Protecting Ohio's Families

OHIO SUNSHINE LAWS

An Open Government Resource Manual

MIKE DEWINE
OHIO ATTORNEY GENERAL

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2014

Ohio Sunshine Laws 2014

Dear Ohioans,

My number one priority as Attorney General is to protect Ohio families. My office does this in a variety of ways. One way is making sure the public has access to information. My office fosters a spirit of open government by promoting Ohio's Public Records Law and Open Meetings Law. Together, these laws are known as "Ohio Sunshine Laws" and are among the most comprehensive open government laws in the nation.

Along with this 2014 Ohio Sunshine Laws Manual, our office and the Ohio Auditor of State's office provide Ohio Sunshine Laws training for elected officials throughout the state, as mandated by Ohio Revised Code Sections 109.43 and 149.43(E)(1). By providing elected officials and other public employees with information concerning public records and compliance, we help ensure accountability and transparency in the conduct of public business. Any citizen is welcome to attend these trainings and benefit from the same knowledge.

In addition, the Ohio Attorney General's Office offers a free public records mediation program to help mediate disputes between public records requesters and local public offices. The program was created in an effort to reduce the number of public records-related cases filed in the court system by providing an alternative means of resolving disputes. Since its inception, the Attorney General's Office has assisted in successfully resolving over 70% of the proper requests for mediation it has received. Either party may request mediation by filling out the online intake form provided on the Attorney General's website or by calling the mediation hotline at 1-888-958-5088 to speak with a member of the Public Records Unit.

The Attorney General's Office and its Public Records Unit stand as one of the state's foremost authorities on public records and open meetings law. The office provides training, guidance, and online resources. Additionally, the Attorney General has created a model public records policy. Local governments and institutions can use this model as a guide for creating their own public records policies. This model policy and other online resources are available at www.OhioAttorneyGeneral.gov/Sunshine.

This manual is intended as a guide, but because much of open government law comes from interpretation of the Ohio Sunshine Laws by the courts, we encourage local governments to seek guidance from their legal counsel when specific questions arise.

Thank you for your part in promoting open government in Ohio.

Very respectfully yours,

Mike DeWine

Mike DeWine
Attorney General

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Readers may find the latest edition of this publication and the most updated public records and open meetings laws by visiting the following web sites. To request additional paper copies of this publication, contact:

Ohio Attorney General
Public Records Unit
Re: Sunshine Manual Request
30 E. Broad St., 16th Floor
Columbus, Ohio 43215
(800) 282-0515 or (614) 466-2872
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Ohio Auditor of State
Open Government Unit
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Columbus, Ohio 43215
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www.OhioAuditor.gov

We welcome your comments and suggestions.

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Over 200 Years of Sunshine: Reflections on Open Government

Ohio Supreme Court Justice Charles Zimmerman:

> The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same. *Patterson v. Ayers, 171 Ohio St. 369 (1960)*.

Thomas Jefferson:

> Information is the currency of democracy.

Patrick Henry:

> The liberties of a people never were, nor ever will be, secure, when the transactions of their rulers may be concealed from them . . . To cover with the veil of secrecy the common routine of business, is an abomination in the eyes of every intelligent man.

James Madison:

> A popular government without popular information, or the means of acquiring it, is but a prologue to a farce or a tragedy, or perhaps both. Knowledge will forever govern ignorance, and a people who mean to be their own governors must arm themselves with the power which knowledge gives.

John Adams:

> Liberty cannot be preserved without a general knowledge among the people, who have a right and a desire to know; but besides this, they have a right, an indisputable, divine right to that most dreaded and envied kind of knowledge, I mean of the characters and conduct of their rulers.

Glossary

When learning about the Ohio Sunshine Laws, you may confront some legal terms that are unfamiliar to you. Below are the more common terms used in this handbook.

Charter
A charter is an instrument established by the citizens of a municipality, which is roughly analogous to a state's constitution. A charter outlines certain rights, responsibilities, liberties, or powers that exist in the municipality.

Discovery
Discovery is a pre-trial practice by which parties to a lawsuit disclose to each other documents and other information in an effort to avoid any surprises at trial. The practice serves the dual purpose of permitting parties to be well-prepared for trial and enabling them to evaluate the strengths and weaknesses of their case.

In camera
In camera means "in chambers." A judge will often review records that are at issue in a public records dispute *in camera* to evaluate whether they are subject to any exceptions or defenses that may prevent disclosure.

Injunction
An injunction is a court order commanding that a person act or cease to act in a certain way. For instance, a person who believes a public body has violated the Open Meetings Act will file a complaint seeking injunctive relief. The court may then issue an order enjoining the public body from further violations of the act and requiring it to correct any damage caused by past violations.

Litigation
The term "litigation" refers to the process of carrying on a lawsuit, i.e., a legal action and all the proceedings associated with it.

Mandamus
The term means literally "we command." In this area of law, it refers to the legal action that a party files when they believe they have been wrongfully denied access to public records. The full name of the action is a petition for a writ of mandamus. If the party filing the action, or "relator", prevails, the court may issue a writ commanding the public office or person responsible for the public records, or "respondent," to correctly perform a duty that has been violated.

Pro se
The term means "for oneself," and is used to refer to people who represent themselves in court, acting as their own legal counsel.

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The Ohio Public Records Act

Overview of the Ohio Public Records Act

Ohio law has long provided for public scrutiny of state and local government records.[1]

Ohio's Public Records Act details how to request public records. The Act also excludes some records from disclosure, and enforces production when an office denies a proper public records request. The pages that follow will explain the details of this process; below is an overview of the basic principles.

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 schedule at a location readily available to the public. When it receives a proper public records request, and 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.

Unless a specific law states otherwise, a requester does not have to provide a reason for wanting records, provide his or her name, or make the request in writing. However, the request does have to be clear and specific enough for the public office to reasonably identify what public records the requester seeks. A public office can refuse a request if the office no longer keeps the records (pursuant to their records retention schedule), if the request is for documents that are not records of the office, or if the requester does not revise an ambiguous or overly broad request.

The General Assembly has passed a number of laws that protect certain records by requiring or permitting a public office to withhold them from public release. Where a public office invokes one of these exceptions, the office may only withhold a record or part of a record clearly covered by the exception, and must tell the requester what legal authority it is relying on to withhold the record.

A person who believes that a public office has wrongly denied him or her a public record may file a lawsuit against the public office. In this lawsuit, the requester will have the burden of showing that they made a proper public records request, and the public office will have the burden of showing the court that any record it withheld was clearly subject to one or more valid exceptions. If it cannot, the court will order the public office to provide the record, and the public office may be subject to a civil penalty and payment of attorney fees.

[1] Ohio's state and local government offices follow Ohio's Public Records Act, found at R.C. 149.43. The federal Freedom of Information Act, 5 U.S.C. § 552, does not apply to state and local offices. *See, State ex rel. O'Shea & Assoc. v. Cuyahoga Metro Housing Auth.*, 131 Ohio St.3d 139, 2012-Ohio-115, 962 N.E.2d 297, ¶ 38.

