Ohio Sunshine Laws Certification Training

Using Ohio’s Public Records Act to Promote Open and Accountable Government

A seminar for public officials, citizens, and the media presented by Ohio Attorney General Mike DeWine
WHY DO WE CARE?
PUBLIC RECORDS ACT OVERVIEW

- Definitions
- Obligations
- Exceptions
- Liabilities
WHAT IS A PUBLIC RECORD?

Ohio Revised Code Section 149.43

“‘Public Record’ means records kept by any public office . . .”
WHO IS SUBJECT TO THE PRA?

- Public Offices
- Persons Responsible
- Functional Equivalents
PRIVATE ENTITIES PERFORMING GOVERNMENT WORK
FUNCTIONAL EQUIVALENCE

1. Performing a governmental function
2. Level of government funding
3. Government involvement or regulation
4. Created to avoid requirements of the PRA
DEFINITION OF RECORD

Fixed Medium

Created, Received, Under Jurisdiction

Documents Activities
Fixed medium:

Not fixed medium:
CREATED, RECEIVED BY, OR COMING UNDER THE JURISDICTION OF A PUBLIC OFFICE
DOCUMENTS ACTIVITIES OF THE OFFICE
DOCUMENTS ACTIVITIES OF THE OFFICE

PUBLIC RECORDS — RECORDS “KEPT BY” ANY PUBLIC OFFICE
RECORD VS. NON-RECORD

- PRA does not apply to non-records
- Non-record items can be redacted or removed
- Non-record ≠ confidential
NOTES

Not records if:

1. Personal papers
2. Kept for convenience; and
3. Others did not use/access
DRAFTS

- Record?
- Transient?
“I’d like copies of all the pictures that the Attorney General has on his desk.”
Fixed medium

Created, received, under jurisdiction of office

Documents activities of the office

Non-record
“Send me a copy of AAG Joe Smith’s personal cell phone call detail statement - he receives a state employee discount on his bill!”

Record?  ☑️ Non-record?  ❌
Fixed medium

Created, received, under jurisdiction of office

Documents activities of the office

Non-record
WHO CAN MAKE A PUBLIC RECORDS REQUEST?

Any “person”
IDENTITY AND MOTIVE IRRELEVANT

Cannot ask for motive unless specifically authorized by law

Cannot demand the identity of the requester
REQUESTER’S RIGHTS TO:
INSPECT OR COPY
COPIES

Requester can choose:

1. Paper
2. Medium record is kept on
3. Any other reasonably available medium
INSPECTION: REASONABLE TIMES DURING BUSINESS HOURS
TIME TO RESPOND

Includes time to:

1. Retrieve
2. Review
3. Obtain legal advice
4. Redact
PUBLIC RECORDS POLICIES


COPYING AND MAILING COSTS

These sealed public records may be charged only the actual cost of making copies, not labor. The charge for paper copies is 12 cents per page. The charge for electronic files encompasses a compact disc (10 cents per disc).

A requester may be required to pay in advance for the actual costs involved in providing the copy. This requester may choose whether to have the record duplicated upon paper, upon the same medium on which the public record is kept, or upon any other medium on which the office determines that the record can reasonably be duplicated as an integral part of the office’s normal operations.

If a requester asks that documents be delivered to them, he or she may be charged the actual cost of the postage and mailing supplies, or other actual costs of delivery. There is no charge for e-mailed documents.

MANAGING RECORDS

Public office records are subject to records retention schedules. The offices’ current schedules are available at http://www.ohioattorneygeneral.gov/recordretention. A record is readily available to the public as required by Ohio Revised Code §419.43(B)(2).

DISCLOSURE AND PROTECTION OF RECORDS

If the requester makes an ambiguous or overly broad request or has difficulty in making a request such that the office cannot reasonably identify what public records are being requested, the request may be denied, but the office must then provide the requester an explanation of the denial. An explanation must identify the reason for which the request is denied, describe the office’s interpretation of the request, and explain how to identify, locate, or deliver the public records that have been requested, and (D) the requester is first told that a written request is not required and that the requester may decline to reveal the requester’s identity or intended use.

In processing the request, the office does not have an obligation to create new records or perform a search or research for information in the office’s records. An electronic record or record stored on another medium can be disclosed in the office’s standard use of sorting, filtering, or querying features. Although not required to do so, the office may consider generating new records when it makes sense and is practical under the circumstances.

In processing a request for inspection of a public record, an office employee may accommodate the requester during inspection to make certain original records are not damaged, torn, or otherwise harmed during the inspection.

