Members Brief

An informational brief prepared by the LSC staff for members and staff of the Ohio General Assembly

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Ohio's Public Records Law

A public office, on request, must promptly prepare public records, make them available for inspection, and provide copies at cost. A public record is any record kept that documents the organization, functions, policies, decisions, procedures, operations, or other activities of the public office. Certain records are exempt under state or federal law, including legislative documents arising out of the confidential relationship between legislative staff and the General Assembly.

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Duty to maintain and provide access to records

The Ohio Public Records Law[1] generally requires every public office,[2] when requested, to promptly prepare public records and make them available for inspection at all reasonable times during regular business hours. A public office must make public records available for copying at cost. Public offices must maintain public records in a manner that allows them to be made available for inspection and copying.

What is a public record?

Public record means any record kept by any public office and any record on the delivery of educational services by an alternative school kept by an entity operating the school.[3]

A **public office** includes any state agency, political subdivision, or other organized body established by Ohio law for the exercise of any function of government. State, county, city, village, township, and school district units are public offices.[4]

A **record** includes any document, device, or item, regardless of physical form or characteristic that (1) is created or received by or coming under the jurisdiction of any public office and (2) serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. Electronic records, such as emails, are records. A record does not include personal notes or any document, device, or item, regardless of physical form or whether an assistive device or application was used, of a public official, or of the official's attorney, employee, or agent, that is used, maintained, and accessed solely by the individual who creates it or causes its creation.[5]

The definitions of record and public record must be read together. Not every document or piece of information maintained by a public office is a "record" subject to disclosure. Matter that does not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of a public office is not subject to inspection or copying under the Law. For example, the contents of allegedly racist email messages that do not serve any of a public office's specified functions are not public records, even though they are transmitted to and maintained by the public office.[6] Similarly, state employee home addresses are not public records because they do not serve to document the organization, functions, policies, decisions,

[1] R.C. 149.43, although inclusions and exemptions from the Public Records Law may be found throughout the Revised Code.

[2] For ease of reading, this brief uses only "public office," but note that an entity responsible for public records may be a private entity if it can be shown, by clear and convincing evidence, that the private entity is the functional equivalent of a public office (*State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456 (2006)). Ohio law expressly excludes JobsOhio from the definition of public office (R.C. 149.011).

[3] R.C. 149.43(A)(1).

[4] R.C. 149.011(A) and 149.43(A)(1).

[5] R.C. 149.011(G).

[6] *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 82 Ohio St.3d 37 (1998).

procedures, operations, or other activities of the state agencies.[7] It is the content, not the medium on which it exists, that make a document a public record of a public office.[8]

In addition, certain records are exempt from the Public Records Law under state or federal statutory or case law (see Appendix A (PDF) to the Attorney General's Ohio Sunshine Laws (PDF) manual for a thorough list of exemptions to the Public Records Law). For example, images and data captured by an automated license plate recognition system that are maintained in a law enforcement database, are exempt from disclosure under Public Records Law.[9] However, certain video records maintained by a public office, such as law enforcement body worn camera videos, generally qualify as public records. As described below, a law enforcement agency or prosecuting attorney's office must consider the time required for to retrieve, download, review, redact, seek legal advice regarding, and produce the video record.

Journalist access to certain exempted records

There is one notable caveat to exemptions. Under certain circumstances, journalists may access information that is otherwise generally exempt from inspection or copying because it relates to the residential and family information of certain designated public service workers.[10] If a journalist submits a signed written request in a specified form that includes a statement that disclosure of the information is "in the public interest," the public office must disclose certain information. This journalist access requirement does not authorize access to Social Security numbers or private financial information.[11]

[7] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160 (2005).

[8] *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St.3d 456 (1992).

[9] R.C. 149.43(A)((1)(yy).

