

OHIO SUNSHINE LAWS, BUT BRIGHTER

An advanced training for experienced Administrators and Board members

porterwright



SUNSHINE LAWS = OHIO PUBLIC RECORDS ACT + OHIO OPEN MEETINGS ACT

R.C. 149.43, R.C. 121.22 RESPECTIVELY

AGENDA

- Ohio Public Records Act
 - Overview
 - Best Practices
 - Case law
- Ohio Open Meetings Act
 - Overview
 - Best Practices
 - Case law
- Sunshine Law Compliance Audits
- StaRS Rating System

OHIO PUBLIC RECORDS ACT

OVERVIEW

Any person may request to inspect or obtain copies of public records from a public office that keeps those records. A public office must organize and maintain its public records in a manner that meets its duty to respond to public records requests and must keep a copy of its records retention schedules at a location readily available to the public. When it receives a proper public records request, unless part or all of a record is exempt from release, a public office must provide inspection of the requested records promptly and at no cost or provide copies at cost within a reasonable period of time.

Let's unpack these terms...

OHIO PUBLIC RECORDS ACT

OVERVIEW

Records - any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in R.C. 1306.01, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

Public Office - any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

Kept by – a record is only a public record if it is “kept by” a public office. Records that do not yet exist – for example, future minutes of a meeting that has not yet taken place – are not records, much less public records, until actually in existence and “kept” by the public office. A public office has no duty to furnish records that are not in its possession or control. Similarly, if the office kept a record in the past, but has properly disposed of the record, then it is no longer a record of that office.



QUIZ!

Does a public records request need to be in writing?

No.

A public records request does not need to be in writing or identify the person making the request. If the request is verbal, it is recommended that the public employee receiving the request write down the complete request and confirm the wording with the requester to assure accuracy.

OHIO PUBLIC RECORDS ACT

OVERVIEW

An item received by a public office is not a record simply because the public office could use the item to carry out its duties and responsibilities. However, if the public office ***actually uses*** the item, it may thereby document the office's activities and become a record. For example, where a school board invited job applicants to send applications to a post office box, any applications received in that post office box did not become records of the office until the board retrieved and reviewed, or otherwise used and relied on them. Personal, otherwise non-record correspondence that is actually used to document a decision to discipline a public employee qualifies as a "record."



QUIZ!

Can I specify that records cannot be printed and provided to the requester?

No.

A requester may specify whether he or she would like to inspect the records or obtain copies. If the requester asks for copies, he or she has the right to choose the copy medium (paper, film, electronic file, etc.). The requester can choose to have the record copied: (1) on paper, (2) in the same medium as the public office keeps them, or (3) on any medium upon which the public office or person responsible for the public records determines the record “reasonably can be duplicated as an integral part of the normal operations of the public office.” The public office may charge the requester the actual cost of copies made and may require payment of copying costs in advance.

OHIO PUBLIC RECORDS ACT

OVERVIEW

A requester must identify the records he or she is seeking “with reasonable clarity,” so that the public office can identify responsive records based on the manner in which it ordinarily maintains and accesses the public records it keeps. The request must fairly and specifically describe what the requester is seeking. A court will not compel a public office to produce public records when the underlying request is ambiguous or overly broad, or the requester has difficulty making a request such that the public office cannot reasonably identify what public records are being requested.

OHIO PUBLIC RECORDS ACT

OVERVIEW

The statute then requires the public office to give the requester the opportunity to revise the denied request, by informing the requester how the office ordinarily maintains and accesses its records. Thus, the Public Records Act expressly promotes cooperation to clarify and narrow requests that are ambiguous or overly broad, in order to craft a successful, revised request. The public office can inform the requester how the office ordinarily maintains and accesses records through a verbal or written explanation. Giving the requester a copy of the public office's relevant records retention schedules can be a helpful starting point in explaining the office's records organization and access. Retention schedules categorize records based on how they are used and the purpose they serve, and well-drafted schedules provide details of record subcategories, content, and duration, which can help a requester revise and narrow the request. Ohio courts have noted favorably an office's invitation to discuss revision of an overly broad request as evidence supporting compliance with the Public Records Act.

OHIO PUBLIC RECORDS ACT

OVERVIEW

Exempt from production:

Records protected by attorney-client privilege • Medical records • FERPA protected records • Records associated with the statutory process through which unmarried and unemancipated minors may obtain judicial approval for abortion procedures in lieu of parental consent • Records pertaining to adoption proceedings, contents of an adoption file maintained by the Department of Health, a putative father registry, and an original birth record after a new birth record has been issued

OHIO PUBLIC RECORDS ACT

OVERVIEW

There is no obligation to create a responsive record.

The proper subject of a public records request is a record that actually exists at the time of the request, not selected *information* the requester seeks to obtain. For example, if a person asks a public office for a list of court cases pending against it, but the office does not keep such a list, the public office is *under no duty to create a list* to respond to the request.



QUIZ!

Are you able to negotiate the terms of a public records request?

Yes.

