Under current law records made in the transaction of public business are considered public and subject to inspection. This aspiration of an open and accountable government is not as simple as the broad statutes may seem to imply. Public content is being created at an exponential rate and policies guiding the management of public records are confusing. Current assumptions are incentives for public officials just to keep all records indefinitely. A flawed system of public record-keeping harms the public’s assurance of meaningful knowledge about its government’s decisions. This paper addresses the realities of public information creation, retention, and management by highlighting problems that could arise in public record-keeping. These realities are considered alongside core principles of record-keeping and original intent of public records law. A look into core principles could be the essential starting point for efforts to reform public records law.

Headings:

Public records--Law and legislation--North Carolina
Records retention--Law and legislation--United States
Public records--Management
Government information--United States
UNWIELDY RULES AND DEFAULT PRACTICES: REALITIES OF PUBLIC RECORD-KEEPING IN NORTH CAROLINA

by
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Table of Contents

Preface............................................................................................................................................. 2

Part I: Introduction to Public Records in North Carolina ............................................................... 5
  What are public records? ............................................................................................................. 5
  Rights of access.......................................................................................................................... 7
  Public records management ..................................................................................................... 7

Part II: Practical Difficulties with Public Records Policies ......................................................... 9
  Retention periods and disposition instructions ....................................................................... 9
  New formats and lack of clear guidance ............................................................................... 10
  Potential complications with “keep everything” mentality ..................................................... 14

Part III: A Look into Core Principles .......................................................................................... 20
  Original intent of record-keeping ......................................................................................... 20
  Original intent of public information laws ............................................................................ 21

Conclusion ..................................................................................................................................... 26

References...................................................................................................................................... 33
Preface

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. 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 as well as the increasing variety in formats (e.g. graphics files, text documents, slideshows, interactive media). In addition, technological advances allow for more diversity in how records are created. These transformations in record creation practices raise important questions, including the following: with so many records being created how is maintenance being affected, what are public officials doing in response to the changes in public records management, and how has stewardship of government information changed as compared to the first instances of such in the United States? I have conducted a broad study in which I have sought to understand the current statutes, policies, and practices of public record-keeping, public employees’ behaviors in complying with these requirements in this technology-driven era, and the

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original intent of public information requirements. I have addressed these issues of public law and brought in 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 distribution**: 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 are records custodians as defined under G.S.§ 132-2 and maintain essential primary records regarding property and life events and are likely to be among the most knowledgeable about record-keeping requirements and challenges as record-keeping is their fundamental job function. 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 North Carolina Department of Cultural Resources. The response rate for the survey was 56%.

- **Literature review**: I researcheded the law of public records, with particular focus on North Carolina’s statutes guiding state and local government. I looked into the origins of federal public records laws, the Administrative Procedures Act (APA) and the Freedom of Information Act (FOIA) in order to understand legislative intent and initial implementation of the laws. I also researched the history of public records to

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2 Survey available with author.
3 G.S.§ 121-5 designates the Department of Cultural Resources as the “official archival agency of the State of North Carolina with authority as provided throughout this Chapter and Chapter 132 of the General Statutes of North Carolina in relation to the public records of the State, counties, municipalities, and other subdivisions of government.”
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 the state agency likely to be most familiar with the advanced trends in electronic record-keeping.
Part I: Introduction to Public Records in North Carolina

Contrary to a popular misconception there is no explicit or even inherent Constitutional right to public information. Many courts including the N.C. Supreme Court have refused to find a right of access to public records within the First Amendment to the federal constitution.\(^4\) News & Observer Publ. Co. v. State ex rel. Starling, 312 N.C. 276, 322 S.E. 2d 133 (1984). Public records are defined and managed according to statutory guidelines (a distinction that will be discussed again later). Public records law balances the principles of an informed electorate, public official accountability, and individual privacy.

What are public records?

Under North Carolina law\(^5\), G.S. § 132-1 (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\(^6\) in connection with the transaction of public business by any


\(^5\) As is similar in most states across the country.

\(^6\) Lawrence writes that “pursuant to law or ordinance” does not mean only records statutorily required to be created, as was argued in News & Observer Publishing Co. v. Poole. Lawrence, *supra* note 4, at 11.
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. The first important
tenet of public records law to understand is the clause, “regardless of physical form or
characteristics” – that records are deemed public according to content, not format. This is
an important distinction in that the law neither applies to only traditional forms of records
(i.e. paper and text) nor solely to records created or stored in the public office or on
public systems. The cultural development of melding professional and personal lives
undoubtedly affects public records management, but the law remains clear; G.S.§
132-1(a) tells us that an email regarding public business send from a public employee’s
personal email account or from his personal “Smartphone” is a public record. Location is
not the defining feature.