I. Chapter One: Public Records Defined

The Ohio Public Records Act applies only to "public records," which the Act defines as "records kept by a public office."[2] When making or responding to a public records request, it is important to first establish whether the items sought are really "records," and if so, whether they are currently being "kept by" an organization that meets the definition of a "public office." This chapter will review the definitions of each of these key terms and how Ohio courts have applied them.

One of the ways that the Ohio General Assembly removes certain records from the operation of the Ohio Public Records Act is to simply remove them from the definition of "public record." Chapter Three addresses how exceptions to the Act are created and applied.

A. What is a "Public Office?"

1. Statutory Definition – R.C. 149.011(A)

"Public office" includes "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."[3] An organization that meets the statutory definition of a "public body" (see Open Meetings Act, Chapter One: A. "Public Body") does not automatically meet the definition of a "public office."[4]

This definition includes all state and local government offices, and also many agencies not directly operated by a political subdivision. Examples of entities that have been determined to be "public offices" (prior to the *Oriana House*[5] decision) include:

- Some public hospitals; [6]
- Community action agencies; [7]
- Private non-profit water corporations supported by public money; [8]
- Private non-profit PASSPORT administrative agencies; [9]
- Private equity funds that receive public money and are essentially owned by a state agency; [10]
- Non-profit corporations that receive and solicit gifts for a public university and receive support from taxation; [11]
- Private non-profit county ombudsman offices; [12] and
- County emergency medical services organizations.[13]

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[2] R.C. 149.43(A)(1).
[3] R.C. 149.011(A) (but "public office" does not include the nonprofit corporation formed under section 187.01 of the Revised Code); JobsOhio, the nonprofit corporation formed under R.C. 187.01, is not a public office for purposes of the Public Records Act, pursuant to R.C. 187.03(A).
[4] *State ex rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Cty. Bd. Comm.*, 128 Ohio St.3d 256, 2011-Ohio-625, ¶¶ 35-38.
[5] *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854. Similar entities today should be evaluated based on current law.
[6] *State ex rel. Dist. 1199 v. Lawrence County Gen. Hosp.*, 83 Ohio St.3d 351, 1998-Ohio-49, *but compare, State ex rel. Stys v. Parma Cmty. Gen. Hosp.*, 93 Ohio St.3d 438, 2001-Ohio-1582 (particular hospital deemed not a "public office"); *State ex rel. Farley v. McIntosh*, 134 Ohio App.3d 531 (2nd Dist. 1998) (court appointed psychologist not "public office").
[7] *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Association*, 61 Ohio Misc.2d 631 (Lucas C.P. 1990).
[8] *Sabo v. Hollister Water Association*, 4th Dist. No. 93 CA 1582 (Jan. 12, 1994).
[9] 1995 Ohio Op. Atty' Gen. No. 001.
[10] *State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-3549 (limited-liability companies organized to receive state-agency contributions were public offices for purposes of the Public Records Act); *see also, State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713, ¶ 42.
[11] *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 65 Ohio St.3d 258 (1992).
[12] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 1997-Ohio-349.
[13] 1999 Ohio Op. Atty' Gen. No. 006.

2. Private Entities can be "Public Offices"

If there is clear and convincing evidence that a private entity is the "functional equivalent" of a public office, that entity will be subject to the Ohio Public Records Act.[14] Under the functional equivalency test, a court must analyze all pertinent factors, including: (1) whether the entity performs a governmental function; (2) the level of government funding; (3) the extent of government involvement or regulation; and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.[15] The functional equivalency test "is best suited to the overriding purpose of the Public Records Act, which is 'to allow public scrutiny of public offices, not of all entities that receive funds that at one time were controlled by the government.'"[16] In general, the more a private entity is funded, controlled, regulated and/or created by government, and the greater the extent that the entity is performing a governmental function, the more likely a court will determine that it is a "public institution" and therefore a "public office" subject to the Ohio Public Records Act.

3. Quasi-Agency – A Private Entity, Even if not a "Public Office," can be "A Person Responsible for Public Records"

When a public office contracts with a private entity to perform government work, the resulting records may be public records, even if they are solely in the possession of the private entity.[17] Resulting records are public records when three conditions are met: (1) the private entity prepared the records to perform responsibilities normally belonging to the public office; (2) the public office is able to monitor the private entity's performance; *and* (3) the public office may access the records itself.[18] Under these circumstances, the public office is subject to requests for these public records under its jurisdiction, and the private entity itself may have become a "person[19] responsible for public records"[20] for purposes of the Ohio Public Records Act.[21] For example, a public office's obligation to turn over application materials and resumes extends to records of private search firms

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[14] *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, paragraph one of syllabus; *State ex rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Cty. Bd. Comm.*, 128 Ohio St.3d 256, 2011-Ohio-625, ¶ 267 (no clear and convincing evidence that private groups comprising unpaid, unguided county leaders and citizens, not created by governmental agency, submitting recommendations as coalitions of private citizens were functionally equivalent to public office).

[15] *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, paragraphs one and two of syllabus; *see also, State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713.

[16] *State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713, ¶ 24; *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, ¶ 36 ("It ought to be difficult for someone to compel a private entity to adhere to the dictates of the Public Records Act, which was designed by the General Assembly to allow public scrutiny of public offices, not of all entities that receive funds that at one time were controlled by the government."); *State ex rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, ¶¶ 15-29 (joint self-insurance pool for counties and county governments found not the functional equivalent of a public office); *see also, State Ex rel. Dayton Tea Party v. Ohio Mun. League*, 129 Ohio St.3d 1471, 2011-Ohio-4751 (granting a motion to dismiss without opinion, based on the argument that the Ohio Municipal League and Township Association were not the functional equivalents of public offices); *State ex rel. Dist. Eight Regional Org. Comm. v. Cincinnati-Hamilton County Cmty. Action Agency*, 192 Ohio App.3d 553, 2011-Ohio-312 (1st Dist.) (home weatherization program administered by private non-profit community action agency found not to be functional equivalent of public office); *State ex rel. Luken v. Corp. for Findlay Mkt. of Cincinnati*, 2012-Ohio-2074, ¶ 27(1st Dist.) (non-profit corporation that manages the operation of a public market is not the functional equivalent of a public office).

[17] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 660, 2001-Ohio-1895; *State ex rel. Gannett Satellite Info. Network v. Shirey*, 76 Ohio St.3d 1224, 1997-Ohio-206.

[18] *State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 36 (finding that firefighter promotional examinations kept by testing contractor were still public record); *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 657, 2001-Ohio-1895; *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 550 N.E.2d 464 (1990) (outcome overturned by subsequent amendment of R.C. 4701.19(B)); *but see, State ex rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Cty. Bd. Comm.*, 128 Ohio St.3d 256, 2011-Ohio-625, ¶¶ 52-54 (quasi-agency theory did not apply where private citizen group submitted recommendations but owed no duty to government office to do so).

