

Problems and Solutions in North Carolina's Public Records Law

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Public Records Research

Defining North Carolina's Public Records and Open Meetings Fee-Shifting Provisions in the Larger National Context, 96 N.C. Law Rev. (forthcoming 2018)

"Tuning Up" North Carolina's Public Records Act: A Brief Discussion of Problem Areas and Proposed Solutions, 9 Elon Law Rev. 23 (2017)

What are public records?

"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 an agency of North Carolina government or its subdivisions."

N.C.G.S. § 132-1(a).

What are public records laws?

Statutory scheme that dictates when and how a person may access state and municipal government records.

Generally provide that government records are open to inspection by "any person" upon request, with certain exemptions.

What is a public records lawsuit?

When requester and government agency disagree as to whether a document is a public record, courts decide.

Pure statutory construction --> no deference to agencies.

Openness



Predictability



Efficiency

Goals of a Good Public Records Scheme

Problem # 1: Who is the
custodian?

Necessary Defendants

Grounds for dismissal under Rule 12(b):

- (1) Lack of jurisdiction over the subject matter,...
- (6) Failure to state a claim upon which relief can be granted,
- (7) Failure to join a necessary party.

N.C. R. Civ. P. 12(b)(1, 6-7).

Necessary
Governmental
Defendants

Where a plaintiff "seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant [must be] named in an official capacity." Cline v. Hoke, 238 N.C. App. 16, 18 (2014).

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Where a plaintiff "seeks an injunction requiring the defendant to take an action involving the exercise of a governmental power, the defendant [must be] named in an official capacity." *Cline v. Hoke*, 238 N.C. App. 16, 18 (2014).

But who is the right
defendant?

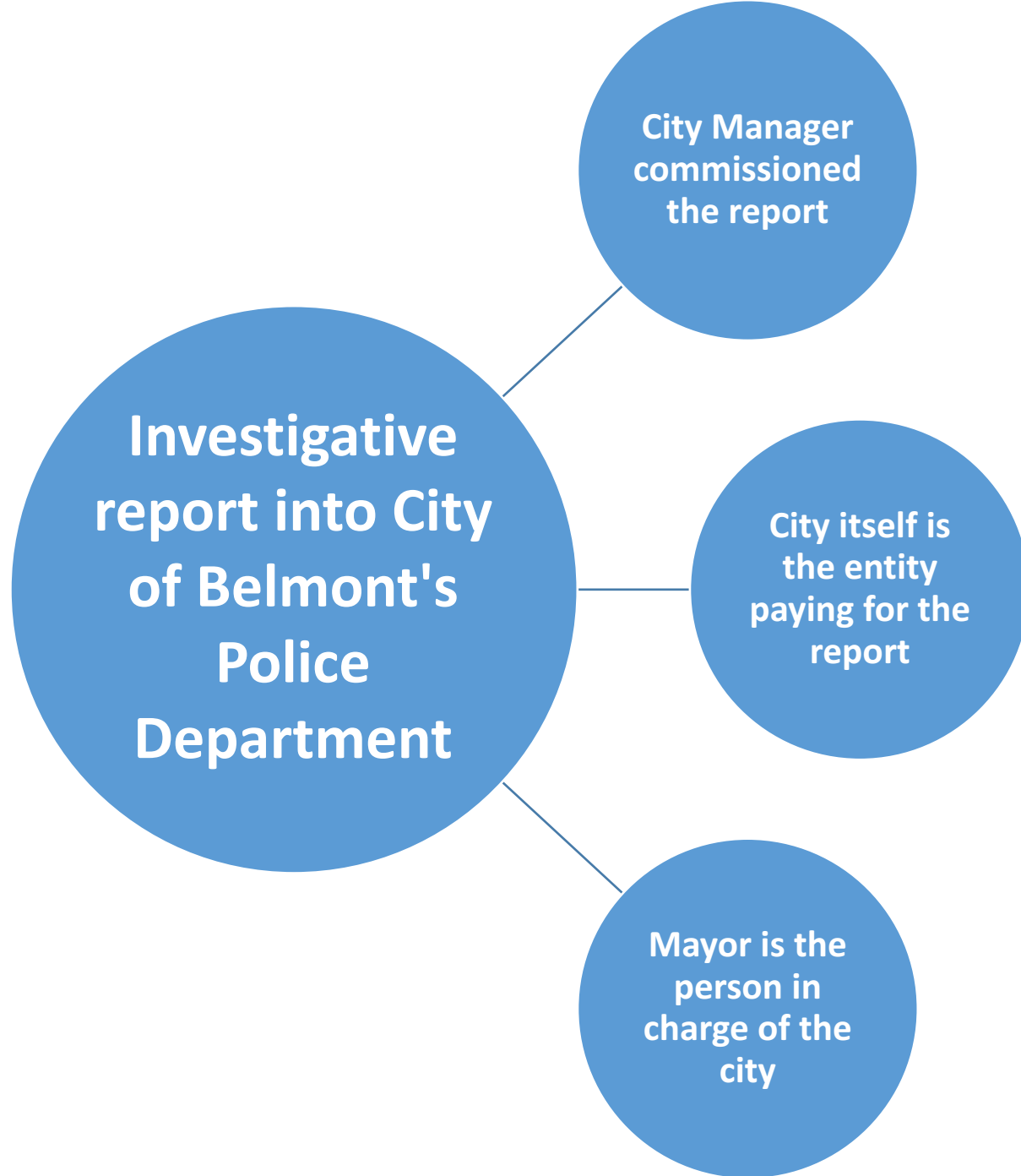
Proper Defendant = Custodian

What is a public records "custodian?"

