

HOW THE NORTH CAROLINA SUPREME COURT SEVERED OPEN ACCESS TO DATA NECESSARY FOR GOVERNMENT TRANSPARENCY AND ACCOUNTABILITY

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I. INTRODUCTION

In August 2015, the North Carolina Supreme Court made a substantial misstep. While understanding how the court came to its decision through very academic and thoughtful considerations, the court unintentionally closed the door to obtaining copies of the Automated Criminal/Infractions System (“ACIS”) database of criminal records data, and it further stepped away from North Carolina’s long-standing public records laws promoting government transparency. The North Carolina legislature has long protected the rights of journalists and researchers, including the one-off researcher’s request, to inspect and examine any government-related file provided under the North Carolina Public Records Act, sections 132-1–132-1.11 of the North Carolina General Statutes (“N.C. Gen. Stat.”) (hereinafter collectively referred to as “Public Records Act”).¹ While the North Carolina Supreme Court may have wanted to limit the repackaging and exploitation of free records from a vendor, it interpreted the statutes so narrowly that they now preclude any access to the data in the aggregate, creating a gap that directly affects innocent third

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1. North Carolina Public Records Act, N.C. GEN. STAT. §§ 132-1–132-1.11 (2015); *see also* SOPHIE WINKLER, NAT’L ASS’N OF CTYS., OPEN RECORDS LAWS: A STATE BY STATE REPORT 100 (Dec. 2010), <http://www.naco.org/sites/default/files/documents/Open%20Records%20Laws%20A%20State%20by%20State%20Report.pdf>.

parties, such as the journalists, researchers, and investigators looking to improve government practice and policies.

By allowing this greater limitation to accessing court records in the aggregate, the North Carolina Supreme Court has made research into public accountability virtually impossible. Not having access to records in the aggregate promotes the perception of government secrecy and supports a lack of motivation to self-report or self-manage the court process, a process that is ensured by the North Carolina Constitution and is necessary to protect individuals' rights.

The first section of this Article outlines the lineage of *LexisNexis Risk Data Management, Inc. v. North Carolina Administrative Office of the Courts* (“*LexisNexis v. N.C. A.O.C.*”), where LexisNexis Data Management, Inc., and LexisNexis Risk Solutions, Inc. (hereinafter collectively referred to as “LexisNexis”), were precluded from obtaining a copy of the ACIS database of criminal records maintained by the North Carolina Administrative Office of the Courts (“N.C. A.O.C.”), a violation of the Public Records Act.² In the next parts, this Article includes a case study that exemplifies the process currently in place to obtain criminal records in the aggregate—the Jury Sunshine Project (“JSP”)—sponsored by Wake Forest University School of Law professors. The Article concludes with an argument that by adding a narrower subsection to a broad public records law, the North Carolina Supreme Court is functionally impeding any efforts for instituting public accountability within the criminal justice system.

II. LEXISNEXIS’S REQUEST FOR PUBLIC RECORDS TO N.C. A.O.C.

In 1973, LexisNexis launched an information retrieval system that provided mere access to “the full text of Ohio and New York codes and cases, the U.S. code, and some federal case law.”³ Growing substantially through the 1970s, 1980s, and 1990s, LexisNexis embarked on the business information world in the early 2000s when it first introduced “the SmartLinx feature for generating highly accurate summary reports about businesses,

2. *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 775 S.E.2d 651 (2015).

3. LEXISNEXIS, THE LEXISNEXIS TIMELINE 2 (2003), http://www.lexisnexis.com/anniversary/30th_timeline_fulltxt.pdf.

locations or individuals from the respected LexisNexis public records collection.”⁴ Over the years, LexisNexis has worked with smaller tech startups to gather and repackage public records into a format that it can make proprietary.⁵ In addition to working with independent companies, presumably LexisNexis has also made forward steps in requesting access to state-level records through the use of state public records laws.⁶

After being denied access to a copy of ACIS, Plaintiffs LexisNexis filed their complaint against the N.C. A.O.C., John Smith as Director of the N.C. A.O.C., and Nancy Lorrin Freeman as the Wake County Clerk of Superior Court (hereinafter collectively referred to as “Defendants”).⁷ LexisNexis alleged that the Defendants had failed to comply with the Public Records Act.⁸

The crux of the litigation lies with ACIS, the real-time database of North Carolina criminal records that has been operating since the 1980s to provide access to court records to

4. *Id.* at 12.

5. *See, e.g.*, Sean Doherty, *LexisNexis Acquires ‘Legal Analytics’: Lex Machina*, ABOVE L. (Nov. 24, 2015, 11:04 AM), <http://abovethelaw.com/2015/11/lexisnexis-acquires-legal-analytics-lex-machina>. One example of this pattern of behavior is:

Lex Machina creates structured data sets from public data, such as PACER (Public Access to Court Electronic Records), to help lawyers predict the outcomes of different legal strategies by mining, tagging, categorizing and enhancing millions of federal court dockets and documents. The technology allows lawyers to make data-driven decisions and develop litigation strategies from data on case law, parties and counsels, jurisdictions and presiding judges. From historical case law and docket information, Lex Machina subscribers can predict the most favorable jurisdictions to bring cases, glean the most successful motions and arguments before judges, and sleuth opposing counsel strategies from prior cases.

Id.; *see also* *LexisNexis(TM) U.S. Will Acquire Dolan Media’s Public-Records Businesses*, PRNEWswire (June 26, 2003, 1:00 AM), <http://www.prnewswire.com/news-releases/lexis-nexistm-us-will-acquire-dolan-medias-public-records-businesses-71415787.html>

(“LexisNexis U.S., a leading provider of legal, news and business information services, said today it has entered into a definitive agreement to acquire the public-records businesses of Dolan Media Company, a Minneapolis-based provider of electronic public-records information, including bankruptcies, civil judgments, federal and state tax liens and eviction notices.”).

6. *See, e.g.*, *LexisNexis*, 368 N.C. at 181, 775 S.E.2d at 652 (deciding whether the North Carolina Public Records Act requires the N.C. A.O.C. to issue a copy of ACIS to a private party).

7. Record on Appeal at 5, *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 232 N.C. App. 427, 754 S.E.2d 223 (2014) (No. COA13-547).

8. *Id.*

government agencies and the public at large.⁹ ACIS was created by the N.C. A.O.C. and is a “compilation of information related to the transaction of public business by the courts of North Carolina.”¹⁰ All one hundred clerks of superior court of North Carolina and their staff input data into the ACIS database daily, at which point the data becomes a permanent part of the ACIS system.¹¹ The input of data is derived from the print copies of the records contained within the clerks’ offices, and ACIS can be accessed by the public at no cost through computers commonly known as green screen terminals.¹² Though the data is inputted into the system by the clerks of court and their staff, the ACIS database is administered, managed, and maintained by the N.C. A.O.C.¹³ The North Carolina Supreme Court’s efforts in defining—or rather, declining to define—this database as a public record is why LexisNexis was denied a copy of the ACIS database.¹⁴

Interestingly, LexisNexis uses the public data it has collected in two of its commercial products, Courtlink and SmartLinx, which is presumptively what would have happened to the ACIS data, or the copy of the ACIS database, if it had ultimately been received by LexisNexis. Though contract prices could not be obtained, LexisNexis markets the LexisNexis Advance product public records package as follows:

It’s hard to hide from the far-reaching power of LexisNexis® smart-search technology and our unrivaled collection of public records. Take the case of one defendant in Colorado who tried to hide his collection of classic cars and other fancy toys under an old girlfriend’s name in Florida. All it took was one savvy litigator who searched LexisNexis to connect the

9. *Id.* at 9.

10. *Id.*

11. *Id.* at 9–10.

12. *Id.* at 10. See generally Jeremy Gibson, *Thoughts on the Lexis Nexis Decision*, G.S. 132 FILES (Feb. 28, 2014), <https://ncrecords.wordpress.com/2014/02/28/thoughts-on-the-lexis-nexis-decision> (illustrating the complexity of using the ACIS system to generate reports as the “green screen” terminals still run on archaic computer commands).

13. *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015).

14. *Id.* at 186–88, 775 S.E.2d at 655–56 (concluding that “[N.C. Gen. Stat.] section 7A-109 [which applies to court records specifically, and not all state government records] controls plaintiffs’ request for these records” and, therefore, avoiding the question of whether the ACIS database is a public record under the Public Records Act).

dots across 45+ BILLION public records and find the defendant's hidden assets. Look anywhere else and you just might miss something.¹⁵

Specifically, LexisNexis compares how their access to public records outpaces WestlawNext.¹⁶ Between LexisNexis and WestlawNext, LexisNexis claims that its driver's license records are updated more frequently in nineteen states and that it has eighteen more states covered than WestlawNext.¹⁷ LexisNexis also lays claim to having 9.6 billion records of dates of birth, 657 million email addresses, and 750 million phone numbers not listed in any other directory.¹⁸ Focusing on business research, LexisNexis markets that it has access to a combined 1.4 billion business records.¹⁹ Additionally, it updates Uniform Commercial Code ("UCC") filing records daily in forty-seven states compared to WestlawNext, which only updates in eight states.²⁰

With regard to property records, LexisNexis Advance makes available deeds and mortgage documents in 150 counties nationwide not available through WestlawNext, and in 1513 counties nationwide LexisNexis claims their records pre-date WestlawNext's property records.²¹ LexisNexis claims that ninety-five percent of the U.S. population is covered by its data; that it covers fourteen more states than WestlawNext and is more frequently updated; and that it has access to over one billion vehicle titles.²² This evidence shows how LexisNexis is heavily marketing access to public records as a means to gain a significant commercial advantage over the competition, WestlawNext, and government-funded access, ACIS.