[19] "Person" includes an individual, corporation, business trust, estate, trust, partnership, and association. R.C. 1.59(C).

[20] *State ex rel. Toledo Blade Co. v. Ohio Bureau of Workers' Comp.*, 106 Ohio St.3d 113, 2005-Ohio-3549 ¶ 20 ("R.C. 149.43(C) permits a mandamus action against either a public office or the person responsible for the public record to compel compliance with the Public Records Act. This provision manifests an intent to afford access to public records, even when a private entity is responsible for the records."); *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 658, 2001-Ohio-1895; *State ex rel. Dist. Eight Regional Org. Comm. v. Cincinnati-Hamilton County Cmty. Action Agency*, 192 Ohio App.3d 553, 2011-Ohio-312 (1st Dist.) (home weatherization program administered by private non-profit community-action agency found not to be person responsible for public records); *State ex rel. Doe v. Tetrault*, 2012-Ohio-3879, ¶ 20 (12th Dist.) (township employee who tracked hours on online management website and then submitted those hours was not "particular official" charged with duty to oversee public records and cannot be the "person responsible for public records requested under R.C. 149.43").

[21] *E.g.*, R.C. 149.43(B)(1)-(9), (C)(1), (C)(2).

the public office used in the hiring process.[22] Even if the public office does not have control over or access to such records, the records may still be public.[23] A public office cannot avoid its responsibility for public records by transferring custody of records or the record-making function to a private entity.[24] However, a public office may not be responsible for records of a private entity that performs related functions that are not activities of the public office.[25] A person who works in a governmental subdivision and discusses a request is not thereby a "person responsible" for records outside of his or her own public office within the governmental subdivision.[26]

4. Public Office is Responsible for its Own Records

Only a public office or person who is actually responsible for the record sought is responsible for providing inspection or copies.[27] When statutes impose a duty on a particular official to oversee records, that official is the "person responsible" within the meaning of the Public Records Act.[28] A requester may wish to avoid forwarding delays by initially asking a public office to whom in the office they should make the public records request, but the courts will construe the Public Records Act liberally in favor of broad access when, for example, the request is served on any member of a committee from which the requester seeks records.[29] The same document may be kept as a record by more than one public office.[30] One appellate court has held that one public office may provide responsive documents on behalf of several related public offices that receive the same request and are keeping identical documents as records.[31]

B. What are "Records?"

1. Statutory Definition – R.C. 149.011(G)

The term "records" includes "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."

2. Records and Non-Records

If a document or other item does not meet all three parts of the definition of a "record," then it is a non-record and is not subject to the Ohio Public Records Act or Ohio's records retention requirements. The next paragraphs explain how items in a public office might meet or fail to meet the three parts of the definition of a record in R.C. 149.011(G).[32]

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[22] *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 1997-Ohio-206; for additional discussion, see Chapter Six: B. "Employment Records".

[23] *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 402-403, 1997-Ohio-206 (despite a lack of proof of public office's ability to access search firm's records or monitor performance, requested resumes were still public records).

[24] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 659, 2001-Ohio-1895; *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 403, 1997-Ohio-206.

[25] *State ex rel. Rittner v. Foley*, 2009-Ohio-520 (6th Dist.) (school system not responsible for alumni rosters kept only by private alumni organizations).

[26] *State ex rel. Keating v. Skeldon*, 2009 WL 1167848 (6th Dist.) (assistant prosecutor and county public affairs liaison not "persons responsible" for records of county dog warden).

[27] *State ex rel. Chatfield v. Flautt*, 2011-Ohio-4659, ¶ 8 (5th Dist.); *Cvijetinovic v. Cuyahoga Cty. Auditor*, 2011-Ohio-1754 (8th Dist.).

[28] *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30 (1985), paragraph two of the syllabus.

[29] *State ex rel. Am. Civ. Liberties Union of Ohio v. Cuyahoga Ct. Bd. Comm.*, 128 Ohio St. 256, 2011-Ohio-625, ¶¶ 33-34.

[30] *State v. Sanchez*, 79 Ohio App.3d 133, 136 (6th Dist. 1992).

[31] *State ex rel. Cushion v. Massillon*, 2011-Ohio-4749 (5th Dist.), *appeal not allowed* 2012-Ohio-136, ¶¶ 81-86.

[32] *See State ex rel. Data Trace Info. Svcs. v. Cuyahoga Cty. Fiscal Offcr.*, 131 Ohio St.3d 753, 2012-Ohio-753, ¶¶ 28-41 for a detailed application of the definition of "records" to the electronic records of one public office.

"Any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code . . ."

This first element of the definition of a record focuses on the existence of a recording medium; in other words, something that contains information in fixed form. The physical form of an item does not matter so long as it can record information. A paper or electronic document, e-mail, [33] video, [34] map, blueprint, photograph, voicemail message, or any other reproducible storage medium could be a record. This element is fairly broad. With the exception of one's thoughts and unrecorded oral communication, most public office information is stored on a fixed medium of some sort. A request for unrecorded or not-currently-recorded information (a request for advice, interpretation, referral, or research)[35] made to a public office, rather than a request for a specific existing document, device, or item containing such information, would fail this part of the definition of a "record."[36] A public office has discretion to determine the form in which it will keep its records.[37] Further, a public office has no duty to fulfill requests that do not specifically and particularly describe the records the requester is seeking. (See Chapter Two: A. 4. "A Request Must be Specific Enough for the Public Office to Reasonably Identify Responsive Records").

". . . created, received by, or coming under the jurisdiction of a public office . . ."

It is usually clear when items are created or received by a public office. However, even if an item is not in the public office's physical possession, it may still be considered a "record" of that office.[38] If records are held or created by another entity that is performing a public function for a public office, those records may be "under the public office's jurisdiction."[39]

". . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."

In addition to obvious non-records such as junk mail and electronic "spam," some items found in the possession of a public office do not meet the definition of a record because they do not "document the activities of a public office."[40] It is the message or content, not the medium on which it exists, that makes a document a record of a public office.[41] The Ohio Supreme Court has noted that "disclosure [of non-records] would not help to monitor the conduct of state government."[42] Some items that have been found not to "document the activities," etc. of public offices include public employee home addresses kept by the employer solely for administrative (i.e. management)

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[33] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 21 (e-mail messages constitute electronic records under R.C. 1306.01(G)).

[34] *State ex rel. Harmon v. Bender*, 25 Ohio St.3d 15, 17 (1986).

[35] *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 1998-Ohio-242 (relator requested names and documents of a class of persons who were enrolled in the State Teachers Retirement System but the court determined that that information did not exist in record form.); *State ex rel. Lanham v. Ohio Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 1997-Ohio-104 (inmates requested "qualifications of APA members").