A copy of the most recent edition of the Ohio Sunshine Laws Manual is available via the Attorney General’s website (www.ohioattorneygeneral.gov/sunshine) for the purpose of inspecting employees of the office and the public to access the office’s obligations under the Open Meetings Act, records retention laws, and Personal Information Systems Act.

ELECTRONIC RECORDS

Records in the form of email, text messaging, and instant messaging, including those sent and received via a handheld communications device, are to be treated in the manner of any other medium.

Public record content transmitted to or from personal accounts or personal devices is subject to disclosure. All employees or representatives of this office are required to retain email records and other electronic records in accordance with applicable records retention schedules.
A PROPER REQUEST

1. Seeks existing records
2. Not research or information
IS THE REQUEST AMBIGUOUS, OR OVERLY BROAD?

Requester has a responsibility to identify records with “reasonable clarity”
LIMITS ON REQUESTS

I’d like the names and addresses of all single girls interested in dating my grandson.

 Grandma REQUEST
NEGOTIATE

Required when denying request as ambiguous or overly broad

Explain how records are maintained and accessed
OPTION TO ASK FOR PURPOSE, IDENTITY, OR WRITTEN REQUEST

Conditions:

1. Must enhance ability to identify, locate, or deliver records

AND

2. Advise that providing information is not required
CHARGING?

Research Fee $500
Photocopies $200
Clerk's Time $460
Paper Clips $15

Don't you know it's called the FREE-dom of information Act?!

Municipal Office

And you won't get the info for six months
ACTUAL COST

https://www.youtube.com/watch?v=PZbqAMEwtOE
DELIVERY?

Any available means
GO ABOVE AND BEYOND

Save...

Time

Expense

Conflict
LEGISLATURE CAN CHANGE RULES
MAKING NON-RECORDS RECORDS

Employee birth dates
MORE ACCESS FOR CERTAIN REQUESTERS

Journalists

Next of kin and Insurers (coroners’ records)
INMATES
SOME OFFICES CAN CHARGE MORE
EXCEPTIONS ARE ONLY CREATED BY APPLICABLE STATE OR FEDERAL LAW

NOT by contract
MANDATORY EXCEPTIONS

No choice but to withhold
EXAMPLES OF MANDATORY EXCEPTIONS

Family Educational Rights and Privacy Act (FERPA)

Law Enforcement Automated Data System (LEADS)
DISCRETIONARY

May withhold, but not required to
NO EXCEPTION?

Government job application materials

Juvenile records

General Privacy
MULTIPLE/MIXED EXCEPTIONS

Non-record

Mandatory

Discretionary
WAIVER?

Intentional disclosure \(=\) Permanent waiver
WITHHOLDING/REDACTING

• Notify where you’ve withheld

• Provide explanation and the legal authority!
PROTECTED INFORMATION MAY BE WITHHELD
WITHHOLD IN GOOD FAITH
EXAMPLE

Hi Sarah,

We got a call from a constituent with a public records question. Can you please call her back at 123-456-7890?

Redact? Release?
February 24, 2016

Jane Smith
123 Main St.
Columbus, Ohio 43215
jms@jms.com

Re: Public Records Request # 16-001

On behalf of Ohio Attorney General Mike DeWine, I am writing in response to your public records request letter dated February 10, 2016, which our office received on February 12, 2016. A copy of your letter is attached for reference.

Please find attached the records responsive to your request. Note that we have redacted or withheld information that is not a record of our office, pursuant to State ex rel. Dispatch Printing Co. v. Johnson, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274 and State ex rel. Fant v. Enright, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993).

If you have any questions or concerns regarding this request, please feel free to contact the Public Records Unit at 614-466-2872.

Brittanie M. Reed
Paralegal - Public Records Unit

Attachments

cc: Renata Y. Staff, Associate Assistant Attorney General, Public Records Unit
REDACTING VS. WITHHOLDING

http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=146519
**Ohio Civil Service Application for State and County Agencies**

**POSITION:** INVESTIGATOR

Please submit one application per position or examination to the address indicated on the job posting or examination announcement. Copies are acceptable. Applications lacking sufficient information will not be processed. Please ensure your application is received or postmarked by the closing date, as required by the hiring agency. Please be sure to complete the entire application. Also note that, once submitted to a governmental agency, this completed form will be subject to all applicable public records laws.