15. LEXISNEXIS, 45 BILLION PUBLIC RECORDS & COUNTING: HIDDEN ASSETS FOUND (Dec. 2015), http://www.lexisnexis.com/em/docs/174514_BMH00542-0_JCM_172765_PublicRec_CHART-Snapshot_Edits_012916_ZZM%20.pdf.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

Additionally, LexisNexis has developed another program that gathers and connects public records—SmartLinx.²³ In 2013, LexisNexis provided this disclaimer to its public records:

Due to the nature of the origin of public record information, the public records and commercially available data sources used in reports may contain errors. Source data is sometimes reported or entered inaccurately, processed poorly or incorrectly, and is generally not free from defect. This product or service aggregates and reports data, as provided by the public records and commercially available data sources, and is not the source of the data, nor is it a comprehensive compilation of the data. Before relying on any data, it should be independently verified.²⁴

While LexisNexis claims access to real property records, tax assessor records, deed and mortgage records, driver licenses, Federal Aviation Administration aircraft registrations, motor vehicle registrations and titles, watercraft records, person locators (nationwide and state-by-state), voter registrations, military information, phone look-up, business locator data, corporate filings, UCC filings, Federal Employer Identification Numbers, marriage and divorce records, personal and business bankruptcy filings, judgments and liens information, criminal records, hunting and fishing licenses, and professional licenses, there are significant limitations to that data.²⁵ With specificity to criminal records, LexisNexis claims to make the following available via SmartLinx:

A robust collection of derogatory information, including statewide criminal court, department of corrections, county arrest records, traffic violations, and county criminal court records. In total, we will provide access to approximately 171 million criminal records, 14 million Department of Correction records,

23. List of the Core Public Records with SmartLinx, LexisNexis (2013) (on file with author) (describing the program as providing “easy-to-navigate reports that let you quickly comb through billions of records in a single search to locate and connect facts”).

24. *Id.*

25. *Id.*

152 million Criminal Court Records, and over 4 million Arrest Records.

Specific derogatory data sources available include: Arrest Logs, Department of Correction - Depending on the state, information will include historical and current data on statewide felony and misdemeanor convictions, statewide current inmates, and institution rosters, and Criminal Court Filings.²⁶

The argument about “Big Data” and too much access is not lost here.²⁷ In addition to SmartLinx, LexisNexis has developed technology to allegedly “connect[] the dots between billions of public records.”²⁸ It alleges to “maintain over two petabytes of content from billions of public and proprietary records” and to have “created [its] own proprietary supercomputing platform,

26. *Id.*

27. See Bernard Marr, *Danger: 3 Reasons to Be Scared of Big Data*, SMARTDATACOLLECTIVE (Sept. 24, 2013), <http://www.smartdatacollective.com/bernardmarr/146811/danger-3-reasons-be-scared-big-data> (describing the positive outcomes of Big Data, but warning that with the amount of data now available, the likelihood of discrimination and invasion of privacy increases significantly); see also K.N.C., *The Backlash Against Big Data*, THE ECONOMIST (Apr. 20, 2014, 11:50 PM), <http://www.economist.com/blogs/economist-explains/2014/04/economist-explains-10>. Big data is explained as follows:

Big data refers to the idea that society can do things with a large body of data that that weren't possible when working with smaller amounts. The term was originally applied a decade ago to massive datasets from astrophysics, genomics and internet search engines, and to machine-learning systems (for voice-recognition and translation, for example) that work well only when given lots of data to chew on. Now it refers to the application of data-analysis and statistics in new areas, from retailing to human resources. . . .

[Additionally,] [t]he criticisms fall into three areas that are not intrinsic to big data per se, but endemic to data analysis, and have some merit. First, there are biases inherent to data that must not be ignored. That is undeniably the case. Second, some proponents of big data have claimed that theory (ie, generalisable models about how the world works) is obsolete. In fact, subject-area knowledge remains necessary even when dealing with large data sets. Third, the risk of spurious correlations—associations that are statistically robust but happen only by chance—increases with more data.

Id.

28. LEXISNEXIS, *supra* note 15.

HPCC Systems, enabling [them] to process at very high speeds” to then link and analyze the data.²⁹ This linking is called “LexID, the linking ingredient inside [its] solutions, [using] unique algorithms to find links and patterns that would not otherwise be obvious in disparate data.”³⁰ Though this Article does not address the inherent privacy and security concerns with linking and making this information commercially available, this could be a hugely problematic aspect of aggregating public records in this way, particularly if medical records and other sensitive information make their way into these systems in a way that allows for gross discrimination against a population of society.³¹

The commercial systems are available to customers at a cost,³² while the government ensures the public constitutional protection to examine these records without unreasonable cost. Specifically, the federal government has made significant strides in their electronic filing system and the public portal, Public Access to Court Electronic Records (“PACER”), which makes all federal filings available (with some time exclusions and court limitations)

29. *Id.*

30. *Id.*

31. See Jennifer Brobst, *Reverse Sunshine in the Digital Wild Frontier: Protecting Individual Privacy Against Public Records Request for Government Databases*, 42 N. KY. L. REV. 191 (2015). Specifically, Brobst states that:

Until governmental agencies are better able to properly maintain and comply with public records requests for mass digital information, the risk of unwarranted disclosure of private information is great and the existing individual remedies and protections slight. Thus, it is timely to consider pragmatic and legislative solutions to more effective and tailored compliance with public records requests in the Digital Age, to empower individuals to enforce their right to privacy and to gain lawful access to public records.

Id. at 191; see also Shannon Gilreath, *The Internet and Inequality: A Comment on the NSA Spying Scandal*, 49 WAKE FOREST L. REV. 525 (2014). Gilreath discusses:

[T]he debate over the collection and storage of the personal information of Internet users, particularly in the context of the large-scale surveillance of Americans by the U.S. government, recently revealed by former National Security Agency . . . contractor Edward Snowden [, undertakes the] endeavor to frame the risk . . . in terms of a historical and continuing technologization of oppression in the name of national security.

Id. at 525–26.

32. See, e.g., *LexisNexis Pricing Plans*, LEXISNEXIS, <http://www.lexisnexis.com/gsa/76/plans.asp> (last visited Feb. 9, 2017) (describing a variety of pricing plans and options for customers).

for limited costs.³³ North Carolina has also protected this right of inspection through the North Carolina Public Records Act;³⁴ however, while an individual currently may easily examine another person's criminal file in a sole county, if a person wished to analyze data in the aggregate, either in one county or state-wide, it is virtually impossible to do with or without these commercial systems. The North Carolina Supreme Court has now made it more difficult to examine criminal records data in the aggregate through *LexisNexis v. N.C. A.O.C.* and its constraining view on providing access to a copy of the criminal records contained within ACIS.

III. THE NORTH CAROLINA PUBLIC RECORDS ACT

Enacted in 1975, the North Carolina Public Records Act intended to provide the public with a means to take an insider's look into government practice.³⁵ In the forty years since its inception, the practice and technology have changed dramatically, to no one's surprise. Both the current practice of records management and provision of those records no longer truly bring life to the true meaning or purpose of these laws. Technology developments have changed the way we look at access and the way that records are maintained. Practical use of these documents show a new end-user expectation of ease in accessibility that was not necessarily present before. Thus, it is understandable how applying modern principles of access and technology to such antiquated statutes had such dramatic, unintended consequences, as seen in *LexisNexis v. N.C. A.O.C.*

Though some provisions of the North Carolina Public Records Act seem clear-cut, the *LexisNexis v. N.C. A.O.C.* decision

33. PUB. ACCESS TO CT. ELECTRONIC RECS., <https://www.pacer.gov> (last visited Feb. 9, 2017). Librarians have taken an increasing role in assisting government officials with the maintenance and updating of databases containing public records. See, e.g., *Promoting Justice by Ensuring Public Access to Federal Decisions: Hearing on Judicial Transparency and Ethics Before the Subcomm. on Courts, Intellectual Prop. & the Internet of the H. Comm. on the Judiciary*, 115th Cong. (2017) (statement of Jonathan Zittrain, Vice Dean for Library and Information Resources, Harvard University). The American Association of Law Libraries ("AALL") also puts forth organizational initiatives that strive to help access to justice, including access to public records of all kinds. See *generally Advocacy*, AALL, <http://www.aallnet.org/mm/Advocacy> (last visited Feb. 23, 2017).

34. N.C. GEN. STAT. § 132-1(b) (2015).

35. *Id.*

shows us that is far from the truth. For example, the North Carolina Public Records Act defines a public record as:

[D]ocuments, 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.³⁶

The North Carolina Attorney General's Office released an advisory opinion in 1996 stating that "[t]he statutory definition of a public record is broad and comprehensive. It includes sound recordings and magnetic or other tapes, or other documentary material, regardless of physical form or characteristics."³⁷ Purposefully creating an expansive list of the types of public records, the North Carolina General Assembly made an effort to shine a light on the government's activities.

Truest in its attempts, the General Assembly intended to include all officials and public officers of the state under this Public Records Act by defining who is under the umbrella of this law by stating that:

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.³⁸

36. *Id.* § 132-1(a).

37. Office of the Att'y Gen. of the State of N.C., Advisory Opinion on the Application of Public Records Law to Voice Mail Records (Apr. 18, 1996) ("It would appear that all voice mail records fall within the first part of this definition. The same is true of voice recordings made on analog tape. This means that every voice mail record could, under some circumstances, be a public record.")

38. N.C. GEN. STAT. § 132-1(a).

By statutory construction, the plain meaning of the statute would lead to the conclusion of a clear set of characteristics that would encompass a public record, thus appearing to be seemingly unambiguous on the inclusion of every type of document or information created in the course of governmental work.