[36] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 1999-Ohio-447 (A public office has "no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records." Requested records of peremptory strikes during relator's trial did not exist, and the court had no obligation to create responsive records.); *Capers v. White*, 8th Dist. No. 80713 (Apr. 17, 2002) (requests for information are not enforceable in a public records mandamus action).

[37] *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St.3d 163, 164 (1989).

[38] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 660, 2001-Ohio-1895 (requested stadium cost-overrun records were within jurisdiction of county board and were public records regardless of whether they were in the possession of the county, or the construction companies).

[39] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 2001-Ohio-1895; *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 39 (1990) ("we hold that the records [of an independent certified public account] are within the auditor's jurisdiction and that he is subject to a writ of mandamus ordering him to make them available for inspection.").

[40] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶ 25 (citations omitted); *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188 (1993) ("To the extent that any item . . . is not a 'record,' i.e., does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed.").

[41] *State ex rel. Margolius v. Cleveland*, 62 Ohio St.3d 456, 461 (1992).

[42] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶ 27 (citing *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 369, 2000-Ohio-345 (names, addresses, and other personal information kept by city recreation and parks department regarding children who used city's recreational facilities are not public records)).

convenience,[43] retired municipal government employee home addresses kept by the municipal retirement system,[44] personal calendars and appointment books,[45] juror contact information and other juror questionnaire responses,[46] personal information about children who use public recreational facilities,[47] and non-record items and information contained in employee personnel files.[48] Similarly, proprietary software needed to access stored records on magnetic tapes or other similar format, which meets the first two parts of the definition, is a means to provide access, not a record, as it does not itself document the activities, etc. of a public office.[49] Personal correspondence that does not document any activity of the office is non-record.[50] Finally, the Attorney General has opined that a piece of physical evidence in the hands of a prosecuting attorney (e.g., a cigarette butt) is not a record of that office.[51]

3. The Effect of "Actual Use"

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.[52] However, if the public office *actually* uses the item, it may thereby document the office's activities and become a record.[53] 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.[54] Personal, otherwise non-record correspondence that is actually used to document a decision to discipline a public employee qualifies as a "record."[55]

4. "Is this Item a Record?" – Some Common Applications

a. E-mail

A public office must analyze an e-mail message like any other item to determine if it meets the definition of a record. As electronic documents, all e-mails are items containing information stored on a fixed medium (the first part of the definition). If an e-mail is received by, created by, or comes under the jurisdiction of a public office (the second part of the definition), then its status as a record depends on the content of the message. If an e-mail created by, received by, or coming under the jurisdiction of a public office also serves to document the organization, functions, etc. of the public office, then it meets all three parts of the definition of a record.[56] If an e-mail does not serve to document the activities of the office, then it does not meet the definition of a record.[57]

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[43] *Dispatch v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384 (home addresses of employees generally do not document activities of the office, but may in certain circumstances).

[44] *State ex rel. DeGroot v. Tilsley*, 128 Ohio St.3d 311, 2011-Ohio-231, ¶¶ 6-8.

[45] *International Union, United Auto., Aerospace & Agric. Implement Workers v. Voinovich*, 100 Ohio App.3d 372, 378 (10th Dist. 1995); however, work-related calendar entries are manifestly items created by a public office that document the functions, operations, or other activities of the office and are records." *State ex rel. McCaffrey v. Mahoning County Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 33.

[46] *Akron Beacon Journal Printing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117.

[47] *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 369, 2000-Ohio-345; *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, ¶ 36 (personal identifying information in lead-poisoning documents, such as the names of parents and guardians; their Social Security and telephone numbers; their children's names and dates of birth; the names, addresses, and telephone numbers of other caregivers; and the names of and places of employment of occupants did not serve to document the CMHA's functions or other activities); R.C. 149.43(A)(1)(r).

[48] *Fant v. Enright*, 66 Ohio St.3d 186 (1993).

[49] *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St.3d 163, 165 (1989); *see State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶¶ 21-25 (data "inextricably intertwined" with exempt proprietary software need not be disclosed).

[50] *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37 (1998).

[51] 2007 Ohio Op. Att'y Gen. No. 034.

[52] *State ex rel. Beacon Journal Publ'g Co. v. Whittmore*, 83 Ohio St.3d 61, 1998-Ohio-180.

[53] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶ 27 (judge used redacted information to decide whether to approve settlement); *State ex rel. Beacon Journal Publ'g Co. v. Whittmore*, 83 Ohio St.3d 61, 1998-Ohio-180 (judge read unsolicited letters but did not rely on them in sentencing defendant, therefore, letters did not serve to document any activity of the public office); *State ex rel. Sensel v. Leone*, 85 Ohio St.3d 152, 1999-Ohio-446 (unsolicited letters alleging inappropriate behavior of coach not "records"); *State ex rel. Carr v. Caltrider*, Franklin C.P. No. 00CVH07-6001 (May 17, 2001); *State ex rel. Rhodes v. Chillicothe*, 4th DIst. No. 12CA3333, 2013-Ohio-1858, ¶ 28 (images that were not forwarded to city by vendor not public records because city did not use them in performing a governmental function).

[54] *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680.

[55] *State ex rel. Bowman v. Jackson City School Dist.*, 2011-Ohio-2228 (4th Dist.).

[56] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253 (public office e-mail can constitute public records under R.C. 149.011(G) and 149.43 if it documents the organization, policies, decisions, procedures, operations, or other activities

Although the Ohio Supreme Court has not ruled directly on whether communications of public employees to or from private e-mail accounts that otherwise meet the definition of a record are subject to the Ohio Public Records Act,[58] the issue is analogous to mailing a record from one's home, versus mailing it from the office – the location from which the item is sent does not change its status as a record. Records transmitted via e-mail, like all other records, must be maintained in accordance with the office's relevant records retention schedules, based on content.[59]

b. Notes

Not every piece of paper on which a public official or employee writes something meets the definition of a record.[60] Personal notes generally do not constitute records.[61] Employee notes have been found not to be public records if they are:

- kept as personal papers, not official records;
- kept for the employee's own convenience (for example, to help recall events); **and**
- other employees did not use or have access to the notes.[62]

Such personal notes do not meet the third part of the definition of a record because they do not document the organization, functions, etc. of the public office. The Ohio Supreme Court has held in several cases that, in the context of a public court hearing or administrative proceeding, personal notes that meet the above criteria need not be retained as records because no information will be lost to the public.[63] However, if any one of these factors does not apply (for instance, if the notes are used to create official minutes), then the notes are likely to be considered a record.[64]

c. Drafts

If a draft document kept by a public office meets the three-part definition of a record, it is subject to both the Public Records Act and records retention law.[65] For example, the Ohio Supreme Court

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of the public office); *State ex rel. Zidonis v. Columbus State Cmty. College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶¶ 28-32; *State ex rel. Bowman v. Jackson City School Dist.*, 2011 WL 1770890 (4th Dist.) (personal e-mails on public system are "records" when relied upon for discipline).

