



MISDEMEANORS

STUDY ON RECORD RETENTION, AVAILABILITY
AND ACCESS OF RECORDS REGARDING FINE-
ONLY MISDEMEANORS

As directed by SB 47, 85th Legislature

(Due 1/1/19)



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Executive Summary

To gather the information sought by Senate Bill 47, the Office of Court Administration distributed a survey designed to generate information about fine-only misdemeanor records access and availability in Texas counties. The survey also sought information on fine-only misdemeanor records retention and destruction practices of Texas counties. Survey respondents suggested the following about fine-only records availability, access, retention and destruction policies and practices in Texas:

- Adult fine-only misdemeanor records (both convictions and deferred dispositions) are generally open to public access, and local policy decisions have not changed access and availability to these records.
 - If local policy has played a role in access and availability, it has tilted toward expanding access and availability.
- Fine-only misdemeanor records “related to a child younger than 18 years of age” are generally unavailable to the public, and local policy decisions have not changed access and availability.
 - Where local policy has played a role in access and availability, it has tilted toward restricting access and availability.
- Most local offices have a local retention schedule, and a majority of those offices destroy fine-only records at some point.
 - Offices differ on whether they promptly destroy records at the end of the state-mandated retention period, or retain records past the minimum retention period and destroy them at a later, locally-determined time.
 - The primary drivers for records destruction are space savings, risk reduction, and filing efficiency.
- Most, but not all, local officials have a process by which to comply with the new confidentiality and non-disclosure requirements of House Bill 681 (85th Legislative Session). Nonetheless, some respondents indicated they did not know how their office complied with House Bill 681 or were unfamiliar with House Bill 681.

Background

Senate Bill 47, passed by the 85th Legislature, directed the Office of Court Administration (OCA) to study the ways non-traffic fine-only (Class C) misdemeanor records are held in Texas. Specifically, Senate Bill 47 (SB 47) required OCA's study to address:

- (1) The public availability of conviction records for misdemeanors punishable by fine only;
- (2) The public availability of records relating to suspension of sentence and deferral of final disposition under Article 45.051 (Suspension of Sentence and Deferral of Final Disposition), Code of Criminal Procedure, for misdemeanors punishable by fine only;
- (3) The public availability of records described by sections (1) or (2) that are related to a child younger than 18 years of age;
- (4) Whether public access to and availability of records described by sections (1) through (3) have been expanded or restricted by the county over time;
- (5) Whether local agencies holding records described by sections (1) through (3) destroy those records;
- (6) The reasons and criteria for any destruction of records described by sections (1) through (3); and
- (7) The retention schedule of each local agency holding records described by sections (1) through (3), if the agency routinely destroys those records.¹

Methodology

OCA developed a survey to gather the information sought by SB 47, organized around the availability of and public access to Class C records for local government agencies, and the retention and destruction policies and practices of local government agencies. Because the heaviest volume of non-traffic, fine-only cases flows through municipal courts and justice courts,² and because appeals from these courts can be heard at county-level and even district-level

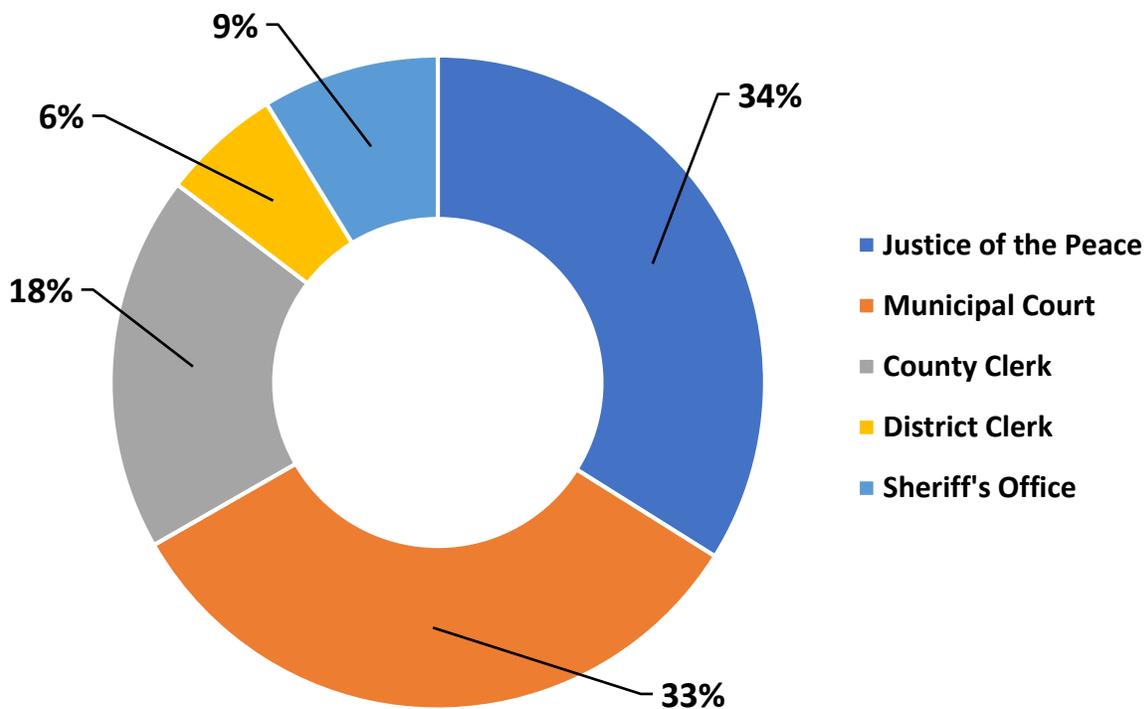
¹ S.B. 47, 85th Leg., R.S., Sec 1, <https://capitol.texas.gov/tlodocs/85R/billtext/pdf/SB00047F.pdf#navpanes=0>.

² See OFFICE OF COURT ADMIN., FISCAL YEAR 2017 ANNUAL STATISTICAL REPORT FOR THE TEXAS JUDICIARY (2017), <http://www.txcourts.gov/media/1441398/ar-fy-17-final.pdf>.

courts,³ OCA sent the survey to justice courts, municipal courts, county clerks, and district clerks. To canvass county-level law enforcement, OCA also sent the survey to sheriff's offices. In developing the survey, OCA sought input from representatives from the survey population as well as judicial training entities.

The survey was sent to 2,564 recipients. OCA received 628 responses, a 24% response rate. Survey results reveal a cross-section of jurisdictions among respondents, including rural, suburban, and urban local government agencies. As might be expected due to original jurisdiction over Class C charges and corresponding case volume, justice court and municipal court respondents comprised over two-thirds of the response pool. See Figure 1.

Figure 1. Survey Respondents by Office (n=628)



³ See, e.g. CODE OF CRIM. PROC. arts. 4.08, 4.09; see also OFFICE OF COURT ADMIN., TEXAS COURTS: A DESCRIPTIVE SUMMARY 16 (2014), <http://www.txcourts.gov/media/994672/Court-Overview.pdf>.

Class C Misdemeanor Records For “Children Under Age 18”

Class C charges brought against juveniles exist in a fluid jurisdictional context: they begin in criminal court *as criminal charges* and do not become a juvenile court matter unless transferred.⁴ Because of this fluid jurisdictional context, the survey relied on SB 47’s exact language when inquiring about records “related to a child younger than 18 years of age.”

