



HANDBOOK

Ohio County Commissioners

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Phone: 614-221-5627 • Fax: 614-221-6986 • www.ccao.org

CHAPTER 128

PUBLIC RECORDS AND RECORDS COMMISSIONS

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128.01 INTRODUCTION

One of the numerous responsibilities of county elected officials is to maintain records. The number of records maintained by county government constantly increases. The proper retention, storage, transfer, and disposal of records can make the job of county officials easier. In addition, transfer or disposal of outdated records can result in considerable savings of space and equipment.

Public records may be kept by any means of photostatic, photographic, film or microfilm process, perforated tape, other magnetic means, electronic data processing, machine readable means, graphic or video display, or any combination of the above which the official authorized to maintain the records deems necessary or advisable.

However, when these methods are utilized, any machines and equipment necessary to reproduce the records in a readable form must be made readily available (ORC 9.01). When any of these recording methods have been employed, the originals are to be disposed of in accordance with requirements of law and procedures of the county records commission.

Establishing a comprehensive county records program involves a cooperative effort between the Ohio Historical Society (OHS), the Ohio Network of American History Research Centers (ONAHRC), and county offices. Assistance is available from local

records specialists of the Ohio Historical Society who will assist counties with the inventory, analysis, transfer, destruction, and retention of county record.

Before any action to destroy or transfer county records can be taken, such action must be approved by the county records commission. For further information refer to *OHIO COUNTY RECORDS MANUAL* and the *LOCAL GOVERNMENT RECORDS HANDBOOK*, both published by the Ohio Historical Society and available at <http://www.ohiohistory.org/resource/lgr/publications.html> These publications make recommendations concerning periods of retention for various records. In addition, the web site of the Ohio Historical Society includes a series of forms, the use of which is important in the administration of the law. The forms will be discussed later in this Chapter of the *Handbook* at: <http://www.ohiohistory.org/resource/lgr/forms.html>

This Chapter will deal with a number of topics. First, it will discuss the complex issue of public records. ORC Section 149.43 defines a public record, generally requires that public records be made available to the public, and exempts certain types of records from public disclosure. Table 128-1 at the end of this chapter explains ten common myths about Ohio's public records law, answering some commonly asked questions.

Second, this Chapter will discuss the organization and functions of the county records commission. The Ohio Attorney General in conjunction with the State Auditor publishes an OHIO SUNSHINE LAWS UPDATE that contains detailed information not only on Ohio's Public Records Law, but also includes useful information on the open meetings (SUNSHINE) law, and the personal information systems law, ORC Chapter 1347, that should be referred to for a complete analysis of these issues. Applicable links for the update are <http://ohioattorneygeneral.gov/Legal/Sunshine-laws> and <http://www.auditor.state.oh.us/services/opengov/default.htm> , respectively.

Finally, the Chapter will address a number of special areas of concern that public record practitioners routinely encounter including email, social security numbers, and employment or personnel records.

128.02 GENERAL PUBLIC RECORDS REQUIREMENTS

ORC Section 149.43, Ohio's basic Public Records Law, is to be interpreted liberally to facilitate broader public access to public records. The Public Records Act imposes two primary obligations upon public offices:

- Provide prompt inspection of public records; and
- Provide copies of public records within a reasonable period of time.

These obligations, in turn, provide the public with two primary rights:

- The right to prompt inspection of public records; and
- The right to copies within a reasonable period of time.

The Public Records Act evolved from the principle that Ohio's citizens are entitled to access the records of their government. Courts have opined that the exemptions to the Public Records Act, which are discussed more fully later, should be narrowly construed (*State ex rel. Warren Newspapers v. Huston* (1994), 70 Ohio St.3d 619). In summary, to advance the principle of utmost access to the public, the Public Records Act is to be interpreted liberally in favor of disclosure (*White v. Clinton Cty. Bd. Of Cmsrs.*(1996), 76 Ohio St. 3d 416; *State ex rel. Patterson v. Ayers* (1960)., 171 Ohio St. 369).

The law requires every public office to maintain its records in accordance with statutory requirements or record retention schedules approved by the county records commission. Records can not be removed, transferred, destroyed, or mutilated unless approved by the county records commission.

More recent legislation requires training requirements for local governments and monetary penalties for improper public record request denials. In addition, the legislation requires local government entities to update their public record retention schedules and create a public record policy and poster. In addition to samples offered by the Attorney General and Auditor of State at the aforementioned websites, CCAO has provided a sample model policy and sample forms available to commissioners. For more information, please see Section 12.15 *Training and County Office Requirements*.

County offices are required to promptly prepare and make available for public inspection all public records at all reasonable times during regular business hours. If the office keeps records in a non-readable form, equipment must be provided to reproduce the record in a readable form (ORC 9.01). If a person requests a copy of a public record, it must be made available at cost and within a reasonable amount of time.

Finally, a county office is required to organize its filing system so that its records can be made available within a reasonable amount of time. In addition, each county office can only make such records as are necessary to the proper and adequate documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the office and for the protection of the legal and financial rights of the state and persons directly affected by the activities of the office (ORC 149.40).

128.03 DEFINITION OF PUBLIC RECORD

As noted above, under Ohio law, a public office may only create records that are "necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency and for the protection of the legal and financial rights of the state and persons directly affected by the agency's activities" (ORC 149.40). In accordance with the Ohio Revised Code and court rulings, a record is defined as any item kept by a public office that meets all of the following:

1. Is stored on a fixed medium, (such as paper, electronic – including but not limited to e-mail, and other formats);

2. Is created or received by, or sent under the jurisdiction of a public office;
3. Documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

If any of these three requirements is absent, the item is not a "record" and therefore not a public record. It should thus be evident that the definition of records is broad enough to include most items maintained in most offices. For example, letters of correspondence and phone message slips would fall under the definition of a public record.

Furthermore, a public office generally is not required to create new records to respond to a public records request, even if it is only a matter of compiling information from existing records (*State ex rel. White v. Goldsberry* (1999), 85 Ohio St. 3d 153; *State ex rel. Warren v. Warner* (1999), 84 Ohio St. 3d 43.2).

