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2016 Ohio Auditor of State's Local Government Officials Conference



**Letting the Sun Shine In...**

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

Ohio Auditor of State  
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Presented by:  
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## Public Records Act Overview

*Definitions*

*Obligations*

*Exemptions*

*Liabilities*



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## Definitions – The “Who?” of Public Records

- **Public Office** – R.C. 149.011(A)
- **A person responsible for public records**
- Any private entity that is the **functional equivalent** of a governmental entity



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### Definitions – The “What?” of Public Records

**Records** – R.C. 149.011(G):

- Have information stored on fixed media (paper, tapes, electronic text, photos, films, videos, etc.), **and**
- Are created or received by, or come under the jurisdiction of, a public office, **and**
- Document what the public office does: the organization, functions, policies, decisions, procedures, operations, or other activities **of the office**

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### Definition: Documents Public Business

- Do employee home addresses document the functions, operation, etc. of the public office?

*State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160

- Does a proposed settlement document the activity of a public office?

*State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126

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### Definitions – The “When” of Public Records

**Public Records** – R.C. 149.43(A) includes records “kept by” any public office

“**Kept by**” means any record that is actually in existence and in the possession of the public office or person responsible for public records

- Examples of records **not “kept by”** a public office:
  - (1) a record not yet in existence,
  - (2) a record that has been disposed of lawfully

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# Electronic Records

*E-mail*

*Databases*

*Electronic Records Management*



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# Electronic Records

**Email**

- Handle electronic records just like any other tangible record
- Analyze based on **content**, rather than storage medium



Uniform Electronic Transactions Act – R.C. Chapter 1306



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# Electronic Records

**Databases**

- If the existing program can perform a search and produce a compilation or summary described by the requester, that output is deemed to already “exist” as a record for the purposes of the Public Records Act.
- A public office is otherwise not required to search a database for information and compile or summarize to create new records.

**Electronic Records Management Resources**

- Ohio Electronic Records Committee:  
<http://www.ohiohistory.org/ohiojunction/erc>



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## Notes

Notes can be “records,” but are usually transient

Notes are not records if they are:

- 1) Kept as personal papers, not official records;
  - 2) Kept for the employee’s own convenience (for example, to recall events);
- AND**
- 3) Other employees did not use or have access to the notes

*State ex rel. Cranford v. Cleveland*, 2004 Ohio 4884

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## Drafts

If a draft meets the definition of a record, it is subject to both the Public Records Act and records retention laws.



A public office can address the length of time that drafts must be kept in its records retention schedules.

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## Rights and Obligations

- Any “**person**” can make a public records request, including corporations and other governmental agencies
- **No special format** or **special language** is required
- A request may be **oral** or **written**
- The requester’s **motive is not relevant**. However, the request must at least be specific and describe in detail the records being sought
- A public office cannot require the requester to reveal his/her **identity**

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### Rights and Obligations

- Promptly, or reasonable period of time
- Reasonable times during regular business hours
- Choice of copy media from normal office operations
- Copies at "cost"
- Payment in advance (optional)
- Methods of delivery



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### Rights and Obligations

**Examples of Permissible/Impermissible Costs:**

- *State ex rel. Data Trace Info. Svcs. v. Cuyahoga Cty Fiscal Offcr.*, 2012-Ohio-753 (\$148,000 for one PDF impermissible)
- *State ex rel. Gambill v. Opperman*, 2013-Ohio-761 (\$2,000 plus cost of hard drive permissible)

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### Public Records Act Exceptions

**Unless the public office can identify an exception that clearly requires or permits withholding a requested record, it must disclose the record**

- Exceptions are created only by law  
(Usually statutes, but they may also come from constitutional rights or common law)
- Exceptions are construed strictly against the public office, and in favor of disclosure
- Persons cannot "contract out" of the Public Records Act

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### Mandatory/Catch-all Exception

- Any state or federal law which **prohibits** the release of specified records – RC 149.43(A)(1)(v)



- If any state statutes, rules, federal statutes or regulations prohibit public disclosure, then a public office **MUST NOT release** that record in response to a Public Records Request

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### Discretionary Exception

- Discretionary Exceptions:** A state or federal law may designate certain records as “not a public record,” or similar language, which removes the record from the coverage of the Public Records Act
- “**Discretionary**” means that a public office **does not have to** disclose the record, but **may if it so chooses** (so consider openness if possible)

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### Waiver of Discretionary Exception