Directly to the point is the plain language of section 132-1(b), which states that “the public records and public information compiled by the agencies of North Carolina government or its subdivisions are the property of the people.”³⁹ Thus, the people of North Carolina “may obtain copies of their public records and public information free or at minimal cost unless otherwise specifically provided by law.”⁴⁰ By using this language, the General Assembly expressly stated that the information created in the course of governmental business is the property of the people of North Carolina and is available for public inspection by any of its constituents.⁴¹ Both subsections 132-1(a) and (b) were in the original legislation passed in 1975; however, the Public Records Act underwent a bit of a change in 1995 by way of legislative amendment.⁴²

A. *The 1995 Amendment to the Public Records Act*

One attempt at keeping this law up-to-date in its application was the 1995 amendment. Thought to not be comprehensive when originally enacted during the 1995 legislative session, the North Carolina General Assembly introduced and passed Senate Bill 426 to strengthen the original public records law of the state.⁴³ This amendment provided some important

39. *Id.* § 132-1(b).

40. *Id.* (“As used herein, ‘minimal cost’ shall mean the actual cost of reproducing the public record or public information.”).

41. *Id.*

42. An Act to Amend the Public Records Law, 1995 N.C. Sess. Laws 388 (1995) (codified as amended at N.C. GEN. STAT. §§ 132-1, 132-6, 132-6.1, 132-6.2, 132-9, 132-10).

43. *Id.* As an aside, the amendment also provided a new section that allows for attorney’s fees when a public records request is improperly denied, perhaps as an attempt to incentivize the agency to produce public records more willingly and for the public to bring forth claims to compel that production. *Id.* sec. 4, § 132-9(c). The new language provides that:

(c) In any action brought pursuant to this section in which a party successfully compels the disclosure of public records, the court may, in its discretion, allow the prevailing party to recover reasonable attorneys’ fees if:

changes to the law that directly come into effect in *LexisNexis v. N.C. A.O.C.* One of the clarifications that the 1995 amendment made was that it limited the word “custodian.” After the amendment, a “‘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.”⁴⁴ The definition of custodian later became a large part of the litigation in determining which agency or officer needed to produce such information and data, if at all.⁴⁵ Another significant addition to the Public Records Act in 1995 was that “no person requesting to inspect and examine public records, or to obtain copies thereof, shall be required to disclose the purpose or motive for the request.”⁴⁶ By removing the disclosure element by the public, the government intended to make inspection of such public records easier and more accessible to the public.⁴⁷ Even now, however, many public officials seem suspicious of public records inspections, especially when they involve researchers who are pursuing initiatives in furthering public accountability.⁴⁸

(1) The court finds that the agency acted without substantial justification in denying access to the public records; and

(2) The court finds that there are no special circumstances that would make the award of attorneys’ fees unjust.

Any attorneys’ fees assessed against a public agency under this section shall be charged against the operating expenses of the agency; provided, however, that the court may order that all or any portion of any attorneys’ fees so assessed be paid personally by any public employee or public official found by the court to have knowingly or intentionally committed, caused, permitted, suborned, or participated in a violation of this Article. No order against any public employee or public official shall issue in any case where the public employee or public official seeks the advice of an attorney and such advice is followed.

Id.

44. *Id.* sec. 2, § 132-6(a).

45. See *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 185–87, 775 S.E.2d 651, 654–55 (2015) (explaining the emphasis the Court of Appeals placed in determining the “custodian” of ACIS, while finding that such determination was irrelevant because the Public Records Act did not apply to the issue at hand).

46. An Act to Amend the Public Records Law, sec. 2, § 132-6(b).

47. *Id.*

48. See generally Ryan Autullo, *Texas Clerks Look to Derail Web-Based Public Access to Court Records*, MYSTATESMAN (Jan. 30, 2017, 2:31 PM), <http://www.mystatesman.com/news/state—regional-govt-politics/texas-clerks-look-derail-web-based-public-access-court-records/pnNpmqoQlwe4s8xIBUZYbJ/>; *Texas Clerks Oppose Online Public Access to Court Documents*, ALBUQUERQUE J. (Jan. 31, 2017, 1:46 PM), <https://www.abqjournal.com/939602/texas-clerks-oppose-online-public-access-to-court-documents.html>.

B. Unintended Consequences of the 1995 Amendment

One provision added in 1995 has had unintended consequences. The section stating that “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 non-confidential information” may become problematic when the confidential information, such as medical or financial data, may be disclosed and stolen by potential identity thieves or other wrong-doers.⁴⁹ Many of the issues that the 1995 General Assembly attempted to address may have either become a moot point or a novel puzzle in the digital age.

For example, the 1995 General Assembly added section 132-6.1, which addresses the electronic data-processing of records.⁵⁰ The electronic data processing of records in 1995 is quite different in context, execution, and theory than that same data processing in the era of “big data” and digital privacy issues of 2015. Particularly, the general assembly added that governmental agencies should not purchase new databases and software that would limit public access to their data and records.⁵¹ Additionally, each agency was mandated to create an index of each database used in their maintenance of digital data that included:

[A] list of the data fields; a description of the format or record layout; information as to the frequency with which the database is updated; a list of any data fields to which public access is restricted; a description of each form in which the database can be copied or reproduced using the agency’s computer facilities; and a schedule of fees for the production of copies in each available form.⁵²

49. An Act to Amend the Public Records Law, sec. 2, § 132-6(c); see Brobst, *supra* note 31 (discussing that “the specter of drastically increased commercial and individual access to government databases warrants caution” because “the risk of unwarranted disclosure of private information is great and the existing individual remedies and protections slight”).

50. An Act to Amend the Public Records Law, sec. 3, § 132-6.1.

51. *Id.* sec. 3, § 132-6.1(a).

52. *Id.* sec. 3, § 132-6.1(b).

While the General Assembly did not directly address the access to these databases, the North Carolina courts would be forced to visit this issue and interpret the aged statutory language in a new digital environment.

Following the General Assembly's lead since the 1995 amendment, the courts also found overwhelming evidence that the Public Records Act should provide for liberal public inspection of any document or information created in the course of the government's business, so long as the document was not exempted by another statutory section.⁵³ Most recently, in *LexisNexis v. N.C. A.O.C.*, the courts were forced to address not just the inspection of data and public records, but rather the data and public records in the aggregate, including the database that houses this information.⁵⁴

IV. AT TRIAL, THE PUBLIC RECORDS ACT AND ACIS

With Plaintiff citing to a letter from James Madison to W.T. Barry, the complaint reads:

The ends served by the Public Records Act are fundamentally important to our form of government. As one of our nation's founding fathers, James Madison, warned: "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or perhaps both. Knowledge will forever govern ignorance; And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives."⁵⁵

Keep in mind that the crux of the litigation squarely fit within ACIS, the real-time database of North Carolina criminal records,

53. *Wallace Farm, Inc. v. City of Charlotte*, 203 N.C. App. 144, 146, 689 S.E.2d 922, 923 (2010) (holding that the Public Records Act provides liberal access to records by the public); *Knight Publ'g Co. v. Charlotte-Mecklenburg Hosp. Auth.*, 172 N.C. App. 486, 489, 616 S.E.2d 602, 605 (2005) (providing that so long as a document falls within the statutory definition of "public records" and not under a clear statutory exemption, then the document must be made available for public inspection).

54. *LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 181, 775 S.E.2d 651, 652 (2015).

55. Record on Appeal, *supra* note 7, at 6.

which was created by the N.C. A.O.C. and is a “compilation of information related to the transaction of public business by the courts of North Carolina.”⁵⁶ All one hundred clerks of court and their staff input criminal record data, including personal information, such as name, address, Social Security numbers, criminal charges, prior history, among other information, into the ACIS database daily.⁵⁷ After the data is entered it becomes a permanent part of the ACIS system, similar to filing away paper copies of a charge in a file in a file cabinet; once added to the file cabinet, it is always there.⁵⁸ Those print files can be electronically accessed through ACIS by the public at no cost through the computers commonly known as green screen terminals, but those files can only be obtained county-by-county and not statewide.⁵⁹ Though the data is inputted into the system by the clerks of court and their staff, the ACIS database is administered, managed, and maintained by the N.C. A.O.C.⁶⁰

On September 23, 2011, LexisNexis attempted correspondence with the Director of the N.C. A.O.C., Smith, and in that letter LexisNexis requested a copy of the ACIS database.⁶¹ LexisNexis specifically cited to section 132-6.1, which provides that an index must be created for databases used by the government and to the entire database of criminal records information uploaded into ACIS.⁶² After several attempts of requesting a copy of the ACIS database, not remote access to the database, the N.C. A.O.C. denied LexisNexis’s request.⁶³

Reasoning for the denial ranged, but included in the denial was the admission by Director Smith that the N.C. A.O.C. “created and maintains ACIS in its administrative support role for the clerks [of court]’ but contends that ‘the 100 clerks remain the

56. *Id.* at 9.

57. *Id.* at 8–9.

58. *Id.* at 10.

59. *Id.* at 10; Gibson, *supra* note 12 (demonstrating the complexity of using the ACIS system, which is the backend system that generates the information presented on the green screen at the courthouse, to generate reports).

60. Record on Appeal, *supra* note 7, at 10 (“[Plaintiffs contend that] the electronic files that comprise the ACIS database and contain criminal records information in electronic format are in the possession, custody or control of [N.C. A.O.C., as well as] . . . the physical media (such as hard drives) on which the ACIS database electronic files are located.”).

61. *Id.* at 12, 17–19.

62. *Id.*

63. *Id.* at 13–14, 23–25.

legal custodians of the data (the records)' . . . [and] that A.O.C. is 'not the custodian' of the ACIS database."⁶⁴ Additionally, the N.C. A.O.C. provided that the "ACIS is a mainframe application that was built to serve as a recordkeeping tool for clerks of court statewide, not as a public inquiry system."⁶⁵ The letter continues with the following more detailed explanation of ACIS and its inception:

ACIS was created in the early 1980s using the latest technology available at the time. As you are likely aware, there have been numerous advances in technology since the 1980s, and the N.C.A.O.C. is well aware of the limitation of older user interfaces. We have been working to replace ACIS with both newer back-end database technology and more modern user interfaces (i.e., browser presentations) as time and budget permit. However, reductions in resources over multiple budget cycles have reduced resources for that effort. Today, ACIS still functions as it was originally designed.⁶⁶

Interestingly enough, N. Lorrin Freeman, Wake County Clerk of Superior Court, provided in a subsequent letter that "this office does not compile or create databases for criminal records information and is incapable of providing a database, therefore there is no record that is responsive to your request."⁶⁷ In sum, LexisNexis found themselves between a rock and a hard place: the Wake County Clerk of Superior Court contended that "she has custody only of the underlying criminal records information, but not the ACIS database," but the N.C. A.O.C. stated that "they have custody of the ACIS database, but not the information contained in the database."⁶⁸ LexisNexis lost its argument at the trial court when the trial court dismissed the matter on the pleadings.⁶⁹

64. *Id.* at 13, 24.

