Administrative Law -- Public Access to Public
Records in North Carolina: The Key to Good
Government

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Public access to public records provides the key to good government, a key that unlocks a storehouse of information, a key that upholds our democratic spirit. But exactly how does an individual grasp that key? Consider a person who wants to know where the state zoo obtains the meat used to feed the lions. As a program administered by the Secretary of the North Carolina Department of Natural Resources and Community Development, the zoo would fall under that agency's rules. Presumably, those rules would contain provisions adopted pursuant to the state public records statute, provisions detailing proper procedures for public access. Consequently, persons seeking information might logically begin with departmental rules governing public access to public records. In order to examine such rules, the author canvassed seventeen state agencies. That examination led the author to create a set of model rules. The results of the agency inquiries and the recommendations of the model rules provide the subject of this Note.

The North Carolina public records statute has a public access provision that reads as follows: “Every person having custody of public records shall permit them to be inspected and examined at reasonable times and under his supervision by any person, and he shall furnish certified copies thereof on payment of fees as prescribed by law.” Unfortunately, the North Carolina appellate courts rarely have interpreted this statute; indeed, the courts did not lay a

1. Surprisingly, the right to inspect does not have a constitutional basis, despite the obvious congruity of the first amendment. E.g., Parks, The Open Government Principle: Applying the Right to Know Under the Constitution, 26 Geo. Wash. L. Rev. 1 (1957). Instead, the right to inspect finds its source in English common law. E.g., The King v. Lucas, 103 Eng. Rep. 765 (K.B. 1808). Thus, when visitors to the National Archives Building in Washington, D.C., view the Constitution, they stand on the common law.

2. The example demonstrates that requests to inspect stem from a variety of reasons: the curiosity of a child; the greed of a knacker; the concern of a horse lover.


5. Id. § 132-6. This Note focuses on the right to inspect.

6. Id.

7. The North Carolina Court of Appeals recently handed down the state's sole appellate decision under the public access provision. Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 281 S.E.2d 69 (1981). The opinion first stated that a letter written to the city manager by a consulting engineer employed to inspect construction of the city's water treatment plant constituted a "public record" under G.S. 132-1, and then stated that a corporation constituted a "person" under G.S. 132-6, -9. Id. at 504, 505, 281 S.E.2d at 69-70. Consequently, the court affirmed an order requiring the city to disclose the record to the publisher. Id. at 507, 281 S.E.2d at 71. Unfortunately, the court compromised this enlightened reasoning by adding that the existence of a single express exemption in G.S. 132-1.1 indicated a legislative intent to preclude judicial exemptions. Id. at 506, 281 S.E.2d at 70 (dictum). Actually, the facts of this case justified...
common-law foundation for public access prior to the enactment of the statute. Consequently, many practical questions await clarification. Must the custodian provide space for inspection? What sort of supervision should the custodian give? Must the custodian permit a person to make his own copies? What should the custodian do before denying a request for access? What specific records fall within the definition of public records? The statute does not expressly address these questions.

Nevertheless, recent critical comment has shown that decisions in other jurisdictions can uncover the basic principles common to all public records statutes. An effective right to public access necessarily includes adequate space and personal copies; however, the need to protect the records from damage and the agency from disruption limits the exercise of that right to the custodian's supervision. Furthermore, any denial of the right should state the specific grounds in order to facilitate review. Finally, the meaning of public records deserves a broad construction, limited only by necessary exemptions. Despite its brevity, the North Carolina statute would permit state judges to imply similar principles governing the practicalities of public access.

As a result, the rule-making power vested in each state agency can supplement the sparse language of the public access provision by anticipating these basic principles. For example, rules promulgated under this provision can articulate the procedures that follow a grant of inspection—the space provided, the extent of the custodian's supervision, the methods of making copies, and so forth. Similarly, such rules can articulate the procedures that follow a denial of inspection—a statement of the reasons for denial. Furthermore, the rules can provide guidance concerning what records qualify as public records. Until North Carolina courts speak to these matters, agency rules defining public access to public records must supply the necessary direction.