128.04 PUBLIC RECORDS AND CONFIDENTIALITY

The concept of confidentiality of public records is a complex legal issue and counsel should always be consulted when in doubt. Generally, confidentiality means that disclosure of information is limited. If a specific provision of state or federal law makes a category of information confidential, the terms of that provision of law controls to whom and under what circumstances a record may be released.

It is generally understood that some public records "must be released", others "may be released" and others "must not be released" (OAG 80-096). Determining which of these categories will apply is made in accordance with the statutory exceptions. The following guidelines may be helpful:

1. **MUST BE RELEASED**---Since most county records are public records, unless one of the exceptions is applicable, the information must be released.
2. **MAY BE RELEASED**---Some county records do not have to be released because one of the exceptions apply, however, the release is not otherwise prohibited by state or federal law. While these records are confidential under the Public Records Law and may not be disclosed to the public at large, they must be disclosed to the person who is the subject of the information as a result of Ohio personal information systems law, commonly referred to as the privacy act that will be discussed in the next Chapter of this *Handbook*.
3. **MUST NOT BE RELEASED**---Some county records can not be disclosed because release is prohibited by state or federal law. Sanctions may exist for the improper release of such information. This category includes adoption records without the consent of a court. A myriad of case law has also defined the exact parameters of what must not be released in this category.

If a county office feels a record is excepted from disclosure the burden is on the county office to prove the exception is applicable. If some information on a document that is subject to disclosure is commingled with information that cannot be released, the confidential information may be "redacted" or obscured and the remainder must be disclosed. Where confidential information is so intertwined with information that must be released so as to reveal excepted information, the entire record can then be withheld.

Given the potential penalties a county may encounter should a public record be improperly withheld, the county prosecutor should be consulted when any public record request raises such concerns.

128.05 PUBLIC RECORDS EXCEPTIONS

As has been stressed, most records kept by a county are public records and must be made available to the public. ORC Section 149.43 (A), however, contains the following specific exceptions:

1. Medical records;
2. Records pertaining to probation and parole proceedings;
3. Records of unmarried minors seeking abortion and defined as confidential under ORC Sections 2151.85 and 2919.121;
4. Records pertaining to adoption proceedings, including adoption files maintained by the Department of Health under ORC Section 3705.12;
5. Information contained in the putative father registry established by ORC Section 3705.12;
6. Records pertaining to adoption proceedings that are confidential under ORC Section 3107.42 or 3107.52;
7. Trial preparation records;
8. Confidential law enforcement investigatory records (CLEIR);
9. Intellectual property records;
10. Donor profile records;
11. Peace officer residential and familial information;
12. Information maintained by a county hospital that constitutes a trade secret as defined in ORC Section 1333.61;

13. Information pertaining to the recreational activities of a person under the age of eighteen;
14. Records the release of which is prohibited by state or federal law;
15. Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under ORC Sections 307.621 to 307.629, and child fatality review data submitted by the child fatality review board to the Department of Health or a national child death review database, other than the report prepared pursuant ORC Section 307.626(A);
16. Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to ORC Section 5153.171 unless the prosecuting attorney releases such information following consultation and determination of prosecution;
17. Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under ORC Section 4751.04 or contracts under that section with a private or government entity to administer;
18. Information reported and evaluations conducted pursuant to ORC Section 3701.072 related to trauma centers preparedness;
19. Records listed in ORC Section 5101.29 of the Revised Code related to daycare records held by the department of job and family services or a county agency.
20. Military discharges recorded with a county recorder under ORC Section 317.24(B)(2).

The ORC contains numerous exceptions under number 14 above (release is prohibited by state or federal law) that do not appear in the text of the Public Records Law. Instead, these exceptions are contained in other sections of the ORC. A comprehensive list of these exceptions can be found in AN OHIO SUNSHINE LAW UPDATE, published by the Ohio Attorney General.

128.06 RELATIONSHIP TO THE OHIO PRIVACY ACT

Ohio's personal information systems act, commonly referred to as the "privacy act" is contained in ORC Chapter 1347. See Chapter 129 of this *Handbook* for detailed information about this topic. One of the common myths of county officials is that the privacy act may limit the public's right to access of records under the Public Records Law.

The fact is that the privacy act does not grant individuals the right of privacy in records

kept by counties. ORC Chapter 1347 may be used to refuse the release of records only if the information is one of the authorized exceptions. The real purpose of the privacy act is to protect individuals from excessive record keeping by the county and to establish additional rights of access to information about individuals to themselves.

128.07 PUBLIC RECORD REQUESTS

As noted, all public records should be promptly prepared and made available for inspection to any person during regular business hours upon request. However, numerous issues may arise when a public records request is made upon a county office. Public record practitioners may face the following issues regarding public record requests: Identification; format; medium; response time; copies; mail requests; and requests made by incarcerated persons.

▪ Identification of the Record

Although no specific language is required to make a request, the requester must at least identify the records requested with sufficient clarity to allow the public office to identify, retrieve, and review the records. If a requester makes an ambiguous or overly broad request for public records such that the office cannot reasonably identify the exact public records being requested, then the office may deny the request. However, in such case, the office **must** provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the office and accessed in the ordinary course of the office's duties.

▪ Format of Request

The public office or the person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but **only** after **all** of the following occur:

- Disclosure to the requester that a written request is not mandatory;
- Disclosure to the requester that the requester may decline to reveal the requester's identity or intended use;
- Determination by the public office that a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability to identify, locate, or deliver the public records sought by the requester (ORC 149.43(B)(5)).

▪ Choice of Medium

The public records law allows a person to choose the medium upon which they

would like a record to be duplicated (ORC 149.43(B)(2); *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office* (2005), 105 Ohio St. 3d 172.) The requester can choose to have the record (1) on paper, (2) in the same form as the public office keeps it (e.g., on computer disk), or (3) on any medium upon which the public office determines the record can “reasonably be duplicated as an integral part of the normal operations of the public office.”

