

**CITY OF NEW BERN
ADMINISTRATIVE ORDERS
OF THE CITY MANAGER**

ADMISTRATIVE ORDER 1.2
PUBLIC RECORDS POLICY
To: All City Employees
From: Mark Stephens, City Manager
Maintained By: City Clerk
Date: December 2016
Update to December 1, 2015 Policy

Purpose

The purpose of this Policy is to assist City officials and employees in understanding and complying with the public records law, including (1) record retention, (2) record disposition and (3) record requests. This Policy is designed to provide guidance only, and in the event of conflict between this Policy and the law, the law prevails. This Policy does not create any new or additional rights or obligations for any person or entity and is not designed to create a higher standard than the laws pertaining to public records establish.

Definitions

Board: City of New Bern elected or appointed body (includes all boards, commissions, committees, task forces, etc.).

Copyright: The legal right granted to a person for exclusive publication, production, sale or distribution of materials.

Employee: All City of New Bern employees, including temporary and part-time employees. Volunteers and persons working for a temporary employment service ("temps") are also subject to this Policy, but the City employee supervising the volunteer or "temp" is also responsible for the public records of such volunteer or "temp."

File Custodian: The person responsible for maintaining the project or subject file to which a record(s) relates.

Network: A system by which many computers are connected together. The City of New Bern has a network that allows access to authorized areas on a central storage device and to access printers and shared drives.

Official Record Custodian (also referred to as "official custodian"): City of New Bern Department Directors are responsible for all City business-related records created/received by all staff in the

particular Department (including the City Clerk for Board of Aldermen business-related records and Board Secretaries for Board member business related records). Official custodians are responsible for ensuring departmental compliance with the Records Retention and Disposition Schedule and records requests.

Official(s): All City of New Bern elected/appointed Governing Board members and appointed board/commission, committee and task force members.

Primary Record Custodian (also referred to as "record custodian"): Employees and officials who create and receive records are responsible for managing the records according to the Records Retention and Disposition Schedule and disclosing the records upon request.

Protected Record: A record that is exempted from the definition of public records and a record for which there is statutory or other authority permitting or requiring that the information not be disclosed.
Public Record: All records created or received by City officials and employees while transacting official City business.

Record Request: Includes any request for records, including subpoenas and discovery (as defined herein).

Records Retention and Disposition Schedule (also referred to as "Schedule"): The Governing Board adopted document that identifies and describes the City's records and provides retention and disposition instructions.

Redact: To remove confidential or protected information from a record before releasing the record in response to a records request.

Retention: As used in this Policy, the minimum length of time we keep a record according to the Records Retention and Disposition Schedule.

Subpoena: An order of the court of a witness to appear at a specified place and time to testify and/or to produce records.

Transitory: Records that are ephemeral, temporary, or transient in nature and have only short-term administrative value.

Public Records

Public Records Defined

With very few exceptions, all records created or received by officials and employees while transacting official City business are public records and must be retained, stored, disposed of, and made available for inspection and copying in accordance with the law. This applies to records in officials' and employees' homes and on home or personal computers if the record pertains to City business. The public records law is primarily contained in N.C.G.S. §132-1 through N.C.G.S. §132-10, which is on-line at:

http://www.ncga.state.nc.us/EnactedLegislation/Statutes/HTML/ByChapter/Chapter_132.html

Public records include paper and electronic documents (including electronic messages), photos, videos, maps, computer files, computer communications and voice mail messages. Unless the purpose and content of a record is personal in nature and not related to the transaction of City business, it is a public record and should be managed according to the Records Retention and Disposition Schedule (hereinafter referred to as "Schedule").

There are certain records that are exempted from the definition of public records, and there are certain public records that do not have to be disclosed. (Refer to "Protected Records" section of this Policy to read more about protected records.)

Transitory Records

Transitory records are public records, but because of their nature, they do not have to be retained. Transitory records include (but are not limited to) messages with short-term or no administrative value, such as many, but not all, voice mails, self-sticking notes, facsimile cover sheets that do not contain substantive information, and telephone messages. Transitory records are created primarily for the informal communication of information and not to perpetuate or formalize knowledge. Transitory records do not set City policy, establish guidelines or procedures, discuss a City business matter, discuss a decision, certify a transaction, or act as evidence of receipt. (Certified or registered mail return receipts that contain important information about the names of the sender/recipient and pertinent dates are not transitory.) Transitory records may be treated as having a reference or administrative value that ends when the employee or official no longer needs the information in the record. Transitory records may be purged when their reference value ends. However, if a record request is received for a transitory record before that transitory record has been purged, that transitory record must be disclosed.

