

STATE OF NORTH CAROLINA

ORANGE COUNTY

IN THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

25CVS002442-67

CHRIS CLEMENS,

Plaintiff

v.

UNIVERSITY OF NORTH CAROLINA

AT CHAPEL HILL, *et al.*,

Defendants

**PLAINTIFF'S MOTION FOR
EXPEDITED DISCOVERY,
PRESERVATION ORDER, FORENSIC
IMAGING, AND IN CAMERA REVIEW**

NOW COMES Plaintiff Chris Clemens pursuant to Rules 26, 34, and 37 of the North Carolina Rules of Civil Procedure and this Court's inherent authority, respectfully moving this Court for relief to prevent ongoing and irreparable spoliation of evidence, showing as follows:

PRELIMINARY STATEMENT

1. This motion seeks court intervention to stop Defendants' destruction of evidence through Signal's auto-delete feature and routine deletion of text messages that document illegal meetings and violations of North Carolina's transparency laws. Without action, evidence of Defendants' deliberate circumvention of the Open Meetings and Public Records Laws will be permanently lost. *Inter alia*, Plaintiff seeks the imaging of Defendants' phones to preserve evidence in this matter.
2. To understand why forensic imaging can recover supposedly deleted messages, consider the architecture of digital storage like a bicycle wheel. The hub represents the device's processor—the brain that runs applications like Signal or iMessages. The spokes are the pathways or pointers that connect the processor to stored data. The rim represents the storage medium—the hard drive or solid-state memory where messages actually reside. When a user “deletes” a message, they are merely removing the spoke—severing the pointer that tells the processor where to find that data. The message itself remains intact on the rim, like a destination that still exists even after the road sign pointing to it has been removed.
3. This is why forensic imaging is so powerful and time sensitive. A forensic examiner can access the rim directly and locate messages that have no spokes connecting them back to the processor—messages the user believes are “deleted” but which persist in storage. However, this window is limited. As the device continues operating, new data gradually overwrites the old data on the rim. Additionally, depending on settings and account configuration, copies of these messages may exist on Apple's iCloud servers (for

iMessages) or temporarily on Signal’s servers (for message delivery), though Signal’s architecture is designed to minimize server retention.

4. Plaintiff acknowledges that the forensic imaging of Defendants’ personal devices is an extraordinary remedy, one that courts do not order lightly due to its potential intrusion on privacy. However, Defendants’ conduct in this matter is even more extraordinary: the deliberate and systemic use of ephemeral messaging platforms like Signal—with auto-delete features enabled—to conduct public business, combined with routine manual deletions of texts and a failure to confirm preservation despite explicit notice, represents a calculated effort to evade North Carolina’s transparency laws.
5. Such evasion is particularly ironic—and doubly extraordinary: the Board, entrusted with governing the nation’s oldest public university, has apparently sought to privatize the public’s business. Such evasion not only frustrates the Public Records Law’s mandate for retention and access but also necessitates this targeted intervention to prevent irreparable spoliation and uphold the public’s right to accountability. As the North Carolina Supreme Court emphasized in *News & Observer Publishing Co. v. Poole*, public records protections must be liberally construed to ensure “liberal access,” even when officials attempt to shield their actions through technological means. 330 N.C. 465, 481 (1992).

PROCEDURAL POSTURE AND JURISDICTION

6. This Court has jurisdiction pursuant to N.C. Gen. Stat. §§ 132-9 (enforcement of Public Records Law) and 143-318.16 (enforcement of Open Meetings Law).
7. Plaintiff filed this action on September 22, 2025, alleging systematic violations of North Carolina’s transparency laws through improper closed sessions and deliberate destruction of public records. (Complaint ¶¶ 1-5, 40-55).
8. The Complaint specifically alleges Board members use Signal messenger and other ephemeral messaging platforms to conduct Board business while avoiding public records requirements. (Complaint ¶¶ 52-55).
9. On September 24, 2025, Defendants accepted service in this matter. (DE # 17).
10. On September 29, 2025, at 2:41 PM, Plaintiff served a comprehensive ESI preservation letter on Defendants. **Ex. A.** Although Defendants’ counsel responded earlier that day at 2:32 PM to a prior preservation demand regarding non-parties Jed Atkins and Dustin Sebell—advising that clients had been notified and litigation hold letters were being prepared—no formal response has addressed the ESI letter’s specific requirements. Plaintiff’s counsel has received no confirmation of ESI preservation or suspension of auto-deletion measures to prevent evidence destruction.