The clear importance of rule-making to the right of access recommended a review of each agency's rules promulgated under the public access provision, as well as some measure of the general availability of such rules. Consequently, the author sent the following simple request to sixteen state agen-
"Please send me a copy of your agency's rules concerning public access to public records." The request neither disclosed a purpose nor mentioned the statute because such requests should not depend upon prior justification or upon specific citation. The author also contacted another agency while employed there as a summer intern. These seventeen agencies, with heads either elected by the voters or appointed by the Governor, included all but one of the major administrative bodies in the state.

The Department of Administration did not make a written response to the request for rules. The Department of Correction answered by suggesting resubmission of the request to the Attorney General, to the Law Librarian at the University of North Carolina School of Law, or to a named law student at that school "familiar with the manner whereby individuals . . . properly address requests . . . to state agencies." Several agencies, including the Departments of Agriculture, Commerce, Crime Control and Public Safety, Cultural Resources, Human Resources, Insurance, Justice, Labor, State Auditor, and Treasurer, plus the State Board of Elections, indicated that they had not written any rules under the state's public records statute. And the Attorney General, responding for the Departments of Revenue and Transportation, added these departments to the list of agencies without rules. Thus, one state agency made no answer, another agency answered that the request should have gone elsewhere, and thirteen agencies answered that they had no rules.

Three of these thirteen agencies justified their lack of rules by arguing that they had no authority to write rules under the public records statute. The Department of Justice applied this view to itself as well as to the Department of Transportation, stating that the public records statute "does not vest any agency with regulatory authority over the issue of public access to public

16. The agencies included the State Board of Elections and the North Carolina Departments of Administration, Agriculture, Commerce, Correction, Crime Control and Public Safety, Cultural Resources, Human Resources, Insurance, Justice, Labor, State Auditor, Transportation and Treasurer.

17. The request appeared under a North Carolina Law Review letterhead.

18. Presumably, a person asking how to make requests for public records would not realize that he should explain his curiosity and would not know of the existence of the public records statute. For an experimental design testing the availability of public records, see Divorski, Gordon & Heinz, Public Access to Government Information: A Field Experiment, 68 Nw. U.L. Rev. 240 (1973).

19. The North Carolina Department of Natural Resources and Community Development.

20. The North Carolina Department of Public Education inadvertently was omitted from the survey.


23. Letters from Department of Justice for the Department of Revenue (July 3, 1981) and for the Department of Transportation (July 2, 1981) (both letters on file at N.C.L. Rev. office).

24. Letter from Department of Justice for the Department of Transportation, supra note 23 (the public access provision "does not provide for regulations").
records." The Department of Commerce also adopted this reasoning.

Only two of the seventeen agencies contacted indicated that they had rules. The Department of the Secretary of State sent copies in response to the request, and the Department of Natural Resources and Community Development supplied copies directly to the author during his employment with them. A third agency, the Department of Human Resources, indicated that it had not written a rule under the public records statute, when such a rule did in fact exist.

As previously described, fifteen of the seventeen agencies failed to make a satisfactory response or failed to write rules under the public access provision. This fact should cause surprise because public access lies at the very heart of democratic government. The idea of an informed populace, and the corollary notion of governmental accountability, demand readily available procedural rules describing the precise manner in which individuals may address their state agencies. Without such rules, governmental responses to requests for information may result in arbitrary limits on the right of inspection. Rather than hinder public access, democratic government should help it.

Three agencies, including the Department of Justice, failed to write rules governing public access because they doubted their authority. Although the public records statute itself does not mention such authorization, the legislature expressly delegated regulatory power under two other statutes. The Executive Organization Act of 1973 permits state agencies to adopt regulations governing "[t]he . . . performance of business . . . [and the] use . . . of the records . . . pertaining to department business." More importantly, the Administrative Procedure Act requires each agency to "[a]dopt rules of practice setting forth . . . all formal and informal procedures available . . . [and to] [m]ake available for public inspection all rules . . . used by the agency." Presumably, a request for public records would constitute "business," and the custodian's response would constitute "practice."