Draft Records

Once a draft document has been shared with another, it is a public record and is subject to public inspection. Inspection may be required for some uncirculated drafts. Officials and employees should consult with the City Attorney's office about the public record status of a draft document prior to denying inspection of that document.

To avoid misunderstandings that can sometimes arise from public circulation of discussion drafts, consider labeling each page of draft documents that you circulate to others with "DISCUSSION DRAFT ONLY." This can be done by doing the following in Microsoft Word 2016:

- Click the "Design" tab
- Click "Watermark" in the "Page Background" group
- Click "Custom Watermark"
- Select the "Text watermark" radio button
- Type "DISCUSSION DRAFT ONLY" in the "Text" field
- Adjust the other text watermark options as desired
- Click the "Ok" button to apply the watermark to the document

Protected Records

Examples of protected records are included in this section. Protected records should not be disclosed, and in some cases must not be disclosed without the permission of the official custodian or City Attorney's office. Just as employees and officials have a duty to disclose public records, they have a duty to protect the privacy of protected records. In particular, a social security number must never be released as part of a public record. Make efforts not to include protected information and public information in the same record. Records that contain a mix of public records and protected records must be disclosed, but the protected information must first be removed (if on a separate page) or redacted (if on the same page with public information). (See Redaction section of this Policy for more information on redaction.) When in doubt as to whether a record is a protected record, employees and officials should consult with the City Attorney's Office. Consulting with the attorney has advantages in the event you determine the record is protected and you do not disclose it, and there is a legal challenge.

Exempted records (records that are exempted from public records) include but are not limited to:

1. Confidential communications from the attorney to the client within the scope of the attorney-client relationship as defined in N.C.G.S. §132-1.1 (that become public records in three years)
2. Public enterprise billing information, as provided in N.C.G.S. §132-1.1.
3. Controlled substances reporting system information as provided in N.C.G.S. §132-1.1 (which may be released only in accordance with The Controlled Substances Act).
4. Criminal investigation records and records of criminal intelligence information, as provided in N.C.G.S. §132-1.4 (note that certain information pertaining to violations of the law and arrests and indictments, and certain content of '911' calls are public records). Note also that certain information about violations or apparent violations of the law is a public record pursuant to N.C.G.S. §132-1.4(c).
5. 911 database information, if required by agreement with the telephone company as provided in N.C.G.S. §132-1.5.
6. Sensitive public security information, including specific details of public security plans and arrangements, detailed plans and drawings of public buildings and infrastructure facilities, and certain plans to prevent and respond to terrorist activity, as provided in N.C.G.S. §132-1.7, and technology security information.
7. Certain identifying information of minors participating in a park or recreation program, although the zip code of residence is a public record, as provided in N.C.G.S. §132-1.12
8. Other records for which statutory exemptions apply.

Records protected from disclosure include, but are not limited to:

1. Personnel files of employees, which includes any information gathered by the City with respect to an employee are protected, except for the following specific information that NCGS §160A-168 requires to be public information: name; age; date of original employment or appointment; terms of any employment contract, current position title; current salary; date and amount of each increase or decrease in salary; date and type of each promotion, demotion, transfer, suspension, separation, or other change in position; date and general description of the reasons for each promotion; date and type of each dismissal, suspension or demotion for disciplinary reasons; copy of the written notice of final dismissal decision setting forth the specific acts or

omissions that are the basis of the dismissal, and the office to which the employee is currently assigned.