Data Limitations

While OCA was pleased to receive responses from nearly one in four people to whom the survey was sent, the number of responses that are available for detailed analysis get low in some areas, and too low to be considered as representative of practices statewide. OCA has nonetheless included all summary statistics gathered during the study to inform discussion on the important issues raised in SB 47.

Survey Results

Access and Availability

SB 47 addresses the “public availability” of fine-only misdemeanor conviction and deferred disposition records. Survey results suggest that adult fine-only conviction and deferred disposition records are generally publicly available across respondent offices, but that fine-only conviction and deferred disposition records “related to a child under age 18” are not publicly available. Respondents further indicated that local policy decisions had not affected the availability and accessibility of the fine-only records.

Adult Records

The vast majority of respondents (81%) reported that adult fine-only conviction records held by their office were publicly available. A slightly smaller majority (74%) reported that adult fine-only deferred disposition records held by their office were publicly available.

- Adult fine-only conviction records are commonly available in respondent justice court, municipal court, and county clerk offices. See Figure 2. These same offices have

⁴ This issue was addressed in an OCA report released in December 2018. See OFFICE OF COURT ADMIN., STUDY ON CERTAIN JUVENILE JUSTICE ISSUES 6 (2018), <http://www.txcourts.gov/media/1443018/hb-1204-final.pdf>.

comparable rates of availability for fine-only deferred disposition records. See Figure 3.

- Justice court and municipal court respondents bear similar, but not parallel, rates of adult fine-only records availability.
- Among respondent categories, adult fine-only records (both convictions and deferred dispositions) are more likely to be available to the public in county clerk offices than any other surveyed office.

Figure 2. In Your Office, Are Adult Fine-Only Conviction Records Available to the Public?

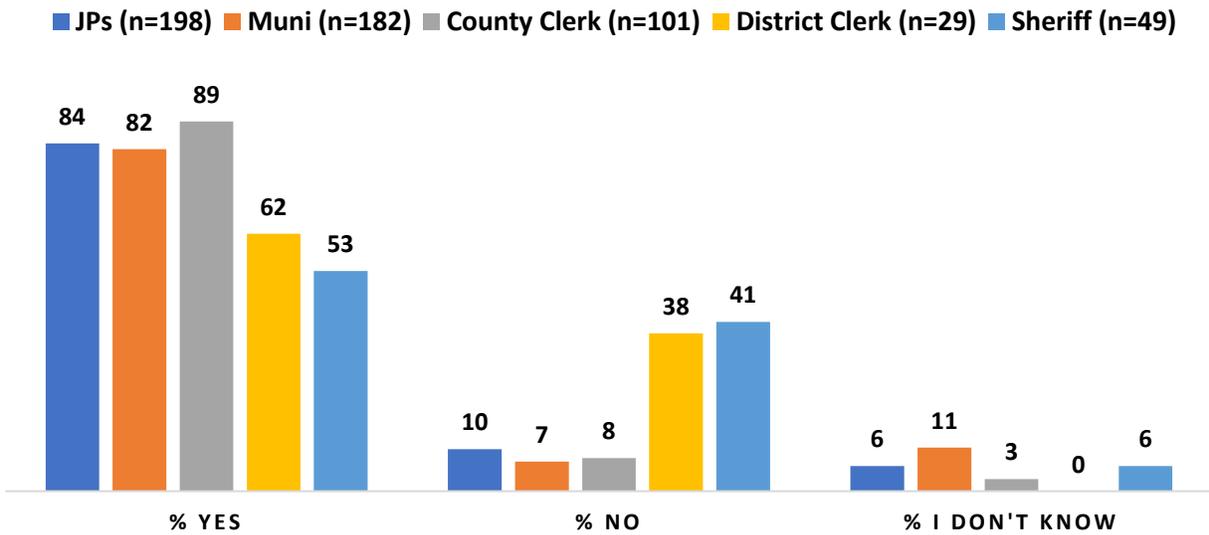
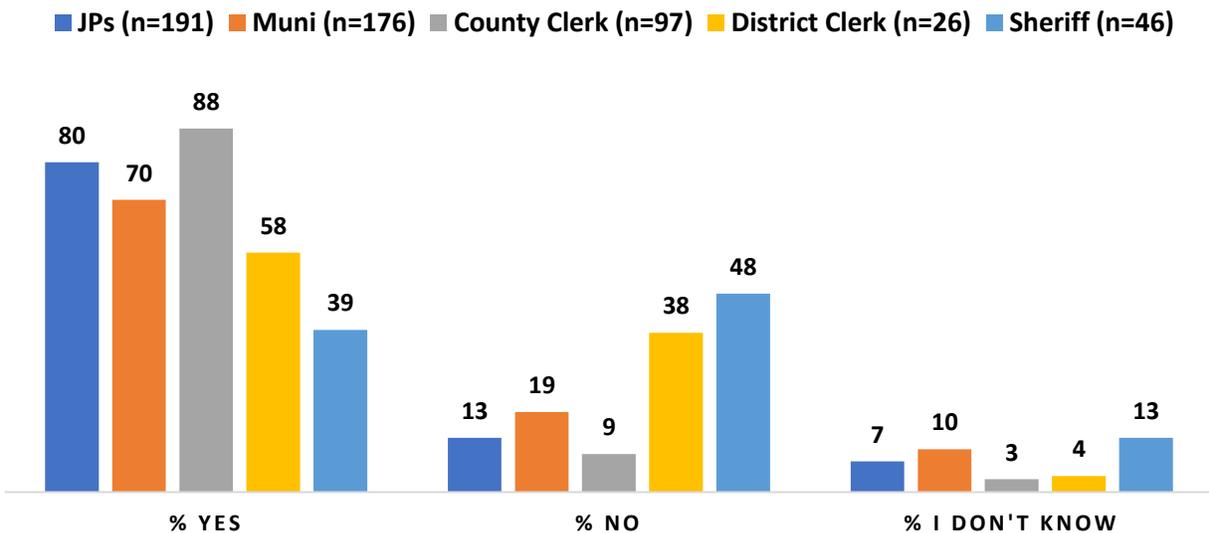


Figure 3. In Your Office, Are Adult Fine-Only Deferred Disposition Records Available to the Public?



Records Access and Availability Policy

SB 47 addressed the extent to which availability of or access to adult fine-only conviction and deferred disposition records have changed, if at all. Accordingly, OCA's survey asked about local decisionmaking in records access and availability. A majority (72%) of respondents reported that local policy decisions had not affected public access to and availability of these records. See Figure 4.

- Only 13% of respondents reported that local policy had affected records access or availability, mostly in expanding, rather than restricting, access or availability. See Figure 4.
- Of the small number of justice courts (n=25) and municipal courts (n=24) that reported that local policy affected access or availability, justice courts were more likely to restrict access while municipal courts were more likely to expand access. See Figure 5.
- Though a small number of respondents overall (n=14), county clerks respondents were the most likely to report that local policy had expanded access and availability. See Figure 5.