▪ **Response Time to Request**

Public records must be available for inspection during regular business hours and made available for inspection promptly. Copies of public records must be made available within a reasonable period of time. However, under current Ohio law, there is no defined period of time by which a public records request must be completed. Instead, appropriate (prompt and reasonable) response times will vary depending on different factors, including, but not limited to all of the following:

- The circumstances of this public office at the time of the request;
- The breadth of the request (*State ex rel. Gibbs v. Concord Twp. Trustees* (2003), 152 Ohio App. 3d 387);
- Whether legal evaluation of the responsive records is required before release (*State ex rel. Taxpayers Coalition v. City of Lakewood* (1999), 86 Ohio St.3d 385).

▪ **Prohibition Against Requesters Right to Make Copies Themselves**

A requester seeking copies of public records is not permitted to make their own copies of the requested records by any means. This measure is to protect the integrity of the original document.

▪ **Limit to Number of Requests by Mail**

The public office may limit the number of records requested by a person that the office will transmit by United States mail to 10 per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. (The scope of the word “commercial” is to be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit education research.)

▪ **Requests by Incarcerated Persons**

Under Ohio law, an incarcerated person may receive public records, but only if the

records concern a criminal investigation. The incarcerated person must also follow these very strict guidelines.

- The records must be “public records” which are not subject to an exemption from disclosure.
- The incarcerated person must have secured a finding from the judge who imposed the sentence of incarceration (or that judge’s successor) that the information sought in the public record is necessary to support a justifiable claim of the person.

Courts have denied the public records requests of inmates because this procedure was not followed (*State ex rel. Breeden V. Judge Paul Mitrovich* (2005), 2002 Ohio 7168.).

128.07 DENIAL OF PUBLIC RECORD REQUESTS

If a request is ultimately denied, in part or in whole, the public office shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. Further, if the initial request was provided in writing, the explanation shall be provided to the requester in writing. The following are scenarios in which a public record request might be denied:

▪ Denial of an Ambiguous or Overly Broad Request for Public Record

If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records such that the public office cannot reasonably identify what public records are being requested:

- The public office may deny the request.
- However, the public office shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained in the ordinary course of business.

▪ Denial of a Public Record Not Maintained by the Public Office

If the public office receives a request for a record that it does not maintain or the request is for a record which is no longer maintained, the requester shall be so notified in writing that one of the following applies:

- The request involves records that have never been maintained by the office (*if possible the office should direct requester to the proper office*);
- The request involves records that are no longer maintained or have been disposed of or transferred pursuant to applicable Schedules of Record

Retention and Disposition (RC-2);

- The request involves a record that has been disposed of pursuant to an Application of the One-Time Records Disposal (RC-1);
- If the record that is requested is not a record used or maintained the public office, the requester shall be notified that the office is under no obligation to create records to meet public record requests (*however, if applicable the office should inform the requestor how the information requested is organized*).

The forms referenced above are more fully described later in this Chapter of the *Handbook* and are available on the Ohio Historical Society website at: <http://www.ohiohistory.org/resource/lgr/forms.html> .

▪ **Denial of a Public Record Maintained by the Public Office**

The public office may deny a request for a record maintained by the office if the record that is requested is prohibited from release due to applicable state or federal law.

If the record request is denied in its entirety:

- The office or employee shall note the applicable statutory exclusion.
- The office shall consult the county prosecutor if the employee is unsure if the record requested is exempt from disclosure.

If only part of the record is not subject to release, the office will redact such information and release the non-exempted information.

("Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record."):

- The office must cite the applicable exemption with the corresponding redaction.
- The office shall consult the county prosecutor if the employee is unsure if a part of the record requested is exempt from disclosure.

As custodians of public records, the public office has a responsibility to maintain the integrity of the record. As such, any request that includes redactions should be made on a copy of the original record to preserve the authenticity and accuracy of the original document.

128.08 COSTS FOR PUBLIC RECORDS

Generally, a requester is only required to pay this public office for the actual cost of reproduction. Employee time cannot be calculated into the “actual cost” charge. However, in some circumstances, it is permissible for the public office to have an outside contractor make copies and recover the cost of the service directly from the requester (*Huston*, 70 Ohio St. 3d 619). The public office may employ the services of a private contractor to produce copies as long as the decision to do so is reasonable (*State ex rel. Gibbs*, 152 Ohio App 3d 387). The following issues should be considered by a public office in establishing policy for responding to public record requests:

1. Payment in Advance

The public office may require a requester to pay in advance the cost involved in providing the copy of the public record, as requested. For photocopies of either letter or legal sized documents, the fee shall be (actual cost) per photocopy. If video tapes, cassette tapes, or any other type of media is requested, the fee shall be the replacement cost or reproduction cost (copying costs if outside vendor is necessary).

2. Delivery Costs to be Paid in Advance

Requesters may ask that documents be mailed or transmitted to them within a reasonable period of time after the office receives the request for a copy. The public office may require the person making the request to pay in advance the cost of postage if the copy is transmitted by U.S. mail or the cost of delivery if the copy is transmitted other than by U.S. mail, and to pay in advance the costs incurred for other supplies (envelope, etc) used in the mailing, delivery, or transmission.

128.09 PENALTIES FOR PUBLIC RECORDS VIOLATIONS

Public officials may not remove, destroy, transfer, mutilate, or otherwise damage records contrary to the law or they are subject to civil actions in the common pleas court. In these cases public officials may be subject to two types of civil actions:

1. An action to enjoin the official, including the payment of attorney fees of the plaintiff.
2. An action for forfeiture of \$1,000 plus attorney fees by a plaintiff.

A person may also file a mandamus action against any public official for the failure to allow inspection or failure to provide copies of public records. Again, in a mandamus action, attorney fees may be awarded at the discretion of the court.

H.B. 9, enacted in 2007 by the 126th General Assembly, allows courts to award court costs to aggrieved parties and in some instances the award of statutory damages and

attorney fees for non-compliance with the Public Records Law. Following is a summary of these provisions of law:

1. Court Costs

The law provides that if the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with the Public Records Law, the court must determine and award to the aggrieved party all court costs.