**PLEASE TYPE OR PRINT IN INK**

| **NAME:** (Last, First, Middle) | BUCKEYE, BARRY B. |
| **ADDRESS:** (Street, City, State, ZIP Code) | 1971 BROWNS BLVD. |
| **HOME PHONE:** (330) 555-6707 | **ALTERNATE PHONE:** (330) 555-1921 |
| **DRIVER'S LICENSE:** Yes | **STATE:** OH |
| **DATE OF BIRTH:** Year Not Required | **CLASS:** CDL |
| **DIRECTOR:** | **ADDRESS:** |
| **E-MAIL ADDRESS:** REDSKYLER8GMAIL.COM |
| **LEGAL RIGHT TO WORK IN:** |
| **THE U.S.:** Yes | **No** |

**PREFERENCES**

| **PREFERRED SALARY:** | **ARE YOU WILLING TO RELOCATE?** |
| **WHAT TYPE OF JOB ARE YOU LOOKING FOR?** | **TYPES OF WORK YOU WILL ACCEPT:** |
| **SHIFTS YOU WILL ACCEPT:** | **Full-Time** |
| **EDUCATION** |

**HIGH SCHOOL NAME:** | **LOCATION:** (City, State) |

**SSN 123-45-6789**

**DATE OF BIRTH**

**COUNTY:** SUMMIT

**Day** | **Evening** | **Night** | **Rotating** | **Weekends** | **On Call (as needed)**

**State ex rel. Beacon Journal Publ’g Co. v. City of Akron, 70 Ohio St.3d 605**

**Redact?**
Also consider protections for certain covered professionals, R.C. 149.43(A)(7)
PREPARATION

• Training
• Lists
• Records
  Retention
  Schedules
• Resources
CONSULT YOUR LEGAL COUNSEL
Minutes Available
April 21, 2015 by Daniel Noonan

The Minutes are available for the October 15, 2014 and January 14, 2015 meetings on the Meetings page.
DO MORE THAN IS REQUIRED
NEGOTIATE TO A WIN-WIN SOLUTION
DOCUMENTING REQUESTS

Benefits:

- Defending litigation
- Duplicative requests
WHAT TO DOCUMENT:

1. The request itself
2. Acknowledgement of request
3. Communication with requester
4. All steps taken
5. Records provided
   • AOS Bulletin 2011-006
OTHER PRACTICAL TIPS

- Contact legal counsel early
- Negotiate if appropriate
POTENTIAL LIABILITIES

• Mandamus or Court of Claims proceeding
• Order to produce records
• Statutory damages
• Attorney fees
# REQUIREMENTS FOR STATUTORY DAMAGES

1. **Certified mail or hand delivery**

2. **Lost use of records**

AND
ATTORNEY FEES

• Available if...
  • Public office acted in bad faith in providing records after mandamus lawsuit filed

• Not Available if...
  • Any well-informed person would have reasonably believed at the time that the conduct of your office was not violating the letter or spirit of the PRA
RECORDS CREATION

“Shall make” only necessary records
ORGANIZE AND MAINTAIN

“I am not disorganized — I know exactly where everything is! The newer stuff is on top and the older stuff is on the bottom.”
RECORDS RETENTION APPROVAL

Local Records Commission

Ohio History Connection (State Archives)

Auditor of State
## CONTENTS OF RETENTION SCHEDULES

<table>
<thead>
<tr>
<th>Series Title</th>
<th>Series Description</th>
<th>Retention Period</th>
<th>Retention Format</th>
<th>Disposal Method</th>
</tr>
</thead>
</table>
FACTORS DETERMINING RETENTION PERIOD

- Administrative Purpose
- Fiscal Tracking
- Legal Value
- Historical Value
RESOURCES

Ohio History Connection
State Archives

Department of Administrative Services
General Schedules
HAVE RETENTION SCHEDULES READILY AVAILABLE
DISPOSE OF RECORDS PROPERLY

As provided for by:

- Law
- Records retention schedules
LIABILITIES FOR IMPROPER DISPOSAL

Potential Consequences:

- Civil lawsuit
- Court of Claims proceeding
- Forfeiture of $1,000 per violation
- Attorney fees
“PERSON AGGRIEVED”

http://www.ohiochannel.org/MediaLibrary/Media.aspx?fileId=130353
R.C. 149.351

Not “aggrieved” if request was contrived to create liability
OPEN MEETINGS ACT OVERVIEW

- Definitions
- Obligations
- Executive Session
- Liabilities
WHO IS SUBJECT AND WHEN?

Applies to “public bodies” when:

1. there is a *prearranged* gathering of
2. a *majority* of the members of a public body
3. conducting or discussing *public business*
“PUBLIC BODIES”

Includes committees and sub-committees
Prearranged Discussion of Public Business Majority of Members
RETREATS, WORK SESSIONS, ETC.?
MEETING MUST BE USED FOR DISCUSSION AND DELIBERATION OF “OFFICIAL BUSINESS”

NOT NECESSARILY FOR ...