"The public official in charge of an office having public records shall be the custodian thereof." N.C.G.S. § 132-2.

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**Who to sue for access to the report?
Who is "the" public official "in charge" of "the office" holding the report?**

A case example: *Cline v. Hoke*

- Plaintiff – pro se former Durham County District Attorney
- Defendant – represented by the office of then-Attorney General Roy Cooper

Question – Who is the custodian of employee emails at the Administrative Office of the Courts?

A case example: *Cline v. Hoke*

Plaintiff's Argument

- AOC Assistant Director is custodian of employee emails
- This is the person plaintiff dealt with throughout her public records request

Defendant's Argument

- Individual employees are the custodians of their *own* emails
- Since Department of Cultural Resources requires employees to retain emails, they are also custodians

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Plaintiff's Argument

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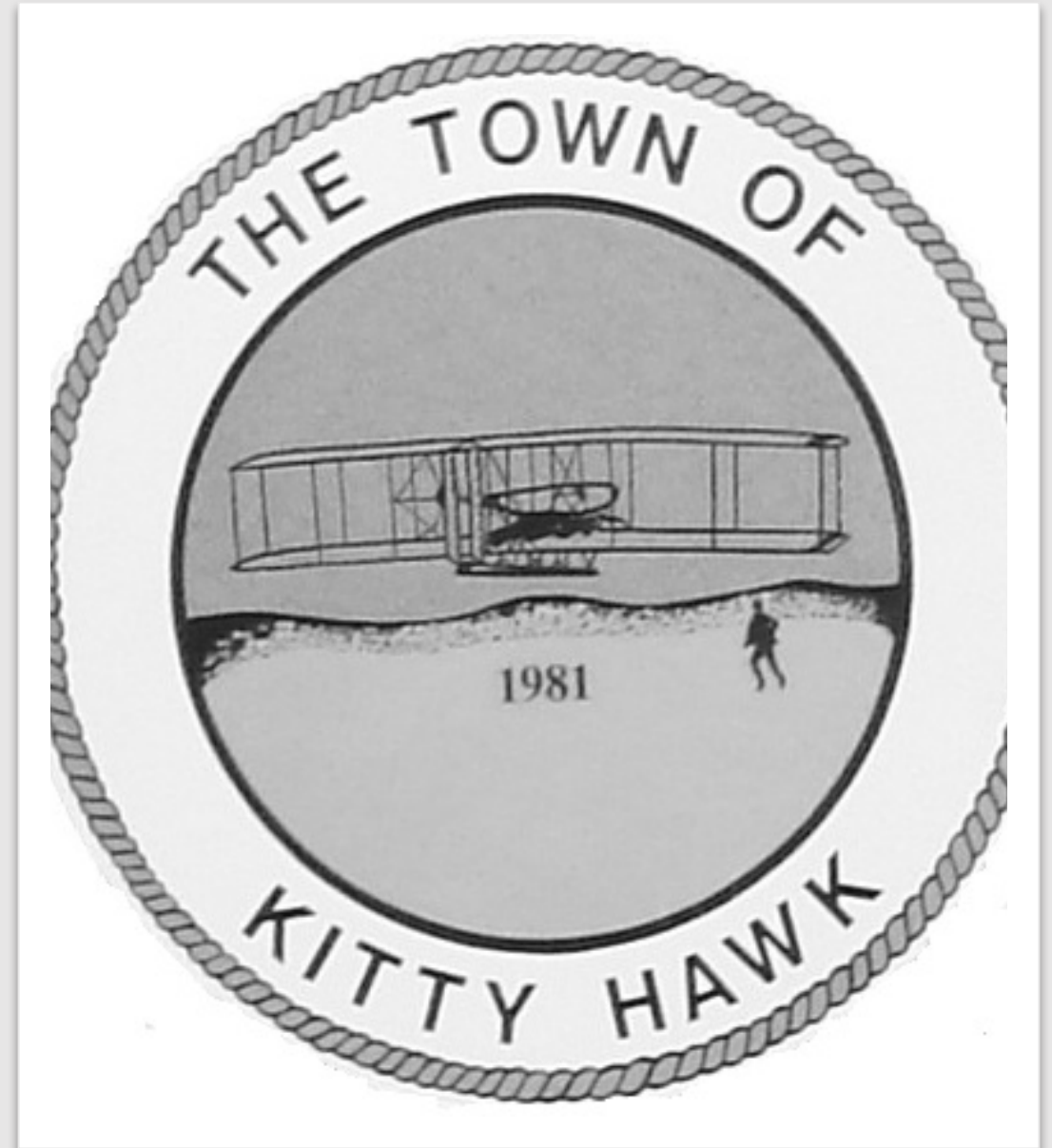
Defendant's Argument

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Case 1: Custodian could be multiple different people

A plaintiff fulfilled its duty to name the records custodian 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 constitutes public records, and who ultimately were responsible for the town's compliance with the Public Records Act."