2. "Tax information" pertaining to a taxpayer's income or gross receipts may not be disclosed, as provided in N.C.G.S. §132-1.1, except as provided in N.C.G.S. §160A-208.1 which permits disclosure to comply with a law or court order; for review by the Attorney General ("AG") or representative of the AG; and to sort, process or deliver tax information for the City to administer a tax.
3. Social security numbers and personal "identifying information" is confidential and unlawful to disclose to the public. Employees and officials must check with Human Resources before collecting any social security number. If a social security number is lawfully collected, it must be segregated on a separate page, or as otherwise appropriate, from the rest of the record, as provided in N.C.G.S. §132-1.10. In addition to social security numbers, "personal identifying information" includes: employer taxpayer identification numbers; drivers' license numbers (except in cases where the number appears on a non-protected law enforcement record), state identification card numbers and passport numbers; checking, savings, credit; and debit account numbers; personal identification code (PIN) numbers used to access financial resources; digital signatures; any other numbers or information that can be used to access a person's financial resources; biometric data; fingerprints; and passwords; all as provided in N.C.G.S. §132.1.10, N.C.G.S. §75-61 and N.C.G.S. §14-113.20.
4. Trade secrets and electronic payment account numbers (see "identifying information" above for protection of account numbers) are protected as set forth in N.C.G.S. §132-1.2. (Note that to protect a "trade secret", detailed requirements must be met.)
5. The seal of an architect, engineer or land surveyor when that seal has been submitted for project approval under Part 5 of Article 19, Chapter 160A (Building Inspections) as set forth in N.C.G.S. §132-1.2.
6. Certain "trial preparation materials" are protected as provided in N.C.G.S. §132-1.9. If records are created for or at the request of an attorney for the City when the City is engaged in litigation or litigation is anticipated, these records are likely protected 'trial preparation materials.' The legal office should be consulted if there is a request for such records.
7. Names and addresses of complaining witnesses to crimes must be temporarily withheld if release of the information is reasonably likely to pose certain threats to the witness or materially compromise the investigation, as provided in N.C.G.S. §132-1.4.
8. Certain economic development incentives are temporarily protected, but the City must make certain prior disclosures to applicants, as provided in N.C.G.S. §132-1.11.

Responsibility for Records

Current Employees and Officials

The law provides in N.C.G.S. §160A-171 that the City Clerk is the custodian of all City records and in N.C.G.S. §132-2 that "public official in charge of an office having public records shall be the custodian thereof." This Policy establishes the following record responsibilities:

1. Officials and employees are the primary record custodians of all records they create, send and receive. Every primary record custodian is responsible for managing, retaining and disclosing their records in accordance with the Schedule.
2. Each department director is the official custodian of all records created, sent and received in his or her department, including those of departed employees from that department.

3. The City Clerk is the official custodian of all records created, sent and received by City Council members. City Council members may provide the Clerk all City business records. Once received, the City Clerk shall maintain, retain, and disclose such records upon a records request. City Council members remain responsible for, and shall maintain, retain, and disclose all records not provided to the City Clerk in accordance with this Policy.
4. The secretary to each board is the official custodian of all records created, sent and received by board members. Board and commission members may provide the secretary of their respective board all City business records. Once received, the appropriate secretary shall maintain, retain, and disclose such records upon a records request. Board members remain responsible for, and shall maintain, retain, and disclose all records not provided to the board secretary in accordance with this Policy.

Every official custodian is responsible for assuring that retention and disclosure requirements are met for the records of their department. Official custodians shall establish and maintain management, retention, and disclosure practices for their departments consistent with this Policy and the law. Official custodians shall receive records requests for records of their department and assure that the appropriate primary record custodians disclose the records.

Each primary record custodian is responsible for maintaining and managing the public records they create, send and receive according to the Schedule, which is on-line at:

http://archives.ncdcr.gov/Portals/3/PDF/schedules/Local%20Schedules/Municipal_20120910.pdf?ver=2016-03-11-084038-807

The City employee or official who creates a record is responsible for managing the record according to the Schedule. Other employees and officials who receive copies of this record only need to keep it until its value to them ends. All City employees and officials are responsible for managing records they receive from outside the City of New Bern, unless they designate the management of that record to a file custodian.

Generally, employees and officials who are cc'd on correspondence, unless they are the custodian of that main file, probably are not required to keep a copy of the record. However, the sender and bcc recipient of a bcc'd correspondence record are custodians of that record and must ensure that one of them retains it or that the main file custodian maintains the complete record in the main file. Also, if you are the only City employee or official copied on a correspondence, you are likely the custodian of that record and must manage it properly.