65. *Id.* at 24.

66. *Id.* at 24–25. The letter continues with a pitch for LexisNexis to enter into a contract for a remote access license to the database and the information within it. *Id.*

67. *Id.* at 14, 27–28.

68. *Id.* at 14.

69. *Id.* at 127.

On January 31, 2013, upon Plaintiffs' Motion for Judgment on the Pleadings, Superior Court Judge James E. Hardin found that:

Defendant Freeman, as the elected Wake County Clerk of Superior Court, does not compile or create databases for criminal records information and did not, therefore, violate the Public Records Act in responding to the plaintiffs that she had no records responsive to their request for an index of all databases and a copy of the ACIS database.⁷⁰

Additionally, he found that “defendant [N.C.] A.O.C. is not the custodian of the criminal records stored in the ACIS database and did not, therefore, violate the Public Records Act in responding to the plaintiffs that it had no records responsive to their request for a copy of the entire ACIS database.”⁷¹ Lastly, Judge Hardin stated that “requiring Defendant [N.C.] A.O.C. to provide a copy of the entire ACIS database would negate the provisions of N.C. Gen. Stat. § 7A-109(d) permitting Defendant Smith to enter into one or more non-exclusive contracts with third parties to provide remote public access to records stored in ACIS.”⁷² Thus, it was ordered that Plaintiffs' Motion for Judgment on the Pleadings was denied, and Defendants were granted judgment on their responsive pleadings; accordingly, this matter was dismissed.⁷³ It is completely understandable that a superior court judge would be hesitant to allow a massive commercial vendor, with a history of gobbling up public data, an all-access pass to all of North Carolina's criminal records so that they could repackage and sell it out to their customers. On appeal, however, LexisNexis brought back its arguments and found a more sympathetic panel of judges to its case.

70. *Id.* at 126.

71. *Id.*

72. *Id.* at 127; *see also* N.C. GEN. STAT. § 7A-109(d) (2015) (providing the Director of the N.C. A.O.C. with the ability to enter into non-exclusive contracts with third parties to provide remote electronic access to databases maintained by the N.C. A.O.C. and the clerks of court, such as the ACIS database).

73. Record on Appeal, *supra* note 7, at 127.

V. LEXISNEXIS WINS ON APPEAL

The North Carolina Court of Appeals reviewed the multiple arguments presented by LexisNexis. First, LexisNexis argued that the ACIS database falls within the Public Records Act because it is in fact a “public record” that was under the custodianship of the N.C. A.O.C.⁷⁴ The court of appeals agreed with this argument, stating that “once the clerks of court enter information from their criminal records into ACIS, the database becomes a new public record ‘existing distinctly and separately from’ the individual criminal records from which it is created.”⁷⁵ Thus, leaning on the definition of database, the court of appeals concluded that the ACIS database fit squarely within that definition of a public record so long as it was classified as an electronic data-processing record.⁷⁶

As to the issue of custodianship, the court of appeals firmly disavowed N.C. A.O.C.’s opposition that it is not the custodian of the information stored within the ACIS database.⁷⁷ The court further notes that “the Act does not refer to custodians of *information*, but of *records*.”⁷⁸ Additionally, the court noted that

74. LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 232 N.C. App. 427, 431, 754 S.E.2d 223, 226 (2014), *rev’d*, 368 N.C. 180, 775 S.E.2d 651 (2015).

75. *Id.* at 432, 754 S.E.2d at 227. Note that the Court of Appeals acknowledges in a footnote that LexisNexis correctly stated the trial court’s order omitted a conclusion of law about whether ACIS is considered a public record. *Id.* at 432 n.7, 754 S.E.2d at 227 n.7.

76. *Id.* at 432, 754 S.E.2d at 227. The North Carolina Court of Appeals defined a database as:

[A] “[c]ollection of data or information organized for rapid search and retrieval, especially by a computer. Databases are structured to facilitate storage, retrieval, modification, and deletion of data in conjunction with various data-processing operations. A database consists of a file or set of files that can be broken down into records, each of which consists of one or more fields. Fields are the basic units of data storage. Users retrieve database information primarily through queries. Using keywords and sorting commands, users can rapidly search, rearrange, group and select the field in many records to retrieve or create reports on particular aggregates of data according to the rules of the database management system being used.”

Id. (quoting *Database*, MERRIAM-WEBSTER, <http://www.merriam-webster.com/concise/database> (last visited Jan. 23, 2014)). Compare *id.*, with Gibson, *supra* note 12 (criticizing the court’s likening of “data-processing operations” with “electronic data-processing record” because “[o]perations are what databases do to information to create records”).

77. *LexisNexis*, 232 N.C. App. at 433, 754 S.E.2d at 227–28.

78. *Id.* at 433, 754 S.E.2d at 227.

“the ACIS database would certainly be encompassed under the Act’s broadly worded catch-all provision including ‘other documentary material’ in the definition of public records.”⁷⁹ The court demonstrates this point beautifully by describing the following:

[A] city council might use information from its police department to create a report about crime statistics within its borders during a given year. Even though the *information* in the city council’s report came from the police department and is available in the police department’s own public records, the city council’s report is still a public record and the city council is the custodian of its report. Our State’s Department of Justice might use information from the city council’s report in creating a chart comparing crime rates in many different cities. That chart would in turn become a new public record in the custody of the Department.⁸⁰

The N.C. A.O.C. contended that it created, maintains, and has absolute control over the ACIS database, including the ability to copy and share it, but that the individual clerks maintain custodianship by way of inputting the data.⁸¹ The court, however, disagreed and found that due to N.C. A.O.C.’s absolute control of ACIS, “ACIS is not the public record of another agency. Rather, ACIS is a record *of the* [N.C. A.O.C.] and *in the* [N.C. A.O.C.’s] *custody*”; and that ACIS is not in the custody of the clerks at the county level who input the data into the statewide database.⁸²

79. *Id.* at 432 n.8, 754 S.E.2d at 227 n.8.

80. *Id.* at 433, 754 S.E.2d at 228.

81. *Id.* at 433–34, 754 S.E.2d at 227–28.

82. *Id.* at 433, 754 S.E.2d at 228; *see also* News & Observer Publ’g Co., Inc. v. Poole, 330 N.C. 465, 412 S.E.2d 7 (1992). In *Poole*, the North Carolina Supreme Court held that:

[W]hen the SBI submitted its investigative reports to [a commission appointed by the president of the University of North Carolina system of higher education] they became Commission records. As such they are subject to the Public Records Act and must be disclosed to the same extent that other Commission materials must be disclosed under that law.

Id. at 473, 412 S.E.2d at 12. So, while one agency may create and maintain a record, upon the submission of that record to another agency, custodianship changes hands and the

Second, LexisNexis contended that the trial court erred in ruling that “requiring the [N.C. A.O.C.] to provide a copy of ACIS upon request would ‘negate the provisions of N.C. Gen. Stat. § 7A-109(d),’” and again the court of appeals agreed with LexisNexis.⁸³ N.C. Gen. Stat. section 7A-109(d) provides that:

In order to facilitate public access to [court records], . . . except where public access is prohibited by law, the Director [of the N.C. A.O.C.] may enter into one or more nonexclusive contracts under reasonable cost recovery terms with third parties to provide remote electronic access [to the records] . . . by the public.⁸⁴

Based on the plain language of the statute, the court of appeals determined that nothing in this statutory section limited the public’s ability to request and obtain copies of public records.⁸⁵ This subsection merely allows the N.C. A.O.C. to offer additional means of access; one of remote access for cost recovery.⁸⁶ To distinguish, LexisNexis requested a copy of ACIS, not remote access.⁸⁷ This was a seemingly less invasive, albeit not as favorable, request for the N.C. A.O.C. to honor.⁸⁸

The court of appeals followed the direction of the North Carolina Supreme Court in *News and Observer Publishing, Co. v. Poole*, “that in the absence of *clear statutory exemption or exception*, documents falling within the definition of ‘public records’ in the [Act] must be made available for public inspection.”⁸⁹ No clear

second agency becomes a custodian of the record. *Id.*; see also *LexisNexis*, 232 N.C. App. at 434, 754 S.E.2d at 228 (reiterating the rule from *Poole* as to who constitutes a custodian under the Public Records Act).

83. *LexisNexis*, 232 N.C. App. at 434, 754 S.E.2d at 228.

84. N.C. GEN. STAT. § 7A-109(d) (2015).

85. *LexisNexis*, 232 N.C. App. at 435, 754 S.E.2d at 228–29.

86. *Id.* at 435, 754 S.E.2d at 229.