[57] *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37 (1998) (When an e-mail message does not serve to document the organization, functions, policies, procedures, or other activities of the public office, it is not a "record," even if it was created by public employees on a public office's e-mail system).

[58] *But see, State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 23 (relator conceded that e-mail messages created or received by her in her capacity as state representative that document her work-related activities constitute records subject to disclosure under R.C. 149.43 regardless of whether it was her public or her private e-mail account that received or sent the e-mail messages).

[59] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 21, fn. 1 ("Our decision in no way restricts a public office from disposing of items, including transient and other documents (*e.g.*, e-mail messages) that are no longer of administrative value and are not otherwise required to be kept, in accordance with the office's properly adopted policy for records retention and disposal. *See*, R.C. 149.351. Nor does our decision suggest that the Public Records Act prohibits a public office from determining the period of time after which its e-mail messages can be routinely deleted as part of the duly adopted records-retention policy.").

[60] *International Union, United Auto., Aerospace & Agric. Implement Workers v. Voinovich*, 100 Ohio App.3d 372, 376 (10th Dist. 1995) (governor's logs, journals, calendars, and appointment books not "records"); *State ex rel. Doe v. Tetrault*, 2012-Ohio-3879, ¶¶ 4, 28, 35-38 (12th Dist.) (scrap paper used by one person to track his hours worked, for entering his hours into report, contained only personal notes and were not a record).

[61] *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶ 22 (notes taken during public employee's pre-disciplinary conference not "records"); *State ex rel. Doe v. Tetrault*, 2012-Ohio-3879, ¶¶ 38 (12th Dist.) (citing *Cranford v. Cleveland*).

[62] *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶¶ 9-23; *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 440, 1993-Ohio-32; *Barnes v. Cols., Ohio Civil Servc. Comm.*, 2011-Ohio-2808 (10th Dist.), *discretionary appeal not allowed*, 2011-Ohio-5605 (police promotional exam assessors' notes).

[63] *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶ 19; *State ex rel. Steffan v. Kraft*, 67 Ohio St.3d 439, 441, 1993-Ohio-32; Personal notes, if not physically "kept by" the public office, would also not fit that defining requirement of a "public record"; R.C. 149.43(A)(1).

[64] *State ex rel. Verhovec v. Marietta*, 4th Dist. No. 12CA32, 2013-Ohio-5415, ¶ 30 (handwritten notes that are later transcribed are records because city clerk used them not merely as personal notes, but in preparation of official minutes in clerk's official capacity).

[65] *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶ 20 ("document need not be in final form to meet the statutory definition of 'record'"); *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶ 20 ("even if a record is not in final form, it may still constitute a 'record' for purposes of R.C. 149.43 if it documents the organization, policies, function, decisions, procedures, operations, or other activities of a public office."); *see also, State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 53, 1998-Ohio-444 (granting access to preliminary, unnumbered accident reports not yet processed into final form); *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170 (1998) (granting access to preliminary work product that had not reached its final stage or official destination); *State ex rel. Dist. 1199, Health Care & Social Serv. Union, SEIU v. Gulyassy*, 107 Ohio App.3d 729, 733 (10th Dist. 1995).

found that a written draft of an oral collective bargaining agreement submitted to a city council for its approval documented the city's version of the oral agreement and therefore met the definition of a record.[66] A public office may address the length of time it must keep drafts through its records retention schedules.[67]

d. Computerized Database Contents

A database is an organized collection of related data. The Public Records Act does not require a public office to search a database for information and compile or summarize it to create new records.[68] However, if the public office already uses a computer program that can perform the search and produce the compilation or summary described by the requester, the Ohio Supreme Court has determined that that output already "exists" as a record for the purposes of the Ohio Public Records Act.[69] In contrast, where the public office would have to reprogram its computer system to produce the requested output, the Court has determined that the public office does not have that output as an existing record of the office.[70]

C. What is a "Public Record?"

1. Statutory Definition – R.C. 149.43(A)(1): "Public record" means records kept by any public office[71]

This short definition joins the previously detailed definitions of "records" and "public office," with the words "kept by."

2. What "Kept By" Means

A record is only a public record if it is "kept by"[72] a public office.[73] 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.[74] A public office has no duty to furnish records that are not in its possession or control.[75] Similarly, if the office kept a record in the past, but has properly disposed of the record and no longer keeps it, then it is no longer a record of that office.[76] For example, where a school board first received and then returned superintendent candidates' application materials to the applicants, those materials were no longer

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[66] *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 2000-Ohio-142.
[67] For additional discussion, *see* Chapter Five: B. "Records Management – Practical Pointers."
[68] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 1999-Ohio-447 (citing *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 1998-Ohio-242). *See also, Margolius v. City of Cleveland*, 62 Ohio St.3d 456, 461 (1992).
[69] *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376, 379 (1989) (overruled on different grounds).
[70] *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 275, 1998-Ohio-242 (Relator requested names and addresses of a described class of members. The court found the agency would have had to reprogram its computers to create the requested records.).
[71] The definition goes on to expressly include specific entities, by title, as "public offices," and specific records as "public records," as follows: "… including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code." R.C. 149.43(A)(1).
[72] Prior to July 1985, the statute read, "records *required to be kept by* any public office," which was a very different requirement, and which no longer applies to the Ohio definition of "public record." *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170, 173 (1988).
[73] *State ex rel. Hubbard v. Fuerst*, 2010-Ohio-2489 (8th Dist.) (A writ of mandamus will not issue to compel a custodian of public records to furnish records which are not in his possession or control.).
[74] *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 16 (in responding to request for copies of maps and aerial photographs, a county engineers' office has no duty to create requested records because the public office generates such records by inputting search terms into program).
[75] *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, ¶ 28.
[76] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 21.

"public records" responsive to a newspaper's request.[77] But "so long as a public record is kept by a government agency, it can never lose its status as a public record."[78]

D. Exceptions

Both within the Ohio Public Records Act and in separate statutes throughout the Ohio Revised Code, the General Assembly has identified items and information that are either removed from the definition of public record or are otherwise required or permitted to be withheld.[79] (See, Chapter Three: Exceptions to the Required Release of Public Records, for definitions, application, and examples of exceptions to the Public Records Act).

[77] *See, State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 99 Ohio St.3d 6, 2003-Ohio-2260, ¶ 12 (materials related to superintendent search were not "public records" where neither board nor search agency kept such materials); *see also, State ex rel. Johnson v. Oberlin City School Dist. Bd. of Educ.*, 2009-Ohio-3526 (9th Dist.) (individual evaluations used by board president to prepare a composite evaluation but not kept thereafter, were not "public records"); *Barnes v. Cols., Ohio Civil Servc. Comm.*, 2011-Ohio-2808 (10th Dist.), *discretionary appeal not allowed*, 2011-Ohio-5605 (police promotional exam assessors' notes).

[78] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 20 (quoting *State ex rel. Dispatch Printing Co. v. Columbus*, 90 Ohio St.3d 39, 41, 2000-Ohio-8).