25. Letter from Department of Justice, supra note 22.
26. Letter from Department of Commerce, supra note 22 ("the department has no . . . authority to adopt rules concerning public access").
30. "[W]hen the people are well-informed, they can be trusted with their own government . . . ." Letter from Thomas Jefferson to Dr. Richard Price (Jan. 8, 1789), reprinted in 7 The Writings of Thomas Jefferson 253 (A. Bergh ed. 1905) [hereinafter cited as Writings].
31. "[W]hile in public service . . . I thought the public entitled to frankness, and intimately to know whom they employed." Letter from Thomas Jefferson to Samuel Kercheval (July 12, 1816), reprinted in 15 Writings, supra note 30, at 32.
32. Comment, supra note 8, at 1201, 1220.
33. Letters from Departments of Commerce and Justice, both supra note 22, and Transportation, supra note 23.
35. Id. § 150A-11.
36. An implied authority to adopt necessary rules, based on the custodian's express authority
Although three agencies have written rules, those rules present problems. The Department of Human Resources does not define public records and does not describe public access except to say that “[a] person may contact individual employees.” The Department of Natural Resources and Community Development not only cites the wrong provision of the statute but also violates the intent of the applicable statutory provision by narrowing the defi-
to supervise inspection, id. § 132-6, may also exist. See, e.g., In re Sorley v. Lister, 33 Misc. 2d 471, 472, 218 N.Y.S.2d 215, 217 (Sup. Ct. 1961) ("[T]he officer having . . . custody of . . . records . . . [must] give to citizens and taxpayers the privilege of inspection . . . .")]. This argument deserves special consideration because the Administrative Procedure Act specifically exempts the Departments of Correction, Revenue and Transportation from the “rules of practice” provision. N.C. Gen. Stat. §§ 150A-1, -11 (1978).

37. The rule written by the Department of Human Resources reads as follows:

.0101 OBTAINING INFORMATION ABOUT THE DEPARTMENT

(a) A person may contact individual employees within a program or service in which the employee is personally involved and about which the employee is informed.

(b) A person seeking information concerning events or activities of major or urgent importance should contact the public information office.

History Note: Statutory Authority G.S. 132-1, -6; Eff. February 1, 1976.


38. Id.

39. The rules written by the Department of Natural Resources and Community Development read as follows:

.0601 PUBLIC RECORDS

Except as hereinafter provided any nonprivileged document made or received pursuant to law or regulation in the possession of the department is a public record for the purposes of this section.

History Note: Statutory Authority G.S. 143B-10; 132-9; Eff. February 1, 1976.

.0602 INTERNAL MEMORANDA

Internal memoranda between and among employees and offices of the department are not public records for the purposes of this section.

History Note: Statutory Authority G.S. 143B-10; 132-9; Eff. February 1, 1976.

.0603 ACCESS TO PUBLIC RECORDS

(a) All public records may be inspected by citizens of North Carolina for all reasonable purposes after making a proper request and receiving permission from the department.

(b) Access will be provided at the situs of the agency which has possession of the public record.

History Note: Statutory Authority G.S. 143B-10; 132-9; Eff. February 1, 1976.

.0604 REQUEST FOR ACCESS

(a) Request for access to a public record shall be made to Secretary of the department.

(b) Request must be in writing and describe with reasonable specificity the document or documents desired to be received.

(c) The request must also give the reason the applicant desires to view the record.

History Note: Statutory Authority G.S. 143B-10; 132-9; Eff. February 1, 1976.

.0605 VIEWING THE DOCUMENT

The applicant who has been given permission to inspect a document may inspect the document during business hours of the agency at the situs of the agency which has possession of the document.

History Note: Statutory Authority G.S. 143B-10; 132-9; Eff. February 1, 1976.
nition of public record, by limiting inspection to state citizens, and by demanding to know the reason for the request. The Department of the Secretary of State anticipates broad disclosure but provides little practical guidance. Thus, only three agencies out of seventeen have rules, and those rules really do not help individuals seeking information from their government.

The problems encountered with the rules actually adopted, and the scarcity of such rules, recommend immediate action. That action must take different forms, because the unique characteristics of a given office dictate different rules requirements. Consequently, the following model rules drafted by the author serve as catalyst rather than as copy.

MODEL RULES OF PUBLIC ACCESS TO PUBLIC RECORDS

.0001 DEFINITIONS

The following definitions apply to rules contained in this Section:

.0606 RETENTION OF CUSTODY

No public document may be taken from the agency situs. Copies may be made at ten cents ($0.10) per copy per sheet.

