
“TUNING-UP” NORTH CAROLINA’S PUBLIC RECORDS ACT:
A BRIEF DISCUSSION OF PROBLEM AREAS AND POSSIBLE
SOLUTIONS

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INTRODUCTION	24
THE BASICS OF NORTH CAROLINA PUBLIC RECORDS LAW.....	26
PROBLEM AREAS AND PROPOSED SOLUTIONS.....	28
I. “CUSTODIANS” OF PUBLIC RECORDS.....	28
<i>A. Problem Areas Surrounding Custodians</i>	29
1. Identifying the Proper Public Records Custodian	29
2. The Role of Non-Custodial Records Officers	31
<i>B. Proposals to Clarify the Identity and Role of Custodians</i>	32
1. Borrow from Rule 4(j).....	32
2. Make the requirement of naming the custodian explicit in the Law	33
3. Provide for Public Information Officers by Incorporating Concepts of Agency Law Into the Public Records Act.....	34
II. THE EXTENT AND LIMITATIONS OF THE “PERSONNEL”	
EXEMPTION.....	37
<i>A. Problem Area – Numerous Exemptions, Sparse Case Law</i>	37
<i>B. Proposed Solutions</i>	41
1. The General Assembly Should Standardize the Definition of a Personnel Record By Adopting the Definition Set by the County Personnel State Across the Board As Much As Practicable.	41

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2. Litigants Should Seek Declaratory Judgments Prior to Filing Public Records Lawsuits When Disputing Whether a Record is “Personnel” In Nature.....	42
III. THE ROLE OF AN “OFFICIAL DENIAL” AND THE AMBIGUITY OF “AS PROMPTLY AS POSSIBLE”	44
A. <i>Problem Area – “Official Denials” and “As Promptly As Possible”</i>	44
B. <i>Potential Solutions</i>	46
1. Amend the Public Records Act to Prohibit Unjustified Delay	46
2. Define the Word “Promptly” In the Public Records Act	48
IV. DETERMINING WHEN A PLAINTIFF IS ENTITLED TO ATTORNEYS’ FEES	49
A. <i>Problem Area – Lack of Clarity As to When a Plaintiff “Substantially Prevails”</i>	49
B. <i>Proposed Solution – Allow judges to make partial awards of attorney fees when a party partially prevails.</i>	51
CONCLUSION	52

INTRODUCTION

North Carolina’s Public Records Act is a statutory scheme that dictates when and how a person may access state and municipal government records.¹ The Law generally provides that government records are open to inspection by “any person” upon request, with certain exceptions and exemptions.² When a citizen and a government actor disagree on whether a document is a public record subject to inspection, the courts ultimately decide who is in the right.³ The policy goal of the

¹ N.C. GEN. STAT. § 132 (2016).

² § 132–6(a) (“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. As used herein, ‘custodian’ does not mean an agency that holds the public records of other agencies solely for purposes of storage or safekeeping or solely to provide data processing.”).

³ See, e.g., *News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992) (deciding whether documents compiled for investigation into university basketball team’s

Public Records Act is to ensure that “the people may obtain copies of their public records and public information free or at minimal cost.”⁴ Unfortunately, several problem areas within the law frustrate this laudable policy goal.

After briefly introducing the basic workings of the North Carolina Public Records Act, this article will identify key problem areas within the law. It will further explain how these uncertainties frustrate the overall purpose of the law. Finally, the article will identify one or more potential solutions for each problem.

The first problem area to be addressed is the nature of “custodians.” Under the Public Records Act, a plaintiff must name the “custodian” of a given record as a defendant in the suit to compel production of records.⁵ However, North Carolina case law is unclear as to exactly how one identifies the custodian of a given record.⁶

Second, this article will briefly examine the personnel exemptions to the Act. The personnel exemptions generally provide that government employee personnel files are exempt from disclosure under the Public Records Act.⁷ However, the personnel exemption is, in fact, a number of different statutes that have received little case treatment. This leaves the exact nature of a personnel record subject to a certain level of ambiguity.

alleged improprieties are public records subject to disclosure or confidential personnel files exempt from the Public Records Act).

⁴ § 132–1(b) (“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.”).

⁵ § 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 in connection with the transaction of public business by any 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.”).

⁶ See discussion *infra* Section I.

⁷ See discussion *infra* Section II.

Third, this article considers the idea of an “official denial” of a public records request. In North Carolina, one cannot bring a public records lawsuit until a government agency denies a public records request.⁸ But this presents real problems for requesters of public records who face substantial delays. Examples from other states will be considered in order to fashion a workable solution to this problem for North Carolina.

Finally, this article will examine the issue of attorney’s fees. In North Carolina, a plaintiff may only recover its fees if it “substantially prevails.”⁹ However, there is no case law interpreting what this means. Does a plaintiff “substantially prevail” when it compels production of only portions of the records that it originally sought? Again, examples from other states will be used to search for a workable solution.

This discussion is not intended to be exhaustive. The goal of this piece is to be a conversation-starter about problem areas and potential solutions within North Carolina’s Public Records Act. Each of these areas could easily be—and should be—the subject of its own larger research endeavor. But for now, these issues will be examined with the goal of identifying clear problem areas and beginning to build solutions.

THE BASICS OF NORTH CAROLINA PUBLIC RECORDS LAW

North Carolina’s Public Records Act is codified at North Carolina General Statutes (N.C.G.S.) § 132.¹⁰ The statutory scheme sets out a broad policy that “the people may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.”¹¹ In pursuit of this policy, “any person” may inspect, examine, and copy public records upon request.¹² The definition of what constitutes a public record is quite broad, including any record “regardless of physical form or characteristics.”¹³ The Public

⁸ See discussion *infra* Section III.

⁹ § 132–9(c) (“In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court shall allow a party seeking disclosure of public records who substantially prevails to recover its reasonable attorneys’ fees if attributed to those public records.”).

¹⁰ § 132.

¹¹ § 132–1.

¹² § 132–6(a).

¹³ § 132–1(a).

Records Act is the North Carolina corollary to the more well-known Freedom of Information Act, which requires federal agencies to make public records “promptly available to any person” upon request.¹⁴

The Law charges “custodians of public records” with a duty to “permit any record in the custodian’s custody” to be inspected and copied by “any person.”¹⁵ A “custodian” is defined by statute as “the public official in charge of an office having public records.”¹⁶

While the Public Records Act generally defines any government record as a “public record” subject to inspection,¹⁷ the statute also contains a number of exceptions and exemptions.¹⁸ Some of these exceptions are quite clear. For example, emergency response plans adopted by a state university, community college, or public hospital “are not public records . . . and shall not be subject to inspection and examination under G.S. 132–1.6.”¹⁹ So, if a person were to file a public records request with the University of North Carolina for its emergency response plan, the university would be entirely justified in denying the request. When exemptions are subject to interpretation, that interpretation is left up to the courts.²⁰

A given record does not necessarily have to be categorized entirely as public or confidential. Instead, a single record can contain a mixture of public and confidential information, and in such situations a government agency is prohibited from using this as a justification for

¹⁴ Freedom of Information Act, 5 U.S.C. § 552(a)(3)(A) (2012).

¹⁵ § 132–6(a).

¹⁶ § 132–2 (“The public official in charge of an office having public records shall be the custodian thereof.”).

¹⁷ § 132–1.

¹⁸ §§ 132–1.4 to –1.10.

¹⁹ § 132–1.6 (“Emergency response plans adopted by a constituent institution of The University of North Carolina, a community college, or a public hospital as defined in G.S. 159–39 and the records related to the planning and development of these emergency response plans are not public records as defined by G.S. 132–1 and shall not be subject to inspection and examination under G.S. 132–6.”).

²⁰ See, e.g., *McCormick v. Hanson Aggregates Se. Inc.*, 164 N.C. App. 459, 467, 596 S.E.2d 431, 436, writ denied, review denied, appeal dismissed, 359 N.C. 69, 603 S.E.2d 131 (2004) (finding that based on “the plain words of the statute” an exception from the Public Records Act for criminal investigations was not limited solely to “ongoing” investigation).

denying a public records request.²¹ Instead, the state actor is required to “separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of public records,” and “the public agency” bears the cost of such separation.²² Where the parties disagree as to what portions of a given document are public or confidential, “the court must review [the challenged information] *in camera*—meaning in private, without revealing the contents in open court.”²³

PROBLEM AREAS AND PROPOSED SOLUTIONS

I. “CUSTODIANS” OF PUBLIC RECORDS

The custodian of a public record is defined by statute as “[t]he public official in charge of an office having public records.”²⁴ It is this “custodian” who is required to “permit any record in [his or her] custody to be inspected and examined and . . . furnish copies thereof.”²⁵ Further, a plaintiff in a Public Records Act case must “sue the custodian of those records in the custodian’s official capacity.”²⁶ This principal is not unique to the Public Records Act, but rather is the specific application of the general principle that where a plaintiff “seeks an injunction requiring the defendant to take an action involving the exercise of a governmental

²¹ § 132–6(c) (“No request to inspect, examine, or obtain copies of public records shall be denied on the grounds that confidential information is commingled with the requested nonconfidential information. If it is necessary to separate confidential from nonconfidential information in order to permit the inspection, examination, or copying of the public records, the public agency shall bear the cost of such separation . . .”).