2. Statutory Damages And Attorney's Fees

The law provides that if a requestor transmits a written request by hand delivery or certified mail and the public office or the person responsible for public records failed to comply with an obligation in accordance with the Public Records Law a court may award statutory damages fixed at \$100 for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with the Public Records Law, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of \$1,000. *(However, please note that courts have found that a "record" may be a single document within a larger file of documents as well as a compilation of documents" and therefore a fine may be levied for every single page (Kish v. Akron, 109 Ohio St. 3d 162, 2006-Ohio-1244).*

The court must award reasonable attorney's fees when either of the following applies (R.C. 149.43(C)(2)(b)):

- a. The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under the Public Records Law.
- b. The public office or the person responsible for the public records promised to permit the requestor to inspect or receive copies of the public records requested within a specified period but failed to fulfill that promise within that specified period.

However, the court may reduce or not allow an award of statutory damages or attorney's fees if the court determines both of the following:

- a. That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with the Public Records Law and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records

did not constitute a failure to comply with an obligation in accordance with that Law;

- b. That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (a), above, would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

128.11 MEMBERS OF COUNTY RECORDS COMMISSION

Each county has a county records commission composed of the following:

1. One member of the Board of County Commissioners,
2. Prosecuting Attorney,
3. County Auditor,
4. County Recorder, and
5. Clerk of Courts.

The member of the county commissioners serves as the chair of the county records commission (ORC 149.38).

128.12 POWERS AND DUTIES OF RECORDS COMMISSION

The following are the major powers and responsibilities of the county records commission:

1. To appoint a secretary who may be a member of the commission or any other individual;
2. To employ an archivist or records manager if the need exists;
3. To meet at least once every six months and upon the call of the chair;
4. To provide rules for the retention and disposal of county records;
5. To review applications for one-time records disposal (RC-1) and to review schedules of records retention and disposal (RC-2) submitted by county offices. It may also at any time review any previously approved schedule and revise it (ORC 149.38).

128.13 RECORDS DISPOSAL PROCEDURE

There are three operative forms used in the records disposal process. These include the following:

1. **RC-1** The RC-1 is an application for one-time disposal. In using an "Application for One-Time Records Disposal," an office requests permission to destroy or transfer particular records covering only specified dates. This is especially useful for destroying or transferring obsolete records.
2. **RC-2** The RC-2 is a record retention schedule. A "Schedule of Records Retention and Destruction" is designed to implement an ongoing records management program. The schedule would describe how long a record is to be retained, rather than listing the specified dates or records to be destroyed.
3. **RC-3** The RC-3 is a "Certificate of Disposal" and must be approved by the Ohio Historical Society and State Auditor before any record may be destroyed.

These three forms are available on the web site of the Ohio Historical society at: <http://www.ohiohistory.org/resource/lgr/forms.html> .

The following steps should be followed when disposing of records:

1. The office desiring to dispose of records should submit a disposal request to the county records commission. When the county records commission has approved any county application for one-time disposal of obsolete records (RC-1) or any schedule of records retention and disposition (RC-2), the commission shall send that application or schedule to the Ohio Historical Society (OHS) for its review.
2. The Ohio Historical Society shall review the application or schedule within a period of not more than 60 days after its receipt. Upon completion of its review, the OHS shall forward the RC-1 or RC-2 to the State Auditor for approval or disapproval.
3. The State Auditor shall approve or disapprove the application (RC-1) or schedule (RC-2) within a period of not more than 60 days after receipt of it.
4. Before public records are to be disposed of pursuant to an approved RC-1 or RC-2, the county records commission must also file a certificate of disposal (RC-3) with the OHS.
5. OHS has 15 business days to select for its custody those records it considers to be of continuing historical society.
6. Upon the expiration of the 15 day period, the county records commission also shall notify public libraries, the county historical society, state universities, and

other institutions that have provided the commission with their name and address for these notification purposes, that the commission has informed the OHS of records disposal and, upon written agreement with the OHS, such institutions may select records of continuing historical value.

Tables 128-2 and 128-3 provide flow charts for the public record retention and disposition process.

In addition, the rules of the county records commission shall include a rule that requires any receipts, checks, vouchers, or similar records pertaining to expenditures from the delinquent tax and assessment collection fund (DTAC) or furtherance of justice fund (FOJ) be retained for at least four years.

128.14 TRANSFER OF RECORDS

The execution of a written agreement is necessary to transfer records, and they may only be transferred to organizations capable of meeting accepted archival standards for the housing and use of the documents.

Some records may be transferred to a regional records center that serves all counties in Ohio. If they are transferred to one of the seven members of the Ohio Networks of the American History Research Center locations, the county records will be arranged by county office and will be available to all persons on the same basis as before transfer to the center. Refer to Table 128-4 for a listing of these centers.

128.15 TRAINING AND COUNTY OFFICE REQUIREMENTS

H.B. 9 (126th General Assembly) placed a number of training and associated requirements upon local governments. The legislation requires local governments to adopt public records policies, update their record retention schedules, create public records posters, and also further established public records training requirements of local elected officials or their designees.

CCAO has provided county officials with a public records policy that is user-friendly for potential practitioners as well as the public. It is, of course, a careful balance between an all-inclusive guide to public records law, including all known exemptions, and a workable guide utilizing layman's terms. As the guide mentions, local governments and agencies will want to work with their County Prosecutor to familiarize themselves with exemptions and case law that are applicable to the records they maintain. For a copy of the CCAO model policy, please use the following link:

<http://www.ccao.org/LinkClick.aspx?link=0709+Model+Public+Records+Policy.pdf&tabid=283&mid=1023&language=en-US>

Of course, training requirements play an extremely large role in fulfilling the requirements of HB 9. All elected officials or their appropriate designees are required to attend public records training approved by the Attorney General. Elected officials may

designate anyone to attend the training on their behalf. CCAO recommends doing so by resolution for audit purposes. The training must be for three hours every term of office for which the elected official was appointed or elected to the public office. The Attorney General's office has begun posting times and locations for such training seminars on their website at: <http://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws/House-Bill-9-Certified-Training>. In addition, the State Auditor's office also provides the approved training. For a list of such training sessions, please use the following link: <http://www.auditor.state.oh.us/conferences/hb9/default.htm> .