Use the chart below as a reference guide to determine who is responsible for keeping a particular record that is determined to be non-transitory. Refer to the "Litigation Hold Requirements" section, which outlines that employees and officials must keep all records when a lawsuit has been or is anticipated to be filed on a particular matter (even those records we would not typically keep).

If the record is...	*Keep It	**Do not keep it
Sent to you from an official/employee of the City		X
Sent to you from someone outside the City (not a City official or employee)	X	
From you	X	
Sent from an official/employee of the City and you are cc'd		X
Sent from someone outside the City (not a City official or employee and you are cc'd)	X	
Sent from an official/employee of the City and you are bcc'd		X
Sent from someone outside the City (not a City official or employee and you are bcc'd)	X	

*Or designate a file custodian

**After the record's administrative value to you ends.

City employees and officials should not unnecessarily create or maintain multiple copies of any record, regardless of its medium. For example, if 10 photographs are taken for purposes of retaining one or two acceptable photos for business purposes, then the unsatisfactory photos are likely transient records and should be purged. Maintaining duplicates and transient records results in unnecessary expense to the City and creates a burden on the computer network. In the example given, if 10 unnecessary photographs are retained it has the undesired effect of possibly creating 10 new records.

The Information Technology Division is responsible for computer system security and performance, but they are not responsible for managing employee's and official's records. Each employee and official is the primary record custodian for their records, and each is responsible for managing City business related records according to the Schedule, regardless of whether they are stored on City-owned or personal equipment.

Departing Employee and Official Records

City business-related records of departing employees and officials remain the property of the City of New Bern. Failure of officials to deliver records to their successor or appropriate City employee is a Class 1 criminal misdemeanor, per N.C.G.S. §132-4.

Departing Employee Records

The supervisor will advise the departing employee to manage all records (paper, electronic and telephone) according to the Schedule. The supervisor will require the departing employee to review paper and electronic records to ensure file names are logical and meaningful and to ensure records are filed in folder systems to provide for easy retrieval.

The supervisor will require the departing employee to copy all records from the employee's computer that are not stored on the City's network and provide this copy to the Department Director prior to the employee's last day of employment.

The supervisor will require the departing employee to manage all telephone voice mail messages according to the Schedule. The employee shall delete transient voice mail messages. The employee shall

maintain all other voice mail messages (either on the computer or in the paper files) and save them appropriately in folder systems to ensure easy retrieval. Voice mails should not be stored on the telephone, because this method does not ensure easy retrieval.

All incoming and outgoing emails are automatically archived by the City's email system, so no action needs to be taken by departing employees to preserve email that meets the definition of a public record.

The Information Technology Division will confirm that the Department Director has a copy of all the departed employee's electronic records before reassigning the computer. Information Technology Division staff will also confirm with the Department Director that all the departed employee's telephone voice mail messages have been handled according to the Schedule prior to reassigning the telephone. If the departing employee fails to manage their electronic records or telephone voice mail messages according to the Policy and the Schedule prior to departing City employment, then the Department Director is responsible for these duties prior to Technology Services reassigning the equipment.

Departing Governing Board Members

The City Clerk will work with all Governing Board members leaving office to request that they provide all City public records to the City Clerk's office.

Departing Appointed Official Records

The Official Records Custodian for a particular Board will work with departing Board members to request that they provide all City public records to the Official Records Custodian.

Retention and Disposition of Public Records

General Retention and Disposition Requirements

The law requires that public records be retained in a manner that allows public inspection and copying, and not destroyed for specific periods of time. Public records should be destroyed after they have been retained for the correct time period according to the Schedule by utilizing approved destruction methods outlined in the Schedule, unless there is some other reason that record should be retained, such as an outstanding record request, subpoena, court order, or some state or federal law or grant requirement. Additionally, if a claim or litigation is pending or threatened, records pertaining to the claim or litigation must not be destroyed. (See "Litigation Hold Requirements" section of this Policy for more information on "litigation hold".) A public record that is not properly purged remains a public record and must be disclosed upon request, upon receipt of a subpoena or court order or if a claim is made or litigation instituted. For example, if the Schedule requires that you maintain a record for two (2) years and, when the record is aged three (3) years, you receive a record request or a court order that includes this record, then you must disclose that record. Having a plan for the destruction of records eliminates obsolete records and saves resources by not indefinitely and unnecessarily storing records beyond appropriate retention periods.

