



Records: Knowing What to Throw Away & Knowing What to Keep

Annee Duprey | March 27, 2024



Public Records Act Basics

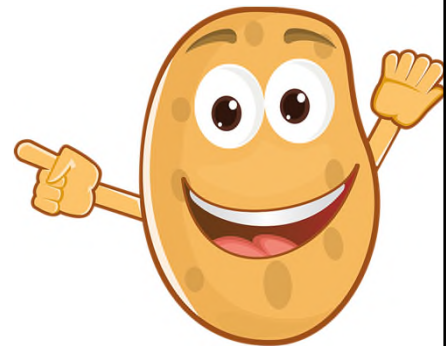
What is a Public Record?

- A “public record” is any ‘record’ that is kept by a ‘public office.’ Ohio Rev. Code § 149.43(A)(1).



Can We Give Public Records to Someone Else?

- Public office **cannot** avoid duties by transferring *custody* to a private party.
- Public office **cannot** avoid duties by transferring *record-keeping function* to private entity.



Record: Three-part definition:

Stored on a *fixed medium*, such as paper, disk, microfilm; and

Created, received, or sent under the jurisdiction of a public office; and

It *documents* the organization, function, policies, decisions, operations, etc. of a public office. Ohio Rev. Code § 149.011(G).

5

Stored = What you Keep

Hard copies

Includes electronic files, such as e-mails

Texts

Backups

Photos on devices

Social Media Content

6

“Created, received, or sent.”

- Tends to mean that the public office has been involved in the creation of the record in some way.

“Documenting” activities, decisions, operations, etc. of a public office:

- It was **used** by the office to do something official.
- Essentially rules out personal e-mails, junk mail, etc. as public records.



Disclosure - Generally



Law is to be interpreted **liberally** in favor of disclosure.



Conversely, exceptions will be construed **narrowly**.



If you have questions about whether you have created a record, **err on side of caution**.



Special Topics

Drafts?

- Yes, can be public records. (Ohio Supreme Court held that a draft collective bargaining agreement was a public record.)
- My test: was the draft circulated and reviewed or relied on by others?

Personal Notes?

- Yes, can be public records.
- If kept for your own convenience, likely not public records.
- Test: were they created for others to see, or did other people have access to them?
 - If so, they are not truly “personal,” and therefore public records.

Electronic Records?

- Voice mail
- Video or audiotapes
- Microfilm or microfiche
- E-mails and e-mail attachments
- Websites (including social media)
- IM/chat records
- Cell phone photos
- Cell phone videos

Tablets, Laptops, Smartphones



Remember that if you are using these devices for City business, you are creating records on these devices.



These records, like any others, must be kept and preserved according to retention schedules.



Maintaining A Public Record

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15

What Records To Keep

- Keep those that are necessary to document the organization, functions, policies, decisions, and essential transactions.

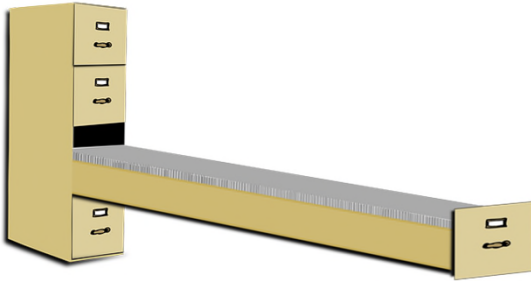
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How Long to Keep

- Use and follow your approved retention schedule.