FACTUAL BASIS DEMONSTRATING THREAT OF EVIDENCE DESTRUCTION

A. Systematic Use of Disappearing Ephemeral Messaging to Evade Transparency

11. Following Plaintiff's internal briefing on the March 20, 2025 closed session violations, Director and Dean Jed Atkins relayed Plaintiff's briefing to Board Chair John Preyer through Signal messenger using its ephemeral message feature, which automatically deletes messages after viewing. (Complaint ¶ 43).
12. This use of Signal's auto-delete was not isolated or accidental. Director Atkins has institutionalized the use of disappearing messages by requiring his leadership team to subscribe to a Signal group and conducting "a substantial portion of official communications via Signal with auto-delete enabled—not only in exchanges with trustees but as a routine practice." (Complaint ¶ 53).
13. Following Dean Atkins' Signal message, Chair Preyer contacted sufficient trustees through text messages to constitute a Board majority for purposes of deliberating about and building consensus for a vote of no confidence in Plaintiff—all without public notice, public access, or minutes required by the Open Meetings Law. (Complaint ¶ 44).
14. These electronic exchanges among Board members about removing the Provost constituted deliberation about public business requiring compliance with transparency laws. Yet no public notice was provided, no public access permitted, and no minutes were kept. (Complaint ¶ 46).
15. The Board's deliberate choice of Signal and similar applications with auto-delete/ephemeral settings to transact public business "frustrates the creation and management of public records." (Complaint ¶ 51). North Carolina law requires public bodies to maintain records and prohibits destruction except per approved retention schedules—using disappearing messages for official business violates these duties.
16. This is not mere negligence but purposeful evasion. On information and belief, "trustees and senior staff have repeatedly relied on off-channel, auto-deleting communications to discuss controversial or consequential Board matters, while simultaneously routing policy debates into closed session." (Complaint ¶ 52).
17. "This combined practice—policy in secret, decisions orchestrated through unnoticed electronic exchanges, and failure to capture/retain related records—constitutes ongoing, systemic, and purposeful evasion of North Carolina law." (Complaint ¶ 52).
18. Critically, since filing this action, Plaintiff has learned that:

- a. Defendant Preyer, especially, and possibly other Board members maintain that messages on personal devices may be deleted regardless of content.
 - b. Defendant Preyer routinely deletes SMS or iMessages involving University business. On information and belief, other Board members do the same.
19. This position and practice contradict North Carolina law. As the Supreme Court held in *News & Observer Publishing Co. v. Poole*, 330 N.C. 465, 476 (1992), public records are defined as “all documents... made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government,” regardless of the medium or location. The Public Records Law itself contemplates that a personal device doesn’t matter and expressly provides that a public record is a public record “regardless of physical form or characteristics.” N.C. Gen. Stat. § 131-1(a).
20. Electronic evidence has already been destroyed—and may continue to be destroyed—through Signal’s automatic deletion, manual deletion of SMS or iMessages, system overwriting, and backup rotation, with no confirmation that such destruction has been suspended.

ARGUMENT

I. This Court Has Authority to Order Immediate Preservation and Forensic Imaging

21. This Court possesses not only the inherent authority but the affirmative obligation to halt spoliation and to ensure that litigants do not destroy evidence to escape accountability—especially when public officials deliberately resort to disappearing messages as a calculated means of evading transparency laws.
22. The North Carolina Supreme Court emphasized in *Poole* that public records laws must be “liberally construed” and that “the public would have liberal access to public records.” 330 N.C. at 481.
23. The Fourth Circuit recognizes spoliation as “the destruction or material alteration of evidence or the failure to preserve property for another’s use as evidence in pending or reasonably foreseeable litigation.” *Silvestri v. Gen. Motors*, 271 F.3d 583, 590 (4th Cir. 2001).
24. Similarly, North Carolina recognizes sanctions for electronic evidence spoliation. *Arndt v. First Union Nat’l Bank*, 170 N.C. App. 518, 613 S.E.2d 274 (2005) (upholding a spoliation instruction where the defendant failed to preserve certain e-mails and profit-and-loss statements); *Commissioner v. Ward*, 158 N.C. App. 312, 580 S.E.2d 432 (2003) (affirming sanctions against a party that refused to comply with multiple consent orders requiring examination, inspection, and copying of electronic information).