²² *Id.*

²³ *See Times News Publ’g Co. v. Alamance-Burlington Bd. of Educ.*, No. COA15–99, 774 S.E.2d 922, 926 (N.C. Ct. App. 2015) (noting that a trial court presented with a public records request seeking access to closed session meeting minutes of a public body must review such minutes in private to determine what portion of the minutes should be open to public inspection).

²⁴ § 132–2.

²⁵ § 132–6(a).

²⁶ *Cline v. Hoke*, 238 N.C. App. 16, 18, 766 S.E.2d 861, 863 (2014) (citing *Mullis v. Sechrest*, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998)) (noting that the plaintiff’s suit against the custodian of public records in his individual capacity was subject to dismissal, as custodians are subject to suit for public records violations only in their official capacity).

power, the defendant [must be] named in an official capacity.”²⁷ Where a plaintiff in a public records lawsuit fails to name the proper custodian, his or her action is subject to dismissal.²⁸

A. Problem Areas Surrounding Custodians

1. Identifying the Proper Public Records Custodian

Since a plaintiff in a public records action must name the records’ custodian as a defendant or otherwise have its action dismissed, it is important to know how to identify the custodian of a given record. Unfortunately, the identity of public records custodians is muddled both in case law and in practice.²⁹

Some case law holds that the custodian of a given record could be one or more people. Where a plaintiff seeking records from the Town of Kitty Hawk named the mayor, town council, and town manager as defendants, the Court of Appeals found that the plaintiff fulfilled its duty to name the records custodian as a defendant by including “as parties to the action all town officials involved in the matter who had the authority over, and responsibility for determining whether the requested records constituted public records, and who ultimately were responsible for the town’s compliance with the Public Records Act.”³⁰ However, the court stopped short of actually defining a proper custodian. The ruling suggests that the only way for a plaintiff to fulfill its duty to name the custodian is to name all persons who have authority over a given record

²⁷ *Id.* at 18, 766 S.E.2d at 863 (quoting *Mullis v. Sechrest*, 347 N.C. 548, 552, 495 S.E.2d 721, 723 (1998)) (noting that where a negligence action was brought against a public school teacher for actions taken in his role as a teacher, it was necessary to sue the defendant in his official capacity).

²⁸ See *Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of Courts*, 232 N.C. App. 427, 430–31, 754 S.E.2d 223, 226 (2014), *rev’d on other grounds*, 368 N.C. 180 (2015) (analyzing whether the North Carolina Administrative Office of the Courts is the custodian of the records sought in order to determine whether it was properly sued under the Public Records Act).

²⁹ See generally *Times News Publ’g Co. v. Alamance-Burlington Bd. of Educ.*, No. COA15–99, 774 S.E.2d 922 (N.C. Ct. App. 2015); *Cline*, 238 N.C. App. 16, 766 S.E.2d 861 (2014); *Womack Newspapers, Inc. v. Town of Kitty Hawk ex rel. Kitty Hawk Town Council*, 181 N.C. App. 1, 639 S.E.2d 96 (2007) (discussing the difficulties in determining who is a custodian of public records and what authority he/she has in that position).

³⁰ *Womack Newspapers, Inc.*, 181 N.C. App. at 17, 639 S.E.2d at 106 (2007).

– meaning that a given record could have multiple custodians that must all be named as defendants.

However, other case law suggests that the custodian for a given public record must be one specific individual. When a former district attorney sued the North Carolina Administrative Office of the Courts (AOC) for employee emails “to defend a complaint filed against her by the North Carolina State Bar,” she named only one defendant – the Assistant Director of the AOC.³¹ The Court of Appeals noted that “by using the singular word ‘[t]he’ public official and in connection with that public official being ‘*in charge* of an office having public records,’ the statute designates a particular person within an office as being the designated custodian for that office’s public records.”³² The court reasoned that since Hoke was the *assistant* director of the AOC, he was not *the* person in charge of AOC records, and therefore was not the proper defendant.³³ The court ultimately reasoned that *both* parties failed to identify the proper custodian.³⁴ It stands to reason that the person the court had in mind as the custodian of AOC records was the Director of the AOC, who is by statute designated as the highest ranking officer within the agency.³⁵

Still other case law suggests that a state agency or entity can be the custodian of its public records. Where the Court of Appeals considered whether an “electronic storage index” of criminal records was a public record subject to disclosure, it reasoned that the AOC itself was the proper custodian because it “created, maintained, and controlled” the

³¹ *Cline*, 238 N.C. App. at 16, 766 S.E.2d at 862.

³² *Id.* at 21, 766 S.E.2d at 864–65.

³³ *Id.* at 21, 766 S.E.2d at 865 (“As the *assistant* director of the AOC, Defendant is not *the* person in charge of the AOC and thus not *the* person in charge of the AOC and thus not the designated custodian of the AOC’s records per N.C.G.S. § 132-2.”) (third emphasis added).

³⁴ *Id.* at 21, 766 S.E.2d at 865 (“[T]he parties . . . have misinterpreted North Carolina’s Public Records Act.”).

³⁵ N.C. GEN. STAT. § 7A–340 (2016) (“There is hereby established a State office to be known as the Administrative Office of the Courts. It shall be supervised by a Director, assisted by an assistant director.”) *Cf.* State Emps. Ass’n of N.C. v. N.C. Dep’t of State Treasurer, 364 N.C. 205, 206, 695 S.E.2d 91, 93 (2010) (noting that the Treasurer of the State of North Carolina is the custodian of public records for the North Carolina Department of State Treasurer).

records.³⁶ The AOC is a State office established by statute, distinct from the physical people who carry out its functions.³⁷ Implicit in the *Lexisnexis* ruling is the idea that a state agency or entity can be a custodian of public records, despite the language of the Public Records Act labeling a custodian as “the public official” in charge of records.

2. The Role of Non-Custodial Records Officers

The Public Records Act contemplates that “custodians” will handle the duties of responding to public records requests and granting public access to records.³⁸ But this is out of sync with how public records requests actually work. A number of state agencies, cities, counties, and others have administrative personnel who are tasked with responding to public records requests.³⁹ Some other cities and agencies delegate public records duties to already existing employees.⁴⁰

Given the structure of the Public Records Act, it should be no surprise that the people who actually carry out the public records process differ from the statutory “custodians.” The Act defines custodians as the public officials in charge of an office, but then charges those custodians

³⁶ See *Lexisnexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts*, 232 N.C. App. 427, 433, 754 S.E.2d 223, 228 (2014); *rev’d on other grounds*, 368 N.C. 180, 188 (2015) (“Here, the AOC has admitted that it created, maintains, and controls ACIS and is the only entity with the ability to copy the database. Thus, ACIS is not the public record of another agency. Rather, ACIS is a record of the AOC and in the AOC’s custody.”).

³⁷ See § 7A–340 (establishing the Administrative Office of the Courts and then naming its officers).

³⁸ § 132–6(a).

³⁹ See, e.g., National Association of Attorneys General, *Telemarketing Fraud Bull.* 8, NAAG (Dec. 2003) (naming Noelle Talley as the Public Information Officer for the North Carolina Department of Justice); Greenville, N.C., *Media Relations*, POLICE PUBLIC INFORMATION OFFICER, <http://www.greenvillenc.gov/government/police/public-information-officer> (last visited Jan. 16, 2016) (listing information about Greenville’s Public Information Officer); Univ. of N.C. at Chapel Hill, *Public Records Requests*, <http://policies.unc.edu/policies/public-records/> (last visited Jan. 16, 2016) (requiring that all requests for public records . . . be made to the City of Asheville’s Public Information Office); City of Greensboro Public Records Requests, <http://www.greensboro-nc.gov> (last visited Nov. 15, 2016) (explaining how the City of Greensboro employs an administrator who oversees the city’s Public Information Request Tracking System (PIRT)).