Records Retention Schedule

- A retention schedule consists of the following:
 - Record title and description;
 - Length of time the record must be retained; and
 - The media type of the records series (paper, microfiche, digital, film or videotape)
- Retention schedules are designed for people who have no knowledge of the records
- An efficient retention policy is one that refrains from using legal jargon and acronyms

Retention Periods

- A record retention period can be:
 - A set period of time with subsequent instructions
 - Routine e-mail correspondence must be kept for 6 months, then destroyed
 - Executive e-mail correspondence must be kept for 2 years, then transferred to State Archives.
 - An event-driven period
 - Mailing lists shall be kept until superseded or obsolete
 - A set period of time and an event driven period
 - Contracts shall be retained for 15 years after expirations

Thoughts on Retention Schedules

This is an art – not a pure science

Reasonable minds can disagree

It involves a risk/reward analysis

You must be consistent

Laws change



Classifying Records: How Long to Store

Non-records

- Can delete immediately personal notes, general conversations

Transitory documents

- Can delete when they no longer have administrative value draft publications, reports, memoranda, meeting notices

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21

CLASSIFYING RECORDS: HOW LONG TO STORE

Intermediate documents

- Delete after one year
- Look at subject line—
- E.g., budget materials, vendor correspondence

Permanent documents

- Print and keep for two years or longer.
- Long-term budgets, capital improvement projects, staff meeting minutes, general correspondence and memos

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GENERAL RECOMMENDATIONS—E-MAIL


Individual departments and employees are responsible for managing their own records.

Generally, the sender should keep the message.

Categorize and retain records like you would paper records.



Responding to a Public Records Request



Responding to a Public Records Request

Contact and involve records custodian for your department.

Track everything:

- Who requested.
- Date requested.
- What was sought.
- What was provided.
- When completed.
- Who completed.

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Public has four basic rights under Act:

1. Prompt inspection;
2. Copies within a reasonable amount of time;
3. Copies by mail (if requested);
4. Copies on paper, on same medium on which it is kept, or any medium specified if public office keeps it that way.

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“Prompt” Inspection



- What is that?
 - Without delay.
 - **Case-by-case basis.**

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27

When must inspection be allowed?



During regular business hours.



Can charge for copies

Cannot charge anyone to just *inspect* records.

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28



Copies

If cannot provide right away, give a written response explaining why and notifying requester that if that is a problem, let you know.

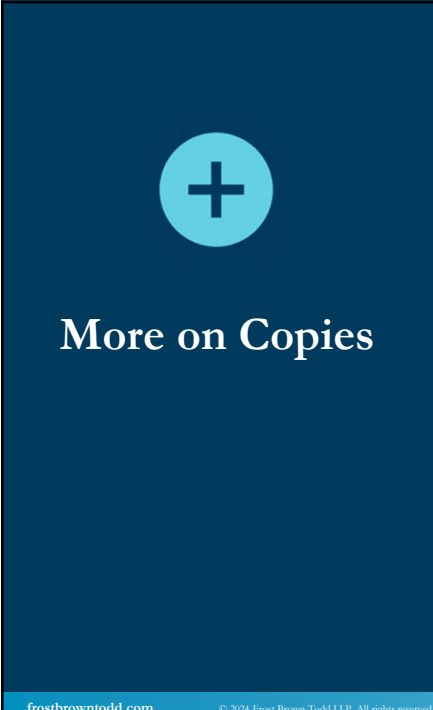
Case-by-case basis on how long a “reasonable” amount of time is.

Depends on how easy it is to reproduce and redact.




How much can be charged?

- *Actual cost* of producing copy.
 - About 5-10 cents per page;
 - Look at your policy!
- *Cannot* charge for employee time.
- *Can* charge extra for certified copies.
- Can use an outside contractor (e.g., Fed-Ex/Kinko’s), and can pass along cost to requester.



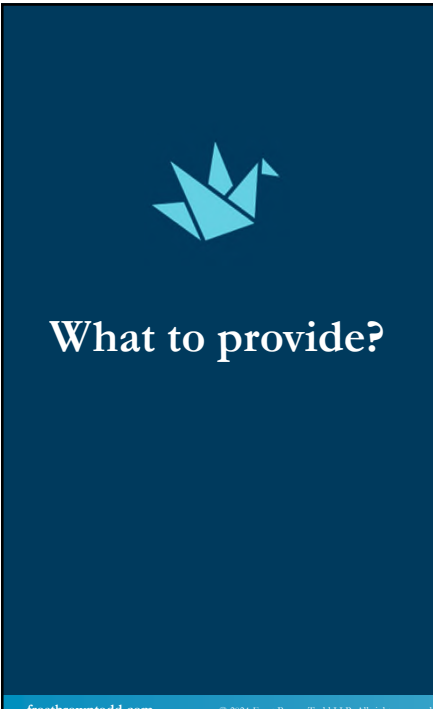


More on Copies



-  Not required to let requester make their own copies.
-  *Can* refuse to provide records if requester does not pay.
-  Can require prepayment.