Womack Newspapers Inc. v. Town of Kitty Hawk
ex rel. Kitty Hawk Town Council, 181 N.C. App. 1,
17 (2007).



Case 2: Custodian is one specific individual



"[B]y 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."

Cline v. Hoke, 238 N.C. App. 16, 21 (2014).

Case 3: Agency/entity can be a custodian of records

The Administrative Office of the Courts itself is the custodian of records that it "created, maintained, and controlled."

Lexisnexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of Courts, 232 N.C. App. 427, 433 (2014), rev'd on other grounds, 368 N.C. 180, 775 S.E.2d 651 (2015).



LexisNexis®

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Also the view taken by Judge Archie in Deitz v. City of Belmont



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AG Opinion: Agency can choose its custodian

Each office should have a “custodian” of public records who is required to allow those records to be inspected.

N.C. Att'y Gen. Office, Guide to Open Gov't and Pub. Records 4 (2008).



Problem # 2: The Role of Non-Custodian Records Officers

The duty of a "custodian"

Custodians must provide access to public records.

Who *actually* does this?

Public Information Officers

Entity	Public Records Policy
NC State University	"Individuals who seek public records from NC State must submit a written request to the University Records Officer...The Records Officer will coordinate with the appropriate NC State units to process and respond to the request."
City of Raleigh	Public Information Officer
UNC Chapel Hill	"[E]mployees who receive a public records request...should forward the request to the appropriate contact.."
City of Greensboro	Public records requests go to administrator who oversees Public Information Request Tracking System
NC Dep't of Environmental Quality	Public Information Officers
NC Department of Justice	Public Information Officers

Solution # 1 – Borrow from Rule 4(j)

Every state entity must "appoint a process agent by filing with the Attorney General the name and address of an agent upon whom process may be served."

But some are appointed by statute.

Examples of Process Agents Appointed by Statute

Entity	Process Agent Appointed by Statute
State of North Carolina	Attorney General, or a deputy or assistant attorney general
Cities & Towns	Mayor, city manager, or clerk
Counties	County manager or chairman, clerk, or any other member of the board of commissioners
Local boards and districts	Any officer or director