128.16 EMAIL

E-mail messages must be analyzed like any other items to determine if they meet the definition of a record. As electronic documents all e-mails are items containing information stored on a fixed medium (the first part of the definition). If an e-mail is received, created by, or comes under the jurisdiction of a public office (the second part of the definition), then its status as a record depends on the content of the message. If an e-mail created by, received by, or coming under the jurisdiction of a public office serves to document the organization, functions, etc. of the public office, then it meets the three parts of the definition of a record. If an e-mail does not serve to document the activities of the office, then it does not meet the definition of a record.

Although the Ohio Supreme Court has not ruled directly on whether communications of public employees to or from private e-mail accounts that meet the definition of a record are subject to the Public Records Act, the issue is analogous to mailing a record from one's home, versus mailing it from the office - the location from which the item is sent does not change its status as a record.

It is important to note that email records, like all other records, must be maintained in accordance with the office's relevant records retention schedules. In *State ex rel. Toledo Blade Co v. Seneca County Board of Commissioners* the Court ordered the county to recover the content of requested e-mails that had been deleted by the commissioners at a considerable cost to the county (120 Ohio St. 3d 372).

128.17 SOCIAL SECURITY NUMBERS

Social Security Numbers (SSNs) should be redacted before the disclosure of public records, even court records. The Ohio Supreme Court has held that while the federal Privacy Act (5 U.S.C. § 552a) does not expressly prohibit release of one's SSN, the Act does create an expectation of privacy as to the use and disclosure of the SSN (*State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 70 Ohio St. 3d 605, 607).

Any federal, state, or local government agency that asks individuals to disclose their SSNs must advise the person: (1) whether that disclosure is mandatory or voluntary and, if mandatory, under what authority the SSN is solicited; and (2) what use will be made of it (*Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (5 U.S.C. § 552a*

(*West 2000*). In short, a SSN can only be disclosed if an individual has been given prior notice that the SSN will be publicly available

However, the Ohio Supreme Court has ruled that 9-1-1 tapes must be made immediately available for public disclosure without redaction, even if the tapes contain SSNs (*ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St. 3d 172). The Court explained that there is no expectation of privacy when a person makes a 9-1-1 call. Instead, there is an expectation that the information will be recorded and disclosed to the public. Similarly, the Ohio Attorney General has opined that there is no expectation of privacy in official documents containing SSNs (*1996 Ohio Op. Att'y Gen. No. 034*).

The Ohio Supreme Court's interpretation of Ohio law with respect to release and redaction of SSNs is binding on public offices within the state. However, a narrower view expressed by a 2008 federal appeals court decision is worth noting, as it may impact future Ohio Supreme Court opinions regarding the extent of a person's constitutional right to privacy in his or her SSN. In *Lambert v. Hartman*, the U.S. Sixth Circuit Court of Appeals looked to its own past decisions to find a constitutional privacy right in personal information in only two situations: (1) where release of personal information could lead to bodily harm, and (2) where the information released was of a sexual, personal, and humiliating nature (517 F.3d 433, 445 (6th Cir. 2008)). The Court explained that it would only balance an individual's right to control the nature and extent of information released about that individual against the government's interest in disseminating the information when a fundamental liberty interest is involved. The interest asserted in *Lambert* - protection from identity theft and the resulting financial harm - was found not to implicate a fundamental right, especially when compared to the fundamental interests found in earlier cases; i.e., preserving the lives of police officers and their family members from "a very real threat" by a violent gang and withholding the "highly personal and extremely humiliating details" of a rape.

128.18 EMPLOYMENT RECORDS

Public employee personnel records are generally regarded as public records. However, if any item contained in a personnel file or other employment records is not a "record" of the office, or is subject to an exception, it may be withheld. We recommend that Human Resource officers prepare a list of information and records in the office's personnel files that are subject to withholding, including the explanation and legal authority related to each item. The office can then use this list for prompt and consistent responses to public records requests. In addition the OHIO SUNSHINE LAWS UPDATE provides a similar checklist, replicated in Table 128-5. The following items are also of importance related to employment records:

1. Non-Records

To the extent that any item contained in a personnel file is not a "record," i.e., does not serve to document the organization, operations, etc., of the public office, it is not

a public record and need not be disclosed. Based on this reasoning, the Ohio Supreme Court has found that in most instances the home addresses of public employees are not “records” of the office. (*State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160). Although Ohio case law is silent on other specific non-record personnel items, a public office may want to evaluate emergency telephone numbers, employee banking information, insurance beneficiary designations, and other items maintained as employment records which may not serve to document the activities of the office. Non record items may be redacted from materials which are otherwise records.

2. Names and Dates of Birth of Public Officials and Employees

Pursuant to ORC Section 149.434, each public office or person responsible for public records shall maintain a database or a list that includes the name and date of birth of all public officials and employees elected to or employed by that public office. The database or list is a public record and shall be made available upon a request.

3. Resumes and Application Materials

There is no public records exception which generally protects resumes and application materials obtained by public offices in the hiring process. The Ohio Supreme Court has found that the public has “an unquestioned public interest in the qualifications of potential applicants for positions of authority in public employment” (*State ex rel. Consumer News Services, Inc. v. Worthington Bd. of Educ.*, 97 Ohio St. 3d 58). For example, when a city board of education used a private search firm to help hire a new treasurer, it was required to disclose the names and resumes of the interviewees. The fact that a public office has promised confidentiality to applicants is irrelevant. A public office’s obligation to turn over application materials and resumes extends to records in the sole possession of private search firms used in the hiring process.

As with any other category of record, if an exception for home address, social security number, or other specific record applies, it may be used to redact only the protected information.

4. Background Investigations

Background investigations are not subject to any general public records exception, although specific statutes may except defined background investigation materials kept by specific public offices.

However, criminal history “rap sheets” obtained from the federal National Crime Information Center system (NCIC) or through the state Law Enforcement Automated Data System (LEADS) are subject to a number of statutory exceptions (ORC 109.57(D),(H); Ohio Adm. Code 4501:2-10-06(B); 42 U.S.C. § 3789g; 28 C.F.R. § 20.33(a)(3)).