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31



What to provide?

-  *Existing* documents.
-  Do not have to create new records in response to a request.

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32

Who Can Request Records?

Any “person”:

- Corporations, individuals, other governmental agencies.

Does NOT have to be an Ohio resident.

Requester can even designate someone else to retrieve or inspect them.

In Writing?

- Does a request have to be in writing?
 - Generally, no.
 - If requester is a journalist seeking a peace officer’s residential and familial information, yes, must be in writing.


Identity of Requester

- Public office can ask that a request be made in writing, ask for the requester's identity, and ask about the intended use of the requested information, BUT
 - **only** if the public office discloses that compliance is not required; and
 - **only** when a written request or disclosure of the identity or intended use would enhance the ability to comply with the request.
- So generally, you can't require it.

Denial Of Request

If a request is denied, office has two legal duties:

- Provide the requester an explanation of the reasons for the denial, including legal authority (legal can provide); and
- If request was in writing, explanation for denial must be in writing.



Motive?

Is motive relevant? Normally no.

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Court has looked at motive rarely. But, typically, not a basis to deny.

Look at constitutional right to privacy if <i>safety</i> is an issue.	You might be able to redact if a real threat to safety exists.
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Broadness?

- Can a request be too broad?
 - Yes, definitely. But look to **request**, not to **response**.
- In other words, the **number of responsive documents** is generally irrelevant.

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38

Examples

- **Request for all traffic reports on a specific date.**
 - How do you keep them?
 - If kept by driver name, and not by date, you may not have to comply with request for all that occurred on specific date.
- **All “litigation files” or [insert type here] files.**
 - Overbroad—that’s a category, not a document.
- **“All 911 calls” or “all traffic reports.”**
 - Overbroad—that’s a category, not a document.

Examples

- **All e-mails or texts sent or received by a specific person for their *entire* work period.**
 - Overbroad—that would be a complete duplication of files; again, not a document.
- **All records that pertain to “me” or [insert name here] or [insert topic here].**
 - Overbroad—would require searching every document in your possession to find the relevant ones.

If you assert overbroad defense, you must:



Provide the requester an opportunity to revise the request; **and**



inform the requester of the manner in which the records are maintained and accessed in the ordinary course of business.



Exceptions to the Public Records Act

Exceptions

- Records sealed pursuant to court order.
- Social Security Numbers.
 - Based on individuals' expectation of privacy in number, and federal statute.

Exceptions

- Medical Records
 - Ohio law requires that a record be generated *as part of medical treatment* to be a medical record.
 - Therefore, psychological and medical testing records generated as part of hiring process are *not* medical records and would have to be produced *under Ohio law*.
 - **But** —the ADA, a federal law, defines those records as medical records.
 - The records are therefore exempt pursuant to the exception for records the release of which is prohibited by state or federal law.

Exceptions

- Trial preparation records:
 - Records specifically compiled in anticipation of litigation.
 - **Except** routine offense and incident reports: those are subject to release.
 - Trial preparation records keep their status until all trials, actions, and proceedings are completed.

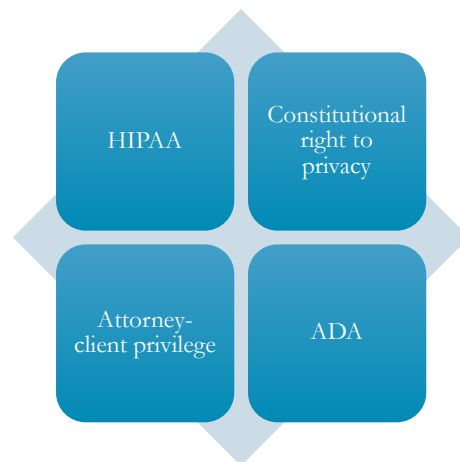
Exceptions

- Security and infrastructure records:
 - *Any* record that contains information used for maintaining security against attack, interference, sabotage, terrorism.
 - Any record that discloses configuration of building in which public office is located.
 - But not plain, generic blueprints.