The opposite is also important; purely personal records, even if created and stored
on public hardware are not considered public records. A number of courts through the
years have held that just because a variety of materials may be kept, inadvertently stored,
or found in government offices and on government equipment, they are not public
records as defined by law if they do not involve government business. Often these
records involved the private affairs of officials and employees and records related to
partnerships with outside, non-governmental parties. Forsham et al. v. Harris, Secretary

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7 Not subject to public records law are the records of the legislative and judicial branches of government.
8 This does not mean, however, the public employer has no right to inspect these personal records or even
present them for public inspection if he deems necessary and appropriate. This is a separate legal question
beyond the scope of this work.

Rights of access

G.S. § 132-1 (b), and G.S. § 132-6 in more detail, further defines public records by saying, “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.” The N.C. Supreme Court affirmed this statutory right to access by holding that if a document falls into the broad definition of public record and does not fall under “clear statutory exemption or exception” it must be made available for public examination. News & Observer Publ’g Co. v. Poole, 330 N.C. 465, 486, 412 S.E. 2d 7, 19 (1992). The basic right of access to public records and the right to receive a copy for a minimum charge are central to the intent of public records law. Without the ability to inspect and obtain copies, a record’s designation as “public” is ineffective.

Public records management

These fundamental features of public records laws are easy to understand – what is and what is not public record, who owns it, and the right of public access. However, defining a record as public does not carry with it specific retention requirements. In other words, we know these are public records, but for how long are we required to keep them
or what are we required to do with them? Here is where G.S. § 132 and 121 tell us that the Department of Cultural Resources is established as the “archival” agency of the state and has the duty and power to provide guiding standards and policies for public records management. Among specific guidelines for certain formats and more informal records management tips and tutorials, the most direct form of management guidance for public records are retention and disposition schedules. These schedules attempt to answer the questions noted above by providing disposition instructions for the various record series, sometimes accompanied by statutory citations. Each autonomous unit in government (agency/department/etc.) has a retention and disposition schedule that includes, among general items, record series that are common and often unique to that office. Retention and disposition schedules are reviewed by the public officials to which they apply and signed by the chief officer of the unit, the governing board of the local government, and the Department of Cultural Resources. In this effect, the retention and disposition schedule stands as an agreement between the archival agency and the local unit.

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9 In N.C. the further divisions with the Department of Cultural Resources are Archives and History -- Government Records Branch (which includes state, university, local, and electronic records units).
10 For examples of retention and disposition schedules for local records in various offices, please visit: http://www.records.ncdcr.gov/local/default.htm.
11 Record “series” is a topical categorization of public records. An example of a record series in local records retention schedules “Citizen Complaints and Service Requests.” The disposition instruction for this series is “Destroy in office 2 years after resolution.”
Part II: Practical Difficulties with Public Records Policies

Retention periods and disposition instructions

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”12 as well as the criteria that forms the base of public records requirements. Responses indicate a common yet mistaken assumption that retention obligations depend on form rather than content. In several instances, most respondents had an incorrect understanding of the requirements. As explained, records are deemed public only according to their content. This is particularly important to understand as records are being created in a variety of forms – email messages, phone text messages, etc. Also expectations for workplace behavior have changed and public employees frequently use personal accounts for work reasons (often off-the-clock) and work accounts for personal reasons. This blurring of the personal and the professional has significant impacts on public record-keeping.

The results of the survey were unsurprising. Many would find the retention and disposition schedules overwhelming and difficult to decipher and apply. The schedule