5. Evaluations and Disciplinary Records

Employee evaluations are not subject to any general public records exception. Likewise, records of disciplinary actions involving an employee are not excepted. Specifically, the Confidential Law Enforcement Investigatory Records (CLEIR) exception does not apply to routine office discipline or personnel matters (*State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St. 3d 578) when such matters are the subject of an internal investigation within a law enforcement agency.

6. Physical Fitness, Psychiatric, and Polygraph Examinations

As used in the Public Records Act, the term “medical records” is limited to records generated and maintained in the process of medical treatment (see “Medical Records”, below). Accordingly, records of examinations performed for the purpose of determining fitness for hiring or for continued employment, including physical fitness, psychiatric, and psychological examinations, are not excepted from disclosure as “medical records.” Similarly, polygraph, or “lie detector,” examinations are not “medical records”, nor do they fall under the CLEIRs exception when performed in connection with hiring. Note, though, that a separate exception does apply to “medical information” pertaining to those professionals covered under ORC 149.43(A)(7)(c).

While fitness for employment records do not fit within the definition of “medical records,” they may nonetheless be excepted from disclosure under the so-called “catch all” provision of the Public Records Act as “records the release of which is prohibited by state or federal law.” Specifically, the federal Americans with Disabilities Act (ADA) and its implementing regulations permit employers to require employees and applicants to whom they have offered employment to undergo pre-employment inquiry and medical examination. Information regarding medical condition or history must be collected and kept on separate forms and in separate medical files, and must be treated as confidential, except as otherwise provided by the ADA. As non-public records, the examinations may constitute “confidential personal information” under Ohio’s Personal Information Systems Act.

7. Medical Records

“Medical records” are not public records, and a public office may withhold any medical records in a personnel file. As noted above, however, only those records that meet the definition of “medical records,” i.e., that are generated and maintained in the process of medical treatment may be withheld under this exception. Note that the federal Health Insurance Portability and Accountability Act (HIPAA), does not apply to records in employer personnel files, but that the federal Family and Medical Leave Act (FMLA), or the Americans With Disabilities Act (ADA) may apply to certain personnel records.

8. School Records

Education records, which include but are not limited to school transcripts, attendance records, and discipline records, that are directly related to a student and maintained by the educational institution, as well as personally identifiable information from education records, are generally protected from disclosure by the school itself through the federal Family Educational Rights and Privacy Act (FERPA). However, when a student or former student directly provides such records to a public office they are not protected by FERPA, and are considered public records.

9. Social Security Numbers and Taxpayer Records

Social Security Numbers (SSNs) should be redacted before the disclosure of public records. The Ohio Supreme Court has held that although the Federal Privacy Act (5 U.S.C. §552a) does not expressly prohibit release of one's SSN, the Act does create an expectation of privacy as to the use and disclosure of the SSN. Ohio statutes or administrative code may provide other exceptions for SSNs for specific employees or in particular locations, and/or upon request.

Information obtained from municipal tax returns is confidential. One Attorney General Opinion found that W-2 federal tax forms prepared and maintained by a township as an employer are public records but that W-2 forms filed as part of a municipal income tax return are confidential.

10. Residential and Familial Information of Listed Safety Officers

As detailed elsewhere in this Chapter, the residential and familial information of certain listed public employees may be withheld from disclosure.

11. Bargaining Agreement Provisions

Courts have held that collective bargaining agreements concerning the confidentiality of records cannot prevail over the Public Records Act. For example, a union may not legally bar the production of available public records through a provision in a collective bargaining agreement.

12. Statutes Specific to a Particular Agency's Employees

Statutes protect particular information or records concerning specific public offices, or particular employees within one or more agencies.

TABLE 128-1

THE TOP TEN PUBLIC RECORDS MYTHS (These are not the correct answers)

- 1. If you don't know the answer to a records request, it's best to "Just Say No."** In the context of a public record request, "just saying no" almost always creates more problems than it solves. In all but the most routine situations, the right response to a public records request is that "it depends"---or perhaps more properly---"we'll be happy to allow inspection or provide copies to the extent permissible as soon as our staff legal counsel has had an opportunity to review the documents."
- 2. When confidential information is mixed on a page with material that isn't confidential, you don't have to turn over anything.** If a given page includes both information which must be released and information which does not have to be released, the latter must be "redacted" (usually by blacking it out) and the remainder must be disclosed. Where information excepted is "so intertwined" with the information otherwise required to be released as to reveal the excepted information from the context, the record itself, and not just the excepted information, may be withheld.
- 3. Always demand a signature on the records request form.** The Public Records Act doesn't permit a public office to require that a person fill out a form before they can see records. The bottom line: a public office can ask (nicely) a person to fill out an "information request form," but it can't require that the form be filled out before the person gets to see the records. Neither does the Public Records Act require that the person put his request in a written correspondence. A request may probably be an oral one. Public record requests also must be fulfilled by United States mail if the requestor asks them to be sent by mail.
- 4. A personal privacy balancing test must be applied each time a request is made for public records act.** This issue arises most commonly with respect to personnel files. The common law right of privacy in Ohio (*Housh v Peth*, 165 Ohio St. 35), is not a state law which prohibits the release of records. There is no statutory "balancing test" where an individual's right of privacy is weighed against the public's "right to know." Absent an otherwise applicable exception, such as the residential and familial information of law enforcement personnel under ORC Section 149.43(A)(7), information contained in personnel files is generally public. The balancing of competing public and private interests has been done by the General Assembly and the competing policy considerations have been factored into the exceptions to the Public Records Act.
- 5. If no rule or statute requires a record to be kept, the record doesn't have to be disclosed.** The Public Records Act requires only that the record be created,

received by, or come under the jurisdiction of a public office before it is subject to disclosure. The Act is not limited to records that must specifically be created or maintained under state statute or rule. The language in the Public Records Act that used to refer to records that were "required to be kept" was deleted in a 1985 amendment.