Exceptions

- “Catch-all” exception:
 - Definition of public records does not include records the release of which is prohibited by state or federal law.
 - Attorney-client privilege

Examples of such laws:



How to Deal with Exceptions

Redact if possible.

Black out with magic marker or on pdf.

- Must be clear that redaction was made.
- Have to provide citation to authority governing redaction.
- Use a cheat sheet.

Redactions

- Sending PDF versions via e-mail.
 - **Note: Use a different program than Adobe.**
 - Often it **LOOKS** like a redaction exists, but it does not.
 - We use Nuance Power pdf.

Importance of Getting Redactions Right



“Embarrassing PDF fail reveals Facebook considered selling access to data.”



“Manafort’s poorly redacted filing reveals new Mueller investigation details.”

TYPICAL PUBLIC RECORDS

Settlement agreements.

Resumes submitted for public employment (and kept by employer).

Personnel files of public employees.

Internal employee discipline records and investigations.

Background checks (including polygraph), but excluding BCI/FBI criminal background check

Typical Non-Records

- Personal e-mails.
 - *Generally* not a public record.
 - BUT—Personal e-mails will be audited.
 - If employees send e-mails that violate policy, they can be disciplined.
 - If the personal e-mails then document the discipline or investigation, then they *do* become public records for all to see.

- Public Employees' Home Addresses
 - If used solely for administrative use (e.g., where to send a paycheck), they are exempt, because they do not document the activities of the public office.

53



Typical Non-Records

Personal Calendars and Appointment Books

- Generally, not public records, because they too do not document the activities of the office.
- **Caveat:** Work-related entries, of course, would be public.

Personal Correspondence

- *E.g.*, e-mails that are not related to the business of the entity.
- Not public records.
- They do not document the activities of *the* entity.

54

Typical Non-Records

- *Items Not “Kept”*
 - *E.g.*, resumes and applications received by the entity, IF the entity returns them to the sender.
 - Not public records.
 - They are not records “kept” by the entity.

- *Certain Residential And Familial Information, But Only For Certain Employees*
 - Must be peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, etc.

Typical Non-Records

- *Certain Residential And Familial Information (cont.)*
 - Exempt, and defined in R.C. 149.43(A)(7):
 - (a) personal residence address;
 - (b) EAP information;
 - (c) SSN, residential telephone number, bank account, debit card, charge card, or credit card number, emergency telephone number, medical information;
 - (d) name of beneficiary of employment benefits (including life insurance benefits);

Typical Non-Records

- *Certain Residential And Familial Information (cont.)*
 - Exempt, and defined in R.C. 149.43(A)(7):
 - (e) identity and amount of any charitable or employment benefit deduction (unless the amount of the deduction is required by state or federal law);
 - (f) spouse's (or former spouse's) name, residential address, employer, work address, SSN, residential telephone number, bank account, debit card, charge card, or credit card number, emergency telephone number;
 - (g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.
 - Quite broad—Does not need to be currently on undercover.

Typical Non-Records

- *Some payroll documents—Applies to **all employees***
 - Charitable deductions
 - (Exempt as non-record)
 - Health insurance
 - (Exempt as non-record)
 - Beneficiary information
 - (Exempt as non-record)
 - Federal tax returns
 - (Exempt under catch-all [from federal law])

Typical Non-Records

- *Personnel documents—All employees*
 - Resumes
 - **Are** public records
 - Evaluations
 - **Are** public records

Typical Non-Records

- *Personnel documents (cont.)*
 - Fitness for duty examinations:
 - Likely exempt, as medical records under the ADA (and therefore under the catch-all provision).
 - What about records the CBA says can't be used against an employee?
 - Still a public record (law trumps the contract).
 - So, keep, but put in a separate folder.
 - Still must produce as a public record but can't use in discipline proceedings.