⁴⁰ See, e.g., N.C. Dept. of Env’t Quality: Admin. (2016) (displaying the North Carolina Department of Environmental Quality employs a number of public information officers).

with the duty of holding records open to public inspection.⁴¹ Realistically, the people “in charge of” public offices do not have the time to devote to responding to public records requests, and they therefore delegate this task to others. This delegation itself is not problematic, and in fact it likely is the most sensible thing for high-level public officials to do. The problem arises when the hypothetical world of the Public Records Act and the real world of public records practice do not align, leading to confusion for public records plaintiffs who are required by law to name records custodians as defendants.

B. Proposals to Clarify the Identity and Role of Custodians

1. Borrow from Rule 4(j).

Public records practice is not the only context in which a plaintiff must be able to identify a particular person in order to file a lawsuit. A plaintiff in any lawsuit must serve process upon the defendant.⁴² Where the defendant is a corporation, partnership, agency, association, municipality, or some other legal fiction, the General Statutes specify precisely which natural person or persons may be served to fulfill the requirements of process.⁴³ To this end, every state agency is required to “appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served.”⁴⁴ For cities and towns, the “mayor, city manager or clerk” is appointed as the process agent by statute.⁴⁵ A county is served by delivering a copy of the summons to “its county manager or . . . chairman, clerk or any other member of the board of commissioners.”⁴⁶

⁴¹ § 132–2, –6.

⁴² *See generally* N.C. R. CIV. P. 4. (“Upon the filing of the complaint, summons shall be issued forthwith, and in any event within five days. The complaint and summons shall be delivered to some proper person for service.”).

⁴³ *See generally* N.C. R. CIV. P. 4(j) (designating the mayor, city manager or clerk as the process agent).

⁴⁴ N.C. R. CIV. P. 4(j)(4)(b).

⁴⁵ N.C. R. CIV. P. 4(j)(5).

⁴⁶ *Id.*

Similarly, N.C.G.S. § 132–2 could be amended to provide that the custodian of public records for a given unit of government is a particular public official. There does not necessarily need to be a one-to-one relationship between the Public Records Act and the Rules of Civil Procedure – and in fact, such an exact correlation would likely not be workable. But the general principal could be used to provide clarity for plaintiffs in public records actions. The records custodians for some state agencies are already designated by statute, and in those cases the current designations could simply be incorporated into N.C.G.S. § 132–2.⁴⁷

For example, the Public Records Act could specify that the custodian of records for a city is its mayor, or that the custodian for a county is the chair of its board of commissioners. The designated custodian would not always correspond exactly to the person who actually deals with and responds to public records requests, but that is no different than the current situation. At the very least, N.C.G.S. § 132–2 could provide a non-exhaustive list of what sort of person the General Assembly contemplates as being “in charge of” a particular office, and therefore charged with custodial duties. Even such a list that is “by way of illustration but not limitation” would provide more clarity than the current statute, which provides no examples of what sort of person the General Assembly contemplates to be a records custodian.⁴⁸

2. Make the requirement of naming the custodian explicit in the Law.

Second, the Public Records Act should be amended to explicitly include the requirement that a plaintiff name the custodian as a defendant. As written, the Act only states that a person denied access to public records “may apply to the appropriate division of the General Court of Justice for an order” compelling access.⁴⁹ The inference that custodians are necessary parties to public records lawsuits is reached

⁴⁷ See, e.g., N.C. GEN. STAT. § 7A–109 (2016) (charging the Clerk of Superior Court with maintaining the records of the Judicial Department and keeping such records open to public inspection).

⁴⁸ See, e.g., § 160A–168(a) (providing examples of items that might constitute “an employee’s personnel file” that are “by way of illustration but not limitation”).

⁴⁹ § 132–9(a).

through case law.⁵⁰ Placing the requirement in statute would help pro se plaintiffs avoid the mistake of filing a procedurally flawed records lawsuit, especially given that the person one deals with during the records request process can be different than the actual records custodian.⁵¹ Indeed, the Court of Appeals even found in one case that where represented parties disputed the proper custodian of records, they were *both* mistaken, and the case was dismissed.⁵² A statutory scheme intended to provide “liberal access to public records” should not turn on such a mistake-prone legal technicality.⁵³

3. Provide for Public Information Officers by Incorporating Concepts of Agency Law Into the Public Records Act.

In the context of corporate law, North Carolina courts recognize that an agent can bind a principal by acting with actual or apparent authority.⁵⁴ “Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal.”⁵⁵ Apparent authority is “that authority which the principal has held the agent out as possessing or which he has permitted the agent to represent that he possess[es].”⁵⁶ These doctrines

⁵⁰ See, e.g., *Lexisnexis Risk Data Mgmt. Inc. v. N.C. Admin. Office of Courts*, 754 S.E.2d 223, 228 (N.C. Ct. App. 2014), *rev'd on other grounds*, 368 N.C. 180 (2015) (noting that a custodian must be sued in his or her official capacity in a public records lawsuit).

⁵¹ See, e.g., *Cline v. Hoke*, 238 N.C. App. 16, 17, 766 S.E.2d 861, 862 (2014) (noting that while the plaintiff sought records from the North Carolina Administrative Office of the Courts, she actually corresponded almost exclusively with the AOC’s General Counsel).

⁵² See *id.* at 17, 766 S.E.2d at 865 (finding that neither party properly identified the custodian of the disputed records).

⁵³ See *Jackson v. Charlotte Mecklenburg Hosp. Auth.*, 238 N.C. App. 351, 352, 768 S.E.2d 23, 24 (2014) (“It is well established that the purpose of the Public Records Act is to grant liberal access to documents that meet the general definition of “public records” under N.C. Gen. Stat. § 132–1 (2013).”).

⁵⁴ *Lucas & Beach, Inc. v. Agri-E. Grp., Inc.*, No. COA15–463, 2016 WL 224031 at *7 (N.C. Ct. App. Jan. 19, 2016) (quoting *Wachovia Bank of N.C., N.A. v. Bob Dunn Jaguar, Inc.*, 117 N.C. App. 165, 170, 450 S.E.2d 527, 531 (1994)) (“There are three situations in which a principal is liable upon a contract duly made by its agents: ‘when the agent acts within the scope of his or her actual authority; when the agent acts within the scope of his or her apparent authority, and the third person is without notice that the agent is exceeding actual authority; and when a contract, although unauthorized, has been ratified.’”).

⁵⁵ *Id.* at *7 (quoting *Harris v. Ray Johnson Constr. Co.*, 139 N.C. App. 827, 830, 534 S.E.2d 653, 655 (2000)).

⁵⁶ *Id.* (quoting *Wachovia Bank of N.C.*, 117 N.C. App. at 171, 450 S.E.2d at 531 (1994)).

exist to protect third parties who “in good faith and with reasonable prudence” rely on an agent’s acts on behalf of a principal.⁵⁷

The doctrines of actual and apparent authority are typically applied in the business law context to hold principals accountable for the action(s) of their agents.⁵⁸ But these doctrines could easily be used to clarify the identity of public records custodians. If the General Assembly were to provide that one who acts with the actual authority of a records custodian becomes the custodian, it would essentially bring Public Information Officers and Public Records Officers within the scope of the statutory scheme by making them custodians.

For example, North Carolina State University (“NCSU”) routes all public records requests to “the University Records Officer,” who is housed within the university’s Office of General Counsel.⁵⁹ The University’s policy further provides that employees “should always consult with the University Records Officer . . . before providing access to their records.”⁶⁰ Under this policy, the University Records Officer is clearly the person making decisions about whether or not to release public records, despite the fact that this person is not “the public official in charge of an office having public records.”⁶¹ Adopting the concept of actual authority into the Public Records Act would simply incorporate systems like NCSU’s into the current framework.

In practice, adopting the practice of actual authority into the public records setting would involve allowing custodians to delegate their custodial duties to some other person. This is already the practice in other jurisdictions. For example, in Florida, a custodian of public records “may designate another officer or employee . . . to permit the inspection and copying of public records.”⁶² However, the custodian

⁵⁷ *Id.* (quoting *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985)).

⁵⁸ *See, e.g.*, *Snow v. De Butts*, 212 N.C. 120, 193 S.E. 224, 226 (1937) (“It is elementary that the principal is liable for the acts of his agent, whether malicious or negligent, and the master for similar acts of his servant, which result in injury to third persons, when the agent or servant is acting within the line of his duty and exercising the functions of his employment.”).

⁵⁹ N.C. State Gen. Counsel, *Public Records*, N.C. ST. U., <https://generalcounsel.ncsu.edu/legal-topics/records/public-records/> (last updated Jan. 21, 2015).