Figure 4. Over Time, Have Local Policy Decisions Affected Public Access / Availability to Adult Fine-Only Misdemeanor Records? (n=541)

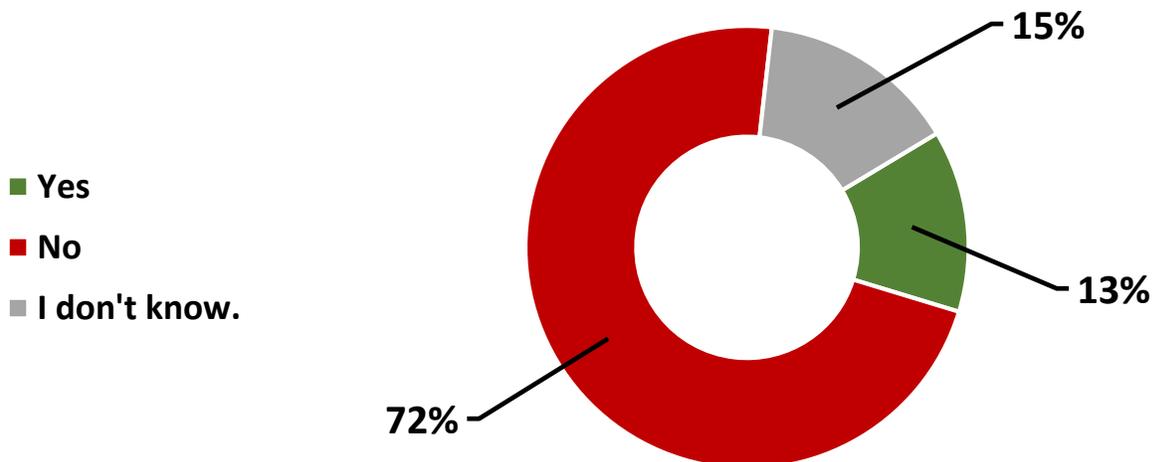
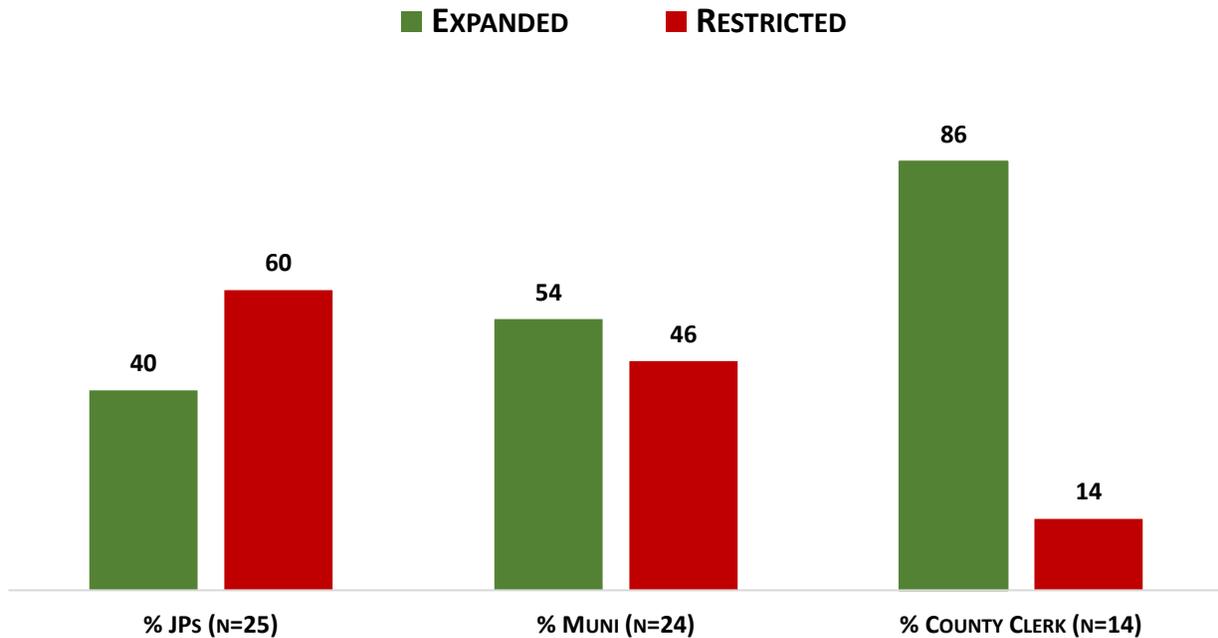


Figure 5. If Local Policy Has Affected Access / Availability, Has it Expanded or Restricted Access / Availability?



Records “Related to a Child Younger than 18 Years of Age”

In contrast to adult fine-only records practice, the vast majority of survey respondents reported that fine-only conviction and deferred disposition records “related to a child younger than 18 years of age” generally were not available to the public.

- For fine-only conviction records of this type, 78% of respondents reported that conviction records were not available to the public. Similarly, 79% of respondents stated that deferred disposition records were not available to the public.
- Unlike adult fine-only record availability, respondents were generally consistent in deeming records unavailable across record types. For example, the percent of justice courts deeming fine-only conviction records unavailable (76%) and deferred disposition records unavailable (77%) are nearly identical. A similar degree of uniformity can be seen in other offices. See Figure 6 and Figure 7.
- Though not generally available to the public, fine-only records related to a child younger than 18 are more readily available in justice court and municipal court offices than in other respondent offices. See Figure 6 and Figure 7.

Figure 6. In Your Office, Are Fine-Only Conviction Records “Related to a Child under 18 Years of Age” Available to the Public?