Damages for Not Producing

Might have to pay
\$100 per day
(now capped at
\$1,000).

Attorney's fees.

Damages for Destroying:

- Ohio Rev. Code § 149.351(B): If records are destroyed without compliance with the law, person can bring an action for injunctive relief, and get attorney's fees, and the court can award a forfeiture of \$1,000 for each violation (capped at \$10,000).

Records Disposal

- Local government records can only be disposed of in accordance with the law.
- That means preparing one of two things:
 - RC-2 (schedule of records retention and disposition); or
 - RC-1 (application for one-time records disposal)

Records Disposal

- RC-2 (schedule of records retention and disposition)
 - Used for records series that are constantly being created and accumulated.
 - For EACH disposal, law requires you to submit an RC-3 and the records to Ohio State Archives 15 business days prior to disposal date.
 - This permits Ohio State Archives to select any documents it wants to keep.

Records Disposal

- RC-1 (one-time application for records disposal).
 - Used to dispose of particular records covering specified dates.
 - Typically used for records that have become obsolete.
 - RC-2 gives continuous authority; RC-1 allows records to be disposed of only one time.



Be Purposeful About What Happens To Your Paper



Think about what happens to each document you create before you create it.



Know where it is going.



Know who is going to see it.



Know how long it will be kept.



Know where it will be kept and how.



Know how it will be destroyed and when.



Know whether it is a public record.

Proper Documentation Has a Purpose

- You must first determine the purpose of the document to determine what and how to document
 - If it's a government function, do you simply need to record the events that occurred?
 - Is it to assign follow-up tasks?
 - Is it to document discipline in an effort to change behavior?
 - Is it to tell somebody to do something?



Creating a Paper Trail

- In “government” functions, you often need documents to, essentially, create a paper trail
 - Who you talked to
 - When you talked to them
 - What was said
 - What are the follow-up steps required
 - Were those follow-up steps completed
 - *Be careful of the contracts you have and those you may make or alter mistakenly*

Creating a Paper Trail

- In other areas which deal with employees, the opposite is true, and documentation should have a purpose *other* than to create a paper trail
 - Convey to the employee, this is important!
 - Tell them what to do! (Or not to do)
 - Develop a plan
 - Document an infraction
 - Give credit where it is due

Be Objective

- Regardless of the purpose:
 - Be objective – don't editorialize or speculate
 - Don't use buzz words "discrimination, harassment, disability claim, citizen safety concern"
 - Don't concede any points
 - "Wrong" does not equal "unlawful"
 - Don't offer opinions as to a citizen's or employee's past or future conduct
 - Don't be dramatic – if someone's life wasn't at risk, don't say it was

Be Objective

- Be specific – even if it hurts or causes embarrassment
 - Don't say poor attitude – say how the attitude manifested itself
 - Don't just say “he allegedly harassed her” – say how he allegedly harassed her
 - Don't just say “he touched her” – say how, where, and when
 - Sometimes you can't be nice – honesty is more important
 - BUT - focus on the behavior, not the person

Tips for Proper Documentation

- Be consistent – do the same thing every time
- Consider making “how to” cards for common situations
- Make it legible
- Date it
- Sign it
- If possible and applicable, let the employee review and sign

Tips for Proper Documentation

- Don't speculate on possible legal claims
- Make sure your "facts" are facts
- Don't use shorthand or code
- Be mindful of your personal notes
- Be complete – you may know what you know but others will not


Tips for Proper Documentation

Keep your documents filed and organized

Follow the document retention policy

Be careful about what you throw away

If you don't want to see it on the nightly news –don't write it down



Confidentiality

- Keep it safe and confidential
 - Don't let your hard work disappear
 - Don't feed the rumor mill
 - Don't ever be in the position to attempt to explain how and why it happened
 - If it can't go in the regular personnel file, it's REALLY confidential

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75

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you



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76