- Waiver of an exception occurs by any voluntary disclosure of a record that could be appropriately withheld under one of the exemptions
- The disclosure **must** have been voluntary and **to a member of the public**
- Waiver is forever, and for everyone, **as to that specific record**

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### Mandatory vs. Discretionary: Examples

Mandatory Exceptions	Discretionary Exceptions
<ul style="list-style-type: none"> <li>Physician-patient privileged records</li> <li>Student education records (FERPA)</li> <li>Criminal history records obtained through LEADS</li> </ul>	<ul style="list-style-type: none"> <li>Trial preparation records</li> <li>“Infrastructure” and “security” records</li> <li>Confidential Law Enforcement Investigatory Records (CLEIRs)</li> </ul>

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### Some Security Exceptions

**R.C. 149.433 Security and Infrastructure Records**

**R.C. 1306.23 Uniform Electronic Transactions**

Records that would disclose or lead to the disclosure of records that would jeopardize the state's continued use or security of any computer or telecommunication devices associated with electronic signatures, records, or transactions are not public records.

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### No exception for that ... !?

**Government job application materials:**  
There is no public records exception that generally protects resumes and application materials submitted to public offices in the hiring process.

**Juvenile records:**  
Although it is a common misconception, there is no Ohio law that categorically excludes all juvenile records from public records disclosure.

**General Privacy:**  
Constitutional right to privacy is very limited.

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### Withholding or Redacting:

#### 1. You Must Notify Where You've Withheld

- "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
- Redactions must be plainly visible, or the office must advise the requester of what redactions have been made – R.C. 149.43(B)(1)

(See Handout Page 2)

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### Withholding or Redacting:

#### 2. Give Legal Authority for Withholding

- Wherever a request is denied in part (redactions), or in whole (entire document), the public office must provide an explanation of why the request was denied, **including legal authority!**
- Provide in cover letter or on the document itself
- Ohio Revised Code and Administrative Code online:
  - <http://codes.ohio.gov> (for office and requester use)

(See Handout Pages 3, 4)

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### Miscellaneous

#### No obligation to:

- Create new records – including electronic records
- Store records on particular media



- Provide complete duplication of the voluminous files of a public office
- Provide internet access to electronic public records

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**How to Comply With Public Records Requests**

*Preparation*

*Negotiation/Clarification*

*Documentation*

*Withholding/Redacting*



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**Preparation: Tools**

**Lists:**

- Non-records
- Exceptions



**Retention Schedules:**

- Set and follow prudent records retention periods

**Periodic training of office staff**

**Yellow Book: keep on hand, linked online:**

[www.ohioattorneygeneral.gov/YellowBook](http://www.ohioattorneygeneral.gov/YellowBook)

**Contact information of your legal counsel**



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**Mandatory Clarification/Revision**

**What is “overly broad”?**

- Mandatory clarification is required when a request is denied as ambiguous or overly broad, or the office can’t reasonably identify which records are being requested
- Public office may deny the request, but must inform the requester how the records are maintained and accessed, so that the requester has an opportunity to revise the request into properly specific form



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### Optional Clarification/Negotiation

A public office *may* ask a requester to make a request in writing, or to provide their identity, or for the intended use of the records, if . . .

- The office believes it would benefit the requester by enhancing the office's ability to **identify, locate** or **deliver** the requested records,

AND

- The office **first** discloses that the requester does not need to submit a request in writing, or reveal his/her identity, or the intended use of the records

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### Documentation of Request Process

- If a request is made verbally, **write it down**
- Send a **receipt letter** if you cannot satisfy a request immediately. Document the **format** in which the requester wishes to receive the records, and the agency's **charges** per copy, if copies are requested.  
*(See Handout 1)*
- Document all **correspondence** with the requester
- Document your **processing**, and **records provided**
  - see AOS Bulletin 2011-006 for some advice and examples in documenting requests

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### Liabilities for Violating the Public Records Act

- **Mandamus Action** by "person aggrieved" by violation of Division 149.43(B) of the Public Records Act
- **Civil Damages** (only if violation caused actual lost use of records)
- **Reasonable attorney's fees** (only for successful parts of lawsuit) and court costs
- **Possible reduction or elimination** of damages and fees

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### Liabilities for Violating Records Retention Laws