[10] A public record exemption applies to the residential and familial information of peace officers, parole officers, probation officers, bailiffs, prosecuting attorneys, assistant prosecuting attorneys, correctional employees, county or multicounty corrections officers, community-based correctional facility employees, designated Ohio National Guard members, protective services workers, youth services employees, firefighters, EMTs, medical directors or members of a cooperating physician advisory board of an emergency medical service organization, State Board of Pharmacy employees, Bureau of Criminal Identification and Investigation investigators, emergency service telecommunicators, forensic mental health providers, mental health evaluation providers, regional psychiatric hospital employees, judges, magistrates, and federal law enforcement officers. R.C. 19.43(A)(7) and (8).

[11] R.C. 149.43(B)(9).

Procedure for records requests

Receiving a request for records

If a document is considered a public record, and not subject to an exemption, the public office generally must permit its inspection or copying. Even if a document does fall under an exemption, the public office has the burden of proving that the record is exempt.[12] And, if a public record contains information that is exempt, the public office must redact the exempt information and make available all of the remaining information.[13] The Public Records Law is to be interpreted in favor of broad access, and a public office must prove nondisclosure falls squarely within an exception.[14]

A public office has the burden of proving that a record is exempt from public inspection or copying.

A person's request for a copy of a public record need not be in writing, and generally, the requestor is not required to give a reason for making it. The public office may ask that the request be in writing, for the requester's identity, or for the intended use of the records, but only after notifying the requester that providing the information is voluntary.[15]

When a defendant or a defendant's counsel or agent makes a request for public records related to a criminal action, the public office must consider the request as a demand for discovery under the Criminal Rules, except to the extent that the Criminal Rules plainly indicate a contrary intent. A defendant, or a defendant's counsel or agent, who makes a request for public records related to a criminal action, must serve a copy of the request on the prosecuting attorney, director of law, or other chief legal officer responsible for prosecuting the action.[16]

Assessing a charge for access to a public record

A public office must make public records available for copying at cost. Courts have found that "at cost" includes the actual cost of making copies, packaging, postage, and any other costs of the method of delivery or transmission chosen by the requester. The cost of employee time generally cannot be included in the cost of copies or of delivery.[17]

An exception exists regarding video records requested from a state or local law enforcement agency or from a prosecuting attorney's office. These public offices may charge a

[12] *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 38 Ohio St.3d 79 (1988).

[13] R.C. 149.43(B)(1). If the exempt and nonexempt information in the record are so intertwined that it would be virtually impossible to separate out the information to be disclosed without disclosing the confidential information, the public record need not be disclosed. *State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340 (1996); *State ex rel. Rocker v. Guernsey County Sheriff's Office*, 126 Ohio St.3d 224 (2010); and *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298 (2013).

[14] *State ex rel. Natl. Broadcasting Co.*; *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81 (2008).

[15] R.C. 149.43(B)(4) and (5).

[16] R.C. 149.43(G).

[17] R.C. 148.43(B)(1) and *State ex rel. Warren Newspapers v. Hutson*, 70 Ohio St.3d 619, 626 (1994); and R.C. 149.43(B)(7) and *State ex rel. Call v. Fragale*, 104 Ohio St.3d 276, 2004-Ohio-6589.

requester the actual cost associated with preparing a video record for inspection or production, not to exceed $75 per hour of video produced, nor $750 dollars total. "Actual cost," with respect to video records only, means all costs incurred by the public office in reviewing, blurring or otherwise obscuring, redacting, uploading, or producing the video records, including to the storage medium on which the record is produced, staff time, and any other relevant overhead necessary to comply with the request. These public offices may include in their public records policies the requirement that a requester pay the estimated actual cost before starting to prepare a video record for inspection or production. If a policy exists, the obligation to produce a video or make it available for inspection begins once the requester pays the estimated actual cost. The public office must provide the requester with the estimated actual cost within five business days and may charge a requester for the difference upon fulfilling a request if the requester is notified in advance that the actual cost may be up to 20% higher than the estimated actual cost but may not charge a requester a difference that exceeds 20% of the estimated actual cost.[18]

Also, these public offices may not charge for preparing a video record for inspection, or producing a copy of a video record, when the requester is a victim, or who is a victim who suffered loss and could seek remedy through a tort action, who reasonably asserts that the video recording relates to the act or omission that caused the victim's harm or loss, or who is the legal counsel or insurer of the victim. The fee may be waived only on the receipt of an affidavit by the victim or the victim's legal counsel identifying that the use of the video is to investigate harm or damages that may have been captured on the video.[19]

Rules and policy

A public office can adopt rules to regulate its public records obligations. It may adopt reasonable rules necessary to:

- Protect the safety of its records;
- Ensure that everyone has equal access to them; and
- Prevent inspection and copying activities from unreasonably interfering with its orderly and efficient operation.

