

ONLY THE APPEARANCE OF ACCOUNTABILITY
THE NEED FOR A RETURN TO FIRST PRINCIPLES IN PUBLIC RECORDS LAW

By
Emily E. Roscoe

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Executive Summary

Under current law records made in the transaction of public business are considered public and subject to inspection. Yet, this aspiration of an open and accountable government through public records law is just that – an aspiration instead of a realization. Public content is being created at an exponential rate and policies that guide the management of public records are confusing to say the least. Current laws, assumptions about storage capacity, and fears of being perceived as trying to avoid accountability are strong incentives for public officials to err on the side of keeping records indefinitely. The mass of records expands and findability decreases. Meanwhile, the public’s assurance of meaningful knowledge about its government’s decision-making diminishes. This paper calls for a return to original principles of records and public records law so the system of accountability can be truly effective.

The retention and management of public records is not a new topic. Government offices in North Carolina have long been subject to statutory obligations to maintain and produce documents and information created and involved in the transaction of public business.¹ However, with advancements in technology, both paper documents converted into electronic form and “born-digital” records are becoming more common, and this growth in digitization has subsequently affected the maintenance of public records. Most obviously, more records are being created than ever before as a result of faster and easier communication and documentation. In addition, technological advances allow for more diversity in how records are created. These transformational changes in record creation practices raise important questions. With so many records being created and maintained, is access being diluted? I have conducted a capstone study to discover if the current statutes, policies, and practices of public record-keeping are fulfilling their original intent in this technology-driven digital era.

In this capstone study I have addressed an issue of public law and applied my findings from a consideration of the policies related to public records and the academic field that guides the professional practices of public record-keeping and archives. My research has included the following:

- Survey distribution²: I administered and analyzed the results of a survey to the North Carolina Registers of Deeds (one per county totaling 100) to gather insight into the understanding of the requirements for public records management. Registers maintain essential primary records regarding property and life events and are likely to be among the most knowledgeable about record-keeping requirements and challenges. The survey was thirteen questions; registers were asked to report information about their records management practices and their understanding of the retention and disposition requirements set forth by the Department of Cultural Resources. The response rate for the survey was 56%.
- Literature review: I researched the law of public records. I also researched the history of public records to determine the original purpose of public information retention and maintenance as well as to understand the principle concerns related to electronic records and technology. In my literature review within the academic and professional fields of public record-keeping and the related law, I took note of trends and concerns regarding the growth and diversity in public records production.
- Other data collection: I looked at data regarding the increase in real estate documents in register of deeds offices in North Carolina. I also noted data from the North Carolina state government website archive to learn more about the record-keeping practices for the web records of executive branch agencies. This archive is managed by the Department of Cultural Resources, which is an agency likely to be familiar with the most advanced trends in electronic record-keeping.

The survey given to the registers of deeds shows there is discrepancy in the understanding of the retention and disposition requirements for public records. There is divergent comprehension in the definition of “historical value” as well as the criteria that forms the base of public records requirements (i.e. incorrect assumption that retention obligations depend on form rather than content). In several instances, most respondents had an incorrect understanding of the requirements.

I found these results unsurprising as I believe many would find the retention and disposition schedules ominous and difficult to decipher and apply. The schedule that applies to registers of deeds is 62 pages in length. The schedule for county managers’ offices is 162 pages. Furthermore a set of records can arguably

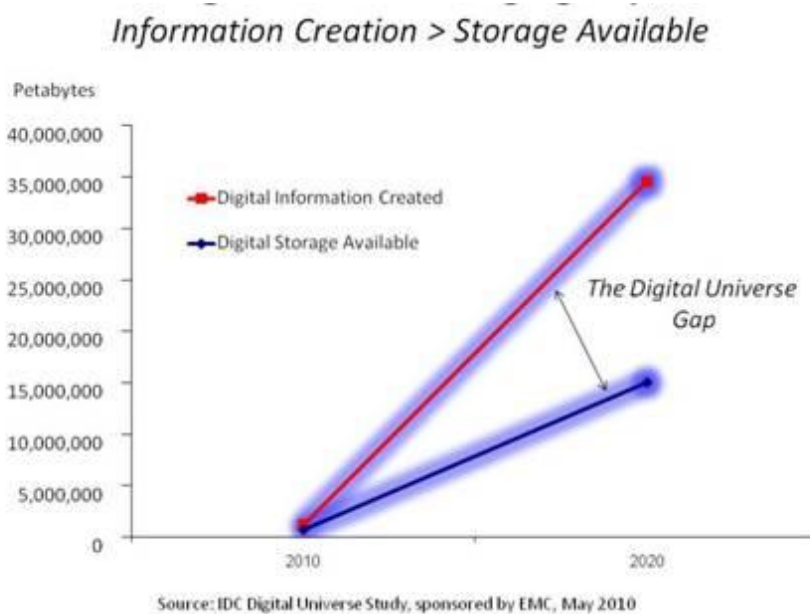
¹ Under North Carolina law, G.S. § 132-1, all documents and other records, “regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business,” are “public records” and “are the property of the people.”