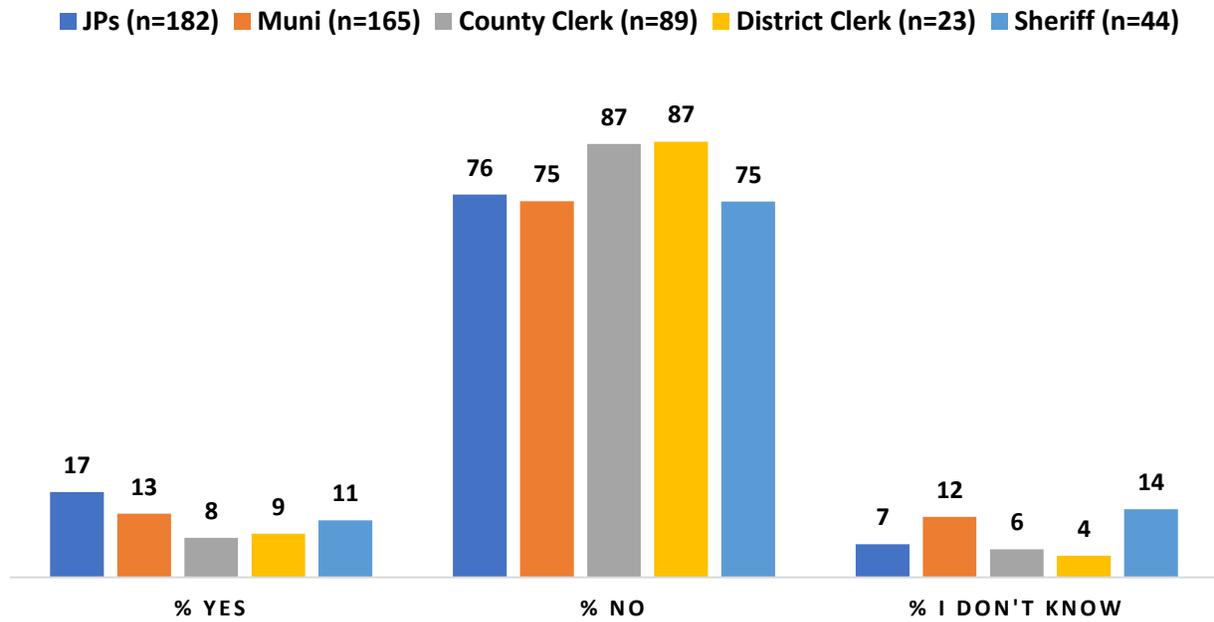
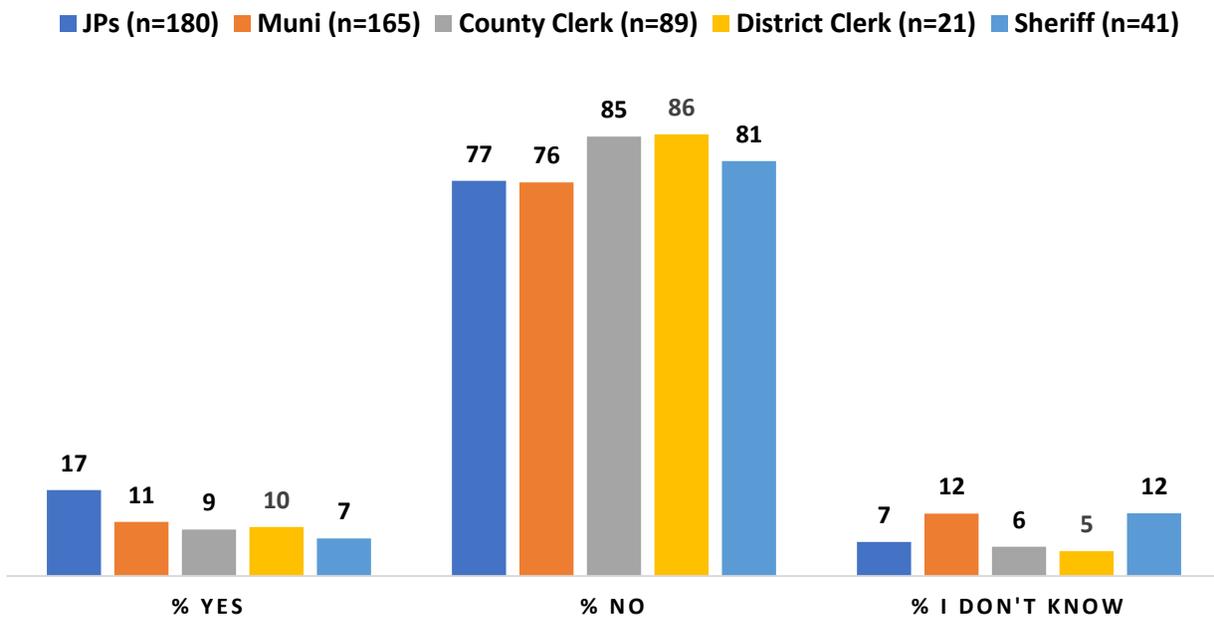


Figure 7. In Your Office, Are Fine-Only Deferred Disposition Records “Related to a Child under 18 Years of Age” Available to the Public?

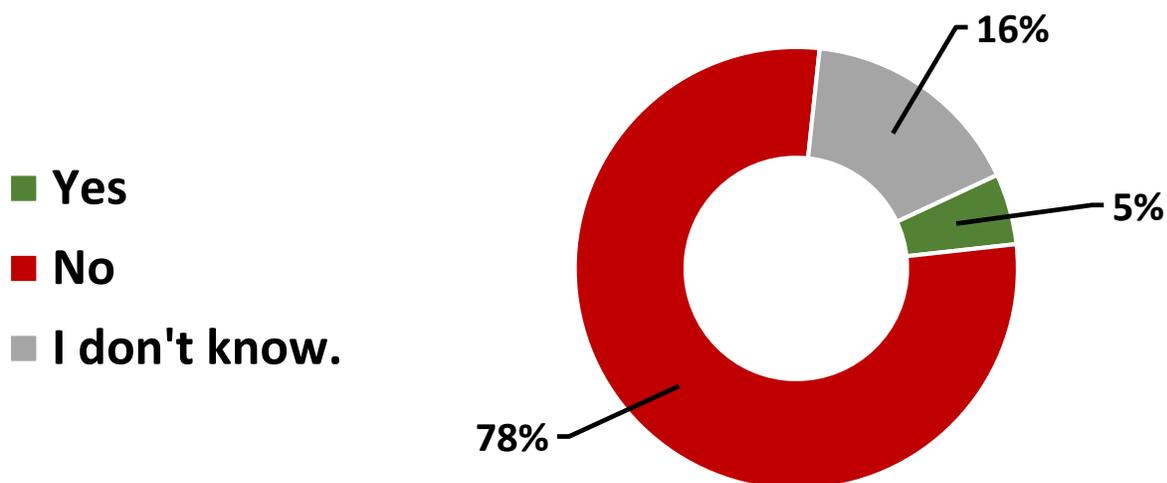


Records Access and Availability Policy

SB 47 addressed the extent to which the availability of or access to records “related to a child younger than 18 years of age” have changed over time, if at all. Accordingly, OCA’s survey asked about local decisionmaking in records access and availability. Nearly 80% of respondents reported that local policy decisions had not affected public access to and availability of these records. See Figure 8.

- Only 5% of respondents reported that local policy decisions had affected the public availability of or access to these records. A larger number (16%) were not sure what role local decision played. Of the small number of respondents (n=20) that reported local policy did play a role, the vast majority felt that local policy restricted access and availability.

Figure 8. Over Time, Have Local Policy Decisions Affected Public Access / Availability of Fine-Only Misdemeanor Records “Related to a Child Under 18”? (n=501)



House Bill 681

During the 85th Legislative Session the Legislature passed, and the Governor signed into law, House Bill 681 (HB 681). HB681 provides for certain confidentiality protections for fine-only convictions and deferred dispositions. Specifically, the new law provides that, with certain limited exceptions, five years after a final conviction of, or dismissal after deferred disposition for, a misdemeanor offense punishable by fine only, all records, files, and information related to

the defendant in such a case held or stored by or for a municipal court, justice court, or appellate court become confidential and are not permitted to be disclosed to the public. OCA's survey asked two specific questions regarding this new law: 1) how were local officials complying with the new confidentiality and non-disclosure requirements; and 2) who as "record holder" was responsible for labeling a fine-only misdemeanor as "sexual in nature" (and thus outside the scope of HB 681)?

- Not all respondents knew how their office complied with HB 681, but most respondents reported that their office had some sort of process in place to ensure that qualifying fine-only records were made non-disclosable. See Figure 9.
 - A sizeable number of justice court and municipal court respondents reported that they did not know if their office complied with HB 681.
 - Survey comments under the "Other (Please Specify)" response option suggest that many localities are still working toward implementing a review process to comply with HB 681.
 - Respondent answers suggest that some offices may still be unaware of the new non-disclosure requirements. Select comments are provided below.
- In justice courts, clerks offices, and sheriff's offices, the elected official typically determines whether a fine-only offense is "sexual in nature" and therefore excepted from the confidentiality provisions of HB 681. In municipal courts, the appointed judge typically makes this decision. See Figure 10.