However, these rules cannot arbitrarily or wholly close the public's access to any public record.[20]

The public office also may adopt a policy that it will follow in transmitting public records. The policy can limit to ten per month: (1) the number of records that it will deliver to a particular requester and (2) if the public office provides public records on a free, accessible, and searchable public website (unless the records requested are not provided on the website), the number of records that it will deliver in a

Public offices may adopt reasonable rules governing the manner in which public records are made accessible.

[18] R.C. 149.43(B)(1).

[19] R.C. 149.43(B)((11).

[20] *State ex rel. Beacon Journal Pub. Co. v. Andrews*, 48 Ohio St.2d 283 (1976), quoting *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369 (1960).

digital format. These policies cannot apply when the requester certifies in writing that the requester does not intend to use or forward the requested records, or the information in them, for commercial purposes. The term "commercial" in this context does not include reporting or gathering of news or information.[21]

What the public office is not required to do

While a public office has the duty to provide access to public records, this duty is limited. The Public Records Law does not require a public office to:

- Create new records by searching for and compiling information from existing records;[22]
- Store records in a particular medium;[23]
- Reprogram a computer to produce a particular compilation of information;[24]
- Accommodate a general request for all of a public office's records;[25]
- Permit an incarcerated adult or delinquent child to inspect or obtain a copy of a public record concerning a criminal or delinquent child investigation or prosecution, unless a request is for information that is releasable as a public record and the sentencing or adjudicating court finds that the information sought is necessary to support what appears to be a "justiciable claim" of the person.[26]

A public office need not create new records if none exist to fulfill a request.

Vexatious litigators

A person who has been found by a court to be a vexatious litigator is prohibited from requesting public records from a public office unless the person has obtained (1) leave to do so from the court of common pleas and (2) an order from the court specifying with particularity what public records the person may request. Until these requirements are satisfied and evidence of satisfaction presented to the public office, the office is under no obligation to respond to the request. A public office may require that the requestor present an acceptable form of identification if the office knows or has reasonable cause to believe that the requestor is a vexatious litigator.[27]

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[21] R.C. 149.43(B)(7).

[22] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153 (1999).

[23] R.C. 149.43(B)(2).

[24] *State ex rel. Kerner v. State Teachers Retirement Bd*., 82 Ohio St.3d 273 (1998) and *Margolius*, 62 Ohio St.3d at 461.

[25] *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989). (The Public Records Law does not contemplate that a person has the right to a complete duplication of a public office's voluminous files.)

[26] R.C. 149.43(B)(8).

[27] R.C. 2323.52(J).

If the public office denies the request

Citizens may sue to compel compliance with the Public Records Law.

If a public office ultimately denies a public records request, in whole or part, it must provide the requester with an explanation, including legal authority, setting forth why the request was denied. If a requester makes an ambiguous or overly broad request, the public office may deny the request but must provide the requester with an opportunity to revise it by informing the requester how the records are maintained and accessed in the ordinary course of the public office's duties. For example, the Court of Claims found that a request for all emails sent to and from six faculty members' email accounts for a five-month period without any subject matter limitation overbroad.[28]

If a requester allegedly is aggrieved by failure to comply with the Public Records Law, the requester may do one of the following, but not both:

