed in chapter 5.
Appendix 1A—Statutes

G.S. 121-2(8)
§ 121-2. Definitions.
For the purposes of this Article:

(8) “Public record” or “public records” shall mean 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 or in connection with the transaction of official business by any agency.

G.S. 132-1
§ 132-1. “Public records” defined.
(a) “Public record” or “public records” shall mean 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.

(b) The public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people. Therefore, it is the policy of this State that the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law. As used herein, “minimal cost” shall mean the actual cost of reproducing the public record or public information.