Solution # 2: Incorporate agency law concepts into the Public Records Act

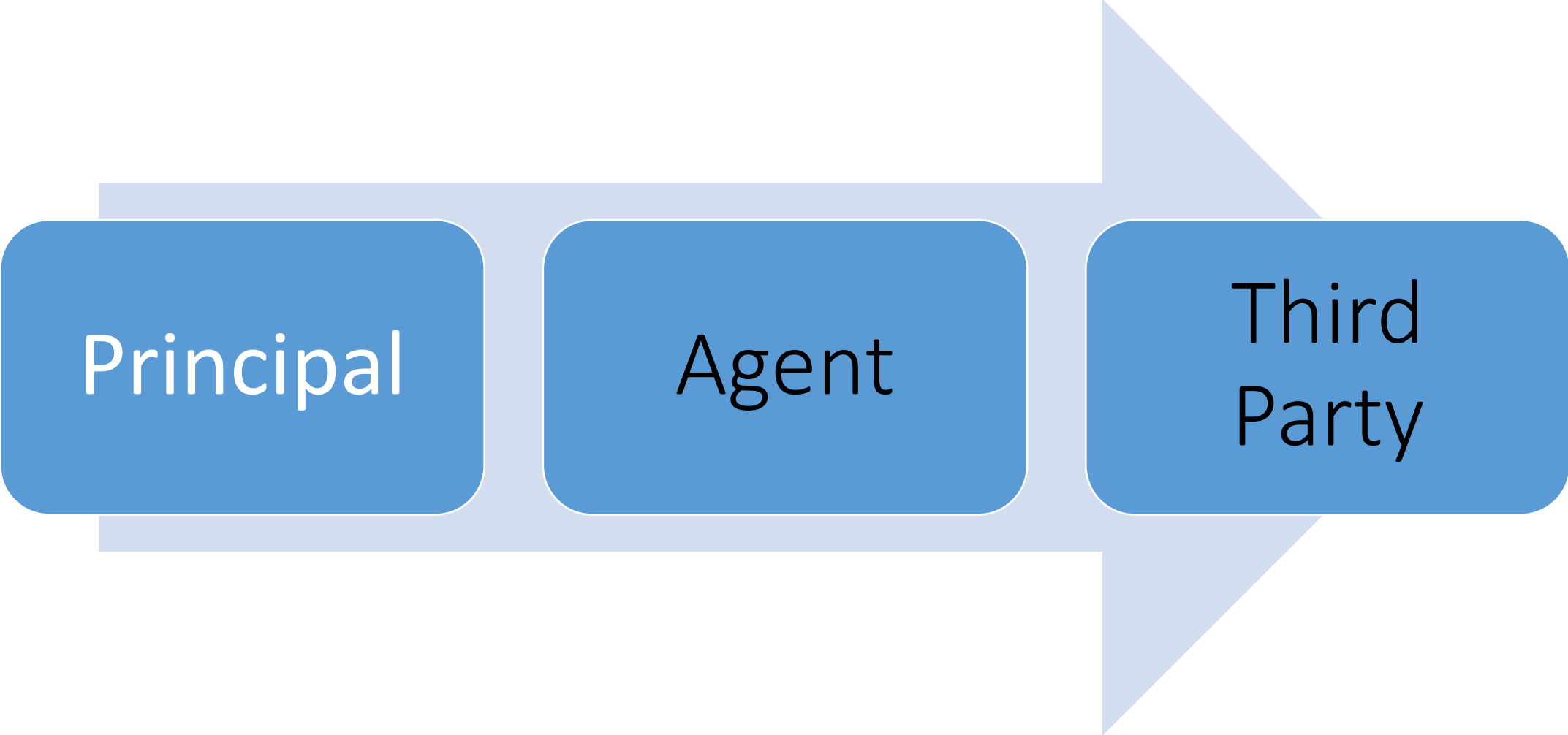
Agency Law

"Actual authority is that authority which the agent reasonably thinks he possesses, conferred either intentionally or by want of ordinary care by the principal." Lucas & Beach, Inc. v. Agri-E. Grp., Inc., 781 S.E.2d 718 (N.C. Ct. App. 2016).

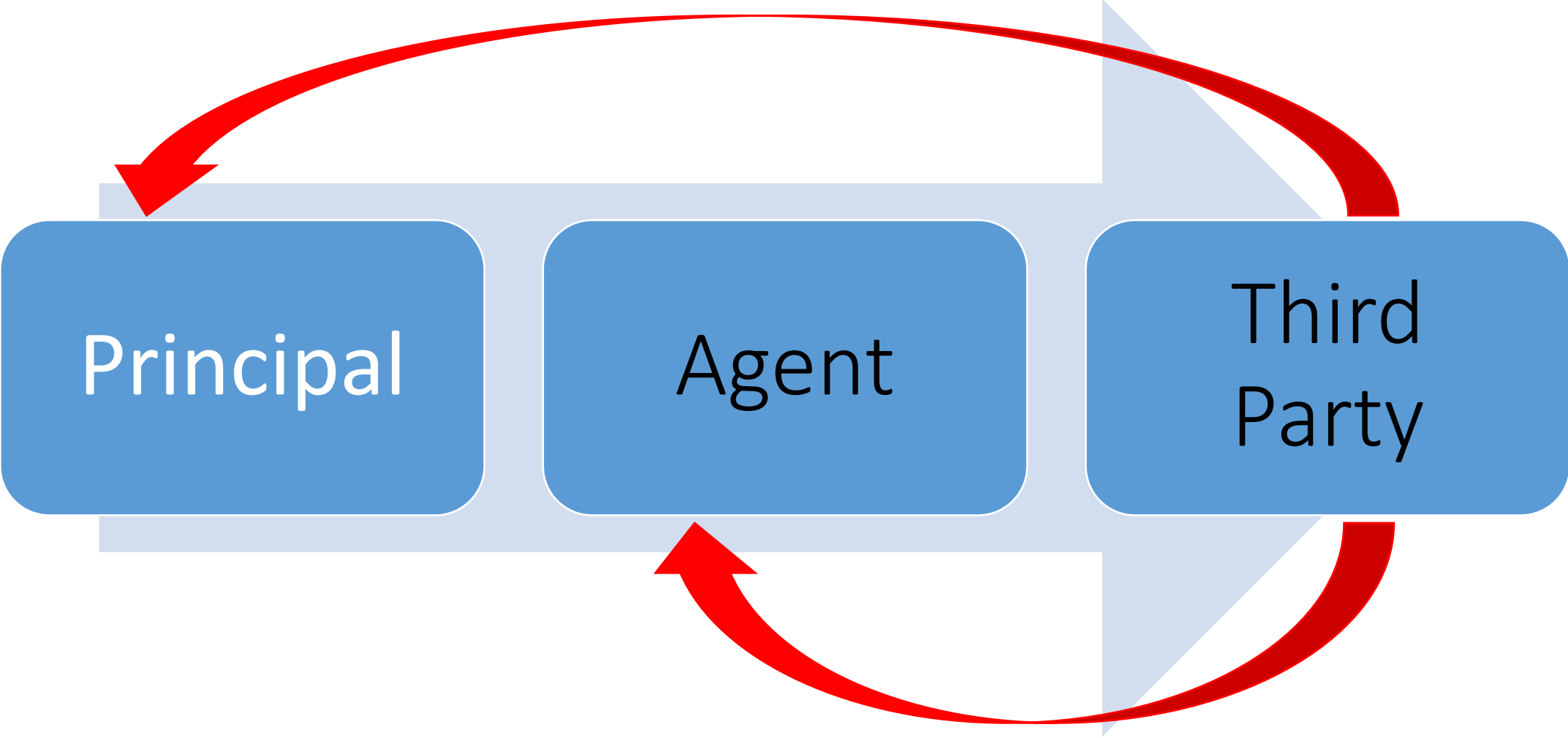
Apparent authority is "that authority which the principal has held the agent out as possessing or which he has permitted the agency to represent that he possess[es]." Wachovia Bank of N.C., N.A. v. Bob Dunn Jaguar, Inc., 117 N.C. App. 165, 171 (1994).