² Survey included as Appendix A

fit into a number of series descriptions and corresponding retention requirements, hence making the policies ambiguous and potentially subjectively applied.

Therefore, in order for registers to ensure their offices' compliance with the public records statute and retention policies (in terms of mandatory retention, not active disposition) they are likely to choose to retain everything permanently. In worries of not retaining something they should, they overcompensate and retain records "just in case." This practice is understandable from the perspective of threats of liability; there is perhaps a greater risk involved in the failure to retain something required to be retained as opposed to the failure to dispose of something directed to be disposed. Additionally, by retaining records officials avoid the potential of negative publicity from questions about why records do not exist if they become the subject of public inquiry, as if the official prefers to keep as little information as possible.

In my extensive literature research I found a great deal of discussion around the issue of retention practices. People are not deleting documents and public records. Instead they routinely save them more than ever. Deleting takes time, and it is actually easier to keep electronic files by default than to actively remove them from one's machine. Just as public officials often keep everything to ensure legal compliance with retention periods, individuals also refrain from deleting electronic files in the chance of an unforeseen need for them in the future. Probably the most documented reason for saving a large amount of, if not all, files is the perceived decrease in associated costs. There has been – and continues to be – exponential growth in storage capacity. According to the Law of Mass Storage that describes historic increases in digital storage capacity, capacity has doubled, per unit cost, each year, and this rate still applies.³ Public officials therefore may assume there is no reason to worry about being able to retain everything. However, this is far from the truth. Content is actually being created more rapidly than storage capacity. The graph below shows this critical trend in records management:



Just one fact shows the enormity of the challenge: The Radicati Group estimated that by 2013 email users will produce 507 billion emails per day.⁴ And according to the predictions shown in the above graph, the

³ Laudon, K.C. (2011). IT infrastructure: Hardware and Software, Technology drivers of IT infrastructure evolution. In *Essentials of management information systems*. Upper Saddle River, NJ: Prentice Hall, 2-5.

⁴ Radicati Group. (2009). Executive summary. In *Email statistics report, 2009-2013*. Palo Alto, CA: Author.

number will continue to grow. This growing mass is mind-boggling and is further complicated as new kinds of records are introduced (e.g. various web records). A look into register of deeds offices shows primary records⁵ alone are increasing as a result of standard population increases.

Thus, the long-run cost of maintaining such a large body of records becomes a public concern. In North Carolina state government, the cost for maintaining all emails of state employees for ten years is currently \$2.50 per email address per month. With approximately 50,000 email addresses in the executive branch at this time, the total dollar amount for this record-keeping requirement will equal \$1.5 million per year or \$15 million over the entire retention period.⁶ These costs are a serious public issue especially in an environment of shrinking government revenues, including in local governments with scarce financial resources.

So, even though it may seem cheaper to save records and likely is in the short-term, it is not cheaper to manage them. And the complexity of retention and disposition policies makes management difficult and downright arduous. As archival scholar David Wallace points out, “I think we need to admit that we really do not know what the best means for managing the volume and diversity of electronic records currently being created across society is.”⁷

T.R. Schellenberg addressed the volume growth in his profound 1956 work, *Modern Archives*. He wrote:

“A reduction in the quantity of such public records is essential to both the government and the scholar. A government cannot afford to keep all the records that are produced as a result of its multifarious activities. It cannot provide space to house them or staff to care for them. The costs of maintaining them are beyond the means of the most opulent nation. Nor are scholars served by maintaining all of them. Scholars cannot find their way through the huge quantities of modern public records.”⁸

Although espoused over fifty years ago, Schellenberg’s claims are worryingly pertinent to the records explosion of the technology age.