12 “Before preparing to dispose of certain records, their potential historical research value should be considered. Selected records might have enduring value because they document the origin, organization, development, and functions of an agency. Likewise, some records have enduring value as sources of information on persons, places, subjects, events, and transactions. These records provide evidence of the interactions between citizens and local government agencies. Several record series which may have such value are identified in this schedule. Assistance in determining historical or archival value is available upon request.” (from North Carolina Department of Cultural Resources retention and disposition schedules)
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 fit into a
number of series descriptions and corresponding retention requirements, hence making
the policies ambiguous and potentially subjectively applied. Registers sometimes consult
with their legal advisors at the UNC-CH School of Government for guidance about how
to make sense of the retention schedule. But those advisors often refrain from giving
specific advice, instead helping the register identify potentially applicable items and
assuring them that public officials can only be expected to act reasonably when dealing
with complex and often confusing rules. The problematic nature of the schedules is
further reflected by the legal advisor’s opinion that even someone with legal training and
extensive experience has difficulty both recalling the possibility that a specific rule exists
for a particular item and reconciling apparently contradictory rules.\textsuperscript{13} This is not to say
that those who wrote the rules were negligent or lacked understanding; it is to say that
the task of giving direction based on a multitude of types of documents, applicable
statutes, and practical concerns may be an impossible goal.\textsuperscript{14}

\textbf{New formats and lack of clear guidance}

With such vague guidance in the North Carolina statutes as to how to handle non-
traditional public records, policies must be written with incredible detail in order to be
functional. This is a common challenge in the law; those who enact requirements must
balance detail and clarity with a flexibility to address diverse applications and changing
technologies and social habits. As with so many other areas of the law – and life in

\textsuperscript{13} Interview with Professor of Public Law and Government Charles Szypszak, School of Government, UNC-CH, February 28, 2012.
\textsuperscript{14} Id.
general – public records policy-makers struggle with new formats of records and the seemingly endless upcrop of new technologies capable of producing records. Retention schedules are designed to include most all records found in public offices so that public officials can simply search the category of record and apply the disposition instructions. But there is no way retention schedules can continue to include all possibly types of records since new formats often cause content to change and, thus, potentially different disposition guidelines. The Department of Cultural Resources has provided a number of other policies and “best practices” for the management of non-traditional records.

One example of a set of non-traditional public records is the records within government website. These are equally deemed public records as any other paper public records, and therefore must be maintained as such. The state of North Carolina has declared government websites to be of enduring public value and thus preserves and archives state government websites using a tool called “Archive-It.”¹⁵ Most other states in the United States do not take this position and do not permanently archive government websites, and it is not yet clear whether North Carolina’s endeavor is considered to be apt. Government website capture and retention introduces many questions that are still being considered. For instance, should governments just maintain a snapshot of websites – essentially just images of what viewers see on their screens – or should the government retain the digital code that provides for the visual layout of the webpage? Ideally website retention would show incremental changes to the sites as the focus is on the content of the public records; yet, there is currently no tool that provides for systematic capturing of

¹⁵ This tool is offered by the Internet Archive and uses the “Wayback Machine” to capture and preserve the functionality and content of sites. The “Archive-It” package the state of North Carolina purchases is for a cost of $17,000 per year.
incremental changes and even if there were such a tool the application would likely be significantly more expensive and unrealistic for government purposes.

Email is especially difficult to manage in a public records context because of the diversity of content within one system. Each email should be appraised for its fit into a series and maintained according to the respective instructions. This diversity alone necessitates diligence by the creator. But maybe more significant is the outcome of the changing societal norm of delineating between professional and private life. It is common for employees to exchange emails with personal contacts within their work email systems and to use personal accounts to do business. This blurring of the professional and personal is likely done through convenience, but the impact on public records management cannot be ignored. Email public records are heavily comingle with personal messages. Regular management of these records becomes complicated and tedious, and in instances of public records requests culling through such email systems is very time-consuming.16

Another issue that remains imprecise in its relation to public records law is to what degree metadata is considered public record. Metadata is most simply understood as data about data. Much metadata is not visibly apparent on the surface of public records, but is often “behind the scenes.” Policy-makers and legal professionals have been grappling with the concern that metadata may be required to be retained as public record and public officials are responsible for capturing this often imperceptible information. At the current time, North Carolina courts have not ruled on the issue so the state’s policy and guidelines for metadata retention is merely projected.