25. As *Poole* established, when documents become part of a public agency's records, they are subject to disclosure regardless of their original source or format. *Id.* at 474 (SBI reports became public records when submitted to commission).
26. Additionally, the North Carolina Business Court has applied proportionality analysis to electronic discovery. *Analog Devices, Inc. v. Michalski*, 2006 NCBC 14 (N.C. Super. Ct. 2006) (applying Rule 26 factors to assess whether producing requested electronic information was unduly burdensome or costly, and ordering production given the significant potential for probative evidence) (available at <https://www.nccourts.gov/documents/business-court-opinions/analog-devices-inc-v-michalski-2006-ncbc-14>)
27. Federal courts have repeatedly ordered forensic imaging of devices where there is evidence of spoliation risk, including the use of ephemeral messaging. See *WeRide Corp. v. Kun Huang*, 379 F. Supp. 3d 834 (N.D. Cal. 2019) (ordering expedited forensic imaging where defendants used ephemeral messaging to evade discovery); *Ainstein AI, Inc. v. ADAC Plastics, Inc.*, No. 23-2166-DDC-TJJ (D. Kan. May 19, 2023) (ordering forensic imaging of work devices under expedited discovery).
28. Courts have also treated failure to suspend auto-delete functions as spoliation. In *Paisley Park Enters. v. Boxill*, 330 F.R.D. 226, 232–33 (D. Minn. 2019), the court found defendants acted unreasonably where they failed to disengage Signal's auto-delete function on their phones, wiped devices after suit was filed, and disregarded both an ESI preservation agreement and a court order.
29. Likewise, in *FTC v. Noland*, No. CV-20-00047-PHX-DWL (D. Ariz. Aug. 30, 2021), the court imposed sanctions where defendants shifted to Signal after learning of an FTC investigation and then deleted the app before their phones could be imaged—conduct the court found established intent to deprive. See also *Measured Wealth Private Client Grp., LLC v. Foster*, No. 20-cv-80148-SINGHAL/MATTHEWMAN, 2021 WL 1250340, at *1–2 (S.D. Fla. Mar. 31, 2021) (ordering forensic examination of defendant's personal mobile phone to recover deleted text messages and iMessages due to obstructionist production, with neutral expert, search terms, and privilege review to protect privacy).
30. North Carolina public officials have an even higher duty: North Carolina's public-records and open-meetings laws impose a continuing obligation of preservation and transparency that is not contingent on pending litigation. Defendants' use of auto-deleting messages—or their routine deletion of SMS and iMessages—to conduct public business is therefore especially egregious.

II. Defendants' Conduct Constitutes Spoliation

31. The combination of auto-deleting Signal messages and routine manual deletion requires this Court's intervention. Unlike traditional document destruction which might leave traces, digital deletion through Signal is absolute and irreversible.
32. The duty to preserve attached when this action was filed on September 22, 2025. Despite explicit notice via the September 29th preservation letter, Defendants have not confirmed that they have suspended auto-deletion or taken steps to preserve evidence.
33. Defendants are not merely failing to preserve—they have already destroyed evidence through Signal's automatic deletion upon viewing and the manual deletion of iMessages and SMS text messages. The following is known: (1) Defendants have conducted public business on Signal with auto-delete enabled; (2) certain Defendants, particularly Preyer but likely others, have manually deleted text messages from personal phones while asserting an unfounded right to do so notwithstanding *Poole*; and (3) UNC has failed to confirm that these practices have ceased or that auto-delete functions have been disabled despite explicit preservation notice. In this posture, the risk of ongoing spoliation is intolerable, and forensic imaging is the only reliable means of ensuring preservation.
34. The destroyed messages are not peripheral—they are the violations alleged. Each deleted message that discussed Board business outside a properly noticed meeting was itself a violation of the Open Meetings Law. Each deleted message that transacted public business was a public record illegally destroyed.
35. As alleged in the Complaint, Defendants have adopted “as a matter of course rather than exception” the practice of conducting public business through disappearing messages, which “is inconsistent with the University's obligations to capture, retain, and make accessible public records.” (Complaint ¶ 53).