If a public office believes that (1) having a request in writing, (2) knowing the intended use of the information, or (3) knowing the requester's identity would benefit the requester by enhancing the ability of the public office to identify, locate, or deliver the requested records, the public office must first inform the requester that giving this information is not mandatory and then ask if the requester is willing to provide that information to assist the public office in fulfilling the request. As with the negotiation required for an ambiguous or overly broad request, this optional negotiation tool regarding purpose, identity, or writing can promote cooperation and efficiency. *** Before asking for the information, the public office must let a requester know that he or she may decline this option.

OHIO PUBLIC RECORDS ACT

SPECIFIC ITEMS TO NOTE

Directory information concerning public school students may not be released if the intended use is for a profit-making plan or activity.

R.C. 3319.321(A) (allowing schools to “require disclosure of the requestor’s identity or the intended use of the directory information ... to ascertain whether the directory information is for use in a profit-making plan or activity”).

OHIO PUBLIC RECORDS ACT

SPECIFIC ITEMS TO NOTE

It is irrelevant whether the intended use of requested records is for commercial purposes. However, if an individual or entity is making public records requests for commercial purposes, the public office receiving the requests can limit the number of records “that the office will physically deliver by United States mail or by another delivery service to ten per month.”

For purposes of this limitation, **the term “commercial purposes”** is to be narrowly construed and **does not include** the following activities: (1) Reporting or gathering news; (2) Reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government; or (3) **Nonprofit educational research**.

OHIO PUBLIC RECORDS ACT

BEST PRACTICES

Revisit your records retention schedule every year.

Your records retention schedule is the baseline by which all records requests are measured. It makes clear (1) what records are kept; (2) how records are organized; and (3) for how long records are maintained.

OHIO PUBLIC RECORDS ACT

BEST PRACTICES

Centralize your records
request/record production tasks.

I'm sure you've seen this before:

(NAME OF AGENCY/DEPARTMENT/SUBDIVISION)
LOG OF PUBLIC RECORDS REQUESTS
(PERIOD OF TIME COVERED BY LOG)

| | DATE RECEIVED | DATE OF RESPONSE | NAME OF REQUESTING PERSON OR ENTITY | DESCRIPTION OF RECORDS REQUESTED | COPY OF RELEASED RECORDS | | EXEMPTION REDACTION | | LEGAL AUTHORITY FOR EXEMPTION REDACTION | NAME OF PERSON FULFILLING REQUEST |
|----|------------------|---------------------|--|--|--------------------------------|----|------------------------|----|---|---|
| | | | | | YES | NO | YES | NO | | |
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OHIO PUBLIC RECORDS ACT

BEST PRACTICES

METADATA

When applying redactions, especially when dealing with electronic records, organizations must be cognizant of the metadata that may be embedded within the file or files that are being prepared for production.

It is common (and recommended) for organizations to include an IT professional in the preparation of electronic records in response to a public records request.

OHIO PUBLIC RECORDS ACT

CASE LAW

State ex rel. Esrati v. Dayton Metro Library, 2021-Ohio-3753

The trial court granted Esrati's motion for summary judgment, denied Dayton Library's motion for summary judgment, and **granted Esrati's request for a writ of mandamus**. The court reasoned that the surveillance video at issue was a public record and did not fall within the "library records" exemption under R.C. 149.432(A)(2)(b). The trial court ordered Dayton Library to turn over the surveillance video to Esrati within 90 days and to "edit the video" only to the extent "necessary to **obscure the faces of other library patrons** in the video." Further, it required Dayton Library to reimburse Esrati for the court costs of the action and awarded him \$1,000, the maximum statutory damages under R.C. 149.43(C)(2). The trial court did not, however, award Esrati attorney fees, finding that Dayton Library did not act unreasonably.

OHIO PUBLIC RECORDS ACT

CASE LAW

State ex rel. Horton v. Kilbane, 2022-Ohio-205

A document requester was not entitled to a writ of mandamus requiring a city to comply with her request under the Ohio Public Records Act, R.C. 149.43. By seeking a third version of one document, **the requester impermissibly broadened the scope of her request**, and another document was not in the city's possession.

OHIO PUBLIC RECORDS ACT

CASE LAW

State ex rel. Armatas v. Plain Twp. Bd. of Trs., 163 Ohio St. 3d 304

Invoices for legal services provided to public offices are public records to the extent that they contain only nonprivileged information (privileged communications must be redacted).

Quasi-agency test: even if the public office does not "create" or "receive" the records, the records may nonetheless be "under the jurisdiction" of the public office.

OHIO OPEN MEETINGS ACT



OHIO OPEN MEETINGS ACT

OVERVIEW

The Open Meetings Act requires **public bodies** in Ohio to take official action and conduct all deliberations upon official business only in **open meetings** where the public may attend and observe. Public bodies must provide **advance notice** to the public indicating when and where each meeting will take place and, in the case of special meetings, the specific topics that the public body will discuss. The public body must take full and accurate minutes of all meetings and make these minutes available to the public, except in the case of permissible executive sessions.



A NOTE REGARDING COVID-19 AND IN-PERSON MEETING REQUIREMENTS

A member of a public body must be present in person at a meeting in order to be considered present, vote, or be counted as part of a quorum. In the absence of specific statutory authority, however, public bodies may not conduct a meeting via electronic or telephonic conferencing.