[79] R.C. 149.43(A)(1)(a-bb) (records, information, and other items that the General Assembly has determined are not public records or otherwise excepted).

II. Chapter Two: Requesting Public Records

The Ohio Public Records Act sets out procedures, limits, and requirements designed to maximize requester success in obtaining access to public records, and to minimize the burden on public offices where possible. While making or responding to a public records request, it is important to be familiar with these statutory provisions to achieve a cooperative, efficient, and satisfactory outcome.

A. Rights and Obligations of Public Records Requesters and Public Offices

Every public office must organize and maintain public records in a manner that they can be made available in response to public records requests. A public office must also maintain a copy of its current records retention schedule at a location readily available to the public.

Any person can make a request for public records by asking a public office or person responsible for public records for specific, existing records. The requester may make a request in any manner the requester chooses: by phone, in person, or in an e-mail or letter. A public office cannot require the requester to identify him or herself or indicate why he or she is requesting the records, unless a specific law requires it. Often, however, a discussion about the requester's purposes or interest in seeking certain information can aid the public office in locating and producing the desired records more efficiently.

Upon receiving a request for specific, existing public records, a public office must provide prompt inspection at no cost during regular business hours, or provide copies at cost within a reasonable period of time. The public office may withhold or redact specific records that are covered by an exception to the Public Records Act, but is required to give the requester an explanation, including legal authority, for each denial. In addition, a public office may deny a request in the extreme circumstance where compliance would unreasonably interfere with the discharge of the office's duties. The Ohio Public Records Act provides for negotiation and clarification to help identify, locate, and deliver requested records if: 1) a requester makes an ambiguous or overly broad request; or 2) the public office believes that asking for the request in writing, or the requester's identity, or the intended use of the requested information, would enhance the ability of the public office to provide the records.

1. Organization and Maintenance of Public Records

"To facilitate broad access to public records, a public office . . . shall organize and maintain public records in a manner that they can be made available for inspection or copying" in response to public records requests.[80] The fact that the office uses an organizational system that is different from, and inconsistent with, the form of a given request does not mean that the public office has violated this duty.[81] For instance, if a person requests copies of all police service calls for a particular geographical area identified by street names, the request does not match the method of retrieval and is not one that the office has a duty to fulfill.[82] At least one court has held that the primary concern of a retrieval system is to accommodate the mission of the office, and that providing reasonable access for citizens is secondary.[83] The Ohio Public Records Act does not require a public office or person responsible for public records to post its public records on the office's website[84] (but doing so may reduce the number of public records requests the office receives for posted

[80] R.C. 149.43(B)(2).
[81] *See, State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶¶ 28-30 (Public Records Act does not expressly require public offices to maintain e-mails so they can be retrieved by sender and recipient status); *State ex rel. Bardwell v. City of Cleveland*, 126 Ohio St.3d 195, 2010-Ohio-2367 (police dept. kept and made available its pawnbroker reports on 3x5 notecards; while keeping these records on 8 ½ x 11 paper could reduce delays in processing requests, there was no requirement to do so); *State ex rel. Oriana House v. Montgomery*, 2005-Ohio-3377 (10th Dist.) (the fact that requester made what it believed to be a specific request does not mandate that the public office keep its records in such a way that access to the records was possible); *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159 (8th Dist.).
[82] *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159 (8th Dist.).
[83] *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989).
[84] *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093, ¶¶ 15-17.

records). A public office is not required to create new records to respond to a public records request, even if it is only a matter of compiling information from existing records.[85]

A public office must have a copy of its current records retention schedule at a location readily available to the public.[86] The records retention schedule can be a valuable tool for a requester to obtain in advance to plan a specific and efficient public records request, or for the public office to use to inform a requester how the records kept by the office are organized and maintained.

2. "Any Person" May Make a Request

The requesting "person" need not be an Ohio or United States resident. In fact, in the absence of a law to the contrary, foreign individuals and entities domiciled in a foreign country are entitled to inspect and copy public records.[87] The requester need not be an individual, but may be a corporation, government agency, or other body.[88]

3. The Request Must be for the Public Office's Existing Records

The proper subject of a public records request is a record that actually exists at the time of the request,[89] not unrecorded or dispersed *information* the requester seeks to obtain.[90] 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.[91] Additionally, there is no duty to provide records that were not in existence at the time of the request,[92] or that the public office does not possess,[93] including records that do later come into existence.[94]

4. A Request Must be Specific Enough for the Public Office to Reasonably Identify Responsive Records

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[85] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 1999-Ohio-447; *State ex rel. Warren v. Warner*, 84 Ohio St.3d 432, 1999-Ohio-475; *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 1998-Ohio-242; *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37, 42 (1998); *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197 (1991); *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 16.

[86] R.C. 149.43(B)(2); for additional discussion, *see* Chapter Five: A. "Records Management."

[87] 2006 Ohio Op. Att'y Gen. No. 038.

[88] R.C. 1.59(C); 1990 Ohio Op. Att'y Gen. No. 050.

[89] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 23 (". . . in cases in which public records . . . are properly disposed of in accordance with a duly adopted records-retention policy, there is no entitlement to these records under the Public Records Act."); *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 389, 1999-Ohio-114; *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 1999-Ohio-447 (a public office has "no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records."); *State ex rel. Cioffi v. Stuard*, 2010-Ohio-829 (11th Dist.) (no violation of the Public Records Act when a Clerk of Courts failed to provide a hearing transcript that had never been created).

[90] *See, Capers v. White*, 8th Dist. No. 80713 (April 17, 2002) (requests for information are not enforceable in a public records mandamus); *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159 (8th Dist.) (requests for service calls from geographic area improper request); *State ex rel. Fant v. Tober*, 8th Dist. No. 63737 (April 28, 1993) (office had no duty to seek out records which would contain information of interest to requester), affirmed by Ohio Sup. Ct. w/o opinion at 68 Ohio St.3d 117; *see also, State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 1994-Ohio-261; *State ex rel. Rittner v. Fulton County*, 2010-Ohio-4055 (6th Dist.) (improper request where requester sought only information on "how documents might be searched"); *Nat'l Fed'n of the Blind of Ohio v. Ohio Rehab. Serv. Comm'n*, 2010-Ohio-3384 (10th Dist.) (a request for information as to payments made and received from state agencies was an improper request); *State ex rel. O'Shea & Assoc. Co., LPA v. Cuyahoga Metro. Hous. Auth.*, 2010-Ohio-3416 (8th Dist.) (a request for meetings that contained certain topics was an improper request for information and the public office was not required to seek out and retrieve those records which contain the information of interest to the requester).

[91] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 1999-Ohio-447 (a public office has "no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records"); *Fant v. Flaherty*, 62 Ohio St.3d 426 (1992); *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197 (1991); *State ex rel. Welden v. Ohio St. Med. Bd.*, 2011-Ohio-6560, ¶ 9 (10th Dist.) (because a list of addresses of every licensed physician did not exist, there was no clear legal duty to create such a record); *Pierce v. Dowler*, 12th Dist. No. CA92-08-024 (Nov. 1, 1993).

