

Coates' Canons Blog: Text Messages as Public Records

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A city manager sends and receives the following text messages from a city resident on the manager's personal smartphone:

Citizen:	u and wife want to meet us for dinner at 6 2moro?
Manager:	same place as last Fri? scallops were delish
Citizen:	yeah. btw-Y potholes on Jones St. not fixed yet? ruining my car shocks. mayoer promised theyd be fixed 6 mnths ago. As usual LOPSOD
Manager:	BMV publ. werks crew painfully slow. will direct to fix asap
Citizen:	Thx. it's doog to know peeps in high paces :-}
Manager:	had 2 pull rank. crew will get there early next week at latest.. ITMT take Smith st.
Citizen:	YTM. where/when is next council mtg?
Manager:	in 3 weeks. moved 2 library mtg. room. 7pm. CU 2moro

Are these text messages public records? Do they need to be retained? Are they subject to public access?

The answer to the first question is that at least some of the text messages between the manager and the citizen likely are public records. And the answer to the second question is that at least some of the messages that are public records must be retained according to record retention requirements promulgated by the NC Department of Cultural Resources. And the answer to the third question is that the texts that are public records are subject to public access.

What is a text message?

A text message (or "text") is an electronic communication that is sent over a cellular network, generally from one mobile phone to another. A text message often is less formal than an e-mail. It is more akin to a brief phone call or in-person chat. A text typically is comprised of a string of acronyms, indecipherable without detailed knowledge of "**texting slang**." Over time, however, as individuals have become more adept at typing with their thumbs, and more familiar with the texting slang, text messages have become increasingly detailed and substantive. (I recently overheard someone, probably a teenager, refer to texting as "the new e-mail.")

Governments use text messaging in a variety of contexts. Some units issue texting devices to law enforcement personnel to provide a means of communication for officers responding to dangerous or sensitive situations. Other units require

managers and other department heads to carry text messaging devices in case emergencies arise during off hours. Still other units issue texting devices to regular staff members simply to facilitate routine communications. And, finally, many units do not issue text messaging devices to their employees or officials. Instead, employees and officials use their own, personal devices to send and receive text messages related to their government work. Under any of these circumstances, questions arise as to whether text messages sent or received by government employees or officials are public records.

Definition of public record includes text messages

G.S. 132-1 defines public records, in relevant part, as “all documents . . . magnetic or other tapes, electronic data-processing records . . . regardless of physical form or characteristics, made or received . . . in connection with the transaction of public business . . .”

This definition is very broad and is generally unlimited by the form of the material in question or by the circumstances under which it was created or received. It includes electronic documents and e-mails. See *generally* State Employees Assoc. of North Carolina v. North Carolina Dept. of State Treasurer, 364 N.C. 205, 695 S.E.2d 91 (2010) (recognizing that e-mails are subject to public records laws in North Carolina). It also almost certainly includes other electronic communications, such as text messages, instant messages, tweets, and social media postings.

Thus, a text message that is made or received by a public employee or official in connection with the transaction of public business is a public record (unless a specific statute exempts the content of the text from the public records law). As with e-mails, there is no general exemption from the public records laws for information sent or received through text messaging. In fact, text messages should be treated the same as e-mails under the public records laws. (Frayda Bluestein provides a great overview of the application of public records laws to e-mails [here](#).)

In the hypothetical example above, the manager and the citizen exchanged a few personal messages about making plans for dinner. These messages are not public records; they were not made or received in the transaction of public business. Several of the messages, however, clearly were sent or received by the manager in connection with his role in city government. The following (or at least a portion of the following) texts likely constitute public records:

Citizen:	yeah. btw–Y potholes on Jones St. not fixed yet? ruining my car shocks. mayoer promised theyd be fixed 6 mnths ago. As usual LOPSOD
Manager:	BMV publ. werks crew painfully slow. will direct to fix asap
Citizen:	Thx. it's doog to know peeps in high paces :-}
Manager:	had 2 pull rank. crew will get there early next week at latest.. ITMT take Smith st.
Citizen:	YTM. where/when is next council mtg?
Manager:	in 3 weeks. moved 2 library mtg. room. 7pm. CU 2moro

Note that the fact that these messages were sent or received from the manager’s privately-owned smartphone is not relevant to the inquiry of whether or not the texts are public records. Texts may be public records even if they are sent or received on an employee’s or official’s personal device. It is the content of the messages that is determinative.