⁶⁰ *Id.*

⁶¹ N. C. GEN. STAT. § 132–2 (2016).

⁶² FLA. STAT. § 119.07 (2016).

must “disclose the identity of the designee to the person requesting to inspect or copy public records.”⁶³ A custodian’s designee has a “duty of disclosure” that makes them subject to suit for failure to comply with the state’s Public Records Act.⁶⁴

The doctrine of apparent authority could also be useful in the public records context. For example, in *Cline*, the attorney plaintiff named as defendant the Assistant Director of the North Carolina Administrative Office of the Courts (“AOC”).⁶⁵ She did so because during the public records request process, she corresponded exclusively with either the Assistant Director of the AOC or its General Counsel who was “generally acting on [the Assistant Director’s] behalf.”⁶⁶ The Assistant Director even partially fulfilled her public records request.⁶⁷ And yet, the court held that her action was subject to dismissal for failing to name the proper custodian. It reasoned that the Assistant Director was not “[t]he public official . . . ‘in charge of an office having public records,’” and therefore he was not the “particular . . . designated custodian for [the AOC’s] public records.”⁶⁸ Such legal minutia should not make or break public records access under a statutory scheme that purports to provide for “liberal access to public records.”⁶⁹ Allowing for those who act as public records custodians on behalf of state agencies to be treated as such, through the use of apparent authority, would help facilitate the Public Records Act’s policy goal of providing the public with a “broad right of access” to public information.⁷⁰

⁶³ *Id.*

⁶⁴ *Puls v. City of Port St. Lucie*, 678 So. 2d 514, 514 (Fla. Dist. Ct. App. 1996).

⁶⁵ *Cline v. Hoke*, 238 N.C. App. 16, 16, 766 S.E.2d 861, 862 (2014).

⁶⁶ *Id.* at 19, 766 S.E.2d at 863.

⁶⁷ *Id.*

⁶⁸ *Id.* at 21, 766 S.E.2d at 864–65.

⁶⁹ *Wallace Farm, Inc. v. City of Charlotte*, 203 N.C. App. 144, 146, 689 S.E.2d 922, 923 (2010) (quoting *Virmani v. Presbyterian Health Servs. Corp.*, 350 N.C. 449, 462, 515 S.E.2d 675, 685 (1999)).

⁷⁰ *Gannett Pac. Corp. v. N.C. State Bureau of Investigation*, 164 N.C. App. 154, 156, 595 S.E.2d 162, 163 (2004) (quoting *Times News Publ’g Co. v. State of N.C.*, 124 N.C. App. 175, 177, 476 S.E.2d 450, 451–52 (1996)).

II. THE EXTENT AND LIMITATIONS OF THE “PERSONNEL” EXEMPTION

The personnel exemptions generally provide that government employee-related records are not subject to public disclosure.⁷¹ The purpose of the exemption is to provide government employees with privacy rights in their employee files.⁷² Any information satisfying the definition of a “personnel file” is “excepted from the Public Records Act.”⁷³ Generally speaking, anyone who views or releases a personnel record in violation of statute is guilty of a crime.⁷⁴

A. Problem Area – Numerous Exemptions, Sparse Case Law

The “personnel exemption” is actually several different exemptions spread out throughout the General Statutes. There are separate personnel exemptions for state agencies,⁷⁵ cities,⁷⁶ counties,⁷⁷ community

⁷¹ See, e.g., N.C. GEN. STAT. § 160A–168 (2016) (“Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by this section.”).

⁷² See, e.g., Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth., 172 N.C. App. 486, 491, 616 S.E.2d 602, 606 (2005) (determining what level of privacy is afforded to hospital personnel files under the corresponding exemption to the Public Records Act).

⁷³ *Id.* at 491, 616 S.E.2d at 606 (quoting News & Observer Publ’g Co. v. Poole, 330 N.C. 465, 476, 412 S.E.2d 7, 14 (1992)).

⁷⁴ See, e.g., § 131E–257.2(h) (“Any person not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully examine in its officially filing place, or remove, or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor; however, conviction under this subsection shall be punishable, in the discretion of the court, by a fine not to exceed five hundred dollars (\$500.00).”); § 160A–168(f) (“Any person not specifically authorized by this section to have access to a personnel file designated as confidential, who shall knowingly and willfully examine in its official filing place, remove or copy any portion of a confidential personnel file shall be guilty of a Class 3 misdemeanor and upon conviction shall only be fined in the discretion of the court but not in excess of five hundred dollars (\$500.00).”).

⁷⁵ § 126–22(a) (“[P]ersonnel files of State employees shall not be subject to inspection and examination as authorized by G.S. 132–6.”).

⁷⁶ § 160A–168(a) (“Notwithstanding the provisions of G.S. 132–6 or any other general law or local act concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by a city are subject to inspection and may be disclosed only as provided by this section.”).

⁷⁷ § 153A–98(a) (“Notwithstanding the provisions of G.S. 132–6 or any other general law or local act concerning access to public records, personnel files of employees, former

colleges,⁷⁸ boards of education,⁷⁹ mental health facilities,⁸⁰ public hospitals,⁸¹ water and sewer authorities,⁸² and public health authorities.⁸³ Some exemptions define personnel records as “any information in any form gathered by the [employer] with respect to an employee” and then provide examples that are “by way of illustration but not limitation.”⁸⁴ Others define personnel records as “any information gathered by the [employer]” relating to an individual’s employment.⁸⁵ At least one statute simply states that personnel information is confidential, but then gives little to no definition of what constitutes personnel information.⁸⁶ All of these statutes leave room for substantial interpretation as to what information is “gathered by” an individual’s employer or what

employees, or applicants for employment maintained by a county are subject to inspection and may be disclosed only as provided by this section.”).

⁷⁸ § 115D-27 (“Personnel files of employees of boards of boards of trustees, former employees of boards of trustees, or applicants for employment with boards of trustees shall not be subject to inspection and examination as authorized by G.S. 132-6.”).

⁷⁹ § 115C-319 (“Personnel files of employees of local boards of education, former employees of local boards of education, or applicants for employment with local boards of education shall not be subject to inspection and examination as authorized by G.S. 132-6.”).

⁸⁰ § 122C-158(a) (“Notwithstanding the provisions of G.S. 132-6 or any other State statute concerning access to public records, personnel files of employees or applicants for employment maintained by an area authority are subject to inspection and may be disclosed only as provided by this section.”).

⁸¹ § 131E-257.2(a) (“Notwithstanding the provisions of G.S. 132-6 or any other general law or local act concerning access to public records, personnel files of employees and applicants for employment maintained by a public hospital are subject to inspection and may be disclosed only as provided by this section.”).

⁸² § 162A-6.1 (“Notwithstanding the provisions of G.S. 132-6 or any other law concerning access to public records, personnel files of employees, former employees, or applicants for employment maintained by an authority are subject to inspection and may be disclosed only as provided by this section.”).

⁸³ § 130A-45.9 (“Except as provided in subsection (b) of this section, the personnel files of employees or former employees and the files of applicants for employment maintained by a public health authority are not public records as defined by Chapter 132 of the General Statutes.”).

⁸⁴ See, e.g., §§ 131E-257.2(a), 160A-168(a), 153A-98(a), 162A-6.1(a) (comparing statutory definitions of “personnel records” for employees in public hospitals, city employees, county employees, and employees of water and sewer authorities).

⁸⁵ See, e.g., §§ 115D-27, 126-22(b)(3), 115C-319, 122C-158(a) (comparing statutory definitions of “personnel records” for employees of boards of trustees, state employees, employees of local boards of education, and employees of mental health authorities).

⁸⁶ See § 130A-45.9.

information “relates to” an individual’s employment.⁸⁷ Further complicating matters is that a given record can be a partial personnel record, meaning that it is partially subject to disclosure.⁸⁸

Typically, appellate case law is used to clarify unclear or ambiguous statutes.⁸⁹ At times, courts have provided guidance as to how various personnel exemptions are to be applied. For example, the North Carolina Supreme Court found that where a personnel exemption applied to “any information in any form gathered by the public hospital with respect to an employee,” it exempted from the Public Records Act “forms of compensation . . . other than salary.”⁹⁰ The Court of Appeals has also held that whether a document is a county personnel record or a public record depends upon the nature of the document rather than where the document is filed.⁹¹ An application for employment sent to a county by a prospective employee was considered “gathered” by the county.⁹²

But in the context of the personnel exemption, the courts are not interpreting just one statute – they are interpreting several. The appellate courts have, at times, cited the case treatment of one personnel statute as controlling for another.⁹³ However, appellate courts have done so where they find relevant similarities between one or more personnel

⁸⁷ The words “gathered by” have been interpreted with regard to at least two of the personnel statutes. See *Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 492–93, 616 S.E.2d 602, 607 (2005); *News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 476–77, 412 S.E.2d 7, 14 (1992).