- *Kish v. City of Akron*, 2006-Ohio-1244
  - Sole issue before Ohio Supreme Court was damages
  - Jury found 480 records for Kish, 380 for Elder...for a combined verdict of \$860,000
- *Rhodes v. City of New Philadelphia*, 2011-Ohio-3279
  - “Aggrieved Party” may request damages
  - Defending party must show by clear and convincing evidence Plaintiff not “aggrieved”
- New 149.351
  - Incorporated language of Rhodes
  - Set \$10,000 maximum

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### Trade Secrets

- *Besser v. OSU*, 89 Ohio St.3d 396.  
Trade Secret for Public Office, if
  - Public Office derives independent economic value from info not being generally known; and
  - Reasonable efforts made to maintain secrecy

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### Trade Secrets

- *State ex rel. Luken v. Corp. for Findlay Market of Cincinnati*, 2013-Ohio-1532 (pricing for vendors at a non-profit corp, wholly-owned by public office, is a trade secret)
- *State ex rel. Gambill v. Opperman*, 2013-Ohio-761 (maps of properties were trade secrets, where images were “inextricably linked” with software)

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**Records Management  
and Retention**

*Obligations*

*Liabilities*

*Schedules*



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**Obligations of Public Offices for  
Records Creation and Retention**

- **Shall make** only such records as are necessary to document the organization, functions, and essential transactions of the agency, and to protect the legal and financial rights of the state and persons directly affected – R.C. 149.40
- **May not** destroy, mutilate, or otherwise dispose of records except as provided by law or under the rules of the records commissions – R.C. 149.351



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**Obligations of Public Offices for  
Records Management & Retention**

- **Shall organize and maintain** public records in a manner that they can be made available for inspection or copying

AND

- Shall have available a copy of its **current records retention schedule** at a location readily available to the public – R.C. 149.43(B)(2)



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### Liabilities for Violating Records Retention Laws

An “aggrieved person” may file either or both of the following, in common pleas court:

- A civil action for **injunctive relief** to compel compliance with this section, and/or
- A civil action to recover a **forfeiture of \$1,000 for each violation**, but:
- Forfeiture for multiple violations capped at \$10,000, and attorney fees are capped at forfeiture amount.



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### Records Retention Schedule: Contents

- Record Series **title**
- Series **description** – describes the purpose and function of the record series and tells what types of information can be found in the records
- Set retention **period, format(s)** to be retained, and **disposal method(s)**

*(See Handouts 5 & 6)*

*Create the schedule for someone who has no knowledge of the records – minimize use of jargon and acronyms*



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### Factors Determining Retention Periods

- **Administrative Purposes** – period needed by the office to carry out its duties
- **Fiscal Tracking** – needs pertaining to the receipt, transfer, payment, adjustment, or encumbrances of funds. Documents subject to audit.
- **Legal Value** – documents relating to rights or obligations of citizens, or of the agency that created it
- **Historical Value** – Ohio Historical Society/Archives



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## Retention Schedule Approval

### 1. Local Records Commission (State Agencies – DAS)

Review and approve or return for modification, then forward to:

### 2. Ohio Historical Society

To review and forward within 60 days to --

### 3. Auditor of State

Review and approve or disapprove within 60 days

**The same agencies review Applications for One-time Disposal of Obsolete Records**

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## Records Retention Information

For more information, contact your own records commission, and/or:

**Ohio Historical Center**

### State Archives:

614-297-2553

[localrecs@ohiohistory.org](mailto:localrecs@ohiohistory.org)

### DAS General Schedules:

<http://apps.das.ohio.gov/rims/General/General.asp>



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## Open Meetings Act Overview

*Definitions*

*Obligations*

*Executive Sessions*

*Liabilities*

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## Who is Subject to the Open Meetings Act and When? Definitions



**Public Body:**  
Any decision-making body of the state, its political subdivisions, and school districts (**including any committee or sub-committee of each body**)

**Meeting:** (1) **Prearranged** gathering of  
(2) a **majority** of members of public body  
(3) conducting or discussing **public business**



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## Looking Deeper: What is a Meeting?

### Discussion/Deliberation vs. Information Gathering:

- Discussion and deliberation involve the weighing of reasons for/against a course of action and **must be conducted in open**
- Gatherings **solely** to receive factual information **may** not be meetings – **but consult legal counsel first!**

### Work sessions:

- **Prearranged** work sessions, retreats, etc. where **public business is discussed** among a **majority of the members** of the public body are "meetings" and must be as noticed and open as any other meeting



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## Definition: Prearranged

- Press conference respecting alleged fraud immediately after a board meeting?