History Note: Statutory Authority G.S. 143B-10; 132-9;
Eff. February 1, 1976.


40. The provision cited deals with the remedy for the denial of public access to public records. N.C. Gen. Stat. § 132-9 (1981). The Department should have cited the public access provision. See id. § 132-6.

41. The rules omit the statutory phrase "in connection with the transaction of public business" but retain the statutory phrase "pursuant to law." Compare 15 N.C. Admin. Code 1B .0601 (July 31, 1981) with N.C. Gen. Stat. § 132-1 (1981). The omission makes a difference because the former phrase apprehends a broad definition of public records while the latter phrase apprehends a narrow definition. Comment, supra note 8, at 1190-91. Also note that the rules exempt internal memoranda. 15 N.C. Ad. Code 1B .0602 (July 31, 1981).


43. The rules state that the request must "give the reason the applicant desires to view the record"; however, the statute does not anticipate this requirement. Compare 15 N.C. Admin. Code 1B .0604 (July 31, 1981) with N.C. Gen. Stat. § 132-6 (1981). Whether motivated by curiosity, private gain or public responsibility, a person intending the lawful use of public records should gain access. Comment, supra note 8, at 1208 & nn.146-47.

44. The rule written by the Department of the Secretary of State reads as follows:

.0601 INSPECTION

Except where made confidential by law, all records filed with the Department of the Secretary of State are public records and are available for inspection during the hours of business specified in the rules of the particular division having custody of the records.

History Note: Statutory Authority G.S. 132-6;
Eff. February 1, 1976.


45. The Department of Administration, the agency that failed to make a written response, does not have any public access rules. Though not included in the survey, an eighteenth agency, the Department of Public Education, also failed to write rules under the public access provision of the public records statute.

46. The model rules reflect the general requirements of the departments as opposed to the more specific requirements of the various divisions constituting those departments. For example, a division that receives many records requests may want to designate a particular area for inspections, while a division that receives few records requests may want only to provide an unoccupied desk for inspections. Whatever the division's specific requirements, the department should write rules that draw attention to the general need for divisional rules governing adequate space. See Comment, supra note 8, at 1202.
“Public Records”
(a) “Public Records” means all documentary material, regardless of physical form, which the agency makes or receives pursuant to law, or which the agency uses in connection with the transaction of public business.
(b) “Public Records” include documents, papers, letters, maps, books, photographs, films, sound recordings, magnetic or other tapes, electronic data-processing records, and artifacts.
(c) “Public Records” do not include:
   (i) Records specifically exempted from disclosure by a federal or state statute.
   (ii) Records protected by a privilege.
   (iii) Records that the agency reasonably believes confidential because disclosure would invade personal privacy, reveal the identity of an informant, or harm governmental interests.

“Agency” means the Department of _______, or any of its divisions or offices.

“Custodian” means the public official in charge of an office having public records, or any person given personal control of such records by the public official.

History Note: Statutory Authority G.S. 143B-10(j); 150A-11; 132-1; 132-1.1; 132-2; Eff. _______.

Access to public records promotes frequent accountability by the government and informed participation by the people; consequently, the custodian shall prominently post this Section in his office.

Any person may seek the custodian’s permission to inspect the agency’s public records by describing the records in terms sufficient to secure their retrieval.

The custodian shall provide adequate space during office hours to all persons making a reasonable request for public records, and the custodian shall supervise the inspection in order to protect the public records and to prevent the disruption of the office.

All persons making a request for public records may copy such records, or may ask the custodian to provide copies at ten cents ($.10) per page.

Before denying a request for public records, the custodian shall seek an advisory opinion from the Attorney General’s staff concerning such denial. However, the custodian shall not extend the deadline for his decision while awaiting the opinion. If the custodian denies access to any public record, the custodian shall give the person making the request a written statement of the reasons for the denial.
(f) The agency shall create a public records committee to review denials. The committee shall render its decision after considering the written statement prepared by the custodian and the advisory opinion submitted by the Attorney General's staff.