The ultimate question, then, is: How should one better manage public records so that their volume is controllable and essential records are not buried underneath ineffectual records? Instead of adding minor refinements to public record policies that were first established in a fundamentally different record-keeping environment, scholars, government leaders, and records managers should look to the original intent of the creation and retention of public records and the respective laws to inform their decisions.

History and original intent

Whenever a system of rules is examined based on first principles it is important to consider both those principles and how the current system evolved. Space allows only a few salient but essential observations. There are two areas to consider with regards to the history and original intent of records in government – the history of records in general and of public records statutes. Records were first appreciated because they eliminated the reliance on imperfect human memory. Government leaders maintained records during the European Renaissance to ensure central authority and maintain an organized society. Record-keeping became part of the development of the rule of law in representative government as the French Revolution

⁵ These records include documents integral in land transfers, financial transactions, and personal identity verification.

⁶ Center for Government Technology, SOG

⁷ Wallace, D.A. (2002, February). *Custodial theory and practice in the electronic environment*. Paper presented at South African Society of Archivists Electronic Records Workshop, Pretoria, South Africa. SASA newsletter, 11.

⁸ Schellenberg, T.R. (1956). The appraisal of modern public records. *National Archives Bulletin: National Archives and Records Service* (No. 8). Washington, DC: U.S. Government Printing Office, 237.

brought a commitment to protections of citizens' rights and freedoms. "Democratic" archives emerged to provide documentary evidence that enabled citizens to force public officials to answer for their actions, and easy access to information served as a counterbalance to privilege and power. Archival scholar Randall Jimerson argues that colonial Americans shared this opinion of the importance of public records retention, and considered public documents as the objective truth, facts.⁹ American record-keeping intensified during industrialization as business processes were strengthened by the maintaining of records that provided institutional memory and a more efficient means of communication.¹⁰

Public records also were key to the emergence of the modern regulatory state. They were first addressed as a statutory requirement in U.S. law in the Administrative Procedure Act (APA) of 1946 (and later with the Freedom of Information Act, FOIA, of 1966). The original intent of the APA, of which FOIA was originally a part, was to cause government bodies to share information about their decisions and rule-making – to actively document and, subsequently, justify their actions.

T.R. Schellenberg indirectly speaks to the original intent of public records by making the distinction between evidential and informational value in records. An evidential record emerges *from* an event and stands as proof of its occurrence and details of such. A record holding informational value may offer interesting and even useful data for future, secondary use; however it cannot stand alone as proof.¹¹ The APA's prompting of agencies to document their actions and reasons for decisions relies on records as evidence, not merely interesting information. Since legal compliance is a driving consideration in records management it is clear that evidential value is typically considered more valuable.

Discussion and recommendations

Research shows that public records requirements are complex and commonly not understood, especially in the digital age where electronic records are more common than ever. So as compensation for the lack of understanding of the specific policies public officials often retain everything indefinitely. Yet the perception of infinite storage capacity is misguided – content is growing at a faster rate than storage. Again, the digital era has added complexity to records management, seen very clearly in the creation and management issues of web records. For example, the Obama administration recently encouraged government to use social media, but this policy did not include meaningful consideration of the records management implications of an influx of new media records. Inconsistency in retention compliance is prevalent in the federal government; "a 2009 records management self-survey of agencies revealed that 79 percent of the agencies ranked themselves at medium to high risk of not complying with records management laws due to weaknesses in their programs, especially related to electronic records management and e-mail."¹² Furthermore as the volume of records builds, the ability to find a specific record diminishes. In a 2005 GAO report, statistics show a rise in FOIA requests (71% increase in two years) as well as a rise in government backlogs for responses.¹³ If the public has no reasonable expectations of findability for potential wrong-doing, how is the government truly being held accountable?

⁹ Jimerson, R.C. (2009) Documenting American Society. In *Archives Power: Memory, Accountability, and Social Justice*. Chicago, IL: Society of American Archivists, 79-83.

¹⁰ Yates, J. (1989). *Control through communication: The rise of system in American management*. Baltimore: Johns Hopkins University Press, 1-100.