[92] *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 2012-Ohio-4246, ¶¶ 22-26; *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, ¶ 25; *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, ¶ 15; *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 448, 2000-Ohio-214; *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 16.

[93] *State ex rel. Chatfield v. Gammill*, 132 Ohio St.3d 36, 2012-Ohio-1862.

[94] *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 392, 1999-Ohio-114; *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376 (1989); *Starks v. Wheeling Twp. Tr.*, 2009-Ohio-4827 (5th Dist.).

A requester must identify the records he or she is seeking "with reasonable clarity,"[95] 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.[96] The request must describe what the requester is seeking "specifically and particularly."[97] 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.[98]

What is An Ambiguous or Overly Broad Request?

An ambiguous request is one that lacks the clarity a public office needs to ascertain what the requester is seeking and where to look for records that might be responsive. The wording of the request is vague or subject to interpretation.

A request can be overly broad when it is so inclusive that the public office is unable to identify the records sought based on the manner in which the office routinely organizes and accesses records. Public records requests that are worded like legal discovery requests[99] – for example, a request for "any and all records pertaining in any way" to a particular activity or employee of the office – are often overly broad for purposes of the Public Records Act because they lack the specificity the office needs to identify and locate only responsive records. The courts have also found a request overly broad when it seeks what amounts to a complete duplication of a major category of a public office's records. Examples of overly broad requests include requests for:

- **All records containing particular names or words;[100]**
- **Duplication of all records having to do with a particular topic, or all records of a particular type;[101]**
- **Every report filed with the public office for a particular time period (if the office does not organize records in that manner);[102]**
- **"All e-mails between" two employees (when e-mail not organized by sender and recipient).[103]**

[95] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17 (quoting *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 29); *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 42.

[96] *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711; *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901; *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989).

[97] *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶ 26 ("records request is not specific merely because it names a broad category of records listed within an agency's retention schedule"); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17; *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 2001-Ohio-193; *Mitseff v. Wheeler*, 38 Ohio St.3d 112 (1988); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989); *State ex rel. Dehler v. Spatny*, 2010-Ohio-3052 (11th Dist.), *aff'd* 2010-Ohio-5711; *State ex rel. Cushion v. Massillon*, 2011-Ohio-4749 (5th Dist.), *appeal not allowed* 2012-Ohio-136, ¶¶ 52-55 ("arbitrator fees paid to attorneys" not included with particularity by request for "records of legal fees or consulting fees").

[98] R.C. 149.43(B)(2); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 19.

[99] *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 1994-Ohio-261 (p. 245, PRIOR HISTORY).

[100] *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 2001-Ohio-193.

[101] *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228 (request for all litigation files and all grievance files for a period over six years, and for all e-mails between two employees during joint employment); *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711, ¶¶ 1-3 (request for prison quartermaster's orders and receipts for clothing over seven years); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-2788, ¶ 19 (request for all work-related e-mails, texts, and correspondence of an elected official during six months in office); *State ex rel. Daugherty v. Mohr*, 2011-Ohio-6453, ¶¶ 32-35 (10th Dist.) (request for all policies, e-mails, or memos regarding whether prison officials are authorized to 'triple cell' inmates into segregation); *State ex rel. Davila v. City of Bellefontaine*, 2011-Ohio-4890, ¶¶ 36-43 (3rd Dist.) (request to inspect 9-1-1 tapes covering 15 years); *State ex rel. Davila v. City of East Liverpool*, 2011-Ohio-1347, ¶¶ 22-28 (7th Dist.), *discretionary appeal not allowed* 2011-Ohio-4217 (request to access tape recorded 9-1-1 calls and radio traffic over seven years); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989) (request for all accident reports filed on a given date with two law enforcement agencies).

[102] *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989).

[103] *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶¶ 33-37.

Whether a public records request is "proper" will be considered in the context of the circumstances surrounding it.[104]

5. Denying, and then Clarifying, an Ambiguous or Overly Broad Request

R.C. 149.43(B)(2) permits a public office to deny any part of a public records request which is ambiguous or overly broad as defined above. However, 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.[105] 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 verbal or written explanation.[106] 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.[107] 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.

6. Unless a Specific Law Provides Otherwise, Requests can be for any Purpose, and Need not Identify the Requester or be Made in Writing

A person need not make a public records request in writing, or identify him or herself when making a request.[108] 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. In most circumstances, the requester need not specify the reason for the request,[109] nor is there any requirement in the Ohio Public Records Act that a requester use particular wording to make a request.[110] Any requirement by the public office that the requester disclose his or her identity or the intended use of the requested public record constitutes a denial of the request.[111]

7. Optional Negotiation When Identity, Purpose, or Request in Writing Would Assist Identifying, Locating, or Delivering Requested Records

However, in the event that a public office believes that either 1) a written request, 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

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[104] *State ex rel. O'Shea v. Cuyahoga Metro. Hous. Auth.*, 2012-Ohio-115, ¶¶ 19-22 (where public office did not initially respond that request was overly broad, and requester later adequately clarified the request, request was found appropriate).
[105] R.C. 149.43(B)(2); *State ex rel. ESPN v. Ohio State University*, 2012-Ohio-2690, ¶ 11.
[106] *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶ 38 (a requester may also possess preexisting knowledge of the public office's records organization which helps satisfy this requirement).
[107] *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶¶ 15, 26, 36-37.
[108] *See*, R.C. 149.43(B)(5).
[109] *See*, R.C. 149.43(B)(5); *see also, Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 10 (citing *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186 (1993) ("[a] person may inspect and copy a 'public record' irrespective of his or her purpose for doing so.")); *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 45 (purpose behind request to "inspect and copy public records is irrelevant."); 1974 Ohio Op. Att'y Gen. No. 097; *but compare, State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 1999-Ohio-264 (police officer's personal information was properly withheld from a criminal defendant who might use the information for "nefarious ends," implicating constitutional right of privacy); R.C. 149.43(B)(5) (journalist seeking safety officer personal or residential information must certify that disclosure would be in public interest).
[110] *Franklin County Sheriff's Dep't v. State Employment Relations Bd.*, 63 Ohio St.3d 498, 504 (1992) ("No specific form of request is required by R.C. 149.43.")
[111] R.C. 149.43(B)(4).

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.[112] As with the negotiation required for an ambiguous or overly broad request, this optional negotiation regarding purpose, identity, or writing can promote cooperation and efficiency. *Reminder*: The public office must let a requester know that they may decline this option, before asking for the information.