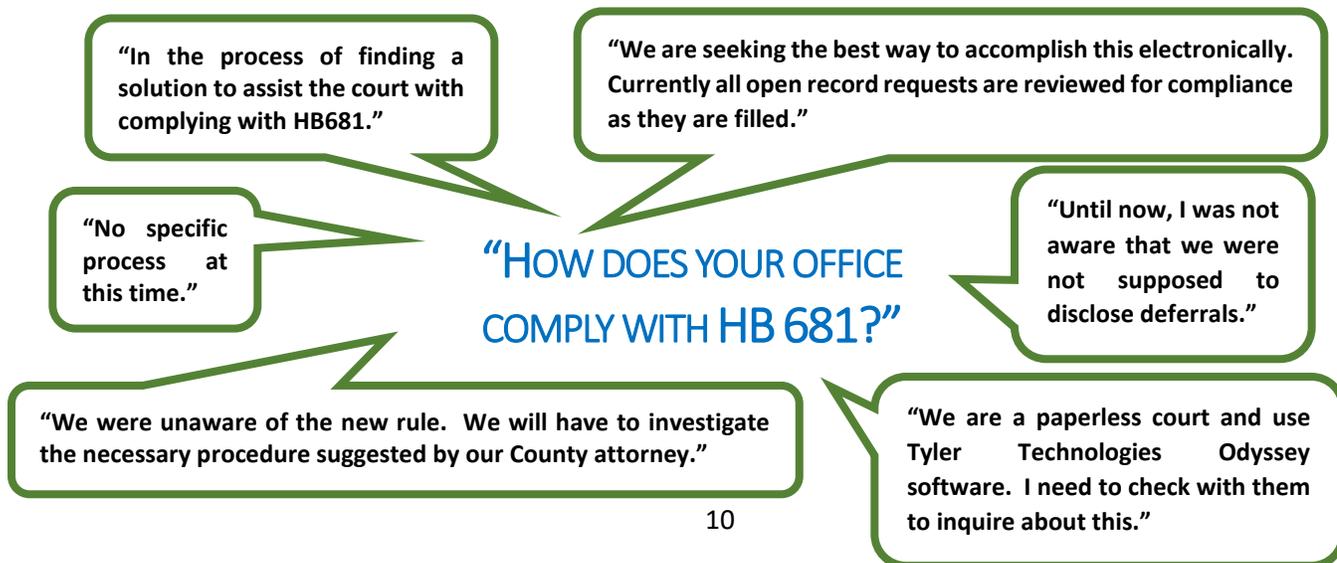


Figure 10. How Does Your Office Comply with HB 681? (mark all that apply)

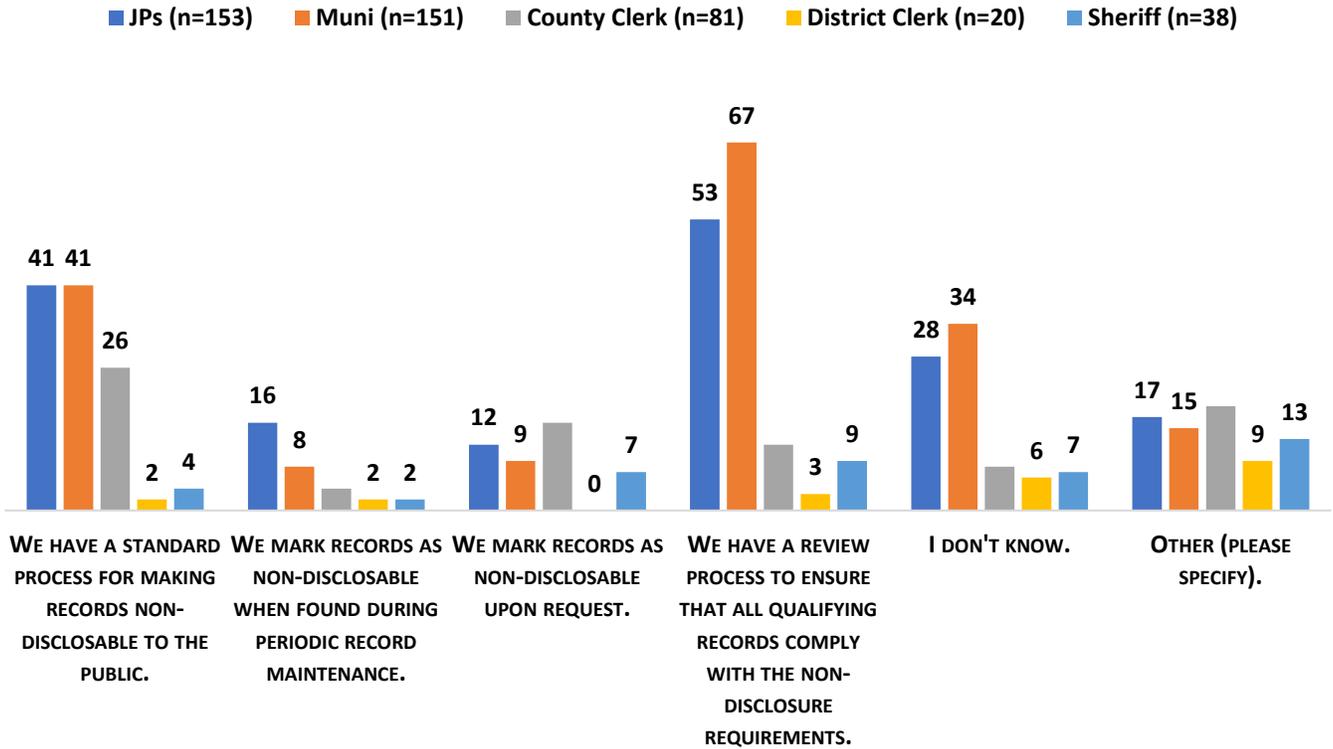
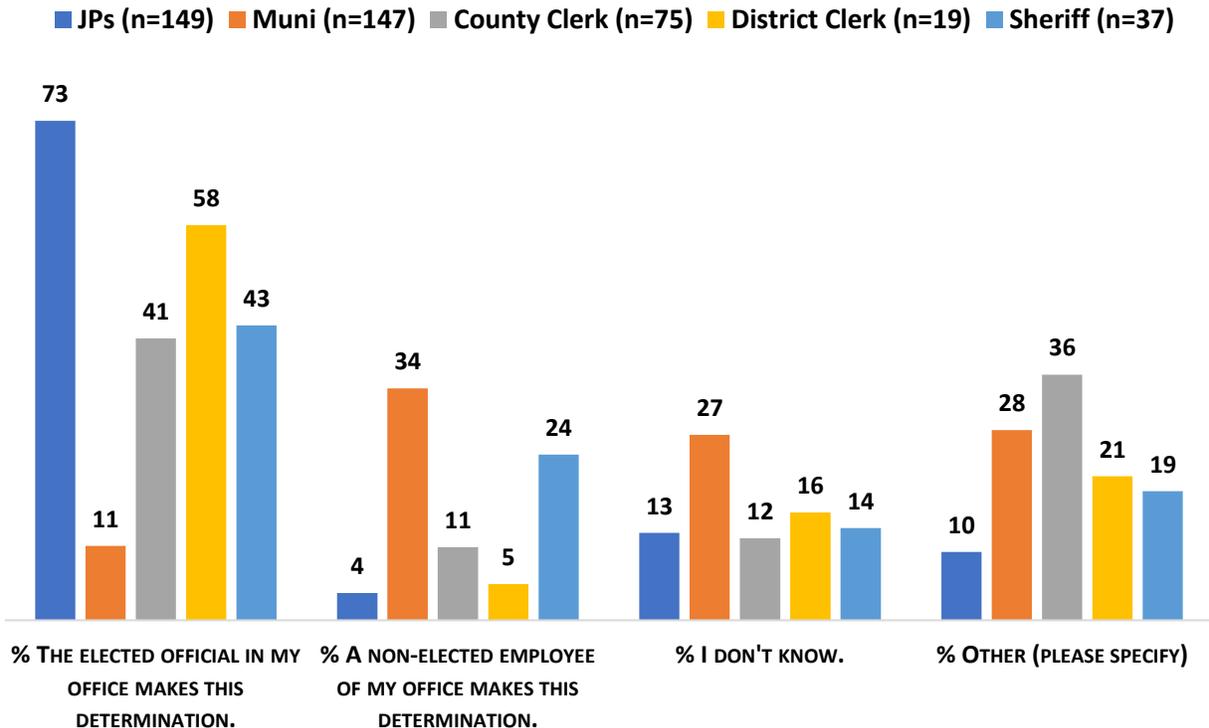