1. File a **mandamus action** to compel the public office to comply with the law, to pay the requester's court costs and reasonable attorney's fees, and, in certain cases, to pay statutory damages. The requester may sue in the court of common pleas of the county in which the failure allegedly occurred, the court of appeals for that county, or the Ohio Supreme Court.
2. File a **complaint** with the Clerk of the Court of Claims or the clerk of the court of common pleas.[29] The Court of Claims is the only court to hear complaints based on an alleged failure to comply with Public Records Law. The county clerks of the court of common pleas must accept complaints, serve a copy to the particular public office, and forward it to the Clerk of the Court of Claims. After receiving a complaint, the Clerk of the Court of Claims assigns a special master, who may refer the case to mediation or may begin a process in which the public office files a response, and if applicable, a motion to dismiss the complaint. The special master then submits a report and recommendation to the Court of Claims. The Court of Claims on its own motion may dismiss the complaint at any time.[30]

Upon filing a mandamus action or complaint with a court, a person allegedly aggrieved must file with the court, in conjunction with the person's petition or complaint, a written affirmation stating that the person properly transmitted a complaint to the public office, the failure alleged in the complaint has not been cured or otherwise resolved to the person's satisfaction, and that the complaint was transmitted to the public office at least three business days before filing the suit. If the person fails to file an affirmation, the suit must be dismissed.[31]

[28] R.C. 149.43(B)(3); *Patton v. Univ. of Akron*, Ct. of Cl. No. 2017-00820PQ, 2018-Ohio-1555.

[29] R.C. 149.43(C).

[30] R.C. 2743.75.

[31] R.C. 149.43(C)(2).

Retention of public records

Under the Public Records Law and for litigation purposes, each state agency is to be considered for all purposes the custodian of its own records, and to be in exclusive possession, custody, and control of its records.[32]

The head of each public office need maintain only necessary records. Records are necessary if they are needed to adequately and properly document the organization, functions, policies, decisions, procedures, and essential transactions of the public office or to protect the legal and financial rights of the state and persons directly affected by the public office's activities.[33]

A public office cannot remove, destroy, mutilate, transfer, or otherwise damage or dispose of its records except as provided by law or under rules adopted by the State Records Administration or a records commission.[34]

The Revised Code also provides for the orderly retention and disposition of public records.

Public records law also imposes certain requirements on private entities. Private nonprofit corporations or associations that contract with the state or a political subdivision to provide services must keep accurate and complete financial records of any public money spent in relation to those services. Those contracts and financial records generally are public records subject to inspection and copying under the Public Records Law.[35]

Remedies

A person who is aggrieved by a public office that improperly disposes of a record may sue for either or both (1) injunctive relief that orders the public office to comply with the retention law, plus reasonable attorney's fees, or (2) a forfeiture of $1,000 for each violation (not to exceed $10,000), plus reasonable attorney's fees.[36]

Training and records policies

To ensure that all employees of public offices know their duties under the Public Records Law, all elected officials or their designees must attend approved public records training.

[32] R.C. 9.59.

[33] R.C. 149.40.

[34] R.C. 121.211 and 149.351. Each county, municipal corporation, township, school district, educational service center, library, and special taxing district is required to have a records commission, which helps regulate the retention and disposal of local records (R.C. 149.38 to 149.42).

[35] R.C. 149.431. Slightly different rules apply for political subdivision individual or joint self-insurance programs, political subdivision joint self-insurance pools, and state university or college joint self-insurance pools (R.C. 9.833(C), 2744.081(A), and 3345.203).

[36] R.C. 149.351.

Additionally, all public offices must adopt a public records policy for responding to public record requests and give a copy of that policy to the office's records custodian.[37]

Confidentiality of certain legislative documents

Legislative staff must maintain a confidential relationship with each General Assembly member, and with each member of the General Assembly staff, with respect to communications between them. Generally, a legislative document arising out of this confidential relationship is not a public record for purposes of the Public Records Law.[38] For additional information on the confidentiality of legislative documents see LSC's *Member Brief* Legislative Documents and the Public Records Law (PDF).

[37] R.C. 149.43(E). A future official may satisfy this requirement by attending the training before taking office, provided that the future official may not send a designee. See also R.C. 109.43.

[38] R.C. 101.30(B).