Any record that is retained electronically should be maintained in a secure system that controls access, storage, retrieval, alteration, and deletion. Each primary record custodian must set up their own retention and disposition procedures, including appropriate back-up, to assure compliance with the law.

Litigation Hold Requirements

A 'litigation hold' is notice from the City Attorney's office that a lawsuit has been or is reasonably anticipated to be filed against the City. When a litigation hold notice is sent, ALL records that may be relevant to the claim or lawsuit must be retained, and not purged, until the lawsuit is resolved and the applicable retention period has expired. Transient records (including telephone voice mail messages), duplicate records, electronic versions of printed records and other records for which there is no duty to retain under the Schedule must be retained once a litigation hold is issued.

A litigation hold may also result if an official or employee receives a letter or other notice from an attorney for an adverse party that specific records be preserved. The City Attorney's office should be consulted if such notice is received.

Records Requests

Responding to a Record Request

The law requires every record custodian to permit the inspection of any public, non-protected record in the custodian's custody at reasonable times and under reasonable supervision, and to furnish copies as promptly as possible after payment of any applicable fee. (See "Charging for Producing Records" section for more information on fees City employees and officials may charge to produce records in response to a record request.)

Persons requesting to inspect a record cannot be required to disclose their purpose or motive for wanting the record, nor can they be required to give their name or address, or show an ID, or sign for a record. However, according to N.C.G.S. §132-10, employees and officials may require the requesting party to agree in writing that geographical information system databases and data files will not be resold or used for trade or commercial purposes. Also, we may require computer database requests be in writing according to N.C.G.S. §132-6.2.

Persons should make record requests to the official custodian. The official custodian who receives the request should confirm that the requester has fully and clearly identified the record(s) sought. Asking for, but not requiring, the request to be in writing may facilitate obtaining clear requests. The official custodian shall forward any record request to the primary custodian. The primary custodian should make or direct a thorough search for the record and provide one of the following responses within two business days: (1) inform the requester that more time is needed to respond to the request and provide an estimated timeframe for the response; (2) make the record available for inspection or copying (redacted, if necessary – see "Redaction" section of this Policy for more information), taking necessary precautions to ensure the records are not at risk of being lost, damaged or destroyed; (3) if there is no record, provide a written statement that you "as custodian" have made a search of the records in your custody and have found no record (the law does not require record custodians to create a new record to satisfy a request); or (4) if the City Attorney concurs with denying the record request, or portions thereof, provide a written explanation of the basis for the denial.

In some cases, the record custodian may be able to simply forward a copy of the requested record(s) to the requester. In other cases, the record custodian may make the records available for inspection and only copy those records identified for copying by the requester. (See "Charging for Producing Records"

section for more information on fees City employees and officials may charge to produce records in response to a record request.)

Copies of public records should be provided to the requesting party in the medium of the requester's choice, provided that the City is capable of satisfying the request in that particular medium (i.e., paper, CD/DVD, etc.). The primary custodian should communicate the cost and obtain approval from the requesting party prior to producing any records in response to the record request. The requesting party shall pay any cost prior to employees and officials reproducing records or at the time of receiving the records. If the requesting party does not concur with paying the fees, then the employee or official will make other arrangements for the inspection of records.

Employees and officials must allow the inspection of electronic mail lists containing e-mail addresses of subscribers. However, employees and officials of the City of New Bern must not provide a copy of these lists in response to a records request in accordance with this policy and Session Law 2010-83.

Employees and officials should immediately advise the City Clerk and Public Information Officer of any record request from the media.

Redacting Protected Information

If a record subject to a record request is a protected record, you likely will not have to make that record available for inspection and copying. In some cases, however, a public record will contain information that is protected, but the entire record is not protected. In those cases, the protected information should be deleted in a manner that shows that a deletion was made. For example, if the record is a printed record, make a copy of the record, tape over the protected information with white correction tape, then use a black painter pen to completely mark over the tape. The marked up record should then be copied and the new redacted copy made available for inspection and copying. If a primary custodian is providing an electronic copy that includes protected information that must be redacted, the custodian should save the electronic document as a new file name, and from the new file, use the electronic "cut" feature to eliminate the protected text and show in the revised document where text has been "cut". It is the primary custodian's responsibility to ensure that protected information remains protected.