Figure 9. For HB 681 Purposes, Who in Your Office Determines Whether a Fine-Only Offense Is "Sexual in Nature"?

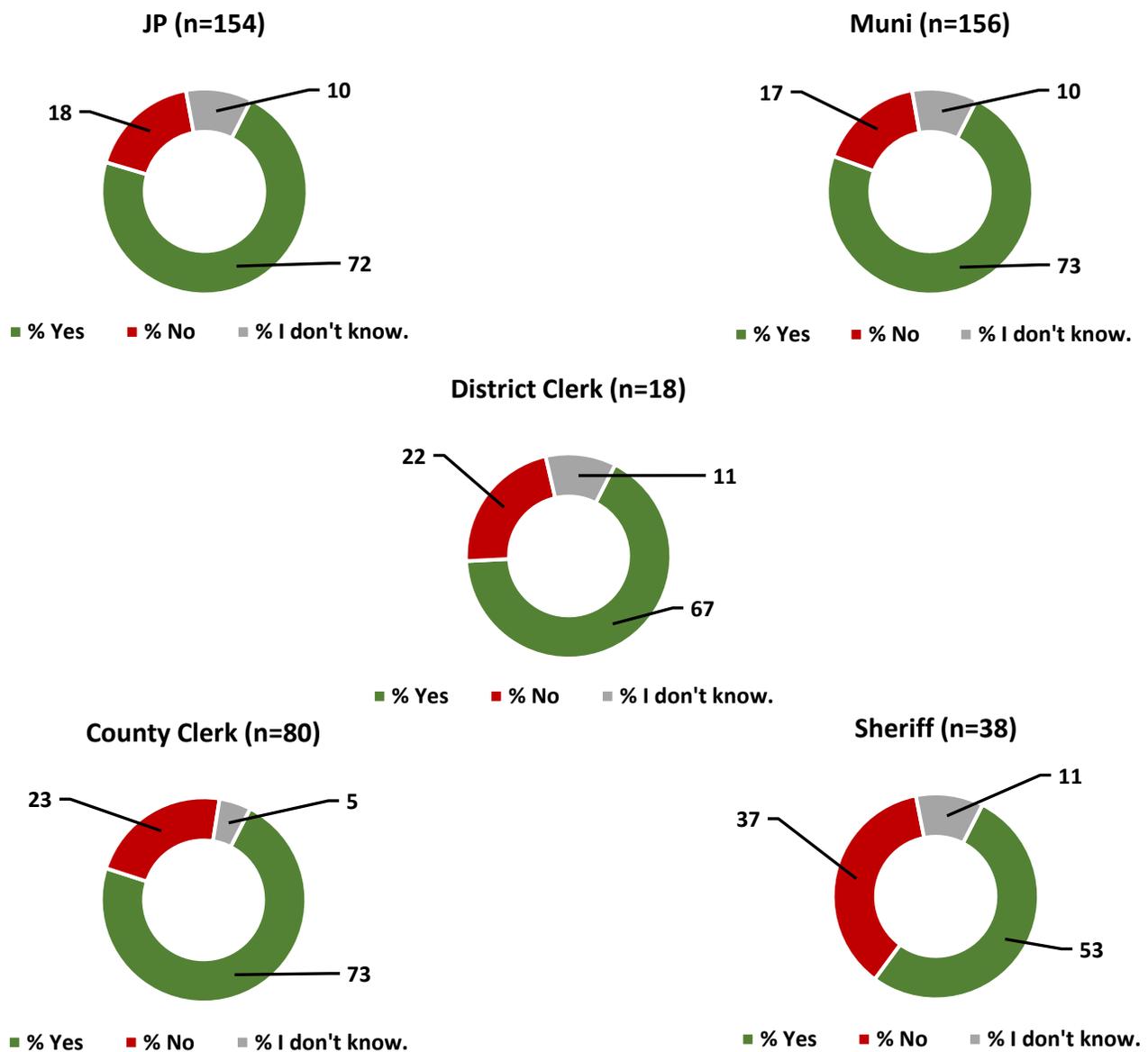


Records Retention and Destruction

SB 47 addressed local records retention and destruction policies and practices for fine-only misdemeanor conviction and deferred disposition records, both adult records and those “related to a child younger than 18 years of age.”

- Most survey respondents reported that they had a local records retention schedule. See Figure 11.

Figure 11. Does Your Office Have a Local Retention Schedule? (n=446)



- A substantial majority of justice court and municipal court respondents reported that they destroyed fine-only records. See Figure 12 and Figure 13.
 - Compared to other survey respondents, municipal court respondents were the most likely to promptly destroy fine-only records when the state-mandated retention period ended.
 - Justice court respondents differed in their retention and destruction practices: adult records are more commonly held past the state-mandated retention period and destroyed at a later, locally-determined time, while records “related to a child younger than 18 years of age” were more commonly destroyed once the state-mandated retention period ended.

Figure 12. Which Option Best Describes Local Retention Policy on Destruction of Adult Fine-Only Records?