87. *Id.*

88. *Id.* N.C. A.O.C. argued that “if copies of the entire ACIS database are available upon request under the Act, third parties may be discouraged from entering into ‘contracts under reasonable cost recovery terms . . . to provide remote electronic access to [court] records . . .’” *Id.* However, the court criticized this argument with the response that “section 7A-109(d) is expressly permissive, rather than mandatory [, and] . . . [i]f provision of copies of ACIS under the Act renders the option of providing remote electronic access unnecessary or not cost-effective, the [N.C. A.O.C.] can simply decline to offer this additional method of access.” *Id.*

89. *Id.* (quoting *News & Observer Publ’g Co., Inc. v. Poole*, 330 N.C. 465, 486, 412 S.E.2d 7, 19 (1992)).

statutory based exemption or exclusion exists, so the court of appeals overturned the trial court's decision and remanded the matter with direction to enter judgment for LexisNexis.⁹⁰ Thus, the ruling of the court of appeals that "ACIS is a public record in the custody of the [N.C. A.O.C.]" and that the provision of N.C. Gen. Stat. section 7A-109(d) allowing the custodian to sell remote electronic access to the records did not limit "the public's ability to obtain *copies* of public records under the [Public Records] Act," set the stage for LexisNexis to request and gain access to the ACIS database and the records contained within it.⁹¹

The court of appeals in this ruling was grappling with the issue of applying modern technology principles, such as defining a database and the data that is contained within it, in a long-standing statutory structure. It appears the court of appeals saw the issue as important—i.e., there needs to be a way to access the database as a public record, and it wanted to provide a means to start opening up the backend of ACIS for public consumption, even with LexisNexis as the lead. That said, the court of appeals ruling did not end the story, and LexisNexis never obtained a copy of ACIS.⁹²

The court of appeals decision was rooted on applying new technological advances that are affecting access to ACIS, thus seemingly wanting to move beyond the green screen terminals and remote electronic access, both out-of-date means for accessing criminal records. In the court of appeals' attempt to define a database and allow for broader access, it opened the discussion in record management, best practices, and the technical differences between a database and the data it contains. An interesting point to be added here is one made by Jeremy Gibson, Records Management Analyst. His perspective on the court of appeals' decision in *LexisNexis v. N.C. A.O.C.* is unique in that it thinks through the logistical part of records, databases, and this decision. Gibson points to where the court summarized the issues at hand: "whether ACIS . . . is a public record and, if so, whether the [N.C. A.O.C.] is its custodian."⁹³ For him, in his role at the State Records Center, this answer is vital. It is "our job . . . to identify records and

90. *Id.* at 435, 754 S.E.2d at 229.

91. *Id.* at 434–35, 754 S.E.2d at 228–29.

92. *LexisNexis Data Mgmt., Inc. v. N.C. Admin. Office of the Courts*, 368 N.C. 180, 187–88, 775 S.E.2d 651, 656 (2015).

93. Gibson, *supra* note 12.

assess their value. In the past two decades as agencies move towards streamlining their operations by consolidating information generating activities into centralized databases that provided enhanced services to divisions and units, the nature of a record and who owns it has changed,” says Gibson.⁹⁴ He further explains, “[I]t is easy to think of a database as an electronic filing cabinet where records are stored waiting to be pulled out when the user ‘searches’ through it looking for indexing information.”⁹⁵ As with the ACIS data, Gibson opines that “[r]elational databases are not simple tables of cells like you see in an excel spreadsheet. Instead rows and fields are linked through foreign keys, primary keys, triggers and procedures across tables.”⁹⁶ These “[f]ields, rows, tables and even other databases may be related to each other through queries using Structured Query Language (SQL).”⁹⁷

The North Carolina Court of Appeals found that the information that each clerk inputted into the ACIS system created a new public record, which existed “‘distinctly and separately from’ the individual . . . records” produced by the courts.⁹⁸ Gibson’s opinion though is thought-provoking. He believes that “equating ‘data-processing operations’ with ‘electronic data-processing record’ misses the nature of a database.”⁹⁹ He continues by saying that “operations are what databases do to information to create records. Operations are the mechanisms through which the database transforms queries into coherent records, and they are intrinsic to the database software and structure. *Thus the operation is not the record, the query is the record.*”¹⁰⁰

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 232 N.C. App. 427, 432, 754 S.E.2d 223, 227 (2014), *rev’d*, 368 N.C. 180, 775 S.E.2d 651 (2015).

99. Gibson, *supra* note 12.

100. *Id.* (emphasis added). Gibson illustrates his objection to the Court of Appeals’ conflating “data-processing operations” with “electronic-data processing record” by providing an example of asking a database to provide a felony rap sheet:

*Select PERSON.first_name, PERSON.last_name,
PERSON.birthdate, PERSON.cid,
CRIMINAL_RECORD.felony_convictions From PERSON Inner
Join CRIMINAL_RECORD On
PERSON.cid=CRIMINAL_RECORD.cid Where
CRIMINAL_RECORD.date < 2014-03-01;*

Despite Gibson’s belief “that the court missed the real nature of a database, a nature that is not as easily argued into a record as the decision might hope, [Gibson does agree] that custodianship of the information has transferred to the [N.C. A.O.C].”¹⁰¹ Though he agrees that once the clerks input the information into ACIS it changes custodianship, he leaves open the question as to whether this creates a new record; thus a new record open for public inspection.¹⁰² To Gibson, “[t]he data is, in a very real sense, a potential record just waiting to be asked a question.”¹⁰³

VI. LEXISNEXIS LOSES AT THE NORTH CAROLINA SUPREME COURT

On August 21, 2015, the saga ended, at least for the litigants. The requests for obtaining public records in the aggregate are far from being gone. LexisNexis lost its battle, and the N.C. A.O.C. maintained ACIS as its sole owner.¹⁰⁴ Writing the opinion, Justice Robert H. Edmunds, Jr., held: “[N.C. Gen. Stat.] § 7A-109(d), addressing ‘remote electronic access’ to court records, is a more specific statute that overrides applicability of the Public Records Act here.”¹⁰⁵ This narrow approach ultimately led to the supreme court deciding that ACIS is “available solely through nonexclusive contracts,” reversing the decision of the court of appeals.¹⁰⁶ They got it wrong. Not academically wrong, but wrong in its application and the unintended effects of their decision.

Notice that the constituent elements of this record are spread across two different informational tables linked by an index. Keep in mind that this is an extremely simple example and it is quite possible to query many more tables linked by multiple indexes using stored procedures, triggers, and other operations intrinsic to the database. In the case of ACIS, these queries could span multiple counties of origin.

Id.

101. *Id.*

102. *Id.* Gibson furthers this point by stating, “The counties are certainly the custodians of the original paper or electronic records used as the source of ACIS’s information, but once the clerks key the information into ACIS, the information is manipulated into a distinctively different form than what is available at the county.” *Id.*

103. *Id.*

104. LexisNexis Risk Data Mgmt., Inc. v. N.C. Admin. Office of the Courts, 368 N.C. 180, 187–88, 775 S.E.2d 651, 656 (2015).

105. *Id.* at 181, 775 S.E.2d at 652.

106. *Id.*

Their interpretation of the records contained within ACIS was that:

[T]he information in ACIS both duplicates the physical records maintained by each Clerk and constitutes the collective compilation of all records individually entered by the one hundred Clerks of Court. ACIS includes information not subject to disclosure, and not every employee in each Clerk's office can access all the information in ACIS.¹⁰⁷

Additionally, the supreme court criticized the court of appeals' interpretation of the custodianship of those records.¹⁰⁸ First, the supreme court points out that "[t]he Court of Appeals . . . noted that each Clerk's custodianship of the criminal records from which ACIS is compiled is immaterial because plaintiffs were seeking a copy of ACIS, not copies of the criminal records."¹⁰⁹ Subsequently, the supreme court further looked to the court of appeals' opinion to highlight that it "also found irrelevant [N.C. A.O.C.'s] argument that employees of individual Clerk's offices entered data into ACIS and could later modify it, observing that 'the clerks have acted at the direction of the [N.C. A.O.C.]'"¹¹⁰ The North Carolina Supreme Court's remarks on these notions of custodianship, however, do not land its ruling there. Rather, the supreme court looked to the statutory construction between the Public Records Act and the additional statutory section, under section 7A-109(d).¹¹¹

In overruling the court of appeals' decision, the North Carolina Supreme Court resolves the dispute of the meaning of section 7A-109(d) by stating that "[t]he cardinal principle of statutory construction is that the intent of the legislature is controlling."¹¹² This statement is an odd interpretation, given that

107. *Id.*

108. *Id.* at 183–84, 775 S.E.2d at 653–54.

109. *Id.* at 184, 775 S.E.2d at 654.

110. *Id.*

111. *Id.* at 186, 775 S.E.2d at 655 ("Because this statute does not refer to the 'custodian' of the pertinent records, we need not address arguments that are dependent on a determination of who is the custodian of ACIS and the records included in that database.").

112. *Id.* at 187, 775 S.E.2d at 656 (quoting *Sutton v. Aetna Cas. & Sur. Co.*, 325 N.C. 259, 265, 382 S.E.2d 759, 763 (1989)).

the original intent of the Public Records Act is open transparency in government-made documents. One would assume that providing LexisNexis a copy of ACIS would further that intention rather than limit it. While subsection (d) of section 7A-109 was added twenty years ago in 1997, the parties to the litigation argued vastly different opinions on its interpretation of the Public Records Act as a whole.¹¹³ The court of appeals agreed with the Plaintiffs that subsection (d) expanded access, but the supreme court declined to follow that principle and found that the “General Assembly’s addition of subsection (d) and its conditions specifically relating to remote electronic access to court records . . . will prevail over a [more] general one.”¹¹⁴ Additionally, the supreme court firmly stood upon the principle that the later addition of a specific provision to a pre-existing more general statute indicates the general assembly’s most recent intent.¹¹⁵ The North Carolina Supreme Court found that the “later-added subsection (d) focuses narrowly on court records maintained in electronic form,” and it was “intended that the nonexclusive contracts authorized in section 7A-109(d) be the sole means of remote electronic access to ACIS.”¹¹⁶ As a head nod towards government transparency and open access, the supreme court concluded its opinion with repeating the public’s option of using the green screen terminals in clerks’ offices or to contract with the N.C. A.O.C. for remote access.¹¹⁷ Adding the cherry to the ice cream sundae, the supreme court, before remanding the case to the court of appeals, further stated that “North Carolina’s robust tradition that ‘strongly favors the release of public records to increase transparency in government’ endures.”¹¹⁸ That sentiment is a fallacy.