¹¹ Schellenberg, T.R. (1956). The appraisal of modern public records. *National Archives Bulletin: National Archives and Records Service* (No. 8). Washington, DC: U.S. Government Printing Office, 239-254.

¹² Franks, P. (2010) *How federal agencies can effectively manage records created using new social media tools*. Washington, DC: IBM Center for the Business of Government, 6.

¹³ United States General Accounting Office. (2010). *Information management: The challenges of managing electronic records*. (Publication No. GAO-10-838T). Washington, DC: U.S. Government Printing Office, 13-22.

These factors drive the need for a return to first principles. Contrary to what may be assumed, the public has no constitutional, legal, or practical assurance that it will have the most meaningful information. Record-keeping requirements emerged to make government participatory and, as noted above, the modern public records laws started this way with the APA. The law compelled government to essentially prove their actions by creating records. The emphasis on open and validated rule-making was submerged with the Watergate scandal, and the current system assumes the goal of record-keeping requirements is to expose wrongdoing by enabling “audits” of whatever records may have been kept. Except in administrative rule making procedures, personnel matters, and a few other isolated contexts, public officials are not usually *required* to document a decision. In this manner, the current system values passivity instead of actively documenting decisions and the rationale for such. As noted in the archival literature, “Although it is perhaps desirable that a government document itself, documentation of government activities is a matter of public policy as defined by law. The long political struggle to establish and support archival agencies at all governmental levels demonstrates that governments assume no inherent responsibility to document their actions.”¹⁴

To the extent that maintaining a trail of potential wrongdoing is an appropriate primary goal of public record-keeping requirements, policy makers cannot naively assume this goal can realistically be met. As stated earlier, this “caught-you” method relies on assumptions about record-keeping capacity and accessibility that can no longer be considered reliable. Furthermore, no one seriously argues that minor refinements to the current laws have curtailed a tide of imprudent or scandalous actions by government officials. And, to put it simply, if the rule is merely to keep what you create, the really good offenders can find ways to shirk the system. The system encourages officials to communicate “off-the-record” to avoid scrutiny, precisely contrary to the original purpose of illuminating the reasons for important decisions. And the “caught-you” system encourages citizens to make requests for agencies to produce records that may or may not exist – an endeavor like searching for a *potential* needle in a haystack. Perpetuation of this passive approach to government record-keeping, especially when records are outpacing storage and the practicality of expecting to find the relevant pin in the haystack, loses sight of the important foundational principle of public record-keeping obligations.

Marking the passive trail of records as “public” only fosters the current, flawed system of accountability. The long-term cost of public records retention has not been sufficiently balanced with evidentiary usefulness of the records. Government cannot keep operating within this current system of “openness;” there is a distinct need for the return to original principles in public records law to sufficiently address the modern explosion of content and simultaneously ensure genuine accountability in government. The original intent of records and public records statutes is based on true accountability. Authenticity in this context is associated with the truth-value of records as reflections of a determinate reality. Public records were intended to reflect facts and the fidelity of an event – “what really happened.”¹⁵

Social and cultural inertia are terms used in the sociology and psychology fields to describe the resistance to change as a result of habit. Decisions made in the past affect current decisions, and relying on the logic of past decisions makes it difficult to promote drastic change. The maintenance of the public records is vital to the efficiency and reliability of government functions, and it would be unwise to ignore the troubling facts and continue to operate under rules written solely for paper records. As such, I recommend legislators, records managers, and other public officials take a closer look at the effectiveness of public records law as compared with the fundamental principles.

¹⁴ Boles, F., & Young, J. M. (1985). Exploring the black box: the appraisal of university administrative records. *The American Archivist*, 48 (2), 123.

¹⁵ MacNeil, H., & Mak, B. (2007). Constructions of authenticity. *Library Trends*, 56 (1), 27.

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United States General Accounting Office. (2010). *Information management: The challenges of managing electronic records*. (Publication No. GAO-10-838T). Washington, DC: U.S. Government Printing Office.

Wallace, D.A. (2002, February). *Custodial theory and practice in the electronic environment*. Paper presented at South African Society of Archivists Electronic Records Workshop, Pretoria, South Africa. SASA newsletter, 1,2,5,10,11.

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Appendix A

Question 1 Multiple Answer

In connection with decisions about how long you must keep records, check each of the following that you believe would have “historical value”?