- Information gathering
- Presentations
- Isolated conversations between employees
MEETING OBLIGATIONS

1. Notice
2. Openness
3. Minutes
NOTICE RULE REQUIREMENTS

1. Be consistent

AND

2. Actually reach the public
OBLIGATION 1: NOTICE

Public bodies establish their own notice rules
NOTICE REQUIREMENTS DEPEND ON TYPE OF MEETING

Two Types of Meetings:

<table>
<thead>
<tr>
<th>Regular</th>
<th>Special</th>
</tr>
</thead>
<tbody>
<tr>
<td>Prescheduled Intervals</td>
<td>Anything other than Regular</td>
</tr>
</tbody>
</table>
**NOTICE: REGULAR MEETINGS**

<table>
<thead>
<tr>
<th>Regular</th>
<th>Time</th>
<th>Place</th>
</tr>
</thead>
</table>

## NOTICE: SPECIAL MEETINGS

<table>
<thead>
<tr>
<th>Special</th>
<th>Time</th>
<th>Place</th>
<th>Purpose</th>
</tr>
</thead>
</table>


SPECIAL MEETINGS: MEDIA

At least 24 hours notice to all media outlets that have requested it
EMERGENCY MEETINGS

Immediate Notice Required

- Type of special meeting
- Must include media with notice
NOTICE TO PUBLIC OF PLANNED DISCUSSION OF PARTICULAR TOPIC

1. Public body must have a method to sign up for such notice
2. May require payment of reasonable fee
OBLIGATION 2: OPENNESS

"All those in favor of what we discussed in our e-mail thread and at Larry's son's birthday party say "aye".

"Aye"  "Aye"  "Aye"  "Aye"  "I have no idea what's going on"

"I thought this meeting was open?"
OPENNESS

Vote and take official actions in public
OPENNESS

No round-robin meetings

No voting by secret ballot
OPENNESS

Forum requirements:

1. Public
2. In area public body serves
3. Large enough
RECORDING AND SPEAKING?

Cannot ban non-disruptive recording

Do not have to allow public participation
Township trustees hold a regular meeting, where all the members attend, and provide the proper notice to the public. But the doors to the meeting room are accidentally locked while the meeting is ongoing.
Proper notice was given

Minutes were taken

Openness denied to latecomers

Potential OMA violation
OBLIGATION 3: MINUTES

Requirements:

1. Promptly prepared
2. Filed
3. Maintained
4. Open to public
Not verbatim transcript, but ...

Must allow public (including those who did not attend) to understand decisions of the public body
EXECUTIVE SESSION
PROPER PROCEDURE

Motion

Second

Roll Call Vote

Identify particular purpose and matter
Do not BEGIN or END a meeting in executive session

Meeting

Insert executive session here!
NINE ACCEPTABLE EXECUTIVE SESSION TOPICS

1. Certain personnel matters (must be specific)
2. Purchase or sale of property
3. Pending or imminent court action
4. Collective bargaining matters
5. Matters required to be kept confidential
6. Security matters
7. Hospital trade secrets
8. Confidential business information of an applicant for economic development assistance
9. Veterans Service Commission applications
Township trustees want to go into executive session to discuss a general OMA issue. Chair moves to adjourn with the board’s attorney to “discuss some legal matters with the attorney for the trustees.” Roll call vote.

Appropriate?  Not appropriate?
Started in open session

Roll call vote to enter executive session

Pending or imminent legal action

Potential OMA violation
WHO CAN BE PRESENT?

1. Members
   • But cannot exclude minority!

2. Anyone else the members invite
CONFIDENTIALITY?

• No confidentiality provisions created in OMA

• Other laws, like Ethics Law, may require confidentiality (but only of the members!)
WHAT **NOT TO DO**
IN EXECUTIVE SESSION

- Vote
- Make Any Decisions
- Discuss Other Matters

**Wrong Way**
VIRTUAL PARTICIPATION?

Not unless *specifically* authorized by law...
WHO ENFORCES THE OMA?

- “Any person” by filing a lawsuit
- No public entity enforces the OMA
POTENTIAL LIABILITIES

1. Fine
2. Attorney fees
3. Invalidation of action(s) taken
4. Removal from office
QUESTIONS?
Ohio Attorney General’s Sunshine Laws Webpage
www.OhioAttorneyGeneral.gov/Sunshine

Ohio Sunshine Laws Manual
www.OhioAttorneyGeneral.gov/YellowBook

Ohio Attorney General Mike DeWine
Public Records Unit
614-466-2872