Principles of agency law exist to protect third parties who "in good faith and with reasonable prudence" rely on an agent's acts on behalf of a principal. Foote & Davies, Inc. v. Arnold Craven, Inc., 72 N.C. App. 591, 595 (1985).

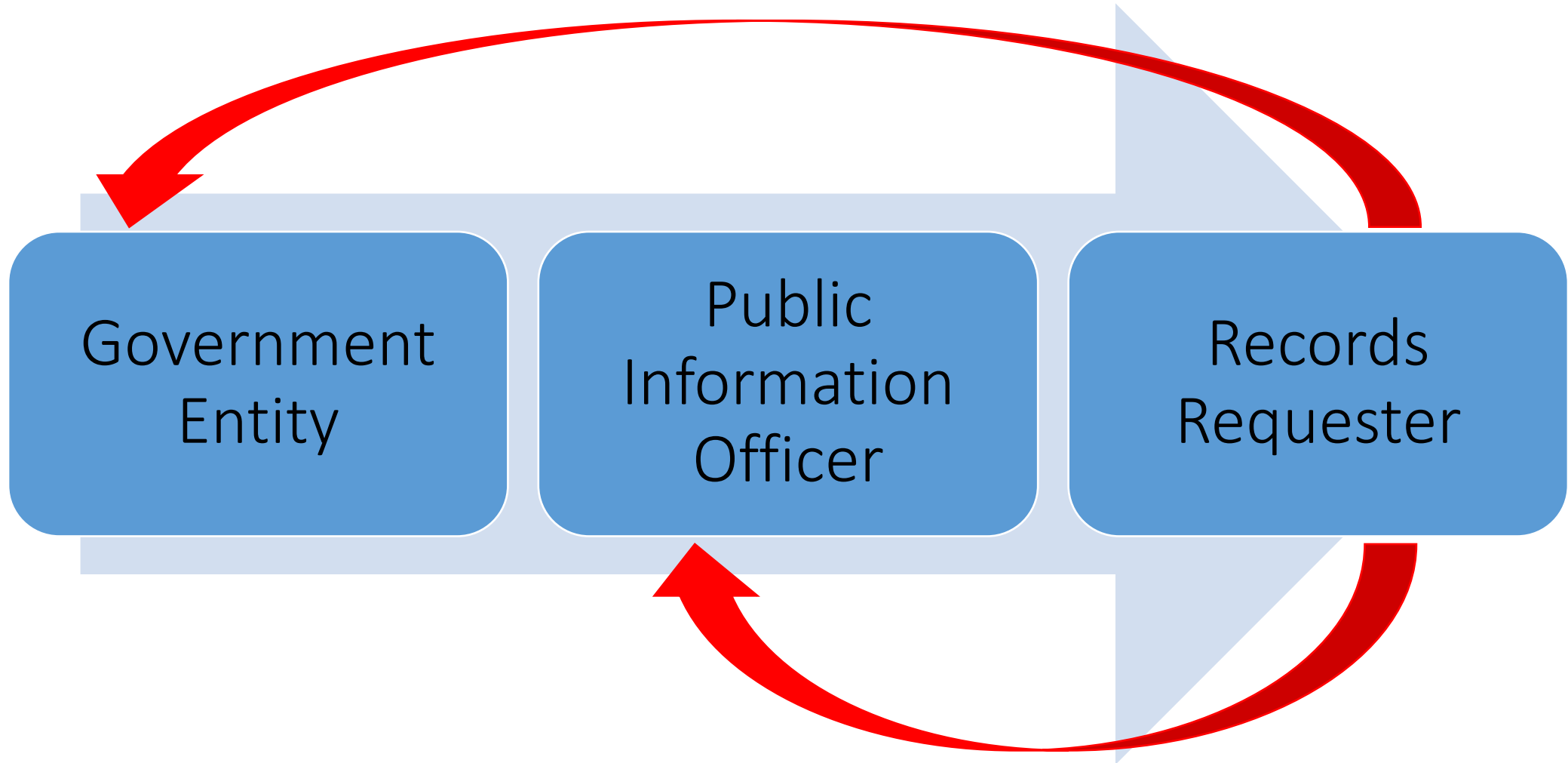
Agency Law



Agency Law



Agency Law



Example




N.C. State University public records policy:

Employees "should always consult with the University Records Officer...before providing access to their records."


Who is making decisions about public records access here?

Florida's Example (Fla. Stat. § 119.07)

A custodian of public records "may designate another officer or employee...to permit the inspection and copying of public records."



However, the custodian must "disclose the identity of the designee to the person requesting to inspect or copy public records."



The designee has a "duty of disclosure" that makes them subject to suit for failure to comply with the state's Public Records Act.

Problem # 3: "Official Denials" and "As Promptly As Possible"

The Current Framework

Custodians must provide access to records "as promptly as possible."
N.C.G.S. § 132-6(a).

Any person who is "denied access to public records" may bring a public records lawsuit. N.C.G.S. § 132-9(a).

When does failing to act promptly constitute a denial of access?

The Importance of a "Denial"

Denial of access is a required element of the cause of action. State Emps. Ass'n of N.C., Inc. V. N.C. Dep't of State Treasurer, 364 N.C. 205, 211 (2010).