(NOTE: In-person attendance requirements were temporarily suspended due to the COVID-19 pandemic. Currently, this suspension is effective until **June 30, 2022.**

OHIO OPEN MEETINGS ACT

OVERVIEW

“Public body” - Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution

“Meeting” - (1) a prearranged gathering of (2) a majority of the members of a public body (3) for the purpose of discussing public business

OHIO OPEN MEETINGS ACT

OVERVIEW

Notice Requirements

Regular Meetings - A public body must establish, by rule, a reasonable method that allows the public to determine the time and place of regular meetings, i.e. monthly, at a certain place and time.

Special Meetings – 24 hour notice and must include the purpose of the meeting

Emergency Meetings – Immediate notification, including time, place, and purpose

OHIO OPEN MEETINGS ACT

EXECUTIVE SESSION

- Executive session can only be held for one of the following reasons:
 - Certain personnel matters
 - Purchase or sale of property
 - Pending or imminent court action
 - Collective bargaining matters
 - Matters required to be kept confidential
 - Security matters
 - Hospital trade secrets
 - Confidential business information of an applicant for economic development assistance
 - Veterans Service Commission applications

OHIO OPEN MEETINGS ACT

OVERVIEW

The person filing an action under the Open Meetings Act generally has the burden of proving the alleged violation. When the plaintiff first shows that a meeting of a majority of the members of a public body occurred and alleges that the public was improperly excluded from all or part of that meeting, the burden shifts to the public body to produce evidence that the challenged meeting fell under one of the Act's exemptions. Courts do not necessarily accept a public body's stated purpose for an executive session if other evidence demonstrates that the public body improperly deliberated during the executive session.

OHIO OPEN MEETINGS ACT

CASE LAW – A NOTE

When the Ohio Supreme Court issues a decision interpreting a statute, that decision must be followed by all lower Ohio courts. A lawsuit to enforce the Open Meetings Act must be filed in a county court of common pleas. While the losing party often appeals a court's decision, common pleas appeals are not guaranteed to reach the Ohio Supreme Court, *and rarely do*. Consequently, the bulk of case law on the Open Meetings Act comes from courts of appeals, whose opinions are binding only on lower courts within their district, but they may be cited for the persuasive value of their reasoning in cases filed in other districts.

OHIO OPEN MEETINGS ACT

CASE LAW

State ex rel. Ames v. Portage Cty. Bd. of Comm'rs, 165 Ohio St. 3d 292

While the Open Meetings Act did not appear to prevent the board from using consent agendas as a general matter, the citizen did raise a plausible theory sufficient to survive summary judgment that the board's use of a consent agenda constructively closed its public meetings and was an impermissible end run around the Open Meetings Act

OHIO OPEN MEETINGS ACT

CASE LAW

Esrati v. Dayton City Comm'n, 2019-Ohio-1021

Plaintiff had not shown that a school facilities task force violated R.C. 121.22(H) of the Open Meetings Act when it participated in a private tour of a school, as there was no evidence that the task force engaged in deliberations during the tour or did anything other than gather information.

The Open Meetings Act does not define "deliberations," but they involve more than information-gathering, investigation, or fact-finding. "Deliberations" have been defined as "the act of weighing and examining the reasons for and against a choice or measure" or "a discussion and consideration by a number of persons of the reasons for and against a measure."

OHIO AUDITOR OF STATE BULLETIN

DIRECTED TO COMMUNITY SCHOOLS AND SPONSORS

PUBLISHED OCTOBER 25, 2021

Annual public records and open meetings laws training for Community School officers and certain employees must be training that is certified by the Ohio Attorney General in accordance with Ohio Rev. Code § 109.43(B)

The Auditor of State will begin auditing compliance with this requirement for fiscal year 2023, i.e. July 1, 2022 – June 30, 2023.

SUNSHINE LAWS COMPLIANCE AUDITS

1. Policy for responding to public records requests
2. Records are promptly prepared and sent
3. Legal authority included when denial is made, in whole or in part
4. Explanation of redactions, including legal authority

SUNSHINE LAWS COMPLIANCE AUDITS

5. Readily available records retention policy
6. Records custodian is aware of public records policy, and acknowledges
7. Include public records policy in manual or handbook
8. Poster describing public records policy – displayed in all locations

SUNSHINE LAW & COMPLIANCE AUDITS

9. Records commission reviews record retention and disposal policy
10. Annual public records and open meetings laws training for Community School officers and certain employees
11. Rule by which anyone can determine time/place/purpose of meetings
12. Meeting minutes promptly prepared and made available
13. Compliance with executive session requirements

STARS RATING SYSTEM

Complying with the previously listed items is required. However, if the goal is to obtain the Highest Achievement in Open and Transparent Government according to the StaRS rating system, an organization must implement five (5) or more best practices:

Records tracking log • Records request forms • Acknowledgement that request has been received • Records policy identified records custodian with contact information • Board members and certain employees complete Sunshine training annually and/or within first four months of onboard • Meeting agendas, policies, minutes available on website • Budget, compensation, audit reports available on website



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