16 As required by 132-6(c).
All factors considered public officials are faced with essentially three choices of action for retention of public information. First, they could completely disregard retention and disposition schedules, ignoring requirements to maintain certain records and making no effort to comply with information policies. Taking this approach is clearly unacceptable in terms of the statutory obligations. Second, public officials could try to apply the instructions given in the retention and disposition schedules and incorporate in their office records management practices. There are likely two rationales for this action, for public officials to attempt compliance with these schedules. One is very obvious – because they must under the law. North Carolina statutes give the Department of Cultural Resources the authority to issue such policies for public records. These policies are signed by the respective government agency, department, or unit and, as such, stand as an agreement between the local department and the Department of Cultural Resources. A more “self”-serving reason for public officials to try to apply the instructions of the schedules is that public officials may want to avoid the potential risk of the public having access to unsavory records. Some argue that destroying records at the moment they are allowed to be destroyed is best so that public officials cannot be questioned about or held liable for content that could be interpreted as improper. Put bluntly, this is an unfortunate and arguably illegitimate rationale for complying with the records management policies. No public policy should be written or applied according to the desire to shirk “risks” of public accountability, embarrassment, and accusations of poor behavior or decision-making. Finally, the third choice of action for retention of public information is to maintain everything.
It may seem obvious that sincere attempts at complying with the retention and disposition schedules are the right actions on behalf of public officials. However, even honest efforts to apply these policies can result in error. As explained earlier, these policies are confusing and growing more so as formats and expectations change in the surrounding environment. Therefore, the third course of action is very likely – keep everything and ensure compliance with those items with mandatory retention. Retaining everything permanently does not meet active disposition guidelines, but fulfills public records statutes in the prohibited destruction of records without authorization. In worries of not retaining something they should, public officials 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. Just in recent years the clamor for government “openness” has sparked numerous news stories about public officials who allegedly destroyed without authorization public information or kept secret information which members of the public argue they have rights to know.

Potential complications of the “keep everything” mentality

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\textsuperscript{17}. 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.\textsuperscript{18} Public officials therefore may assume there is no reason to worry about being able to retain everything. However, this may not be the case in the abstract. Content is actually being created more rapidly than storage capacity. The graph below shows this critical trend in records management:

\begin{center}
\includegraphics[width=\textwidth]{graph.png}
\end{center}

\textsuperscript{17} Interestingly, traditional information theory which has a strong base in physics echoes this truth in that more energy is expended in erasure than in creation.
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.¹⁹ And according to the predictions shown in the above graph, the 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 records²⁰ alone are increasing as a result of standard population increases.²¹ Individuals are not likely to significantly feel the pressure of the “digital gap” because on the personal, micro-level no capacity problems exist. However, expanded out this trend is worrisome and could result in a significant problem in the future. Scholars and practitioners should

²⁰ These records include documents integral in land transfers, financial transactions, and personal identity verification.
²¹ Statistics available with Charles Szypszak, Professor of Public Law and Government Charles, UNC-CH School of Government.
not blindly assume infinite information storage despite their previous and current experiences.

Even if the “digital gap” does not result in an information management crisis – soon or ever – it introduces questions and uncertainties that should be taken seriously. In light of the exponential growth in information and record creation, 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 in 2011, the total dollar amount for this record-keeping requirement will equal $1.5 million per year or $15 million over the entire retention period. 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 may not be cheaper to manage them especially as the mass continues to grow. Public records law prohibits government from putting public records requests as its lowest priority. Government cannot intentionally “drag its feet” in responding to a public records request nor can it withhold the record[s] by claiming the disclosure would impede the government’s use of the record[s]. Likely a surprise to most, standing requests for public records have been upheld and allowed in other state courts. Public records law mandates the management of public records and the government’s satisfactory response to inspection requests, but these mandates emanate unfunded. Departments must deal

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22 Statistics measured and reported by Center for Government Technology, UNC-CH School of Government.
23 Lawrence, *supra* note 4, at 45-46.
with public records alongside their essential duties. It is not uncommon for a large number of institutional staff to spend part of each of their workdays handling issues related to public records. Some units have even had to hire additional staff to exclusively manage public records requests. Especially in adverse economic times, government cannot afford to divert its resources – in monetary amounts as well as human capital – to responding to public records questions and away from core activities. Although doubtless that transparency is vital to a functioning democratic government, there are few who can credibly argue there is no relative value scale in government activities. Some services are simply more important and central to the department’s purpose.

And as mentioned earlier, 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.”

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

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opulent nation. Nor are scholars served by maintaining all of them. Scholars cannot find their way through the huge quantities of modern public records.”

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

Considering these possible complications from a “retain everything” mentality, scholars and practitioners must ask the ultimate question: how should the government better manage public records so that their volume is controllable and so that the retention of public information proves to be a valuable piece in upholding an effective government? 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 and any future modifications to public records law.

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Part III: A Look into Core Principles

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.

Original intent of record-keeping

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 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.26

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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.  