6. **If an investigation is ongoing, the investigative files are automatically closed.** Just because an investigation is ongoing doesn't mean that all of the investigatory records are exempt from disclosure. Similarly, some of the information in an "inactive" investigation, i.e., one that has not yet resulted in charges being brought, may not have to be disclosed.
7. **If information is not kept on paper, it doesn't have to be released.** Information kept on computer disks or tapes, audio or video tape, microfilm, microfiche, or just about any other form of media imaginable is covered by the Public Records Act. Senate Bill 78 of the 123rd General Assembly, which became effective in December 1999, allows record requesters to receive records either 1) on paper; 2) in the same medium in which the office keeps the record; or 3) in any other medium requested that the office determines can be provided "as an integral part of normal operations."
8. **A settlement agreement can require that records be treated as confidential.** Parties to a public contract---including a settlement agreement---cannot nullify the Public Record Act's guarantees of public access to public records. A public office's assurance of confidentiality, alone, cannot protect documents from public disclosure. Absent a statutory exception, a "public entity cannot enter into enforceable promises of confidentiality with respect to public records."
9. **If you don't need a record, just "pitch it."** Records must only be destroyed in accordance with properly approved record retention schedules. If no retention schedule addresses a given classification of records, the records cannot be destroyed until the schedule is appropriately amended.
10. **If this kind of request has come through the office before, you don't need to bother legal counsel.** All too often, counsel's advice from years ago gets handed down from generation-to-generation and slowly becomes ingrained as "departmental policy." The problem with this is that the Public Records Act has been amended and interpreted so often that last year's---or even last months---right answer may be today's wrong answer.

TABLE 128-2

APPROVAL PROCESS FOR RETENTION SCHEDULES (RC-2) AND ONE-TIME DISPOSALS (RC-1)