Where a plaintiff fails "to show that 'access to or copies of the requested public records [was] denied,'" its case is subject to dismissal. Brooksby v. N.C. Admin. Office of Courts, 789 S.E.2d 540, 542-43 (N.C. Ct. App. 2016).

Is there a cause of action for unjustified delay?

Court of Appeals has declined to answer this question.

One federal district court decision on point: the North Carolina Public Records Act "does not provide relief for mere delay in producing copies of public records." Built Homes, Inc. v. Vill. Of Pinehurst, 2008 WL 350319, at *13-14 (M.D.N.C. Aug. 11, 2008).

Solution # 3.1: Amend the Public Records Act
to Prohibit Unjustified Delay

Florida's Example

"A custodian of public records...must acknowledge requests to inspect or copy records promptly and respond to such requests in good faith." Fla. Stat. § 119.07(c).

"[U]njustified delay in making non-exempt public records available violates Florida's Public Records Act." Consumer Rights, LLC v. Bradford Cty., 153 So.3d 394, 397 (Fla. Dist. Ct. App. 2014).

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. Consumer Rights, LLC v. Union Cty., Fla., 159 So.3d 882, 885 (Fla. Dist. Ct. App. 2015).

Acceptable Delays (from Florida case law)

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.

If listed as part of Public Records Act, these become defenses for governments in public records actions.

Solution # 3.2: Define the word "promptly" in the Public Records Act

Ohio's example (statute)

"[A]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." Ohio Rev. Code Ann. § 149.43(B)(1).

Failure to act promptly ≠ Denial of access.

Instead, remedy is writ of mandamus.

Ohio's example (case law)

"Promptly" means "without delay and with reasonable speed." State ex. Rel. Wadd v. City of Cleveland, 81 Ohio St. 3d 50, 53 (1998).

Whether an agency provides access "promptly" is a question of fact that will depend largely on the facts of each case. Id.

Ohio's example (case law)

<u>Not Prompt</u>	<u>Prompt</u>
<p>City that did not provide access to an accident report for over three weeks after the accident did not act "promptly." <u>State ex. Rel. Wadd v. City of Cleveland</u>, 81 Ohio St. 3d 50, 53 (1998).</p>	<p>City acted promptly where it provided access to presentations made by city officials twelve days after request. <u>State ex rel. Taxpayers Coalition v. Lakewood</u>, 715 N.E.2d 179, 181, 86 Ohio St.3d 385, 386 (Ohio 1999).</p>
<p>Town did not act promptly where it did not even respond to a public records request for two months. <u>Specht v. Finnegan</u>, 149 Ohio App. 3d 201 (2002).</p>	<p>City acted promptly where it provided access to financial statements the week after the statements were prepared. <u>State ex rel. Taxpayers Coalition v. Lakewood</u>, 86 Ohio St.3d 385 (Ohio 1999).</p>
<p>Agency did not act "promptly" when it produced an additional 7,000 documents nine months after its initial response, considering that agency did not inform requester that such records might exist. <u>State ex rel. Bott Law Group, L.L.C. v. Ohio Dept. of Natural Resources</u>, 2013 WL 6200196 (Ohio App. 10 Dist. 2013).</p>	

Problem # 4: When does a plaintiff get attorney's fees?

The policy behind fees

"[T]he very purpose of the attorney fee 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.'" Cmty. Youth Athletic Ctr. v. City of Nat'l City, 220 Cal. App. 4th 1385, 1447 (2013).

North Carolina's Fee Statute

A plaintiff who "successfully compels" production of public records "shall...recover its reasonable attorneys' fees if attributed to those records" if the plaintiff "substantially prevails." N.C.G.S. § 132-9(a).

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Added in 2010.

Zero interpretive cases.

North Carolina's Fee Statute

Big question – can North Carolina look to the federal Freedom of Information Act for guidance?

The Spangler case

Defendant produced documents after being ordered to do so by court, but defendant argued that they planned to release the documents anyways.

Defendant argued that the plaintiffs "cannot be a prevailing party" because "the documents were released as a consequence of a decision made prior to the lawsuit, not as a consequence of the lawsuit."

Defendant cited to federal law stating that "the moving party has the burden of showing that the lawsuit caused the agency to release the documents."

The Spangler case

The federal Freedom of Information Act contained "language substantially different from [the North Carolina] Public Records Act," and therefore the federal Act is "not persuasive." Spangler, 94 N.C. App. at 697 (1989).

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But it gets way more complicated.

The Timing

	NC Public Records Act	Federal FOIA
1989	Court had discretionary power to award "reasonable attorney's fees" where "a party successfully [compelled] the disclosure of public records."	Court had discretion to award a plaintiff its "reasonable attorneys fees and other litigation costs" where it had "substantially prevailed."
2017	A plaintiff who "successfully compels" production of public records "shall...recover its reasonable attorneys' fees if attributed to those records" if the plaintiff "substantially prevails." N.C.G.S. § 132-9(a).	Court has discretion to award attorney's fees to a plaintiff who "has substantially prevailed" where the plaintiff "has obtained relief" through either "a judicial order, or an enforceable written agreement or consent decree," or "a voluntary or unilateral change in position by the agency..."