**Original intent of public information laws**

Much of the literature surrounding public records laws and what is often considered the “opening up” of government stresses the inherent goodness in increased openness. Near countless articles are written praising efforts to collect and make accessible more of the government’s records as well as condemning measures taken to keep government information private and out of public scrutiny. As a reiteration, a goal of this article is to highlight another angle of public information – an angle that does not have its base in the theory that, intrinsically, “more is better.” Few record-keeping and legal scholars have scrutinized current laws and policies according to analysis of the original principles of public information laws.

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. Conceptually speaking, the APA and FOIA “…provide transparency by generating extensive, publicly available records of the factual, analytic, and policy positions of the

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28 As of late March 2012, searching UNC-CH’s library periodical catalog with keyword terms “more open government” returns 4,039,075 results.
agency and, in the case of notice and comment rulemaking, of outside parties, as well as the basic for the agency’s decision.”

The records aspect of the APA was part of a response to concern about public knowledge about the activities of a proliferation of agencies setting thoughtful policies and making important decisions. In the United States 1930s government agencies were cropping up at a fast pace and much discussion arose regarding their regulatory powers and their processes in issuing regulations. In 1939 President Roosevelt requested a committee to explore the “need for procedural reform in the field of administrative law.” The charge for the committee was to present a comprehensive study of the administrative process and make recommendations for any necessary improvements, according to the basic ideal that “powers must be effective exercised in the public interest, but they must not be arbitrarily exercised or exercised with partiality for some individuals and discrimination against others. Procedures must be judged by their contribution to the achievement of these ends.” So the focus was on decision-making, not recording-keeping for its own sake. The committee made recommendations that would eventually become law in the passage of the APA in 1946. The APA contains four major features that affect regulatory agencies; the relevant piece for this context is the requirement that agencies keep the public informed of their organization, procedures, and rules and provide for public participation. The APA aimed to cause government bodies to

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31 *Id.* at 2.
share information about their decisions and rule-making – to actively document and, subsequently, justify their actions.

National leaders were cognizant of the potential for record-keeping requirements becoming an impediment to good government. President Lyndon B. Johnson signed the Freedom of Information Act (FOIA) into law 1966 after many years of clamor for such legislation from journalists and other advocates. The FOIA created a “judicially enforceable policy that favors a general philosophy of full disclose of information held by government agencies,” and “… made agency records available to any person upon request and placed the burden of justifying nondisclosure on the government”\(^{32}\). The first few years of operation of FOIA are generally known to be unsuccessful in accomplishing its purported purposes. The Act carried little initial support and lacked “teeth,” as Antonin Scalia memorably noted while he was a law professor at the University of Chicago. In fact, President Johnson was pointedly hesitant in his signing of the FOIA. Among other types of diversions, he stifled major attention for the signing and personally blunted strong openness language in the bill\(^{33}\). It was written that Johnson “…hated the thought of journalists rummaging in governments closets and opening government files; hated them challenging the official view of reality”\(^{34}\). In his statement upon signing the FOIA, Johnson acknowledges the great importance of prohibiting secrecy when disclosure would cause no injury to the public interest. However, he also stresses the necessity that some documents be kept private in light of the “…welfare of the nation and the rights of individuals.” He goes on to say, “Officials within government must be able

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\(^{34}\) *Id.* at 2
to communicate with one another fully and frankly without publicity. They cannot operate effectively if required to disclose information prematurely or to make public investigative files and internal instructions that guide them in arriving at their decisions.”

As mentioned the FOIA lacked many key enforcement features in its initial form in 1966. Agencies were not presented time limits for responses, monetary limits for copy charges, nor a set of penalties for noncompliance. When 1972 brought the Watergate scandal, government was forced to reconsider the access principles of the FOIA. The same year Nixon resigned, 1974, the FOIA incorporated major changes including specifics about what information was allowed to be kept private. The rush to “fix” government accountability after the public scandal resulted in a significantly altered FOIA, one which has not changed substantively much since.

The importance of first principles is not an entirely overlooked concern in library science scholarship. 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. 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

37 Schellenberg, supra note 25, at 239-254.
driving consideration in records management it is clear that evidential value is typically considered more valuable. Legal scholars agree that original intent is difficult to nail down, and they often discourage grand conclusions drawn from speculation on original intent. And certainly the standards of the time have changed and the context may be divergent enough that original principles may not make sense for today. However, in such an important and wide-reaching issue as this – public information management – the insight provided in core principles and original intent should not be overlooked.
Conclusion

Research shows that public records requirements are complex and commonly not understood, especially in the digital age when 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 may be unfounded – content is growing at a faster rate than storage. The digital era has also 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 in recognition of its rapidly growing popularity. But this policy did not include meaningful consideration of the records management implications of an influx of new media records as the practical realities reveal.