⁸⁸ See, e.g., *News Reporter Co. v. Columbus Cty.*, 184 N.C. App. 512, 518, 646 S.E.2d 390, 395 (2007) (finding that a letter sent from a government employee to his employer was “gathered by” the employer for the purposes of the personnel exemption).

⁸⁹ The proper interpretation of a statute is a question of law that can be properly resolved only by a court. See, e.g., *Purcell v. Friday Staffing*, 235 N.C. App. 342, 346, 761 S.E.2d 694, 698 (2014). North Carolina courts have the power to determine “any question of construction or validity arising under [a] . . . statute.” N.C. GEN. STAT. § 1–254 (2015).

⁹⁰ *Knight Publ’g Co.*, 172 N.C. App. at 495, 616 S.E.2d at 608 (quoting N.C. GEN. STAT. § 131E–257.2 (2015)).

⁹¹ See *News Reporter Co.*, 184 N.C. App. at 516, 646 S.E.2d at 393.

⁹² *Elkin Tribune, Inc. v. Yadkin Cty. Bd. of Cty. Comm’rs*, 331 N.C. 735, 737–38, 417 S.E.2d 465, 467 (1992).

⁹³ See, e.g., *News Reporter Co.*, 184 N.C. App. at 514–15, 646 S.E.2d at 393 (2007) (citing the North Carolina Supreme Court’s treatment of the *state* personnel statute, when the case at hand dealt with the *county* personnel statute); see also *Knight Publ’g Co.*, 172 N.C. App. at 490, 616 S.E.2d at 606 (finding that the state and hospital personnel exemptions are materially similar enough to use case law interpreting one to determine the meaning of the other).

exemptions.⁹⁴ Given that many of the various exemptions are worded differently, a given appellate court ruling may only apply to a limited number of personnel exemptions.

If it were not bad enough that case law is of limited use in the personnel context, it is also relatively sparse.⁹⁵ The county personnel exemption has been interpreted three times by appellate courts.⁹⁶ The state personnel exemption has been interpreted twice.⁹⁷ The exemptions for municipalities, boards of education, and public hospitals have each been interpreted one time.⁹⁸ There is no appellate case law treating the personnel exemptions for community colleges, mental health facilities, public health authorities, or water and sewer authorities.

Even the General Assembly is unsure of the exact limits of the personnel exemption. In carving out body camera footage as a separate

⁹⁴ *Knight Publ'g. Co.*, 172 N.C. App. at 490, 616 S.E.2d at 606.

⁹⁵ This is a reference to cases that actually interpret the substantive meaning of the personnel exemptions. It does not include appellate case law that deals with the personnel exemptions in a non-interpretative context. For example, the Court of Appeals has dealt with the issue of “whether [an order for release of an employees’ personnel files] could be sought without first filing a civil or criminal action.” *In re Brooks*, 143 N.C. App. 601, 608–09, 548 S.E.2d 748, 753 (2001).

⁹⁶ *See Durham Herald Co. v. Cty. of Durham*, 334 N.C. 677, 435 S.E.2d 317 (1993) (holding that applications filed with a county board of commissioners for the position of county sheriff were “personnel files” within the meaning of the exemption); *Elkin Tribune, Inc.*, 331 N.C. at 737, 417 S.E.2d at 466 (holding that applications for the position of county manager were personnel records and therefore not subject to disclosure under the Public Records Act); *News Reporter Co.*, 184 N.C. App. at 513, 646 S.E.2d at 391–92 (holding that a letter written by a county employee to the board of commissioners about the board’s decision regarding whom to hire for the position of medical director was a public record subject to disclosure).

⁹⁷ *See Durham Herald Co.*, 334 N.C. at 680, 435 S.E.2d at 319 (noting that the state personnel exemption applies both to low-level state employees and high-level elected officials); *see also News & Observer Publ'g. Co. v. Poole*, 330 N.C. 465, 412 S.E.2d 7 (1992).

⁹⁸ *Times News Publ'g Co. v. Alamance-Burlington Bd. of Educ.*, No. COA15–99, 774 S.E.2d 922 (N.C. Ct. App. 2015) (holding that where a county school board discusses personnel information in closed session, the conversation could still include broader information that would be subject to disclosure, and it was up to the trial court to properly redact the closed session minutes to reflect this reality); *Release of Silk Plant Forest Citizen Review Comm.'s Report & Appendices v. Barker*, 216 N.C. App. 268, 719 S.E.2d 670 (2011) (holding that transcripts of police officer interviews concerning an assault investigation were confidential personnel records); *Knight Publ'g. Co.*, 172 N.C. App. at 495, 616 S.E.2d at 609 (holding that information about non-salary benefits was confidential within the meaning of the hospital personnel exemption).

class of record, the General Assembly took care to provide that such footage is neither a public record nor a personnel file.⁹⁹ This is despite the fact that, prior to the new body camera law, footage logically could not have been both a personnel record and a public record.¹⁰⁰

B. Proposed Solutions

1. The General Assembly Should Standardize the Definition of a Personnel Record By Adopting the Definition Set by the County Personnel State Across the Board As Much As Practicable.

The General Assembly could achieve a great deal of clarity by standardizing the definition of a “personnel record” across the General Statutes. Instead of having several different definitions, the General Assembly could provide for a single overall personnel definition, and then add the unique aspects of each separate exemption as needed.¹⁰¹ This would eliminate the need for courts to compare and contrast various personnel statutes in order to draw inferences and comparisons.¹⁰² Words like “gathered by” or “related to” could be definitively interpreted only once, with no guessing games about how a given appellate court

⁹⁹ “Recordings are not public records as defined by G.S. 132–1. Recordings are not personnel records as defined in part 7 of Chapter 126 of the General Statutes, G.S. 160A–168, or G.S. 153A–98.” N.C. GEN. STAT. § 132–1.4A(b) (2016).

¹⁰⁰ This is not to say that a given record cannot be partially personnel and partially public in nature. But prior to the new body camera law, the question of whether body camera footage was a personnel record would have turned on whether it was gathered “with respect to” the police officer wearing the camera. *See, e.g.*, § 160A–168(a) (2015) (defining a municipal personnel record as “any information in any form gathered by the city with respect to [an] employee”). The resolution of this question would be categorical for all body camera footage, rather than different on a case-by-case basis, since body cameras are by their nature attached to an individual police officer. For that reason, body camera footage logically could not have been both a personnel record and a public record. The fact that the General Assembly took steps to remove body camera footage from both categories demonstrates that the legislature contemplated that such footage could have potentially fallen into either category.

¹⁰¹ For example, the personnel exemption for public hospitals could keep its definition of who is and is not a “covered officer.” *See* § 131E–257.2(b2)(1) (2015).

¹⁰² For example, the Court of Appeals has been left to consider how similar various personnel statutes are in order to determine how persuasive or binding the case law surrounding one is to another. *See, e.g.*, *Knight Publ’g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 490, 616 S.E.2d 602, 606 (2005) (comparing the exemption for state employee records to the exemption for county employee records).

treatment of one exemption applies in a different context.¹⁰³ This would allow the courts to get much more “mileage” out of each appellate decision.

2. Litigants Should Seek Declaratory Judgments Prior to Filing Public Records Lawsuits When Disputing Whether a Record is “Personnel” In Nature.

When a plaintiff and a defendant disagree as to whether a record is a public record or a personnel record, a plaintiff typically sues under the Public Records Act, which creates a cause of action for situations where a defendant denies a public records request.¹⁰⁴ However, this may not be the most effective method of obtaining public records when the sole barrier to access is a government defendant’s claim that the disputed records are confidential personnel files. This is particularly true given that government defendants are likely predisposed towards nondisclosure due to the potential criminal liability that they face if they erroneously release a public document that was, in fact, a personnel record.¹⁰⁵ If a court of competent jurisdiction were to declare that a given record were not “personnel” in nature, it would protect the government actor from any claim that by releasing the record, it had “knowingly, willfully, and with malice” released a personnel file.¹⁰⁶

¹⁰³ The word “gathered” has been interpreted the most in the context of the county statute. For example, the Court of Appeals has considered whether a given document was “gathered” by a county for the purposes of the county personnel exemption. *See News Reporter Co. v. Columbus Cty.*, 184 N.C. App. 512, 516, 646 S.E.2d 390, 393 (2007). The North Carolina Supreme Court has considered whether applications for employment that were sent to a county were “gathered” by the county for the purposes of the county personnel statute. *See Elkin Tribune, Inc. v. Yadkin Cty. Bd. of Cty. Comm’rs*, 331 N.C. 735, 737, 417 S.E.2d 465, 467 (1992).