NC has to pick one of two models

	Texas	Federal
Text	A plaintiff shall receive its attorney's fees where it "substantially prevails."	Court has discretion to award attorney's fees to a plaintiff who "has substantially prevailed" where the plaintiff "has obtained relief" through either "a judicial order, or an enforceable written agreement or consent decree," or "a voluntary or unilateral change in position by the agency..."
Meaning	A plaintiff may only receive fees where records are produced pursuant to court order. (Defendant-Friendly).	A plaintiff may receive its attorney's fees where its lawsuit is the catalyst for the production of public records. (Plaintiff-Friendly)

Texas model has been widely criticized

- Legislature attempted to amend the law to be more plaintiff-friendly
- Governor vetoed

PROCLAMATION BY THE Governor of the State of Texas

TO ALL TO WHOM THESE PRESENTS SHALL COME:

Pursuant to Article IV, Section 14, of the Texas Constitution, I, Greg Abbott, Governor of Texas, do hereby disapprove of and veto House Bill No. 1426 as passed by the Eighty-Fifth Texas Legislature, Regular Session, because of the following objections:

One of the consequences of committing a crime is a criminal record. Both this session and last session, I have signed bills designed to help people with criminal records get jobs so they can lead productive lives. This is a worthy goal, but House Bill 1426 goes too far by prohibiting state licensing agencies from considering the criminal records of some who apply for a license. A license applicant's criminal background is something the licensing agency should be able to consider. If certain licensing agencies are unfairly discriminating against applicants with criminal records, that should be addressed at the agency board level or through more targeted legislation.

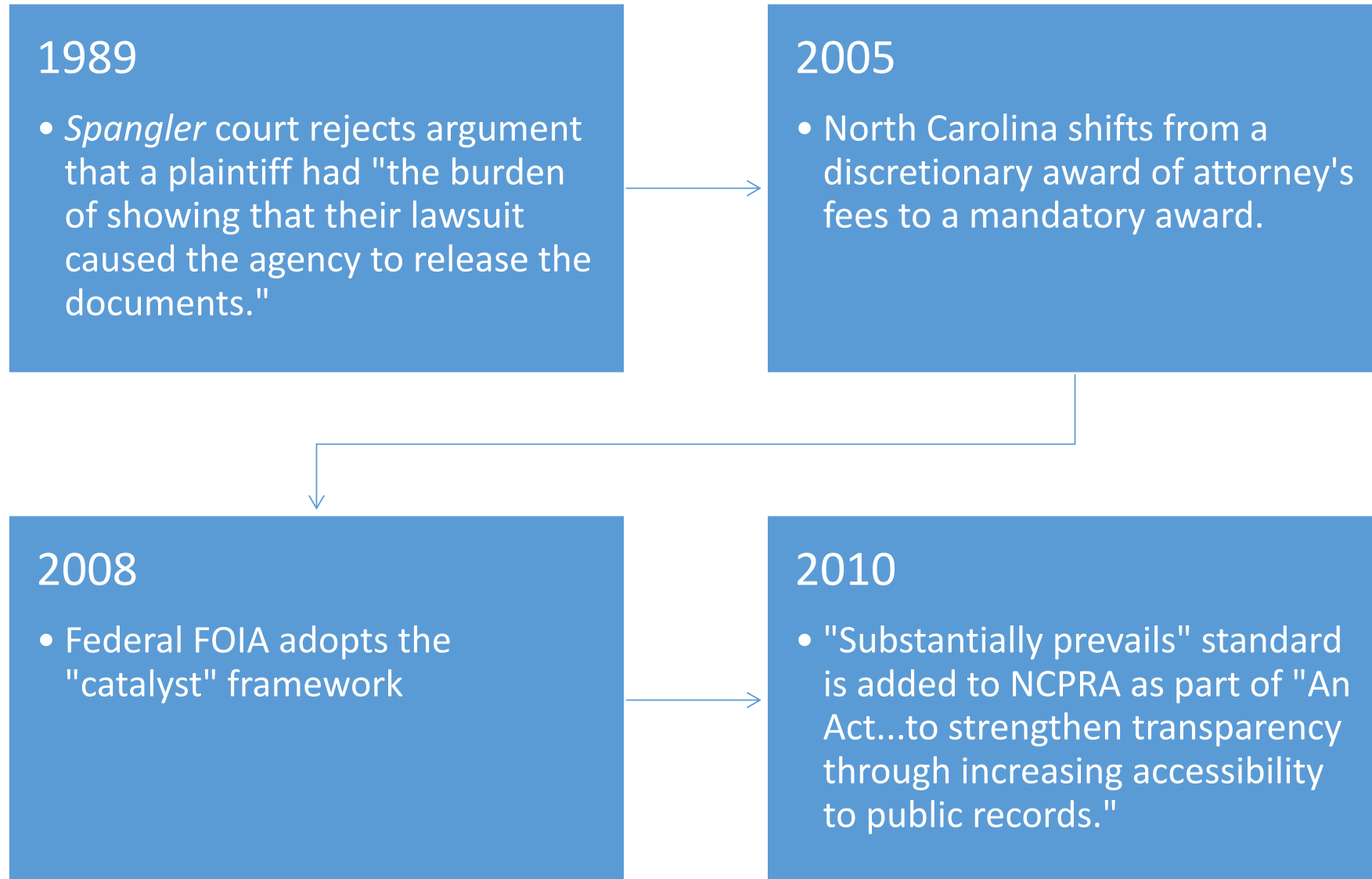
Since the Eighty-Fifth Texas Legislature, Regular Session, by its adjournment has prevented the return of this bill, I am filing these objections in the office of the Secretary of State and giving notice thereof by this public proclamation according to the aforementioned constitutional provision.



