
Coates' Canons Blog: Is a Survey A Public Record? Another Application of the Framework for Analyzing Public Records Questions

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Surveys are a valuable tool for local governments and other public agencies. They provide important data that can help agencies make decisions and improve services. Surveys might be designed to get feedback from citizens or employees, or may involve research about facts and conditions that will inform pending agency decisions. Consider a few specific examples: 1) A survey of citizens who use particular services the agency provides to determine which ones they prefer, how they think the service could be improved, or how the agency should finance it (fees or taxes?); 2) A survey of employees asking them to evaluate department heads or the manager, asking them for suggestions on how to improve working conditions or systems in place, or asking about which benefits they value most; or 3) A survey of properties in the area that might be available for a possible economic development project. In each of these scenarios, the public agency and the respondents may assume that their responses and survey results will be confidential. Are they?

Let's apply the framework (introduced **here**, and applied previously to the question of whether time sheets are public records, **here**) to determine whether surveys are public records.

Let's assume that the agency has received a request for copies of the responses and information from the three surveys. For ease in reference, we'll call them 1) the citizen survey, 2) the employee survey, and 3) the property survey.

Here's the framework again:

- 1. Does a record exist that corresponds to the request?** *If not, no disclosure is required. If so, continue to question 2.*
- 2. Is the record "made or received in the transaction of public business?"** *If not, no disclosure is required. If so, continue to question 3.*
- 3. Is there an exception that applies?** *If not, the requested access must be provided. If so, continue to question 4.*
- 4. Does the exception apply to the entire record, or only to certain information, and does it prohibit disclosure or does it deny the right of access?** *If a prohibition applies to the entire record, do not disclose; if it applies only to certain information, redact and disclose. If there is no right of access to some or all of the information, but release is not prohibited, determine whether or not to release the entire or a redacted record.*

The framework applied to surveys:

- 1. Does a record exist that corresponds to the request?**

Yes. In all three cases, the survey will result in one or more records. The purpose, after all, is to obtain information that can be reviewed and analyzed. Whether conducted electronically, on paper, or even by telephone, responses will most likely be recorded in some tangible format.

- 2. Is the record "made or received in the transaction of public business?"**

Yes. In all three cases, it's clear that the agency is using the survey for an agency purpose. A question might arise, however, in a case where a respondent includes in the response comments or information that is entirely unrelated to the subject of the survey. For example, imagine that a response from a citizen includes a statement like, "I think the staff does a great job providing recreational services, but I think the board members and the mayor are a bunch of crooks. Too bad we can't fire *them!*" Even though this comment isn't related to the survey itself, it's probably still within the broad definition of what constitutes a public record under the statute. Since responses, even if unrelated to the purpose of the survey, are submitted in connection with the survey, it seems likely that they will be considered to have been received in the transaction of public business.

So if the records of surveys are "made or received in the transaction of public business" that means that the survey information is subject to public access unless an exception applies. It's important to stop here and consider what that means with respect to promises of confidentiality or anonymity. First, it means that a public agency will be able to make good on a promise of confidentiality only if there is an exception that applies (see question 3 below). What about a promise of anonymity? That's a different question. While confidentiality suggests withholding the entire record from public access, anonymity may be obtained by separating the response from the identity of the respondent. This may be a function of how the survey instrument is designed. If a survey record exists that contains both the response and respondent's identity, I don't know of any way to preserve anonymity. On the other hand, if the survey is designed in a way that separates or doesn't even obtain the respondent's identity, it may be possible to promise and preserve some degree of anonymity. For example, an electronic survey might create separate fields for identity or demographic information, so that it would be possible to preserve anonymity by maintaining the information separately, even though both sets of records are subject to public access.

3. Is there an exception that applies?

Two exceptions that might apply to some or all of the information in these surveys come to mind.