¹⁰⁴ § 132–9 (“Any person who is denied access to public records for purposes of inspection and examination, or who is denied copies of public records, may apply to the appropriate division of the General Court of Justice for an order compelling disclosure or copying, and the court shall have jurisdiction to issue such orders if the person has complied with G.S. 7A–38.3E.”).

¹⁰⁵ *See, e.g.*, § 160A–168(e) (“A public official or employee who knowingly, willfully, and with malice permits any person to have access to information contained in a personnel file, except as is permitted by this section, is guilty of a Class 3 misdemeanor and upon conviction shall only be fined an amount not more than five hundred dollars (\$500.00).”).

¹⁰⁶ *Id.*

The Uniform Declaratory Judgment Act vests North Carolina courts with the power to “declare rights, status, and other legal relations, whether or not further relief is or could be claimed.”¹⁰⁷ “Any person . . . whose rights, status, or other legal relations are affected by a statute . . . may have determined any question of construction or validity arising under the . . . statute . . . and obtain a declaration of rights, status, or other legal relations thereunder.”¹⁰⁸

Rather than filing a lawsuit compelling production of public records, within which the issue of whether the disputed records are public or personnel would be litigated, a plaintiff could file a declaratory action focusing *only* on the legal question of whether the disputed records are public or personnel in nature. By filing such a lawsuit, plaintiffs would avoid the requirement that they “initiate mediation . . . no later than 30 days from the filing of responsive pleadings” in a public records lawsuit.¹⁰⁹ A plaintiff could potentially even use a motion for judgment on the pleadings to quickly obtain a declaratory ruling as to the nature of the records sought in cases where the parties’ sole disagreement is how the public records and personnel statutes apply to a given record.¹¹⁰ In fact, government *defendants* have twice attempted to use the declaratory process to accelerate public records disputes.¹¹¹ However, in both cases the court found that only a plaintiff could initiate an action seeking access to public records.¹¹²

¹⁰⁷ § 1–253.

¹⁰⁸ § 1–254.

¹⁰⁹ § 7A–38.3E.

¹¹⁰ Once the pleadings are closed, “any party may move for judgment on the pleadings.” N.C. R. CIV. P. 12(c). This essentially allows a party to move for a legal ruling prior to discovery, and the court may still allow “matters outside the pleadings” to be considered and then treat the motion “as one for summary judgment.” *Id.*

¹¹¹ *McCormick v. Hanson Aggregates Se., Inc.*, 164 N.C. App. 459, 463–64, 596 S.E.2d 431, 433–34, (2004); *City of Burlington v. Boney Publishers, Inc.*, 166 N.C. App. 186, 191–92, 600 S.E.2d 872, 876 (2004).

¹¹² *See McCormick*, 164 N.C. App. at 464, 596 S.E.2d at 434, *writ denied, review denied, appeal dismissed*, 359 N.C. 69, 603 S.E.2d 131 (2004); *see also Filarsky v. Super. Ct.*, 49 P.3d 194, 195 (2002) (“Permitting a public agency to circumvent the established special statutory procedure by filing an ordinary declaratory relief action against a person who has not yet initiated litigation would eliminate statutory protections and incentives for members of the public in seeking disclosure of public records, require them to defend civil actions they otherwise might not have commenced, and discourage them from requesting records pursuant to the Act, thus frustrating the Legislature’s purpose of furthering the fundamental right of every person . . . to have prompt access to information in the possession of public agencies.”);

The most obvious disadvantage of filing a declaratory judgment instead of a public records lawsuit is that a plaintiff forfeits its ability to “recover its reasonable attorneys’ fees.”¹¹³ But in the right situation, the declaratory process may be quick enough to merit this tradeoff. Further, it is far from certain exactly when North Carolina public records plaintiffs can obtain their attorney’s fees in the first place.¹¹⁴

III. THE ROLE OF AN “OFFICIAL DENIAL” AND THE AMBIGUITY OF “AS PROMPTLY AS POSSIBLE”

The Public Records Act requires that custodians of public records respond to requests “as promptly as possible.”¹¹⁵ It further provides that any person who is “denied access to public records . . . or who is denied copies of public records” may bring a public records lawsuit.¹¹⁶ The courts have found that denial of a public records request is one of three required elements needed to state a valid claim in a public records lawsuit.¹¹⁷ Where a plaintiff fails “to show that ‘access to or copies of the requested public records [was] denied,’” its case is subject to dismissal.¹¹⁸

A. Problem Area – “Official Denials” and “As Promptly As Possible”

By requiring that one be denied access to public records before being able to state a claim in a records lawsuit, the statutory scheme

Boney Publishers, Inc., 166 N.C. App. 186, 192, 600 S.E.2d 872, 876 (2004) (quoting *McCormick*, 164 N.C. App. at 464, 596 S.E.2d at 434 (“Further, the Public Records Act does not appear to allow a government entity to bring a declaratory judgment action; only the person making the public records request is entitled to initiate judicial action to seek enforcement of its request.”)).

¹¹³ § 132-9(c) (2016).

¹¹⁴ See discussion *infra* Section IV.

¹¹⁵ § 132-6(a).

¹¹⁶ § 132-9(a).

¹¹⁷ “Based on a plain reading of the [Public Records Act], three elements are required to state a prima facie case: (1) a person requests access to or copies of public records from a government agency or subdivision, (2) for the purpose of inspection and examination, and (3) access to or copies of the requested public records are denied.” *State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 364 N.C. 205, 211, 695 S.E.2d 91, 95 (2010) (citing N.C. GEN. STAT. § 132-9(a) (2015)).

¹¹⁸ *Brooksby v. N.C. Admin. Office of Courts*, 789 S.E.2d 540, 542-43 (N.C. Ct. App. 2016) (quoting *State Emps. Ass’n of N.C., Inc.*, 364 N.C. at 211, 695 S.E.2d at 95).

assumes that records custodians evaluate records requests and then either grant or deny them.¹¹⁹ But all too often, this is not how public records requests actually work.

There is no appellate case law in North Carolina interpreting what the words “as promptly as possible” actually mean in the Public Records Act, or what happens when a government actor fails to provide access “as promptly as possible.” The Court of Appeals had the opportunity to provide such clarity in 2010, but opted not to because it was not required to do so to resolve the case before it.¹²⁰ In North Carolina public records cases litigated in federal court on consent jurisdiction, the United States District Court for the Middle District of North Carolina has found that the Public Records Act “does not provide relief for mere delay in producing copies of public records.”¹²¹ However, that decision has no precedential effect, as it was made by a federal trial court.¹²²

Some plaintiffs have attempted to seek declarations that a government actor has failed to act promptly enough to comply with the law’s requirement. For example, a lawsuit filed by a consortium of North Carolina media outlets against Governor Pat McCrory alleges that

¹¹⁹ This assumption is sometimes true. *See, e.g.,* Gannet Pac. Corp. v. N.C. State Bureau of Investigation, 164 N.C. App. 154, 159, 595 S.E.2d 162, 165 (2004) (noting that the plaintiffs requested access to “all public records” and the government defendant “categorically denied” the public records request).

¹²⁰ *See* State Emps. Ass’n of N.C., Inc. v. N.C. Dept. of State Treasurer, 364 N.C. 205, 213, 695 S.E.2d 91, 96–97 (2010) (“Whether the length of defendants’ delay in producing copies of the requested public records constitutes a denial of access is not a question we need address at this time because we have found plaintiff’s complaint sufficient on other grounds.”).

¹²¹ The case was in federal district court on consent jurisdiction. It is important to note that the delay claimed by the plaintiffs was only a matter of days and took place regarding a records request that was filed the Friday before Christmas. The court ultimately found that the plaintiffs’ public records claim was “at least, frivolous, and at most, brought in bad faith.” *See* Built Homes, Inc. v. Vill. of Pinehurst, No. 1:06CV1028, 2008 WL 350319, at *13–14 (M.D.N.C. Aug. 11, 2008) (“[T]he NCPRA does not provide relief for mere delay in producing copies of public records. In their response brief, Plaintiffs acknowledge that the NCPRA provides no remedy for a mere delay in producing public records. Plaintiffs have therefore withdrawn their request for attorney’s fees and now seek only ‘nominal damage.’ The NCPRA does not, however, provide for an award of damages, nominal, or otherwise, for mere delay in producing the records.”).