*Holeski v. Lawrence*, 621 N.E.2d 802

- Pre-caucus meetings prior to a regular meeting of City Council?

*State ex rel. Vindicator Printing Co. v Hughey*, 2 OBR 449



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### Definition: Majority of Members

- Back-to-back meetings, which were each attended by less than a majority, but taken together, were attended by a majority of council members?

*State ex rel. Cincinnati Post v. Cincinnati*,  
76 Ohio St. 3d 540



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### Definition: Deliberation or Discussion

- Question and answer sessions between board members and non public officials?

*State ex rel. Hardin v. Clermont Cty. Bd. of Elections*, 2012 Ohio 2569

- A “discussion” under OMA entails the exchange of words, comments, or ideas by members of the public body with one another.

*Cincinnati Enquirer v. Cincinnati Bd. Of Edn.*,  
2011 Ohio 703



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### Obligations

Give appropriate **notice**  
R.C. 121.22(F)

Take action & deliberate on public business in **open** session  
R.C. 121.22(C)

Take & file **minutes**  
R.C. 121.22(C)



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**Obligation 1: Notice (by rule)**  
**Types of Meetings and the Notice Required**

**Regular Meetings** → Meetings held at prescheduled intervals  
 Notice = time and place

**Special Meeting** → **Any meeting that is not a regular meeting**  
 Notice = at least 24 hrs advance notice of time, place, and purpose, **unless** it is:

*Emergency Meeting, where notice must still be given immediately to news media who have so requested.*



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**Obligation 2: Openness**  
**Take Action & Deliberate in Public**

**Where must public meetings be held?**  
 – In a public forum within the area that the public body serves

**Does the public have a right to speak at public meetings?**  
 – Not required by the OMA, but may otherwise be permitted or required

**Can members of the public record proceedings?**  
 – Yes, if it does not disrupt the meeting



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**Obligation 3: Minutes**

“The minutes of a regular or special meeting of any public body shall be **promptly prepared, filed, and maintained and shall be open to the public.**”  
 – R.C. 121.22(C)

- Minutes do not have to be a verbatim transcript of the proceedings but must be **full and accurate** and enable the public to understand the rationale behind the public body’s decisions.
- There is no requirement to keep minutes of executive sessions.



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**Executive Sessions**

**Proper Procedures:**

- Must be preceded by specific motion, second, and roll call vote
- Motion should state the specific permissible topic(s) to be discussed
- Meetings must always begin & end in open session

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**Executive Sessions**

**Acceptable Topics for Discussion:**

- Personnel (**must** state specific type of personnel matter to be discussed, but **not** identity of the person)
- Certain property sale or purchase issues
- Court action (only with the body's attorney)
- Collective bargaining preparation and sessions
- Matters required to be kept confidential by **codified** law
- Security arrangements
- Certain public hospitals' trade secrets

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**Executive Sessions**

**Present in Executive Sessions:**

***Who may members include?***

- anyone who is invited to stay

***Who may the members exclude?***

- any other members of the public

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### Restrictions On Executive Session

- There can be **no decision-making**
- **No voting**, including "straw polls"
- Non-permitted matters may **not** be discussed in executive session, even if intertwined with permitted matters



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### Executive Sessions - Records

- Executive sessions provide private space for discussion, but they do not **make** any materials confidential, including documents that are handed out
- Analyze public records issues separately, as though taking place outside of executive session
- No minutes need to be taken (and probably shouldn't be) of executive session discussions

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### Miscellaneous Topics: Virtual Participation

- A member "**shall be present in person** at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting"  
– R.C. 121.22(C)
- Virtual participation (teleconferencing) is only permitted when it is **specifically authorized by law**

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**Penalties for Violating the OMA**

*Fines*  
*Injunction*  
*Court Costs*  
*Attorney Fees*  
*Action Invalidated*  
*Removal from Office*



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**Penalties for Violating the OMA**

***Fines and Attorney Fees***

- *Jennings v. Putnam Cty. Bd. Of Elections* (\$5,000 statutory fines Plus \$32,000 in attorneys' fees)

***Removal from Office***

- *In re removal of Kuehnle, 2005-Ohio-2373* (school board removed)

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**Questions & Answers**

**Open Government Unit:**  
<http://www.ohioauditor.gov/services/opengov/default.htm>

**Sunshine Laws Manual Online:**  
<https://ohioauditor.gov/publications/15SunshineManual.pdf>

For Additional Information ...

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