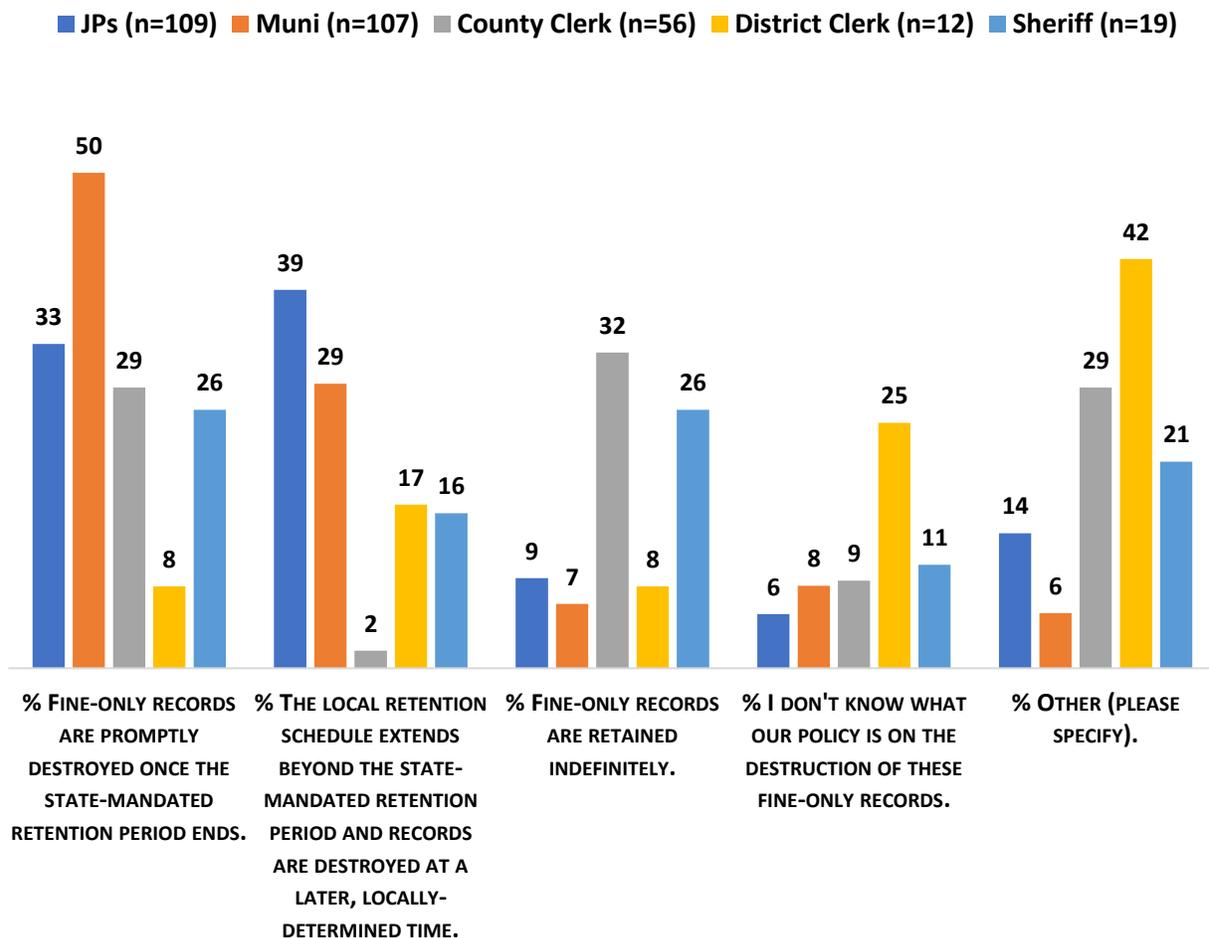
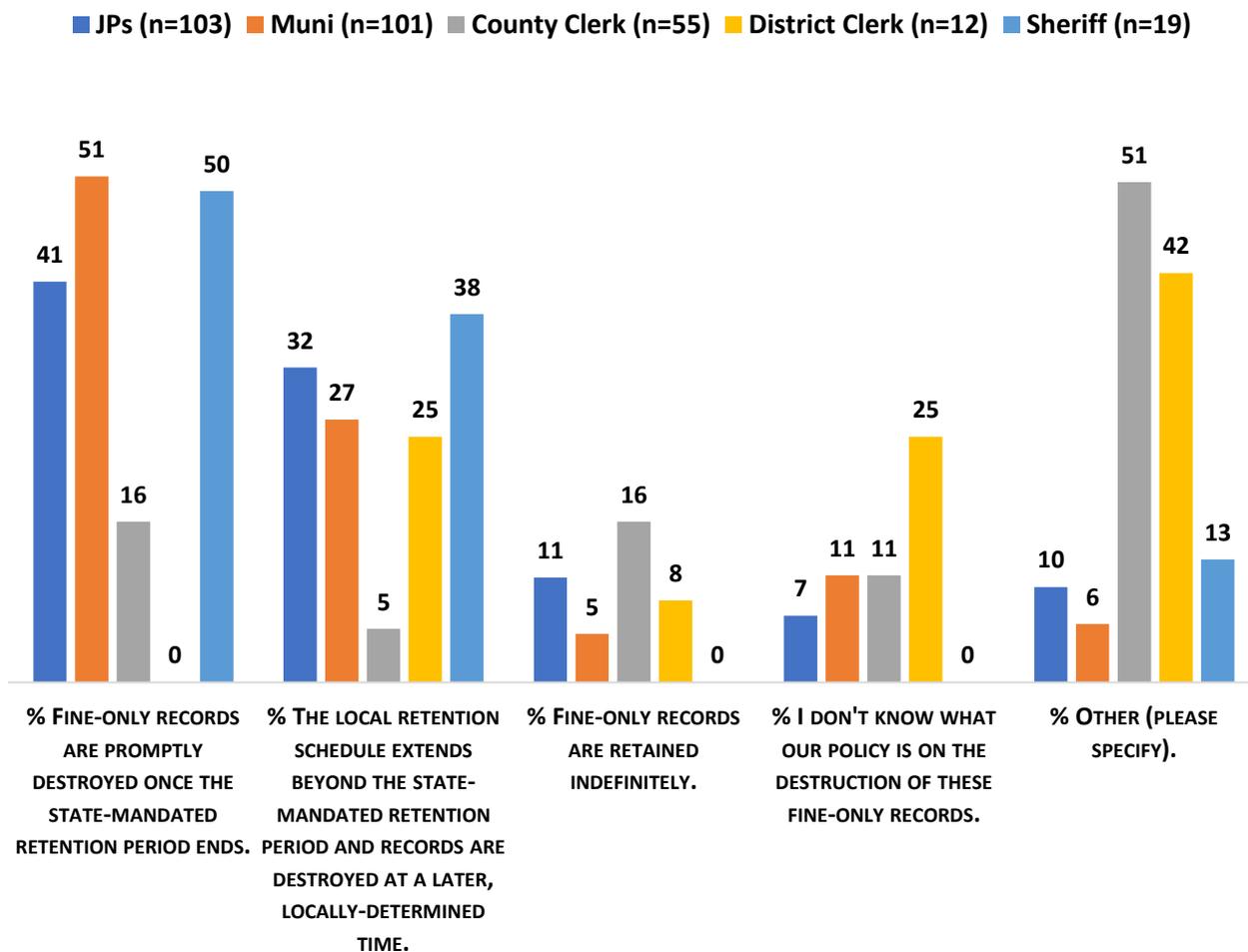


Figure 13. Which Option Best Describes the Local Retention Schedule Policy on Destruction of Fine-Only Records “Related to a Child Younger than 18 Years of Age”?



Why Are Records Destroyed?

For those respondents that reported that they destroyed fine-only records, the OCA survey followed up with questions about the reasons and criteria for records destruction.

- Survey results suggest that physical space savings and risk reduction are the primary drivers behind the destruction of fine-only records. This is true for adult records and those “related to a child younger than 18 years of age”. See Figure 14 and Figure 15.
- Survey results also suggest there is a distinction in the way local officials handle paper files versus electronic files.
 - Municipal court respondents reported they destroyed fine-only records for electronic storage space savings at a significantly higher rate than other

respondents.

- Many respondents reported that they destroyed paper files after the state-mandated retention period ended but retained electronic files indefinitely.