113. *Id.* The defendants consistently argued that the legislature intended that the electronic access to ACIS was to be the exclusive means of access; while the plaintiffs argued that the addition of subsection (d) was to expand access options. *Id.* at 187, 775 S.E.2d at 655–56.

114. *Id.* at 187, 775 S.E.2d at 656.

115. *Id.* at 187–88, 775 S.E.2d at 656.

116. *Id.*

117. *Id.* at 188, 775 S.E.2d at 656.

118. *Id.* (quoting *State Emps. Ass’n of N.C., Inc. v. N.C. Dep’t of State Treasurer*, 364 N.C. 205, 214, 695 S.E.2d 91, 97 (2010)).

VII. IMPLICATIONS OF THIS LIMITATION OF ACCESS TO DATA IN REAL EMPIRICAL RESEARCH: BRIEF CASE STUDY OF THE JURY SUNSHINE PROJECT IN NORTH CAROLINA

While LexisNexis may be one entity trying to obtain access to the records maintained in ACIS, other constituencies also have a vested, policy-forward, non-commercial interest in access to this data in the aggregate. For example, the JSP is a case study of a faculty-library collaborative project where the library—specifically, the librarian liaison—managed a substantial portion of the data collection while the faculty members analyzed the high-level issues of the empirical study.¹¹⁹ The thesis of this project began with an inquiry into creating an online resource, that would be made available to the world, of data as a means of opening access to the jury selection process in criminal cases.¹²⁰ The hope emerged that better factual understanding of jury selection could be possible if records were collected outside the context of *Batson v. Kentucky* litigation, as well as addressing other underlying questions of the courtroom actors during a criminal trial. This project was not charged with an underlying claim, but, rather, its goal was to gather facts—proved facts encapsulated by data points. These facts

119. JSP is an empirical study that compiled data on the jury selection processes for felony criminal jury trials in the State of North Carolina. The purpose of JSP is to build a unique database that will provide researchers with the ability to compare felony jury selection practices across the one hundred counties of the State of North Carolina, which data will allow researchers to draw conclusions as to jury performance based on their race and gender compositions. The data compilation and analysis on the project was performed by Kami Chavis, J.D., Associate Dean for Research and Public Engagement, Wake Forest University School of Law; Elizabeth McCurry Johnson, J.D., M.L.S., Reference Librarian and Instructor of Legal Research, Wake Forest University School of Law; Gregory S. Parks, Ph.D., J.D., Associate Professor of Law, Wake Forest University School of Law; and Ronald F. Wright, J.D., Needham Y. Gulley Professor of Criminal Law, Wake Forest University School of Law. All of the resources cited with regards to JSP are on file with the author, as no publication has been formalized on this empirical study as of now. See also Liz McCurry Johnson, *The Practical Obscurity of the Green Screen Terminal: A Case Study on Accessing Jury Selection Data* (Feb. 23, 2017) (Wake Forest Univ. Sch. of Law Legal Studies Research Paper Series, <https://ssrn.com/abstract=2921405>).

120. *Batson v. Kentucky*, 476 U.S. 79 (1986) (establishing the right to a procedural challenge to object to the validity of the use of a peremptory challenge during jury selection, where one litigant believes opposing counsel is excluding a jury on the basis of race, ethnicity, or sex; the result of which is a new trial); see also Emily Coward, *U.S. Supreme Court Strikes Down Racial Discrimination in Jury Selection*, N.C. CRIM. L. (June 2, 2016, 7:49 AM), <http://nccriminallaw.sog.unc.edu/u-s-supreme-court-strikes-racial-discrimination-jury-selection> (“In *Foster v. Chatman*, a 7–1 opinion authored by Chief Justice John Roberts, the U.S. Supreme Court held that prosecutors in Georgia discriminated on the basis of race during jury selection in a 1987 death penalty trial.”).

of courtroom practice would show how effective or ineffective lawyers and judges are in jury selection—specifically, in selecting a non-biased jury of our peers, a constitutional right.¹²¹

The project’s goal to gather data rested on the availability to access that data. Government records and data are governed by what are commonly known as Sunshine Laws. These are “statutes that mandate that meetings of governmental agencies and departments be open to the public at large.”¹²² Because of Sunshine Laws “(also termed open meeting laws, public meeting laws, and open door laws), administrative agencies are required to do their work in public, and as a result, the process is sometimes called ‘government in the sunshine.’”¹²³ A typical Sunshine Law often “requires open meetings [and] ordinarily specifies the only instances when a meeting can be closed to the public and mandates that certain procedures be followed before a particular meeting is closed.”¹²⁴ Analogous at the federal level, the Freedom of Information Act (“FOIA”) “requires agencies to share information they have obtained with the public. Exceptions are permitted, in general, in the interest of national security or to safeguard the privacy of businesses.”¹²⁵ If North Carolina had

121. U.S. CONST. amend. VI.

122. GALE ENCYCLOPEDIA OF AMERICAN LAW 439 (Donna Batten ed., 3d ed. 2011).

123. *Id.*

124. *Id.*

125. *Id.*; see also Freedom of Information Act (“FOIA”), 5 U.S.C. § 552 (2012). Recently, though, the U.S. House of Representatives Committee on Oversight and Government Reform produced a report on FOIA. STAFF OF H. COMM. ON OVERSIGHT & GOV’T REFORM, 114TH CONG., FOIA IS BROKEN: A REPORT ii (Comm. Print 2016). This report states:

The power of FOIA as a research and transparency tool is fading. Excessive delays and redactions undermine its value. In large part, FOIA’s efficacy is limited by the responsiveness of the agency that receives and processes the request. On innumerable occasions, agencies have refused to produce documents or intentionally extended the timeline for document production to stymie a request for information. In many cases, American citizens find themselves frustrated by the total lack of response from the government they are asked to trust.

Id. So, even at the federal level, access to public records is difficult and is in constant need of reform. *Id.* Finalizing this sentiment, the report states:

The FOIA process is broken. Unnecessary complications, misapplication of the law, and extensive delays are common occurrences. Agencies fail to articulate reasons for delays or explain how to navigate the process. Requesters wait months, not weeks, before receiving any response. Even a

similar Sunshine Laws for public records on its books, the JSP would have been monumentally easier and cheaper to complete. Additionally, if North Carolina was as open as Florida or Kansas with regard to acknowledging data software as a public record, then LexisNexis may not have been forced into litigation over a copy of ACIS.¹²⁶ However, a significant number of states either do not address access to software within their public records law or specifically exclude it from disclosure.¹²⁷

This project emerged with a focus on access to justice issues principally guided by an urge to gather facts about jury selection trends, which in the future will hopefully lead to endeavors that ensure fairness in the jury selection process of criminal cases.¹²⁸ Since aggregate state trial records of the jury selection process in North Carolina do not exist, or at least are unavailable to the public (the hidden black box of public records), the JSP shifted to manually collecting jury selection information from each county courthouse.¹²⁹ The information available in the print files included the characteristics of the criminal charge, the attorneys

denial on a technicality can be significantly delayed because the agency may fail to read the request for months. Unreasonable requests for detail and repeated ultimatums to respond within narrow windows or start all over reinforce the perspective that the process is designed to keep out all but the most persistent and experienced requesters.

Id. at 2; see also Jacob Gershman, 'FOIA is Broken,' Says House Panel Report, WALL STREET J.: WASH. WIRE BLOG (Jan. 11, 2016, 12:37 PM), <http://blogs.wsj.com/washwire/2016/01/11/foia-is-broken-says-house-panel-report> (describing the House report).

126. Under Florida law, "data processing software" is included in the definition of a "public record." FLA. STAT. ANN. § 119.011(12) (West 2015). However, software that is a trade secret and licensed under an agreement that prevents its release is exempt from disclosure. *Id.* § 119.071(f). An agency may not execute a contract if it might impair the public's ability to inspect public records. *Id.* § 119.01(2)(c). Under Kentucky law, the definition of a "public record" includes "software." KY. REV. STAT. ANN. § 61.870(2) (LexisNexis 2015). The term "software" is defined as "the program code which makes a computer system function" and includes "the operating system, application programs, procedures, routines, and subroutines such as translators and utility programs." *Id.* §§ 61.870(3)(a)–(b). However, it "does not include that material which is prohibited from disclosure or copying by a license agreement between a public agency and an outside entity which supplied the material to the agency." *Id.* § 61.870(3)(b). See also BRYAN ARNOLD, GORDEE, NOWICKI & AUGUSTINI LLP, A SURVEY OF PUBLIC RECORDS LAWS—ISSUES AFFECTING STATE AND LOCAL CONTRACTS, BIDDERS, AND CONTRACTORS 7, 13, http://apps.americanbar.org/dch/thedl.cfm?filename=/PC500000/relatedresources/A_SURVEY_OF_OPEN_GOVERNMENT_LAWS.pdf.

127. ARNOLD, *supra* note 126.

128. See *supra* note 119.

129. See *supra* note 119.

and judges involved, and the names of jurors selected or excused.¹³⁰

Professor Ronald Wright began a pilot project in Guilford and Forsyth Counties.¹³¹ This pilot offered insight into what kind of information was available within the clerks' files and available for public access. After working on this project from 2012 through March 2013, the project was expanded to include more students and library staff to collect data throughout North Carolina counties.¹³² At the beginning of April 2013, the project contained the coded data from ninety-nine case files and only two counties within North Carolina.¹³³ The goal after a summer's worth of data collection by students and library staff was to review and code five hundred files, including information of approximately ten thousand seated and prospective jurors; that goal was nearly met.¹³⁴

After the summer and the library's help in managing personnel and data, the JSP gathered information on over 450 jury trials.¹³⁵ This project included the management of over twenty people (library staff and students), as well as contacts with clerks' offices in over thirty-five North Carolina counties.¹³⁶ As the project continued throughout 2014, it expanded its coverage to researching files in all one hundred North Carolina clerks' offices and gathering data on over 1300 jury trials from 2010 to 2012—primarily from the years 2011 to 2012.¹³⁷ At the conclusion of data collection, the project held a database of over 25,000 juror members that were either seated or removed from juries of felony crimes.¹³⁸ Additional public data has been added to this database, which includes the demographics available through the Board of Elections website for registered voters by their township/zip code, gender, race, and political affiliation.¹³⁹ The demographics of the litigators have been added to this database as well, which include

130. *See supra* note 119.