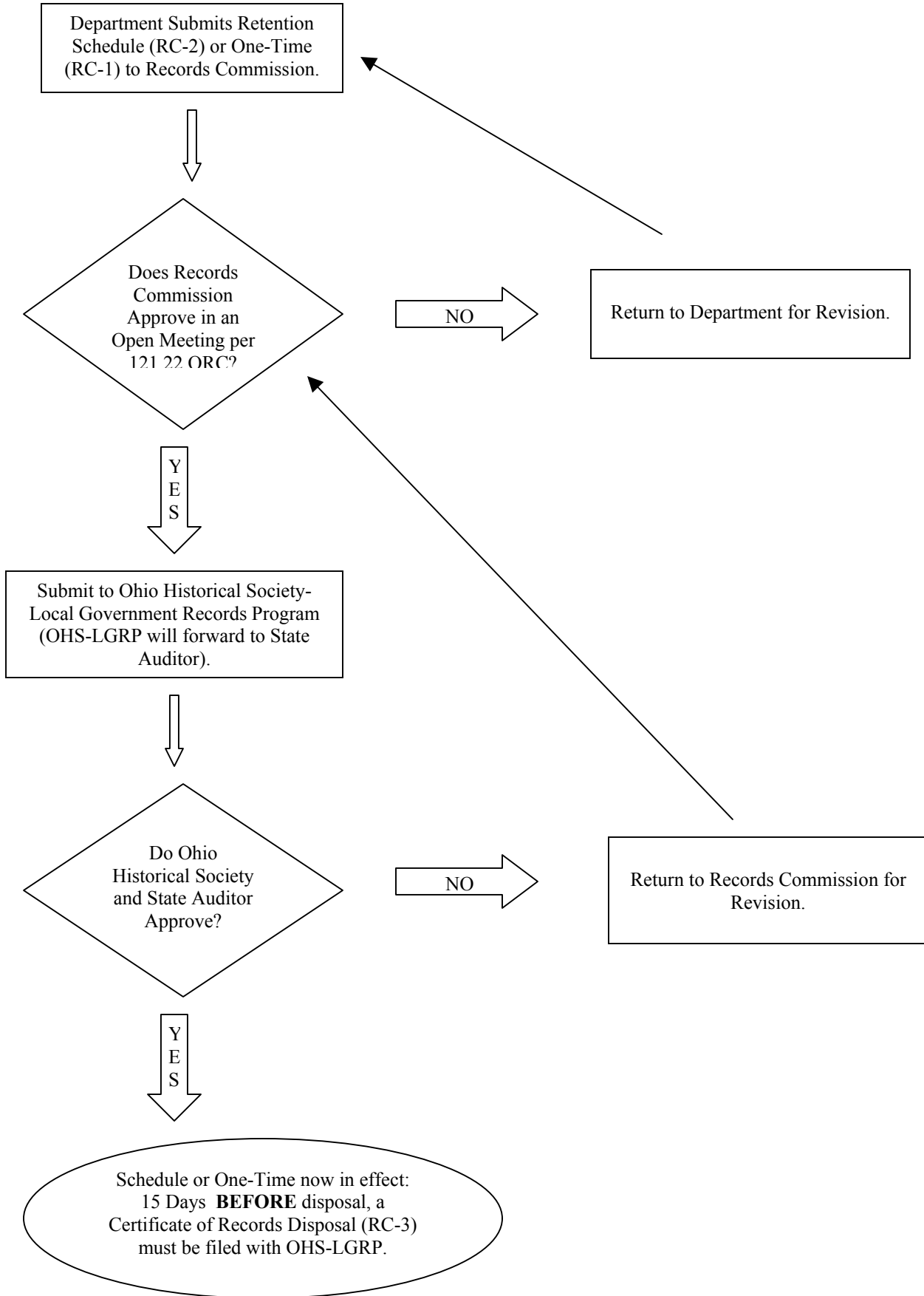


TABLE 128-3

RECORDS DISPOSAL PROCESS; DETERMINING RECORDS DISPOSAL

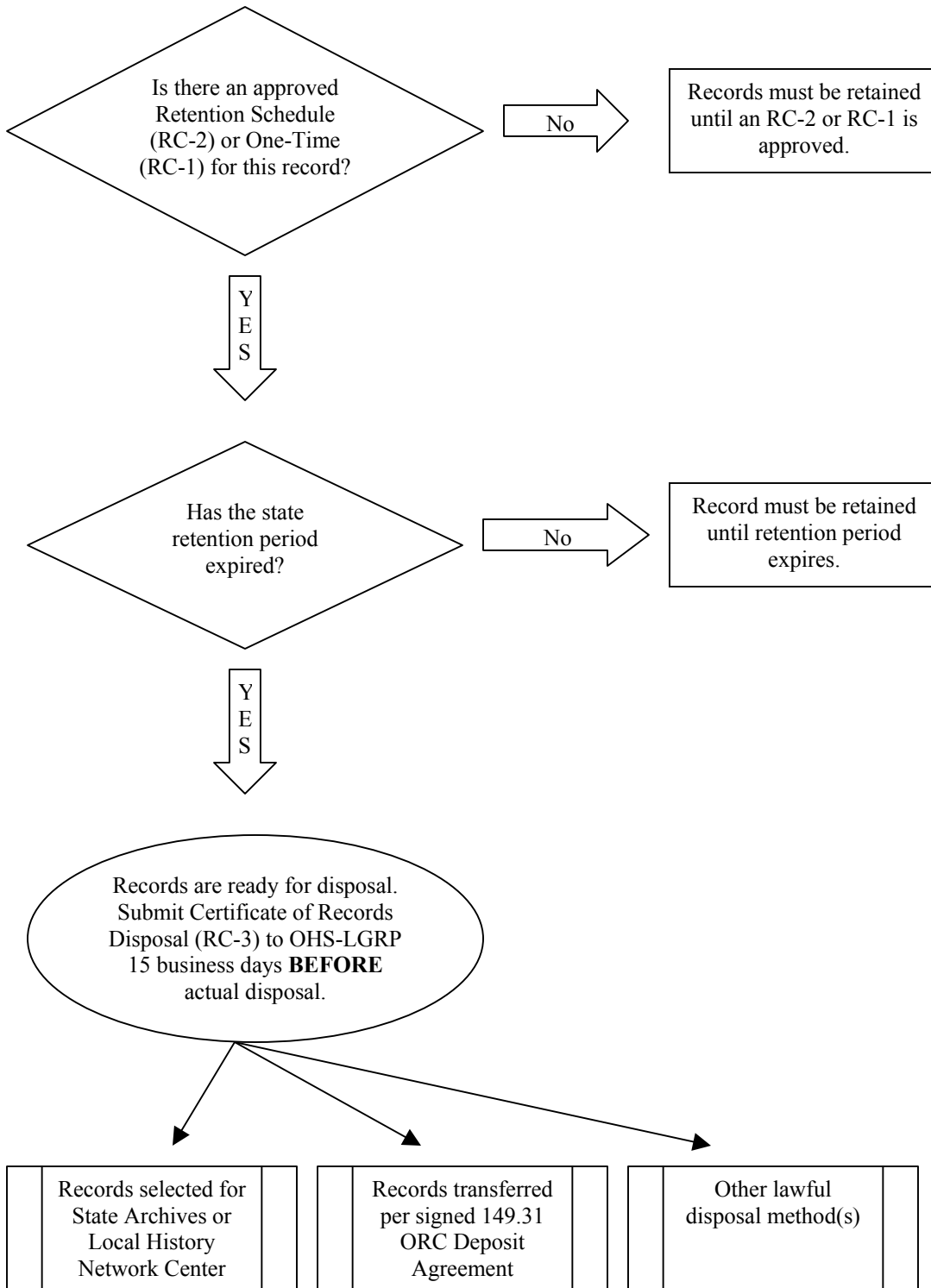


TABLE 128-4

OHIO NETWORK OF AMERICAN HISTORY RESEARCH CENTERS

University of Akron - Archives Services
Polsky Building
225 S. Main St.
Akron, OH 44325-1702
(330) 972-7670

Center for Archival Collections
Jerome Library - 5th Floor
Bowling Green State University
Bowling Green, OH 43403-0175
(419) 372-2411

Archives & Rare Books Department
Blegen Library - 8th Floor
University of Cincinnati
Cincinnati, OH 45221-0113(513) 556-1959

Local Government Records Program (LGRP)
Ohio Historical Society - State Archives
1982 Velma Avenue
Columbus, OH 43211-2497
(614) 297-2553

Western Reserve Historical Society Library
10825 East Blvd.
Cleveland, OH 44106-1788
(216) 721-5722

Archives and Special Collections
Wright State University - Dunbar Library
Dayton, OH 45435-0001
(937) 775-2092

Youngstown Historical Center of Industry and Labor
151 West Wood Street
PO Box 533
Youngstown, OH 44501-0533
(330) 743-5934

TABLE 128-5

PERSONNEL FILES CHECKLIST

Items from personnel files that are subject to release with appropriate redaction:

- Payroll records
- Timesheets
- Salary information
- Employment application forms
- Resumes
- Training course certificates
- Forms documenting receipt of office policies, directives, etc.
- Forms documenting hiring, promotions, job classification changes, separation, etc.
- Position descriptions
- Performance evaluations
- Background checks, other than LEADS throughput, NCIC and CCH
- Leave conversion forms
- Letters of support or complaint
- Disciplinary investigation/action records, unless exempt from disclosure by law

Items from personnel files that may or must be withheld:

- Social security numbers (based on the federal Privacy Act: 5 USC §552a)
- Public employee home addresses, generally (as non-record)
- Residential and familial information of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or BCI & I investigator, other than residence address of prosecutor (See ORC 149.43 (A)(1)(p))
- Charitable deductions and employment benefit deductions such as health insurance (as non-records)
- Beneficiary information (as non-record)
- Federal tax returns and “return information” filed under jurisdiction of IRS (26 USC §6103)
- PERS personal history information (R.C. 3307.20 (B)(2))
- Taxpayer records maintained by Ohio Dept. of Taxation and by municipal corporations (RC 5703.21; RC 718.13)

- “Medical records” that are generated and maintained in the process of medical (RC 149.43(A)(1)(a) and (A)(3))
- LEADS, NCIC or CCH criminal record information (42 USC §3789g; 28 CFR §20.21, §20.33(a)(3); ORC 109.57(D) & (E); OAC 109:05-1-01; OAC 4501:2-10-06)
- Records of open internal EEO investigations (discretionarily exempt as Confidential Law Enforcement Investigatory Records under RC 149.43(A)(1)(h) if conducted pursuant to OAC Rule 123:1-49)