The current administration’s policies reflect a larger trend in government. For instance, 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. Furthermore as the volume of records builds, the ease in finding 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. If the public has only modest expectations of inspecting government records for potential wrong-doing in a timely manner (which hinges on the queue of requests as well as the level of record findability within the government agency), is the government being held truly accountable?

Very important to realize as well is that government is not required to retain public information beyond its required holding period just because the information is or has the potential to be useful to an individual of the public. The purpose of public record-keeping is not to fulfill the public’s curiosity. As David Lawrence writes in his treatise on public records,

“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. Besides indexes of computer databases, 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.

Courts have also relied on the basic principle that agencies need not create records they have no need for themselves. Governments may stop generating or maintaining records

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40 Lawrence, supra note 4, at 28.
they no longer need even though those records may be particularly useful to a private individual or entity who has been using them.” Yet, the current tenor in American society is that the public should be provided with whatever information they wish to inspect – a stark reverse of one of the basic principles of public record-keeping as mentioned above. Public access to government information was provided for public inspection of government activities and decisions, and the public has an interest in encouraging and ensuring an efficient and effective government. However, an effective government is not the result when government is pulled away from its essential responsibilities and instead thrust into a game of “catch the public official who has something that looks bad in a record.”

An interesting feature of records is their intended evidentiary value as described in the historical analysis of the purposes of record-keeping. Records can often provide the most accurate account of a decision or activity, especially after much time has passed. Also, government has acknowledged the benefit of record creation and retention as a way of justifying and declaring government intent. It is understandable that many argue this feature of public records – the ability to ascertain intent – is why we should continue to function under such broad public records law and even pursue more robust legislation. There are problems with this approach, though.

For example, records are only as good as the context provided with them. A great deal of literature exists regarding the contexts of records and the importance for records managers and archivists to provide appropriate meta-information. Without context records are often meaningless (a common phrase in the archival community is “what

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Id. at 34, see State ex rel. Kavanaugh v. Henderson 169 S.W. 2d 389 (Mo. 1943).
exactly am I looking at?”). Therefore inspection of records not required to be created likely means the inspector gets only part of the story, evidence, and intent. Is it effective and wise to judge government on potentially haphazard records?

A retain-everything approach is likely misguided in the short term for management concerns and potentially unrealistic in the long term according to the trend of content explosion. This illusion of a stable public record-keeping scene assures the frustration of proper purpose. 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 completely 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. What we have created is the incentive for public officials to avoid creating records; if the record does not exist, it cannot be requested.

An example that hits too close to home is the 2011 University of North Carolina at Chapel Hill football team ethics fiasco in which UNC’s associate athletic director for compliance stated in her sworn testimony that she had been advised to avoid creating documents and that UNC was using outside legal counsel, implying records may not be
open to public scrutiny because non-UNC employees were the owners. The News and Observer published the story “UNC-CH avoided creating public record” on October 21, 2011 in which a representative from the North Carolina Department of Justice was quoted saying,

“It is not unlawful to not create a public document….I mean, some would even say that that’s actually good advice, to not create public documents. There’s no requirement that public documents be created if you could pick up a phone and talk to somebody.”

Rule-makers must discontinue fostering the current, flawed system of accountability through problematic record-keeping practices. Government cannot keep operating within this current system of “openness.” The long-term cost of public records retention has not been sufficiently balanced with evidentiary usefulness of the records. This, among other factors explained throughout this paper, drives the need for a consideration of major reforms in public records law. A first strategy should be a look into 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

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42 It is important to note that this presumption that keeping records always in private hands prevents the records from being considered public is not clear cut. David Lawrence points out that if records have been presented to public officials it is unlikely the technicality of the records being physically held by private hands serves to prevent the records from becoming public. He cites a Florida case in which this held true – Times Publishing Company v. City of St. Petersburg 558 So. 2d 487 (Fla. Cist. Ct. App. 1990) – but also notes other states that have held the opposite. Lawrence, supra note 4, at 12.

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.”

A look into original principles in public records law to could provide insight in how to address the modern explosion of content and simultaneously ensure genuine accountability in government. The original intent of records and public records statutes was 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.”

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

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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.
References


Center for Government Technology, UNC-CH School of Government.