¹²² Consent jurisdiction grants “a particular state or court personal jurisdiction over those consenting to it, authorizing that court or state to act against him.” *Capital Bank, N.A. v. Cameron*, 231 N.C. App. 326, 330, 753 S.E.2d 153, 156 (2013) (alteration omitted) (consenting to jurisdiction, the consenting party waives both personal jurisdiction and venue).

his administration has failed to respond to public records requests “as promptly as possible.”¹²³ Another lawsuit filed against the McCrory administration in September 2016 contains similar allegations, seeking an order requiring the administration to show cause as to why the plaintiffs are not entitled to obtain the requested records.¹²⁴ The Raleigh-based Civitas Institute similarly threatened suit against the University of North Carolina at Chapel Hill for failing to respond to records requests “as promptly as possible” after the university failed to provide any substantive response to a public records request after three months.¹²⁵

Despite these and other disputes surrounding when a state agency fails to respond to a record request “as promptly as possible,” there are no clear guidelines for what a requester of public records can or should do when a government agency does not issue an official denial, but nonetheless delays responding to a request seemingly in perpetuity.

B. Potential Solutions

1. Amend the Public Records Act to Prohibit Unjustified Delay

Florida’s Public Records Act provides that “[a] custodian of public records . . . must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith.”¹²⁶ The state’s courts have interpreted this language to mean that “unjustified delay in making non-exempt public records available violates Florida’s Public Records Act.”¹²⁷ Florida courts consider “unjustified delay” to be legally

¹²³ Brief for Plaintiff-Appellee at 3–4, *News & Observer Publ’g Co. v. Pat McCrory*, No. COA 16–725 (N.C. Ct. App. Sept. 7, 2016). Roy Cooper became the defendant in this suit upon his swearing in as Governor pursuant to N.C. R. Civ. P. 25(f)(1). As of this writing, this substitution has not materially altered the status of the case.

¹²⁴ Complaint & Petition for Order to Show Cause at 8, *Real Facts NC v. Pat McCrory*, No. 16CV011171 (Super. Ct. Sept. 6, 2016). Roy Cooper became the defendant in this suit upon his swearing in as Governor pursuant to N.C. R. Civ. P. 25(f)(1). As of this writing, this substitution has not materially altered the status of the case.

¹²⁵ Elliot Engstrom, *Civitas pressuring state agencies on transparency*, CIVITAS INST. (June 1, 2015), <https://www.nccivitas.org/civitas-review/civitas-pressuring-state-agencies-on-transparency/#>.

¹²⁶ FLA. STAT. § 119.07(c) (2016).

¹²⁷ *Consumer Rights, LLC v. Bradford Cty.*, 153 So.3d 394, 397 (Fla. Dist. Ct. App. 2014) (citing *Barfield v. Town of Eatonville*, 675 So.2d 223, 224 (Fla. Dist. Ct. App. 1996)).

identical to a denial of a public records request.¹²⁸ These courts have further found that even a “facially valid” public records policy “can be implemented in such a way as to result in unjustified delays.”¹²⁹ Florida goes so far as to award a plaintiff attorney’s fees “when the [government defendant] unjustifiably fails to respond to a public records request by delaying until after the enforcement action has been commenced.”¹³⁰ However, delay in and of itself does not give rise to liability for attorney’s fees unless it is an “unjustifiable” delay that equates to an “unlawful refusal” to provide access to records.¹³¹

North Carolina should go a step further by incorporating a cause of action for unjustified delay into the Public Records Act. As currently written, N.C.G.S. § 132–9 only provides a cause of action to “any person who is denied access to public records.”¹³² The statute should be amended to provide a cause of action to any person whose access to public records is delayed unjustifiably.

North Carolina could then leave it up to the courts to determine what delay is “unjustifiable.”¹³³ Or, the statute itself could provide an exhaustive or non-exhaustive list of acceptable delays. For example, the statute could provide that it is acceptable for a government to delay responding to a request (1) to determine whether the records exist, (2) to determine whether the record is public or confidential, (3) to await any appropriate fees to be paid by the requesting party, (4) to delete or redact those portions of the record that the custodian believes are confidential, or (5) to respond to other preexisting public records requests.¹³⁴

¹²⁸ *Id.*

¹²⁹ *Morris Publ’g Grp., LLC v. State*, 154 So.3d 528, 535 (Fla. Dist. Ct. App. 2015) (citing *Johnson v. Jarvis*, 74 So. 3d 168, 170–171 (Fla. Dist. Ct. App. 2011)).

¹³⁰ *Office of State Attorney v. Gonzalez*, 953 So. 2d 759, 764 (Fla. Dist. Ct. App. 2007).

¹³¹ *Consumer Rights, LLC v. Union Cty., Fla.*, 159 So.3d 882, 885 (Fla. Dist. Ct. App. 2015) (quoting *Office of State Attorney v. Gonzalez*, 953 So.2d 759 (Fla. Dist. Ct. App. 2007)).

¹³² N.C. GEN. STAT. § 132–9(a) (2016).

¹³³ For example, Florida courts have found that “a delay in making records available is only permissible under limited circumstances,” including “to determine whether the records exist.” *Consumer Rights, LLC*, 153 So.3d at 397.

¹³⁴ See *Promenade D’Iberville, LLC v. Sundy*, 145 So.3d 980, 983 (Fla. Dist. Ct. App. 2014) (quoting *Tribune Co. v. Canella*, 458 So.2d 1075, 1079 (Fla. 1984)) (“Delay in making public records available is permissible under very limited circumstances. A records custodian may delay production to determine whether the records exist . . . if the custodian believes that some or all of the record is exempt under the Act . . . or if the requesting party fails to remit the appropriate fees Otherwise, ‘the delay permitted by the Act is the limited reasonable time

Providing such a list in statute would essentially provide a list of “defenses” that a government actor could claim in response to a lawsuit alleging unjustified delay. This would clarify the issues to be litigated and ultimately accelerate the resolution of such disputes.

2. Define the Word “Promptly” In the Public Records Act

Ohio, like North Carolina, uses the word “promptly” in its Public Records Act.¹³⁵ There, the relevant statute provides that “all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours” and that “upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time.”¹³⁶ Ohio courts have defined the word “promptly” to mean “without delay and with reasonable speed.”¹³⁷ They have further found that whether a government actor provides access to records “promptly” is a question of fact.¹³⁸ An Ohio court must therefore “examine the pertinent facts to determine whether [a government defendant] acted within the required time to provide access to” requested records.¹³⁹

allowed the custodian to retrieve and record and delete those portions of the record the custodian asserts are exempt.”).

¹³⁵ Compare OHIO REV. CODE ANN. § 149.43(B)(1) (LexisNexis 2016) (“Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.”), with N.C. GEN. STAT. § 132-6(a) (2016) (“Every custodian of public records shall permit any record in the custodian’s custody to be expected 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.”).

¹³⁶ OHIO REV. CODE ANN. § 149.43(B)(1) (LexisNexis 2016).

¹³⁷ State ex. rel. Wadd v. City of Cleveland, 81 Ohio St. 3d 50, 53, 689 N.E.2d 25, 28 (1998) (quoting BLACK’S LAW DICTIONARY (6th ed. 1990)) (finding that the respondent city did not act promptly enough when it did not provide access to accident report until up to twenty-four days after the accidents).

¹³⁸ *Id.* at 53, 689 N.E.2d at 28.

¹³⁹ State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ., 97 Ohio St. 3d 58, 2002-Ohio-0131, 776 N.E.2d 82, at ¶ 37; see also State ex rel. Lucas Cty. Bd. of Comm’rs. v. Ohio Env’tl. Prot. Agency, 88 Ohio St. 3d 166, 172, 724 N.E.2d 411, 417 (2000) (“When records are available for public inspection and copying is often as important as *what* records are available.” (quoting *Wadd*, 81 Ohio St. 3d at 52, 689 N.E.2d at 27)).

North Carolina should adopt, by statute, the Ohio courts’ definition of “promptly” as meaning “without delay and with reasonable speed.” By doing so, the North Carolina General Assembly would make clear that the “as promptly as possible” language in N.C.G.S. § 132–9 has some sort of legal meaning and effect, as to date it has not been interpreted as placing any sort of requirement on government actors. By incorporating the definition into statute, North Carolina would gain the institutional knowledge that Ohio courts have accumulated through years of litigation. In this way, North Carolina’s Public Records Act would gain a body of persuasive case law to be used in deciding disputes about whether a government actor did or did not respond “promptly” to a public records request.

