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## Coates' Canons Blog: Ask, Don't Compel: Local Government Authority to Establish Rules For Public Records Requests

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An email to the town clerk requests electronic copies of the job descriptions for all town positions that are currently filled, and a list of all current town employee salaries. It asks for a response by return email. The email address is "guess who" @gmail.com and there is no other identifying information in the request. The town has a standard form it requires for public records requests, including an on-line version. The sender refuses to complete the form and claims that it's illegal for the town to require it. The next day, a person walks into town hall and requests hard copies of all emails sent to and from the town manager within the past month. Again, the town insists on its standard form but the requester refuses to complete it, will not provide her name or any contact information, and says she will come in person in a week and pick up the records. Is it illegal for the town to ask for written requests or additional information? Must they provide the records if a person refuses to comply with the protocol?

While the North Carolina public records law does not specifically authorize local governments to require that public records requests must be submitted in a particular form, there are legitimate reasons to request information that will help the agency fulfill its legal obligations in providing access to public records. But if the agency has the minimum information it needs, it must respond, even if a request is not submitted in the standard form. This blog discusses the limitations public agencies face in controlling the ways public records requests must be submitted.

### Legal Authority to Establish a Protocol

Requests to inspect or receive copies of public records come in many different forms — by letter, by email, by telephone call, and in person. They vary in their specificity, from the very detailed legalistic types that read like discovery requests, to the very vague that are so broad that a follow-up will be necessary to even determine what is requested. Some don't even indicate who is asking, as in the case above. The federal government, some states, and some local governments have created standardized protocols for public records requests. As noted, there's no specific authority for this under our statute.

The legal argument in support of a protocol for public records requests is that it is necessary to fulfill the public agency's obligations under the statute. Those obligations include both facilitating access to records, and protecting the integrity and confidentiality of records. As long as the specific requirements are tied to the agency's legitimate needs, and are implemented in ways that do not unduly burden the right of access, the process should be legally acceptable. As David Lawrence notes in **Public Records Law for North Carolina Local Governments**, there is support in the cases and the statutes for regulations detailing the right of access, including hours in which inspection is allowed, the form that requests must take, handling of records, and cost of copies. See p. 44-45; **G.S. 132-6** ("Every custodian of public records shall permit any record in the custodian's custody to be inspected and examined at reasonable times and under reasonable supervision by any person, and shall, as promptly as possible, furnish copies thereof upon payment of any fees as may be prescribed by law.").

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But to what extent can these requirements be mandatory? State law provides specific authority for dictating reasonable hours of access and handling of records, so it seems likely that these types of requirements can be mandatory. But what about a requirement that all requests must be in writing? Or that they be signed? Or that the requester's name be provided? Probably not. As Lawrence notes, the public records law does provide specific authority to require that requests for computer databases be in writing (**see, G.S. 132-6.2(c)**). He suggests that this creates an implication that there is not authority to *require* written request for any other type of record.

Local government officials should assume that protocols for the form of the request may be used, but the refusal to comply with them cannot be a basis for denying access if the request provides sufficient information for the agency to respond. Indeed, even in jurisdictions in which there is specific authority to establish forms for records requests, courts have held that the agency is required to provide records without the proper form, as long as there is sufficient information in the request as submitted. See, for example, *Renna v. Union County*, 970 A. 2d 414, 421 (2009) (“The vast majority of other jurisdictions fostering public access to government records have adopted policies and procedures that eschew the necessity for official forms...”)

#### What Minimum Information is Required?

Courts around the country have consistently held that in order to trigger some obligation to provide access, a public records request must identify with reasonable clarity the specific records that are desired. See, for example, *Beal v. City of Seattle*, 209 P.3d 872, 875 (Wash. App. 2009) (“The prompt response requirement does not apply until a requestor makes a specific request for identifiable public records... An identifiable public record is one for which the requestor has given a reasonable description enabling the government employee to locate the requested record.”) Even an extremely broad request can satisfy this standard and must be responded to as long as the requester identifies how and where the records are to be delivered. Information about the requester is not essential as long as the request is specific enough and the method of delivery is known.

#### What Information May Be Requested?

The information in a protocol for public records requests could be designed to serve a number of legitimate purposes. It might include a standardized set of information that the agency can use to document, track, and respond to requests in a consistent and timely manner. It may include a specific statement of the records requested, which can encourage the person to focus on and describe the particular records sought. It provides proof of what the request was, in case there should be a dispute about whether the records provided are responsive to the request. It can also provide an opportunity to record other important information about the request, such as whether the request is for inspection or copies, in what medium the records are to be provided, how they are to be delivered or received, and whether the requester agrees to pay for the costs of copies (limited **under the statute** to the cost of the actual copies, including mailing or delivery fees, if any).

Obtaining this type of information need not limit the right of access. It can protect the agency from unnecessary costs and effort in producing records that are not the focus of the request, or that the requester later refuses to accept or pay for. Indeed, for a request that may involve significant cost to the requester, a jurisdiction may wish to require payment in advance or, at least, written agreement to pay upon delivery.

#### What Not To Include

Some kinds of information should not be included in a standard protocol. For example, it should not ask the requester to indicate the purpose or motive for which records are being sought. The public records law (**G.S. 132-6(b)**) specifically prohibits a public agency from requiring a person requesting public records to disclose the purpose or motive for the request. Even if the use of a written request form is made optional, it seems inappropriate to even request this information, given this explicit prohibition in the statute.

The protocol should also avoid requesting personal information beyond what is absolutely necessary to fulfill the request. Any information obtained and recorded by the agency would, of course, itself become public record. A person may not wish to list his or her name, address, phone number, email address, or any other information at all if the person will inspect records or pick up copies in person. To include such information might well be viewed as creating an unnecessary burden on the right of access. Requests for contact information and identification should be flexible, optional, and designed to

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provide only the information the agency needs to comply with the specific request.

A protocol should not include a requirement that all requests must be in writing. This could create a burden for anyone who has limited ability to comply due to language, literacy, disability or other limitations. The public records intake process could be designed so that it can be completed either by the requester or by the administrative staff of the public agency. In this way, the agency can obtain the information without creating a burden on the requester. Web-based forms could be developed for email requests and staff can be trained to recognize and respond to requests that satisfy the minimum requirements even if they don't arrive in the requested standard format.

#### A Few Remaining Issues

The request from "guess who" raises another question that remains unclear under the North Carolina public records law. Does a public agency have an obligation to send records out (on paper or electronically) to anyone who asks for them? Or can the agency require a person requesting records to come to a public agency's physical office to get them? We have no case law on this. Lawrence notes that cases from other states have gone both ways on the question of whether copies must be mailed to remote requesters. (See Lawrence, *Public Records Law* at 44.) With the prevalence of records and requests in electronic form, and the ubiquity of electronic communication, it seems unlikely, in my view, that a court would uphold a requirement of personal delivery. So I think it's likely that the request from "guess who" must be accommodated. Similarly, the anonymous, in-person requester, has a right to obtain records without providing any further information.

But that doesn't mean it's illegal to ask.

## Links

- [www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition](http://www.sog.unc.edu/publications/books/public-records-law-north-carolina-local-governments-second-edition)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6)
- [www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6.2](http://www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6.2)