131. *See supra* note 119.

132. *See supra* note 119.

133. *See supra* note 119.

134. *See supra* note 119.

135. *See supra* note 119.

136. *See supra* note 119.

137. *See supra* note 119.

138. *See supra* note 119.

139. *See supra* note 119.

gender, race, political affiliation, and, if they are elected, the year of their election.¹⁴⁰

*A. Clerks of Court vs. Administrative Office of Courts:
Their Roles in the JSP*

While this project was a massive undertaking, it was thwarted by the N.C. A.O.C. Particularly, upon request for inspection of files that were relevant to the JSP, the N.C. A.O.C. declined our request for providing any help or assistance in locating file numbers that could be researched upon visiting the clerks' office.¹⁴¹ The first step in the project was the most difficult: finding the file numbers and locating data by subject, across the state. The N.C. A.O.C. did provide a five-year abstract of data that the JSP collaborators were able to use to extract some data, but only by building a database and running multiple inquiries until one hit the mark.¹⁴²

140. *Id.*

141. *Id.*

142. *See* Gibson, *supra* note 12 (discussing how multiple tables and keys work to connect the data together). AALL advocates for open access to government materials. *AALL Government Relations Policy*, AALL, <http://www.aallnet.org/mm/LeadershipGovernance/policies/PublicPolicies/policy-government.html> (last visited Feb. 4, 2017). Particularly, this association argues for government information to be made available in a "tangible form." *Id.* Explicitly, AALL provides that:

Government information in tangible form should be available to the public at no cost. If fees are mandated, they should be kept low enough as to cover necessary expenses and not provide a significant barrier to access. Any revenue garnered by governments from the sale of print publications should be reinvested in the infrastructure that delivers government information to the public.

While it is the government's responsibility to create and provide access to government information, the commercial sector often plays an important role in its collection and dissemination. Members of the public are served by a multitude of information providers, and no public or private entity should enjoy a publishing monopoly over any type of government information. No private or public sector entity should limit the dissemination of government information through exclusive contracts, resale restrictions, or other restrictive trade practices.

Id. The green screen terminals made available to access North Carolina criminal records come nowhere close to providing public access to tangible government records. *See generally* Gibson, *supra* note 12 (illustrating the complexities in generating ACIS reports on the green screen terminals at the courthouse).

More troublesome than the lack of useable data was the lack of assistance for running reports of the data that the N.C. A.O.C. manages.¹⁴³ The N.C. A.O.C. had the ability to generate reports that detailed the file numbers, names, charge, and disposition of all criminal trials in North Carolina.¹⁴⁴ Once in the system, the N.C. A.O.C. can manipulate the data in various forms to generate reports.¹⁴⁵ These reports, though, were only made available to officers of the court, which included the clerks of court. The N.C. A.O.C. would not produce any new report or record for the public upon request. The Gibson article helps to clarify the thought process behind the denial here: running a report would be generating a new public record, which would then be a record that qualifies for open access under the North Carolina Public Records Act.¹⁴⁶

This lack of assistance is also troublesome because individual clerks' offices typically had no structured way to find files based on a description (e.g., jury trials of felony charges). A researcher could use the public green screen terminals, but to use that terminal effectively you need to know some information about the file to search, such as name or file number. The N.C. A.O.C. does produce a report that details the number of charges that are brought to jury trial; however, that report only provides the aggregate total, and is only partially reflective of the true amount of cases.¹⁴⁷

143. *Texas Clerks Oppose Online Public Access to Court Documents*, *supra* note 48.

144. N.C. ADMIN. OFFICE OF THE COURTS, AUTOMATED CRIMINAL/INFRACTIONS SYSTEM (ACIS) (Sept. 2015), http://www.nccourts.org/Citizens/JData/Documents/Techology_ACIS_Facts.pdf.

145. *See* Gibson, *supra* note 12.

146. *Id.*

147. N.C. ADMIN. OFFICE OF THE COURTS, *supra* note 144. Given that many felony criminal jury trials often consolidate multiple charges into one trial, really only a proportion of the charges actually end in a jury trial. *See generally* Jed S. Rakoff, *Why Innocent People Plead Guilty*, N.Y. REV. BOOKS (Nov. 20, 2014), <http://www.nybooks.com/articles/2014/11/20/why-innocent-people-plead-guilty> (discussing the role prosecutors play in deciding what charges to proceed on). For example, Mecklenberg County, North Carolina, has more than 1200 charges reported for 2011; however, when the Mecklenburg County Clerk of Superior Court requested a file list from the N.C. A.O.C., there were only 256 jury trials resulting from those charges. N.C. DEP'T OF JUSTICE, CRIME IN NORTH CAROLINA—2010 (June 2011), <http://www.ncdoj.gov/getdoc/85af28c4-333e-4b6c-9ee3fe30db2a34bf/2010-Crime-Statistics-Annual-Summary.aspx>; *see also* ASHLEIGH GALLAGHER ET AL., N.C. SENTENCING & POLICY ADVISORY COMM., STRUCTURED SENTENCING STATISTICAL REPORT FOR FELONIES AND MISDEMEANORS i (Mar. 2012), http://nccourts.org/Courts/CRS/Councils/spac/Documents/statisticalrpt_fy10-11.pdf (discussing data, compiled from ACIS, regarding felony and misdemeanor convictions, including the

Many fields, such as medicine and software, fall back on open access to data and have placed a special importance on making data sharable for other scholars in order to improve and collaborate on innovation—law and government strive for that type of access.¹⁴⁸ For example, in 2009, “[t]he [National Institute of Health] . . . declared that the sharing of data is essential for translating research into knowledge and products that improve health.”¹⁴⁹ This idea of knowledge sharing and data sharing seems to be lost upon the state government of North Carolina.¹⁵⁰

Not only has the N.C. A.O.C. placed an undue burden on researchers in this field, the North Carolina Supreme Court and North Carolina General Assembly have sealed the deal on ever obtaining access to ACIS data outside of a remote access contract or using the green screen terminals in each North Carolina county courthouse. By and through the *LexisNexis v. N.C. A.O.C.* decision, the North Carolina Supreme Court interpreted a statute that, in theory, has real effects on the public. Researchers no longer realistically have any access to the N.C. A.O.C. data in the aggregate—not even by persuading the clerks of court to act on their behalf, which is how the field researchers in the JSP were able to gather aggregate reports of data to then look up files and the information contained therein. There is no practical way to

number of convictions, the distribution of convictions within respective punishment charts, and types of punishments imposed).

148. *AALL Government Relations Policy*, *supra* note 142. AALL’s Government Relations Policy provides that:

Accessible government information, including legal and legal-related information, is both an essential principle of a democratic society and a valuable public good created at taxpayer expense. Federal, state, and local governments have a duty to create, collect, and disseminate government information and to ensure equitable permanent public access to official government information. Federal, state, and local governments should create comprehensive and coherent policies for managing government information in all formats, and for making those materials permanently available to members of the public, regardless of their income level or geographic area.

Id.

149. Caroline Savage & Andrew Vickers, *Empirical Study of Data Sharing by Authors Publishing in PLoS Journals*, PLOS ONE (Sept. 18, 2009), <http://journals.plos.org/plosone/article?id=10.1371/journal.pone.0007078>.

150. *But see* Sunshine in Litigation Act of 2008, H.R. 5884, 110th Cong. (2008) (acknowledging that serious concerns have been raised as to whether court secrecy orders may endanger public health and safety).

obtain file numbers of felony charges that were disposed of by jury trials; it cannot be done through the N.C. A.O.C. or the clerks of court, so nowhere can this aggregate data be found. And the North Carolina Supreme Court basically sectioned off any responsibility for the N.C. A.O.C. to produce this type of information to the public or outside commercial vendors, absent a contractual license with the N.C. A.O.C. for remote electronic access.

Though the JSP is only one example of where a simple question about government practice was asked, it could not be answered. The JSP simply asked: “Who is being seated and knocked off a jury in felony jury trials across North Carolina?” And, even simpler, the JSP asked: “Which felony charges presented in North Carolina resulted in a jury trial?” Neither of these questions could be answered easily or efficiently, and these inquiries will not go away. There are other examples of when ACIS data and other data in the aggregate, if provided, would have real, practical impacts.

Journalists are a demographic that would greatly benefit from being able to ask simple questions and analyze the raw data to answer their inquiry. For one thing, journalists could use the data provided in the JSP to gather information on the voir dire practices of district attorneys in order to inform voters of their political candidates. Broader even, the JSP data, if used by district attorneys, could set the foundation to offer internal prosecutor trainings or trainings at the state-level of all attorneys on how to seat unbiased juries. The data that ACIS could provide would allow the inquirer to see facts that tell the story of what happens in the courtroom. This data could be analyzed and explored in so many, non-commercial ways, that it could help to unlock the perceptions and practices of our criminal justice system. Ultimately, making ACIS data available to researchers in all capacities furthers the purpose of the Public Records Law, which holds the government accountable for its actions to its constituencies. Without inspection, there is no accountability, and the JSP is one example of how this data could provide change directly affecting many criminal defendants.

*B. Working Around the N.C. Supreme Court Decision
Through the Incorporation of Clerks of Court*

While at the state level there has been a strong tradition of underfunding to support and develop ACIS and the clerks that input data into the system, the federal government is leading the charge with grants to help states develop best practices and systems to better provide criminal records to other systems and, ultimately, out to the public.¹⁵¹ By providing grants and other federal funding, the states can develop new technologies without the involvement of outside commercial vendors, such as LexisNexis.