Figure 144. If Your Office Destroys Adult Fine-Only Misdemeanor Records, Why? (mark all that apply)

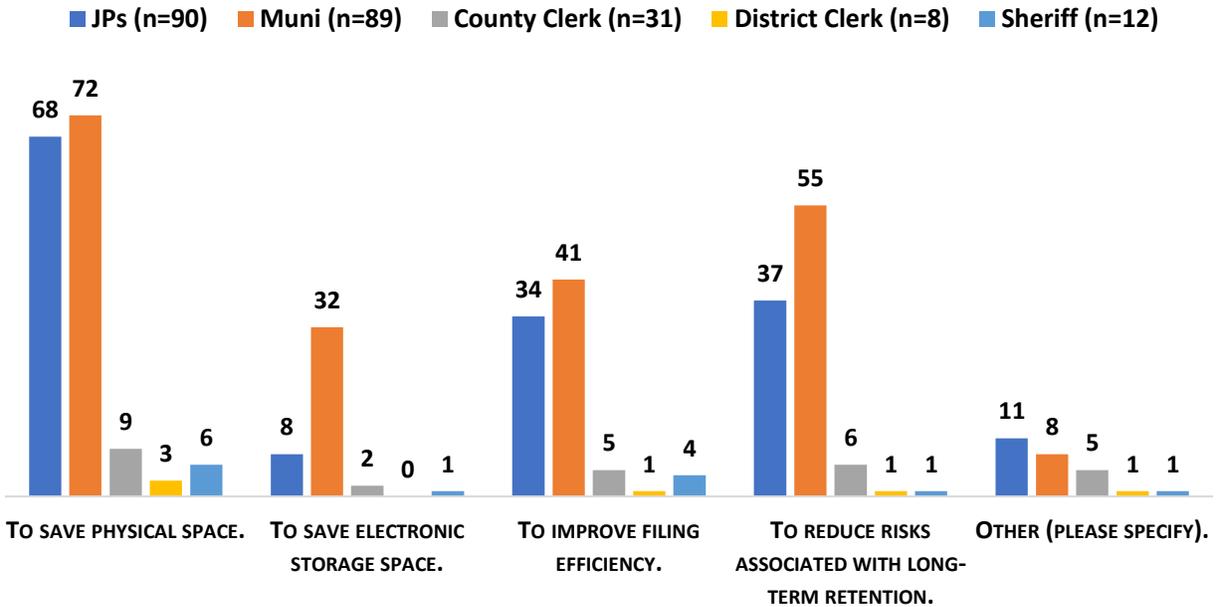
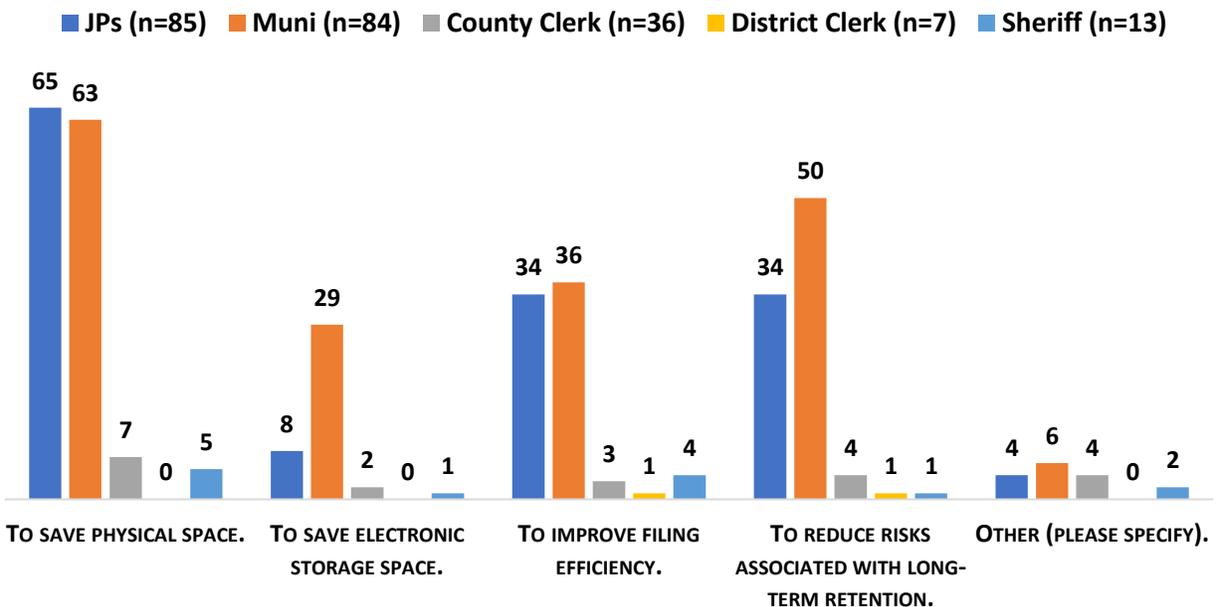


Figure 155. If Your Office Destroys Fine-Only Misdemeanor Records “Related to a Child Younger than 18 Years of Age,” Why? (mark all that apply)



Additional Observations

After the survey closed, OCA staff compiled preliminary observations based on the survey data and commentary. OCA staff then convened a small focus group of judicial education representatives and others familiar with the practices being studied to gain additional insight about records accessibility, availability, retention, and destruction practices. On the basis of this feedback and OCA's review of the results, the following observations are made:

- Many respondents may not clearly understand the distinction between a juvenile case (with juvenile records under the purview of a juvenile court), and a Class C, fine-only misdemeanor charge against a “child under age 18.”
 - Most fine-only Class C cases brought against a “child under age 18” are adjudicated under the criminal jurisdiction of justice and municipal courts, generally do not result in a juvenile record, and generally do not receive the same protections juvenile cases and case records receive.⁵ In the survey, however, several respondents referred to fine-only records “related to a child under age 18” as “juvenile” records and therefore restricted, which may have contributed to the lower availability rates for fine-only records “related to a child under age 18.” See Figure 6 and Figure 7.
- A wide variety of actors might have a role in setting confidentiality and non-disclosure policy for fine-only records related to charges that might be “sexual in nature.”
 - HB681 allows the record holder to determine whether a fine-only offense is “sexual in nature” and thus not covered by the new law’s confidentiality and nondisclosure protections. Respondents identified the city attorney, the county attorney, the attorney general, or the county judge as among those

⁵ In December 2018, OCA completed a study on the use of the terms “juvenile,” “child,” and “minor” throughout the criminal justice and juvenile justice statutes. Some of the most notable observations that arose during the study were the lack of unitary definition and inconsistency in use among those terms. See OFFICE OF COURT ADMIN., STUDY ON CERTAIN JUVENILE JUSTICE ISSUES 2 – 4 (2018), <http://www.txcourts.gov/media/1443018/hb-1204-final.pdf>. It is conceivable that references to Class C records “related to a child under age 18” as “juvenile records” stem from the lack of uniform definition and inconsistency in use among the terms “juvenile,” “child,” and “minor” in statute.

officials who might make the “sexual in nature” determination.

- There may be a need for additional legislation or guidance addressing the importance of closing out and destroying records, and the methods by which to do so.
 - Several respondents reported that their offices never destroy fine-only records. Others noted that, while they destroy paper records following the end of the state-mandated retention period, they hold electronic records indefinitely. These retention practices may dovetail with focus group comments suggesting that the law surrounding case close-out can be confusing for local officials, resulting in cases being held “open” with files retained indefinitely.