First, personnel information. In the citizen survey, it's possible that some responses will include information about the performance of specific employees. That information, if considered by the agency to be relevant to an employee's performance, may be legally protected under the personnel privacy statutes as part of the personnel file. In order for this exception to apply, the information must relate to a specific employee. The exception would apply if an employee is named, or if the comment is so specific that its connection to a specific employee is obvious even though he or she is not named. Comments about employees generally (including comments about specific departments), or about elected or appointed board members would not be covered by this exception, and would be public. Similarly, in the employee survey, responses to questions seeking feedback about the performance of specific employees would be protected from public access under the personnel privacy provisions. Responses about benefits or general working conditions may not be protected under this or any other exception, unless they disclose personal financial or employment information about the respondent (assuming that the respondent's identity is connected to the response). So for example, if a respondent says: "I think our health benefit package may work for some, but not for someone like me that has a serious medical condition." That comment would be considered confidential personnel information that would not be subject to public access, again, assuming that the record connects the comment with a specific individual.

Second, economic development information. There are two exceptions that might apply to the property survey. First, **G.S. 132-6(d)** allows (but does not require) a public agency to withhold from public access public records relating to the "proposed expansion or location of specific business or industrial projects." If the survey was done in connection with the expansion or location of a specific business, the results of the survey would be protected from public view for as long as necessary to prevent the frustration of the purpose for which they were created. So this is a temporary protection until the business commits to the project or the agency abandons it. It's important to note, however, that this provision does not protect records that relate to "general economic policies or activities." So if the survey does not relate to a proposal for a specific business or industrial project, the survey results would be public.

A second protection for economic development information can be found in the open meetings law. Under **G.S. 143-318.11(a)(4)**, a public agency may meet in closed session to discuss matters relating to the "location or expansion of industries or other businesses in the area served by the public body." This exception appears to be broader than the one under the public records law, so that a general analysis of available properties for economic development projects could be discussed in closed session. If the agency contracted with a private consultant to do the property survey, and the

contract called for the consultant to provide only the final report (and not the supporting data), it's possible that the actual survey data would not be "received" by the public agency prior to the meeting. In this situation, the report could be presented in closed session and made a part of the closed session minutes, which are protected from public access under **G.S. 143-318.10(e)**, for as long as necessary to prevent the frustration of the purpose for which the meeting was held. This may be a desirable approach if the agency does not want to disclose which properties are under consideration until a later point in the process. In addition, **G.S. 143-318(a)(5)** allows a board to discuss acquisition of property in closed session. (This provision would, however, require identification of the properties in question.)

4. Does the exception apply to the entire record, or only to certain information, and does it prohibit disclosure or does it deny the right of access?

As noted above, responses to a survey that is designed to evaluate an employee would, in their entirety, be considered part of that employee's personnel file, and the agency would be prohibited from releasing them. The citizen survey, as well as the more broadly focused employee surveys may contain specific information that is protected, and in those cases, such information would be redacted and the remainder of the survey results would be subject to public access. As noted above, the property survey, if protected under either of the two exceptions described above would be protected from public access in its entirety but for a limited period of time. Since these records probably don't include trade secret information, the agency has to option of denying access to the records, but is not required to do so.

One final point about surveys:

What if the survey is done under contract with a private party, rather than by the agency itself? Does that change the analysis? Only slightly. If the contract gives the public agency access to all of the information obtained by the contractor, it's likely that a court would find that the records are subject to access under the public records law, even when still in the hands of the private party. (For a discussion of this issue see p. 24 -25 in David Lawrence's book **Public Records Law for North Carolina Local Governments**.) On the other hand, if the contract denies the public agency the right to obtain to the raw data, then the underlying records are likely not subject to public access. In that case, only the final report or other "deliverables" under the contract would be subject to public access once received by the public agency.

Want to learn more about surveys? Here's **an article about surveys**, with some examples from North Carolina local governments. The article is co-authored by School of Government faculty member **Maureen Berner**, who regularly advises local governments about how to develop effective surveys.

Links

- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=132-6
- www.ncga.state.nc.us/gascripts/statutes/statutelookup.pl?statute=143-318.11
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