While not directly on point, the Bureau of Justice Statistics (“BJS”) provides that this federal funding is intended to develop best practices that “involve identifying, collecting, maintaining, automating, and transmitting information that determines whether a person is prohibited by federal or state law from possessing or receiving a firearm, and that improves the availability of these records to national systems.”¹⁵² However, the BJS extends this funding to allow for the development of “several practices [that] focus on how to improve reporting of mental health information while others address how to determine relevant records, how to facilitate broader coordination, or other process improvement efforts.”¹⁵³ Texas offers an interesting example of how this funding is being put to use.¹⁵⁴ With regard to mental health-related cases and reporting them to the National Instant Criminal Background Check System (“NICS”), Texas established that there was an “[i]nability to create accurate estimates of available mental health records.”¹⁵⁵ The reporting problem started

151. See, e.g., *Promising Practices by States for Improved Record Reporting*, BUREAU JUST. STAT. (2016), <http://www.bjs.gov/index.cfm?ty=tp&tid=491> (“The BJS website now has information on promising practices by several states for improved record reporting to the National Instant Criminal Background Check System (NICS). This information responds to requirements in the NICS Improvement Amendments Act of 2007 (P.L. 110-180) and the recent GAO Report, *Gun Control: Sharing Promising Practices and Assessing Incentives Could Better Position Justice to Assist States in Providing Records for Background Checks* (GAO-12-684).”).

152. *Id.*

153. *Id.*

154. *NICS Improvement Amendments Act of 2007: Promising Practices for Improved Record Reporting*, BUREAU JUST. STAT., <http://www.bjs.gov/content/pub/pdf/practices/Texas.pdf> (last visited Feb. 10, 2017).

155. *Id.*

with “[c]onfusion among clerks regarding their role in reporting cases to NICS and a lack of understanding about which cases to report, resulting in a lack of records being reported.”¹⁵⁶ Similar to North Carolina, the clerks were confused about who was the custodian of the criminal records that they were inputting into ACIS.¹⁵⁷ While the N.C. A.O.C. purported that the clerks were the custodians, the county clerks placed responsibility on the N.C. A.O.C. as the main controlling entity of the records within ACIS.¹⁵⁸

In Texas, the federal funding is going to “[c]onduct NICS reporting outreach activities through articles in clerk association newsletters and presentations at regional and state conferences,” as well as providing “NICS reporting training to clerks in person or over the phone and [providing] resources, such as answers to frequently asked questions or a manual.”¹⁵⁹ While the main problem within North Carolina is the limitation placed on the data at the N.C. A.O.C. level, the North Carolina Clerks of Superior Court do play a powerful role in allowing public access to data. If a similar strategy was used in North Carolina to educate clerks on how to get data out to the public upon request, then the N.C. A.O.C. would have fewer requests and less financial drain on their already-underfunded department. The BJS has a system for providing federal funding and aid to state-level systems that are in need of help (albeit these state-level systems are reporting up to a federal database).¹⁶⁰ That said, North Carolina could use a similar model of training and education to lift the financial burden placed on the N.C. A.O.C. in the data-intensive queries. When field researchers queried clerks of court across the state about obtaining file numbers of felony charges disposed of by jury trial, a plethora of responses came raining in.¹⁶¹ If there was a uniform system of education to support these types of questions and inquiries, then the standard answer would not have to be “no,” and, instead, there could be a procedure in place that the clerk

156. *Id.*

157. *Id.*

158. Record on Appeal, *supra* note 7, at 14–15, 23–28.

159. *NICS Improvement Amendments Act of 2007: Promising Practices for Improved Record Reporting*, *supra* note 154.

160. *National Criminal History Improvement Plan*, BUREAU JUST. STAT., <https://www.bjs.gov/index.cfm?ty=tp&tid=47#grants> (last visited Feb. 10, 2017).

161. *See supra* note 119.

could follow to obtain these reports.¹⁶² This reaction to the problem is just one way to answer *LexisNexis v. N.C. A.O.C.*, which is not the reaction had by the North Carolina General Assembly.

VIII. THE NORTH CAROLINA GENERAL ASSEMBLY'S REACTION TO *LEXISNEXIS v. N.C. A.O.C.*

Jonathan Jones wrote an interesting article in March 2015, "Secrets, Settlements, Body Cameras: NC's Top Open Government Stories," covering the top three open government stories to watch in 2015.¹⁶³ Second on the list is the court system database, ACIS.¹⁶⁴ In the section covering *LexisNexis v. N.C. A.O.C.*, the article states:

This case is about who owns the database used by the clerks of superior court in all 100 North Carolina counties and how access to that database should be provided. The clerks—as well as district attorneys, judicial officials and public defenders—all across the state use the same Automated Criminal Infractions System (ACIS) to access basic information about criminal court files. The clerks are responsible for adding information to the database. And anyone who has visited a courthouse to learn about a criminal case knows the system is not easy to use without training.¹⁶⁵

The fact that the green screen terminals are difficult to use without training is widely acknowledged and felt by journalists, who are often the primary consumers of the data contained within it.¹⁶⁶ This case was important to watch, as the court determined how the Public Records Act interplays with electronic databases

162. See *supra* note 119. The response from the N.C. A.O.C. to a public inquiry was a refusal to make such an inquiry because they could not generate a new public record for the public (a report of file numbers); however, a clerk of court could request a report and the N.C. A.O.C. could generate it through a cross-government agency. That new report was a public record and could then be released to the public by the clerk. This process was highly discretionary from one county to the next.

163. Jonathan Jones, *Secrets, Settlements, Body Cameras: NC's Top Open Government Stories*, WRAL.COM (Mar. 20, 2015), <http://www.wral.com/secrets-settlements-body-cameras-nc-s-top-open-government-stories/14522943>.

164. *Id.*

165. *Id.*

166. *Id.*

and further defined who custodians of public records are within agencies.¹⁶⁷

In 2015, the North Carolina General Assembly legislatively reacted to *LexisNexis v. N.C. A.O.C.*, by enacting a small section within the 429-page session law, Session Law 2015-241, which amended N.C. Gen. Stat. section 7A-109(d) to say that “access to the electronic data processing records, or any compilation of electronic court records or data of the clerks of superior court” are governed by this subsection.¹⁶⁸ Statutory language now clarifies custodianship, even though the supreme court did not address it, by stating that “[n]either the Director nor the Administrative Office of the Courts is the custodian of the records of the clerks of superior court or of the electronic data processing records or any compilation of electronic court records or data of the clerks of superior court.”¹⁶⁹ While the journalists had an objective reaction to a case that would clearly help them in their own research, the North Carolina General Assembly countered with a stronger reaction.

The North Carolina Supreme Court got the *LexisNexis v. N.C. A.O.C.* decision wrong, because now there is a greater limitation to accessing court records in the aggregate. Not having access to records in the aggregate promotes government secrecy and lack of motivation to self-report or self-manage the court process; a process that is ensured by the North Carolina Constitution in order to protect individuals’ rights. Through this decision, the North Carolina Supreme Court limited access to those records in a way that makes research on policy impossible. While police officers have to report out the demographics of those who are stopped, courts and their officials have no such accountability on who is kept on or knocked off a jury.¹⁷⁰ Shouldn’t this data be open for inspection? Is it not a public record that should be made available upon request? The answers

167. *Id.*

168. Current Operations and Capital Improvements Appropriations Act of 2015, 2015 N.C. Sess. Laws 241, sec. 18A.24 (codified as amended at N.C. GEN. STAT. §7A-109(d) (2015)).

169. *Id.*

170. AM. CIVIL LIBERTIES UNION, DRIVING WHILE BLACK OR BROWN: AN ANALYSIS OF RACIAL PROFILING IN ARIZONA (Apr. 2008), <http://www.acluaz.org/sites/default/files/documents/DrivingWhileBlackorBrown.pdf>.

to these questions are yes; if not, how else will change happen and rights be protected and ensured?

IX. CONCLUSION

While LexisNexis might not be the most sympathetic requestor of the public data available through ACIS, they are a consumer that should be allowed access. While LexisNexis does have a commercial interest, there are many other valid interests in accessing ACIS data. The North Carolina Court of Appeals justifiably found that a copy of the ACIS system would qualify as a public record under the Public Records Act—a public record that should be made available upon request. Yet, the North Carolina Supreme Court decided the case on narrow, technical grounds that created as many problems as it solved.

The solutions are not complicated, so long as the state legislature and government see the issue as a problem and set it as a priority. Even if the N.C. A.O.C. does not have the funding to implement the provision of providing copies of this vast data upon request, due to technology defects and lack of staffing, clerks of court have the opportunity to provide valuable assistance to research being conducted in advancement of public policy. Clerks can request that a new public record be created through whatever query the public patron would like and then make that new report available for consumption. While not the most effective, nor logical, means for obtaining North Carolina criminal record data in the aggregate, it is currently the only practical way that the North Carolina Supreme Court has left for eager researchers. There is always hope that ACIS will be updated; that the North Carolina General Assembly will define a copy of ACIS as a public record; and that the North Carolina Supreme Court will read and interpret the Public Records Act more broadly. However, those hopes do not seem realistic or practical in the current environment. Hopeful, but not realistic.

The public's right to inspect public records should not stop at an individual record. Instead, the public should be able to inspect and manipulate underlying raw data in order to discover new trends and change bad practices. This detailed examination lies at the heart of the North Carolina Public Records Act and with the analogous federal provision under FOIA. Both seem equally broken but have the opportunity for reform through federal

funding and cross-national efforts in accountability and best practices. The data is already there and simple changes to technology or process could solve the problems that keep aggregated data out of the public's hands, which goes against the spirit and heart of the North Carolina Public Records Act.