(g) The custodian's failure to deny or to grant the request within ten working days shall constitute a denial, and the committee's failure to render a decision within five working days shall constitute a final agency action.

History Note: Statutory Authority G.S. 143B-10(j); 150A-11; 132-6; 132-9;
Eff. ________.

The model rules respect the public's right to know. The definitions supplied track the broad definitions contained in the statute. In particular, "public records" sweeps up every imaginable item, provided that a special statute does not control the record, that a privilege does not protect the record, and that certain policy considerations do not affect the record. Special statutes include those governing state employees' personnel files and legislative lobbyists' expense accounts. Privilege extends beyond the public records statute's treatment to traditional notions of confidential communication. Policy considerations include: personal privacy—for example, manufacturers who cooperate with pollution investigations by supplying inadmissible evidence; informant identity—for example, individuals who report unlawful waste discharges into the state's river system; and governmental interests—for example, the need to withhold the precise location of an endangered species' natural habitat. Unless the public record fits one of these exemptions, the govern-

48. Id. §§ 126-22 to -29 (state employees' personnel files not open to inspection); id. § 120-47.6 (legislative lobbyists' expense accounts open to inspection). For a more complete list, see Comment, supra note 8, at 1193 & n.44.
49. The statute mentions only communications made by counsel to the agency, suggesting that the legislature assumed that communications made by the agency to counsel, the essence of the attorney-client privilege, did not need express protection. After all, courts in other states have recognized that agencies may withhold privileged records. This argument preserves both the attorney-client privilege and the doctor-patient privilege. Id. at 1196-97. But see Advance Publications, Inc. v. City of Elizabeth City, 53 N.C. App. 504, 506, 281 S.E.2d 69, 70 (1981) (the state legislature intended only the one exception provided in the statute) (dictum).
50. The proliferation of government information on individual citizens has caused many courts to protect personal privacy. Comment, supra note 8, at 1196. Although North Carolina courts have not considered privacy under the public records statute, they have recognized privacy in other contexts. E.g., In re Investigation by Att'y Gen., 30 N.C. App. 585, 227 S.E.2d 645 (1976) (telephone company that cooperated with criminal investigation by supplying inadmissible evidence entitled to order prohibiting public disclosure), cited in Comment, supra note 8, at 1196 n.60. "Reverse freedom of information" suits in federal courts also indicate the growing importance of legitimate privacy interests. See, e.g., Note, Protection from Government Disclosure—The Reverse FOIA Suit, 1976 Duke L.J. 330, cited in Comment, supra note 8, at 1215 n.174. But see Advance Publications, 53 N.C. App. at 506, 281 S.E.2d at 70 (dictum).
51. Though more common in criminal law enforcement, the protection of government sources often serves the public interest in other administrative areas. Comment, supra note 8, at 1195-96. But see Advance Publications, 53 N.C. App. at 506, 281 S.E.2d at 70 (dictum).
52. Many courts permit agencies to withhold records when disclosure would harm the government's financial or other interests. Comment, supra note 8, at 1196, 1213. But see Advance Publications, 53 N.C. App. at 506, 281 S.E.2d at 70 (dictum).
ment may not keep the record secret.\textsuperscript{53}

Procedures under the model rules also favor broad disclosure. A person may submit a request orally or in writing.\textsuperscript{54} The person making the request need not demonstrate any interest in the record,\textsuperscript{55} and the request itself need only meet a minimum standard of specificity;\textsuperscript{56} however, the person must make a reasonable request—one that does not require an exceptionally large number of records to discover a relatively insignificant fact.\textsuperscript{57} The custodian must make the records available during office hours\textsuperscript{58} and must provide adequate space;\textsuperscript{59} furthermore, the custodian’s supervision must extend only to protection of the records from damage and protection of the office from disruption.\textsuperscript{60} In addition to a request for a certified copy under the statute, a person may make his own copies or may pay the custodian for office copies.\textsuperscript{61}

To discourage a casual denial of a request to inspect, the rules require the custodian to seek an advisory opinion from the Attorney General’s office.\textsuperscript{62}