CONCLUSION

36. North Carolina's transparency laws cannot be circumvented through technological manipulation. As *Poole* makes clear, public records protections apply regardless of format or location. Defendants have weaponized technology to evade transparency. Ironically, the guardians of a public institution—sworn to openness—have cloaked the people's business in digital secrecy. They conduct the people's business through disappearing messages, coordinate Board action through unrecorded electronic meetings, and then delete the evidence. This Court must act to preserve what evidence remains and recover what has been destroyed.

RELIEF REQUESTED

- A. Enter a Preservation Order requiring all Defendants and non-party Jed Atkins to:
1. Immediately disable all auto-delete, ephemeral, or disappearing message features on all devices (personal and University-issued) and all applications used for any University-related communications, including but not limited to Signal, WhatsApp, iMessage, and any other messaging platforms;
 2. Submit within 72 hours for forensic imaging at Defendants' expense"
 - i. All mobile phones (personal and University-issued);
 - ii. All tablets and iPads;
 - iii. All laptops and desktop computers; and,
 - iv. All other electronic devices capable of sending/receiving messages.
- B. Enter an order requiring Defendants to provide sworn affidavits within 10 days detailing:
1. Every messaging application ever used for University business;
 2. All auto-delete settings currently enabled and when enabled;
 3. All deletions of any University-related messages since November 1, 2023;
 4. All devices ever used to conduct University business; and,
 5. Whether Signal was used and if so, all Signal account information.
- C. Order Forensic Examination and Recovery at Defendants' expense consisting of:
1. Appointment of neutral forensic examiner within 48 hours to:
 - i. Create bit-for-bit forensic images of all devices;
 - ii. Attempt recovery of all deleted Signal messages using advanced forensic techniques;
 - iii. Attempt recovery of all deleted iMessages and text messages;
 - iv. Extract all metadata showing communication patterns, participants, and deletion timestamps;
 - v. Recover any deleted WhatsApp, Teams, or other messaging application data; and
 - vi. Search for and recover any deleted emails relating to Board business.
 2. Production of forensic report within 30 days detailing:
 - i. All recovered messages (Signal, iMessage, SMS, etc.);
 - ii. All metadata extracted;

- iii. Timeline of deletions;
- iv. Evidence of auto-delete settings and when enabled/disabled;
- v. Chain of communications between Board members; and,
- vi. Preservation of forensic images for duration of litigation.

D. Order In-Camera Review whereby:

- 1. The Court reviews all recovered messages to determine which constitute public records;
- 2. Messages involving any University business, Board deliberations, or public business are immediately produced to Plaintiff;
- 3. Purely personal content is logged but withheld;
- 4. Any claimed privileged communications are logged with specific basis for privilege asserted; and,
- 5. The Court makes final determination on any disputed categorizations

E. Award All Costs and Fees including:

- 1. All forensic imaging costs to be borne entirely by Defendants and/or the University given their deliberate choice to use ephemeral messaging platforms for public business;
- 2. All forensic examination and recovery costs to be borne entirely by Defendants and/or the University;
- 3. Plaintiff's attorneys' fees necessitated by this emergency motion and Defendants' deliberate attempts to avoid transparency through technology; and,
- 4. Any future costs associated with compelling compliance with this Order.

F. Schedule hearing within 10 days given the known destruction of evidence.

G. Grant such other relief as the Court deems just and proper.

Respectfully submitted this the 8th day of October 2025 at Raleigh, North Carolina.

/s/ David McKenzie

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