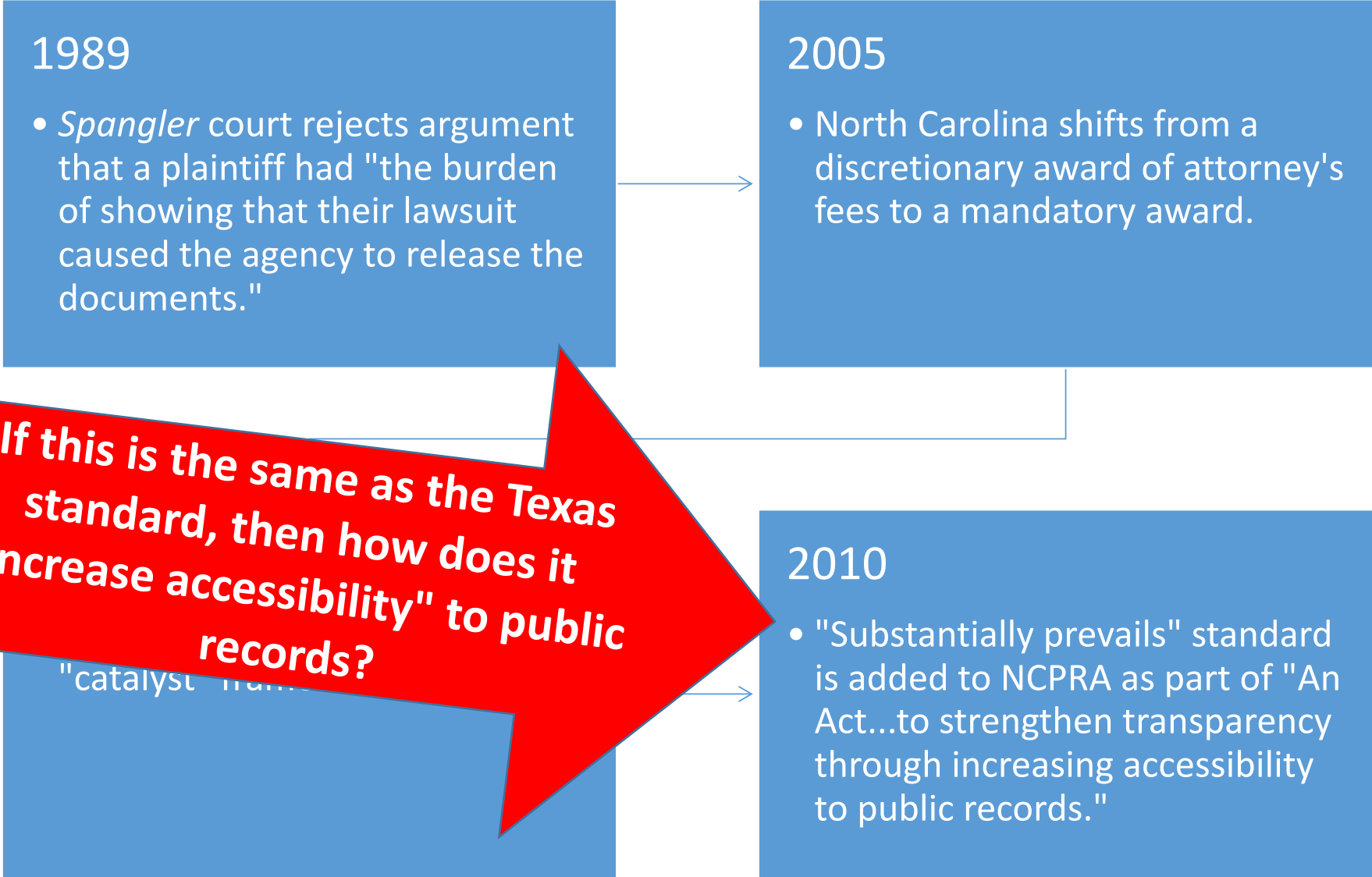
IN TESTIMONY WHEREOF, I have signed my name officially and caused the Seal of the State to be affixed hereto at Austin, this 15th day of June, 2017.


GREG ABBOTT
Governor of Texas

Federal model makes more sense considering legislative history



Federal model makes more sense considering legislative history



1989

- *Spangler* court rejects argument that a plaintiff had "the burden of showing that their lawsuit caused the agency to release the documents."

2005

- North Carolina shifts from a discretionary award of attorney's fees to a mandatory award.

2010

- "Substantially prevails" standard is added to NCPRA as part of "An Act...to strengthen transparency through increasing accessibility to public records."

If this is the same as the Texas standard, then how does it "increase accessibility" to public records?

"catalyst trans"

Questions?

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