Answers	Percent Answered
An e-mail received from the mayor of a town in your county who has just announced his retirement.	21.429%
A report of vandalism specifying stolen office property.	64.286%
A 2000 Register of Deeds annual budget.	83.929%
A file of citizen complaints about the register’s office from 2005.	50%
A contract from a vendor whose services ended in 2008.	62.5%

Question 2 True/False

Please indicate whether the following statement is true or false:

All correspondence received by your office is considered “public record.”

Answers	Percent Answered
True	57.143%
False	42.857%
<i>Unanswered</i>	0%

Question 3 True/False

Please indicate whether the following statement is true or false:

All guidance received electronically from another government agency is considered “public record.”

Answers	Percent Answered
True	82.143%
False	17.857%
<i>Unanswered</i>	0%

Question 4 True/False

Please indicate whether the following statement is true or false:

A cell phone text message from a friend asking the register’s office hours received on your personal cell phone is considered “public record.”

Answers	Percent Answered
True	30.357%
False	69.643%
<i>Unanswered</i>	0%

Question 5 True/False

Please indicate whether the following statement is true or false:

An email about vacation details received from a travel agent in your office email account is considered “public record.”

Answers	Percent Answered
True	69.643%
False	30.357%
<i>Unanswered</i>	0%

Question 6 Multiple Choice

When can you dispose of time cards/sheets?

Answers	Percent Answered
When the employee no longer works in the register’s office.	5.357%
After 4 years.	30.357%
Must retain permanently.	14.286%
After 7 years.	50%
<i>Unanswered</i>	0%

Question 7 Multiple Choice

When are you *actually* disposing of time cards/sheets?

Answers	Percent Answered
N/A — time cards/sheets are not used in my office.	26.786%
I am retaining them permanently.	25%
I am disposing of them after I have no use for them.	3.571%
I am retaining them for a certain amount of time I believe to be the correct retention period.	44.643%

Unanswered	0%
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Question 8 Multiple Choice

When can you dispose of internal letters and memos?

Answers	Percent Answered
Only after 5 years.	17.857%
Whenever I no longer have use for them.	53.571%
Must retain permanently.	10.714%
Only after 1 year.	17.857%
Unanswered	0%

Question 9 Multiple Choice

When are you *actually* disposing of internal letters and memos?

Answers	Percent Answered
I am retaining them permanently.	19.643%
I am retaining them for a certain amount of time I believe to be the correct retention period.	30.357%
N/A — internal letters and memos are not used in my office.	7.143%
I am disposing of them after I have no use for them.	42.857%
Unanswered	0%

Question 10 Multiple Choice

How frequently do you consult the retention and disposition schedule?

Answers	Percent Answered
At least once a year.	16.071%
On a regular basis as part of a routine records management plan.	16.071%
Only when I am considering disposing of records.	64.286%
I don't consult the retention and disposition schedule.	3.571%
Unanswered	0%

Question 11 Calculated Numeric

Other than the records you maintain specifically for public access (deeds, vital records, indexes), how much of your internal office records (such as correspondence and employee files) is paper-based and *not* electronic? Please give a rough estimate off the top of your head of the percentage that is paper-only.

Answers	Percent Answered
35	1.786%
10%	8.929%
60%	1.786%
80%	3.571%
75-80%	1.786%
80	1.786%
98%	3.571%
60	1.786%
100	1.786%
15%	1.786%
85	3.571%
90	1.786%
90%	7.143%
20 percent	1.786%
25	3.571%
25%	3.571%
75%	5.357%
95 percent	1.786%
50%	1.786%
10	1.786%
20%	3.571%
0	1.786%
5%	3.571%
30	1.786%
100%	8.929%
95%	7.143%
85%	1.786%
95 %	1.786%
30%	3.571%
75	1.786%
50	3.571%
<i>Unanswered</i>	0%

Question 12 Either/Or

Do you have a documented (written or electronic) records management plan for your office?

Answers	Percent Answered
Yes	41.071%
No	58.929%
<i>Unanswered</i>	0%

Question 13 Multiple Choice

How long must you retain a mylar of a plat that has been scanned and indexed into the public record?

Answers	Percent Answered
Not required to be retained.	55.357%
For 1 year.	0%
For 3 years.	0%
Must be retained permanently.	44.643%
<i>Unanswered</i>	0%