Copyrighted Records

There are records in the City's custody that may be copyrighted material and protected by copyright laws. If a record request is made for a record that is protected by copyright, employees and officials should make the record available to the requester for inspection. If the requester requests a copy, then the employee or official may permit the requester to copy such record themselves. Employees and officials should not copy records known to be copyrighted in response to a records request.

It is possible that City records may contain copyrighted materials for which employees and officials are not aware of the copyright status. If it is possible that records provided by employees and officials may include copyrighted materials, then the employee or official should use the following statement when releasing the records in response to a records request:

The City of New Bern is providing copies of records you have requested in accordance with the North Carolina Public Records Law. To the extent any of the records provided are copyrighted, take notice that these records remain subject to copyright law and you are not authorized to

reproduce, download or otherwise reproduce or copy any copyrighted material or work that the City has provided in accordance with the public records law. The use, reproduction, downloading or distribution of copyrighted materials and works may subject you to applicable penalties and damages under state and federal laws.

Charging for Producing Records

The law and the City's fee schedule permits the City to charge a fee for copy of a record that recovers the actual cost of duplicating the record. Specific fees are set forth in the City of New Bern's most current Fee Schedule.

In rare cases, providing public records may require extensive use of information technology resources or clerical and/or supervisory assistance. In these cases, the official custodian may assess a reasonable service charge based on the City's actual incurred costs. This reasonable service charge must be approved by the Department Director and the City Manager or designee. An estimate of the charges should be given to the requester and approval obtained prior to responding to the request.

All fees and charges should be collected before producing the records or at the time the records are delivered.

Disputed Records Requests: Enforcement and Penalties

The law provides a mediation process for resolving lawsuits regarding public records disputes. The law also provides that if a legal action is brought against the City to compel the disclosure of public records, the City will be required to pay the other party's attorney's fees if the other party substantially prevails in the action unless the court finds that the City acted in reasonable reliance on (i) certain court orders or judgments applicable to the City, (ii) a published appellate court opinion or (iii) a written opinion or letter of the NC Attorney General. Individual employees and officials are not subject to personal liability for attorney fees if they consulted with and followed the advice of an attorney. For this reason, if employees or officials have doubts about the protected status of a record or are considering denying a records request, they should consult the City Attorney's office.

General Recommendations

1. Make thoughtful decisions about the medium you use to convey information. The creation and retention of unnecessary printed and electronic records places burdens on the City's physical and electronic storage systems. Avoid creating records that are not necessary, and dispose of unnecessary duplicate records and transitory records.
2. Try not to mix public records with protected and personal records. Treat protected records with a heightened concern for security, and segregate protected records from other records if possible. Never share protected records with a person who should not have access to those records. In some cases, such as Social Security numbers, the law requires that the protected record be segregated.
3. Maintain all City records on City equipment and all personal records on personal equipment.
4. Time spent creating a record retention and disposition management system that meets the requirements of this Policy and works for the custodian is time well spent. Appropriately label and store records so they can quickly and easily be retrieved in the event a records request is received. Label those records that are protected records or that contain protected records in a

manner than clearly indicates their protected status. If a protected record will become a non-protected record at some time in the future, mark it in some way to identify the date it will lose its protected status. Dispose of transitory records, duplicate records, and records that have exceeded their retention period.

5. Contact the City Clerk's or City Attorney's office with any questions about this Policy.
6. Contact the City Clerk and Public Information Officer to advise them of media record requests.

Related Documents

1. North Carolina General Statutes (Chapter 132 and other chapters)
2. NC Division of Archives and History, Guidelines for Public Records with Short Term Value
3. NC Division of Archives and History, Metadata as a Public Record in North Carolina: Best Practices Guidelines for Its Retention and Disposition
4. NC Division of Archives and History, Best Practices for File Naming
5. NC Division of Cultural Resources Records Retention and Disposition Schedule



Mark A. Stephens
City Manager

12/21/16

Date