\textsuperscript{53} Defining public records to exempt those records not open to inspection differs from creating specific exemptions to a general definition of public records. See Comment, supra note 8, at 1193. The statute prefers the latter method, defining public records in one provision and creating a single exemption for counsel-to-agency communications in another provision. N.C. Gen. Stat. §§ 132-1, -1.1 (1981). However, the Attorney General’s opinions prefer the former method, defining any records not subject to inspection as “not public records.” E.g., Public Records Opinion, 44 N.C. Att’y Gen. Rep. 340 (1975) (“police . . . [criminal] investigative reports . . . are not public records”). The model rules adopt the Attorney General’s approach because agencies seeking the opinion generally phrase their questions in terms of public records/not public records. Id. Nevertheless, the statute’s approach creates less confusion because a public record exempted from inspection still qualifies as a public record subject to preservation and discovery. N.C. Gen. Stat. §§ 132-8 to -8.2 (1981); 44 N.C. Att’y Gen. Rep. at 341; Comment, supra note 8, at 1192-93. See also Advance Publications, 53 N.C. App. at 504, 281 S.E.2d at 69 (issue defined as whether letter constituted “a public record subject to disclosure”).

\textsuperscript{54} The agency does not have any reason to discriminate between telephone requests and mail requests. Comment, supra note 8, at 1218.

\textsuperscript{55} The statute says that “any person” may request inspection. N.C. Gen. Stat. § 132-6 (1981). Other states have interpreted such language as eliminating the common-law interest requirement. Comment, supra note 8, at 1199-1200.

\textsuperscript{56} The identification requirement should serve to locate the record rather than to restrict public access. E.g., In re Dunlea v. Goldmark, 85 Misc. 2d 198, 201, 380 N.Y.S.2d 496, 499 (Sup. Ct. 1976) (both the party making the request and the agency entertaining the request share responsibility under the state statute’s identity requirement). Of course, the custodian should not have to perform general research beyond retrieving the record. Comment, supra note 8, at 1206, 1219.

\textsuperscript{57} An overly broad request would burden unnecessarily the custodian’s supervision and other persons’ inspections. Comment, supra note 8, at 1204.

\textsuperscript{58} Id. at 1200, 1203.

\textsuperscript{59} Id. at 1202, 1202.

\textsuperscript{60} If inspection threatens the original record with damage, then the custodian must substitute copies for the original. Id. at 1201-02. If inspection threatens the office with disruption, then the custodian must limit access; for example, the custodian may restrict access to a few hours per day when employees need the records in their work. Id. at 1203-04.

\textsuperscript{61} Although the public access provision of the public records statute does not say whether a person may make his own copies, the remedies provision refers to access for “inspection, examination or copying.” Compare N.C. Gen. Stat. § 132-6 (1981) with id. § 132-9. See also Advance Publications, 53 N.C. App. at 505, 281 S.E.2d at 70 (“plaintiff . . . entitled to . . . copying rights”). Such right would exist in the absence of this statutory language. Comment, supra note 8, at 1204-05.

When the custodian makes copies, the state may charge a fee designed to recover the costs of reproduction excluding labor. Id. at 1206-07.

and to prepare a written statement of his reasons. These two requirements also facilitate agency review of denials. The fifteen-day limit on that agency review prevents delays that could postpone judicial resolution. Finally, the custodian must post these rules in his office and should provide copies of these rules free to persons making requests for public records, because rules that unlock governmental information deserve wide publication.

Rules promulgated under the state's public records statute contain the key to good government. Our state agencies, however, have failed to adopt effective rules, depriving the public of a practical framework for the right to access. In turn, the resulting lack of disclosure discredits government by consent. Public distrust grows. Perhaps a model set of such rules will encourage each agency to review its posture.

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63. The statement should indicate the statute, the privilege or the policy that causes the record to fall outside the definition of "public records." Comment, supra note 8, at 1219.

64. This review proceeding does not anticipate an adjudicatory hearing; consequently, the Administrative Procedure Act's provisions on contested cases do not apply. See N.C. Gen. Stat. §§ 150A-2, -23 to -37 (1978).

65. Persons denied inspection may apply to the courts for "an order compelling disclosure." Id. § 132-9 (1981).

66. The publication requirement avoids arbitrary limits on public access. Comment, supra note 8, at 1218, 1219-20.