IV. DETERMINING WHEN A PLAINTIFF IS ENTITLED TO ATTORNEYS’ FEES

In North Carolina, a plaintiff may recover its attorney’s fees from the defendant “only when authorized by statute.”¹⁴⁰ A plaintiff in a public records action who “successfully compels the disclosure of public records” and “substantially prevails” may “recover its reasonable attorney’s fees if attributed to those public records.”¹⁴¹ There is an exception for situations where “the governmental [defendant] . . . acted in reasonable reliance on” relevant case law or attorney general decisions.¹⁴² A government defendant may recover fees only where a public records action “was filed in bad faith or was frivolous.”¹⁴³

A. Problem Area – Lack of Clarity As to When a Plaintiff “Substantially Prevails”

Prior versions of the Public Records Act provided that “the prevailing party” would be awarded its “reasonable attorneys’ fees.”¹⁴⁴

¹⁴⁰ Hoke Cty. Bd. of Educ. v. State, 198 N.C. App. 274, 281, 679 S.E.2d 512, 518 (2009) (citing Horner v. Chamber of Commerce, 236 N.C. 96, 97, 72 S.E.2d 21, 22 (1952)).

¹⁴¹ N.C. GEN STAT. § 132–9(c) (2016).

¹⁴² *Id.*

¹⁴³ § 132–9(d).

¹⁴⁴ 2005 N.C. Sess. Laws 1192.

In 2010, this language was amended to provide that attorneys' fees would only be awarded to a party who "substantially prevails."¹⁴⁵ The only treatment of attorneys' fees at the appellate level considers whether a plaintiff was a "prevailing party" under the old statutory language.¹⁴⁶ This leaves the current statute with no case treatment. It is therefore difficult to know what the difference is between a plaintiff "prevailing" and "substantially prevailing" in a public records lawsuit. Even general principles of statutory interpretation, which provide that a statute should be interpreted "to ensure that legislative intent is accomplished," are of little use here.¹⁴⁷ One can deduce little other than that by limiting attorneys' fees to parties who "substantially prevail," the General Assembly contemplated making it more difficult for plaintiffs to recover their fees than under the previous language.

Attorneys' fee awards generally serve as "an incentive for the initiation of public interest litigation by a private party."¹⁴⁸ Specifically in the public records context, "the very purpose of the attorney fees provision is to provide 'protections and incentives for members of the public to seek judicial enforcement of their right to inspect public records subject to disclosure.'"¹⁴⁹ But where a party is not certain that exactly where or how they can recover such fees, this incentive will not exist.

Further, the structure of the Public Records Act lends itself to uncertainty as to whether a plaintiff "substantially prevails." A given record can be partially public and partially confidential. The Public Records Act prohibits governments from denying public records requests "on the grounds that confidential information is commingled with the requested nonconfidential information."¹⁵⁰ When a record is partially public and partially private, the court "must examine the documents *in*

¹⁴⁵ 2010 N.C. Sess. Laws 660.

¹⁴⁶ See *N.C. Press Ass'n v. Spangler, Jr.*, 94 N.C. App. 694, 696–97, 381 S.E.2d 187, 189–90 (1989).

¹⁴⁷ *Insulation Sys., Inc. v. Fisher*, 197 N.C. App. 386, 389, 678 S.E.2d 357, 360 (2009) (citing *McLeod v. Nationwide Mutual Ins. Co.*, 115 N.C. App. 283, 288, 444 S.E.2d 487, 490 (1994)).

¹⁴⁸ *Stephenson v. Bartlett*, 177 N.C. App. 239, 244, 628 S.E.2d 442, 445 (2006) (citing Ann K. Wooster, Annotation, *Private Attorney General Doctrine—State Cases*, 106 A.L.R. 5th 523 (2003)).

¹⁴⁹ *Cnty. Youth Athletic Ctr. v. City of Nat'l City*, 164 Cal. Rptr. 3d 644, 694 (2013) (quoting *Galibiso v. Orosi Pub. Util. Dist.*, 84 Cal. Rptr. 3d 788, 807 (2008)).

¹⁵⁰ N.C. GEN. STAT. § 132–6(c) (2016).

camera to decide if any part of them falls within” the claimed exception to the Public Records Act.¹⁵¹ Where the court finds that “portions of [a record] are protected from disclosure, those portions can be redacted, and the remainder—falling with the Public Records Act—provided to plaintiffs.”¹⁵² North Carolina courts have not ruled on whether or how an attorney’s fee award is to be apportioned in this situation.¹⁵³

Where a plaintiff compels production of a portion of a given record, it is unclear whether that plaintiff “substantially prevails.” But the reality is that quite often, public records lawsuits result in only portions of disputed records being produced.¹⁵⁴ This lack of clarity is a serious barrier to both plaintiffs who cannot afford to pay an attorney out of pocket and public interest organizations who rely on attorney fee awards to help fund their operations.

B. Proposed Solution – Allow judges to make partial awards of attorney fees when a party partially prevails.

Some states provide judges with the power to award partial attorney’s fees awards when appropriate. For example, Louisiana empowers courts to award “reasonable attorney fees or an appropriate portion thereof” to any person who “prevails in part.”¹⁵⁵ The state’s courts have confirmed that the statute operates so that parties who prevail only “in part” may still receive “an appropriate portion [of their

¹⁵¹ *News & Observer Publ’g Co. v. Poole*, 330 N.C. 465, 477, 412 S.E.2d 7, 14 (1992).

¹⁵² *News Reporter Co. v. Columbus Cty.*, 184 N.C. App. 512, 513, 646 S.E.2d 390, 392 (2007).

¹⁵³ *Cf. Smith v. Bradley*, 223 W. Va. 286, 292, 673 S.E.2d 500, 506 (2007) (quoting *Daily Gazette Co. v. W. Va. Dev. Office*, 206 W.Va. 51, 521 S.E.2d 543 (1999)) (“For a person to have brought a suit for the disclosure of public records under the West Virginia Freedom of Information Act (FOIA), as permitted by [statute], so as to entitle him/her to an award of attorney’s fees for ‘successfully’ bringing such a suit pursuant to [statute], he/she need not have prevailed on every argument he/she advanced during the FOIA proceedings or have received the full and complete disclosure of every public record he/she wished to inspect or examine.”).

¹⁵⁴ *See, e.g., News Reporter Co.*, 184 N.C. App. at 513, 646 S.E.2d at 392 (2007); *News & Observer Publ’g Co.*, 330 N.C. 465, 412 S.E.2d 7 (1992); *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C. App. 292, 296, 399 S.E.2d 340, 343 (1991).

¹⁵⁵ LA. STAT. ANN. § 44:35D (2016).

attorney's fees] at the discretion of the court."¹⁵⁶ Several other states follow this or similar models.¹⁵⁷

Allowing for partial awards of attorney's fees would help plaintiffs seeking portions of withheld records to know that, if they prevail, they at least will have some sort of fee award to offset the costs of litigation. This would retain the incentive to litigate in situations where the plaintiff seeks a large body of documents within which there likely will be some exempt materials. North Carolina could retain its rule that a party must "substantially prevail," so long as it allowed for attorney's fee awards as to the records in regard to which a plaintiff does so.

CONCLUSION

There are almost certainly other problems within North Carolina's Public Records Act that have not been discussed here. And, there are likely other solutions to the problems mentioned herein. The solutions proposed in this article offer at least some potential ways to approach some of the more problematic portions of North Carolina's Public Records Act. Ultimately, if these sorts of solutions are not implemented by the legislature, the only other option to achieve clarity will be for members of the bar to litigate more public records cases in order to build up a larger body of case law.

¹⁵⁶ *Capital City Press v. Bd. of Sup'rs of La. State Univ.*, 2001-1692 (La. App. 1 Cir. 6/21/02); 822 So.2d 728, 730.

¹⁵⁷ MICH. COMP. LAWS § 15.240(7) (2016) ("If the person or public body [seeking access to records] prevails in part, the court may, in its discretion, award all or an appropriate portion of reasonable attorney's fees, costs, and disbursements"); 65 PA. CONS. STAT. § 67.1304(a) (2016) ("If a court . . . grants access to a record after a request for access was deemed denied, the court may award reasonable attorney fees and costs of litigation or an appropriate portion thereof to a requester . . ."); *Booth Newspapers, Inc. v. Kalamazoo Sch. Dist.*, 181 Mich. App. 752, 759, 450 N.W.2d 286, 289 (1989) (citing *Schinzel v. Wilkerson*, 110 Mich. App. 600, 602, 313 N.W.2d 167 (1981), *lv. Den.* 417 Mich. 863 (1983)) ("When the plaintiff prevails only as to a portion of the request, the award of fees should be 'fairly allocable' to that portion.").