Public record text messages must be retained based on content of message

If a text message is a public record, it may need to be retained, at least for a period of time. Public records, regardless of their form or format, must be retained according to retention schedules promulgated by the NC Department of Cultural Resources (NCDCCR). See **G.S. 132-3**. Retention is based on the content of the public record. Thus, text messages must be retained according to the same rules as e-mails or paper documents with the same content. NCDCCR has published

public record retention schedules for a variety of government entities. See, e.g., **Municipal Retention and Disposition Schedule**; **County Management Retention and Disposition Schedule**.

According to the NCDCCR, even if the records retention schedules do not explicitly mention text messaging, “communications through these media are nevertheless covered if the records retention schedule includes reference to electronic records, or ‘correspondence’ or other relevant description that would implicate the use of text/IM messages or communications related to public business.” See **Best Practices for Electronic Communications Usage in North Carolina: Text and Instant Message**.

The records retention rules provide that records of “short term value” do not need to be retained for any specific period of time. Given the nature of text messaging, most texts likely fall within this category. For example, the texts between the manager and citizen about the location, date, and time of the next council meeting likely are of short term value and would not need to be retained by the manager.

However, the content of some text messages, such as the exchange between the manager and citizen about the potholes, are more substantive in nature. In fact, although perhaps not entirely clear, I think that the text in which the citizen asks why the potholes on a particular street have not been fixed, and indicates that his vehicle has been damaged by the potholes, likely constitutes a citizen complaint. According to the **Municipal Retention and Disposition Schedule**, such complaints must be retained for at least 1 year from the date of resolution of the issue.

How to retain text messages that are public records

It can be difficult for an employee or official to determine if a text is a public record that must be retained. It is even more difficult for a local unit to figure out how to capture and retain the text. For many units, the only practical way to retain text messages is to have the sender or receiver forward each public record text to his or her government e-mail account. The e-mail then can be archived along with other public record e-mails of like content. Once the public employee or official successfully forwards the text to the e-mail account the text likely need not be retained. The NCDCCR has provided guidance on forwarding texts from a variety of different text messaging platforms. See **Best Practices for Electronic Communications Usage in North Carolina: Guidelines for Implementing a Strategy for Text and Instant Messages**.

If a unit contracts with an external provider, the external provider typically keeps a record of the content of all text messages sent or received for only a short period of time. A unit could contract with the external provider to retain the text messages for a longer period of time. It may be difficult, if not impossible, for the external provider to segregate and retain only the public record text messages that must be retained, though. Furthermore, a unit must ensure that it has ready access to the stored text messages. As discussed in a previous **post**, the federal Stored Communications Act may prohibit a government entity from accessing the content of a text message stored by an external provider, even if the government unit is the contracting party, without the explicit consent of the sender or recipient of the message.

Text messages that are public records are subject to public access unless they are statutorily exempted

A text message that relates to public business also is subject to public access unless it is statutorily exempted. See **G.S. 132-6**. A local unit should treat text messages as equivalent to e-mails in responding to requests for electronic records or electronic communications. To facilitate this process, the unit should adopt and implement detailed policies and procedures for capturing and storing a text that is a public record and that must be retained. It also should routinely train employees and officials on how to identify a public record text and, if required, retain, search, and retrieve that text.

Links

- www.netlingo.com/acronyms.php



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- www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-1.html
 - canons.sog.unc.edu/?p=1712
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-3.html
 - archives.ncdcr.gov/For-Government/Retention-Schedules/Local-Schedules#chart
 - www.google.com/search?q=best+practices+electronic+nc+archives&ie=utf-8&oe=utf-8
 - canons.sog.unc.edu/?p=6625
 - www.ncleg.net/EnactedLegislation/Statutes/HTML/BySection/Chapter_132/GS_132-6.html