8. Requester Choices of Media on Which Copies are Made

A requester must specify whether he or she would like to inspect the records, or obtain copies.[113] If the requester asks for copies, he or she has the right to choose the copy medium (paper, film, electronic file, etc.).[114] The requester can choose to have the record copied: (1) on paper, (2) in the same medium as the public office keeps them,[115] or (3) on any medium upon which the public office or person responsible for the public records determines the record can "reasonably be duplicated as an integral part of the normal operations of the public office . . . "[116] The public office may charge the requester the actual cost of copies made, and may require payment of copying costs in advance.[117]

9. Requester Choices of Pick-up, Delivery, or Transmission of Copies; Delivery Costs

A requester may personally pick up requested copies of public records, or may send a designee.[118] Upon request, a public office must transmit copies of public records via the U.S. mail "or by any other means of delivery or transmission," at the choice of the requester.[119] The public office may require prepayment of postage or other actual delivery cost, as well as the actual cost of supplies used in mailing, delivery, or transmission.[120] (See paragraph 12 below for "costs" detail).

10. Prompt Inspection, or Copies Within a Reasonable Period of Time

There is no set, predetermined time period for responding to a public records request. Instead, the requirement to provide "prompt" production of records for inspection, and to make copies available in a "reasonable amount of time,"[121] have both been interpreted by the courts as being "without delay" and "with reasonable speed."[122] The reasonableness of the time taken in each case depends on the facts and circumstances of the particular request.[123] These terms do not mean

[112] R.C. 149.43(B)(5).
[113] R.C. 149.43(B); *see also, generally, Consumer News Servs., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2000-Ohio-5311; R.C. 149.43(B)(6)-(7).
[114] R.C. 149.43(B)(6); *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, ¶¶ 12-13.
[115] *Gomez v. Ct. of Common Pleas*, 2007-Ohio-6433 (7th Dist.) (although direct copies could not be made because the original recording device was no longer available, requester is still entitled to copies in available alternative format).
[116] R.C. 149.43(B)(6).
[117] R.C. 149.43(B)(1), (B)(6).
[118] *State ex rel. Sevayega v. Reis*, 80 Ohio St.3d 458, 459, 2000-Ohio-383; *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 427 (1994).
[119] R.C. 149.43(B)(7).
[120] R.C. 149.43(B)(7).
[121] R.C. 149.43(B)(1); *Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 10; *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 35.
[122] *State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 16; *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 37; *see also, State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 53, 1998-Ohio-444.
[123] *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007 (45 days not unreasonable where responsive records voluminous over multiple requests); *State ex rel. Patton v. Rhodes*, 129 Ohio St.3d 182, 2011-Ohio-3093, ¶ 20 (56 days was not unreasonable under the circumstances); *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901 ("Given the broad scope of the records requested, the governor's office's decision to review the records before producing them, to determine whether to redact exempt matter, was not unreasonable."); *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶ 44 (delay due to "breadth of the requests and the concerns over the employees' constitutional right of privacy" was not unreasonable); *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311; *State ex rel. Stricker v. Cline*, 2010-Ohio-3592 (5th Dist.) (nine business days was a reasonable period of time to respond to a records request.); *State ex rel. Holloman v. Collins*, 2010-Ohio-3034 (10th Dist.) (The critical time frame is not the number of days between when respondent received the public records request and when relator filed his action, but rather the number of days it took for respondent to properly respond to the relator's public records request.); *State ex rel. Davis v. Metzger*, 5th Dist. No. 11-CA-130, 2013-Ohio-1620, ¶ 12 (provision of requested records less than three full business days from date of request was reasonable); *State ex rel. Davis v.*

"immediately," or "without a moment's delay,"[124] but the courts will find a violation of this requirement when an office cannot show that the time taken was reasonable.[125] Time spent on the following response tasks may contribute to the calculation of what is "prompt" or "reasonable" in a given circumstance:

Identification of Responsive Records:

- Clarify or revise request;[126] and
- Identify records.[127]

Location & Retrieval:

- Locate records[128] and retrieve from storage location, e.g., file cabinet, branch office, off-site storage facility.

Review, Analysis & Redaction:

- Examine all materials for possible release;[129]
- Perform necessary legal review,[130] or consult with knowledgeable parties;
- Redact exempt materials;[131] and
- Provide explanation and legal authority for all redactions and/or denials.[132]

Preparation:

- Obtain requester's choice of medium;[133] and
- Make copies.[134]

Delivery:

- Wait for advance payment of costs;[135] and
- Deliver copies, or schedule inspection.[136]

The Ohio Supreme Court has held that no pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by the public office to evade the public's right to inspect or obtain a copy of public records within a reasonable time.[137]

Woolard, 1st Dist. No. 12-CA-36, 2013-Ohio-1699, ¶ 20 (because requester requested, in effect, a complete duplication of the public office's files, the public office acted reasonably by releasing responsive records approximately 54 days after receiving request); *State ex rel. Bott Law Group, L.L.C. v. Ohio Dept. of Natural Resources*, 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 19 (public office failed to provide records responsive to requests made on May 17 and October 27, 2011 within a reasonable period of time by releasing additional responsive records on April 19, 2012).

[124] *State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 10.

[125] *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶¶ 33-51 (public office's six-day delay when providing responsive records was neither prompt nor reasonable); *see also, Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 53, 1998-Ohio-444 (thirteen to twenty-four day delay to provide access to accident reports was neither prompt nor reasonable); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 624, 1994-Ohio-5 (police department taking four months to respond to a request for "all incident reports and traffic tickets written in 1992" was neither prompt nor reasonable); *State ex rel. Muni. Contr. Equip. Op. Labor Council v. Cleveland*, 2011-Ohio-117 (8th Dist.) (28 days to release two emergency response plans and two pieces of correspondence found not reasonable).

[126] R.C. 149.43(B)(2), (5).

[127] R.C. 149.43(B)(2), (5).

[128] R.C. 149.43(B)(5).

[129] *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901; *State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 17 ("R.C. 149.43(A) envisions an opportunity on the part of the public office to examine records prior to inspection in order to make appropriate redactions of exempt materials.") (quoting *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 1994-Ohio-5).

[130] *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901.

[131] R.C. 149.43(A)(11), (B)(1); *see, State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 17 (clerk of courts was afforded time to redact social security numbers from requested records).

[132] R.C. 149.43(B)(3).

[133] R.C. 149.43 (B)(6).

[134] R.C. 149.43(B)(1), (B)(6).

[135] R.C. 149.43(B)(6), (B)(7).

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

[137] *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 53-54, 1998-Ohio-444.

11. Inspection at No Cost During Regular Business Hours

A public office must make its public records available for inspection at all reasonable times during regular business hours.[138] "Regular business hours" means established business hours.[139] When a public office operates twenty-four hours a day, such as a police department, the office may adopt hours that approximate normal administrative hours during which inspection may be provided.[140] Public offices may not charge requesters for inspection of public records.[141] Posting records online is one means of providing them for inspection -- the public office may not charge a fee just because a person could use their own equipment to print or otherwise download a record posted online.[142] Requesters are not required to inspect the records themselves; they may designate someone to inspect the requested records.[143]

12. Copies, and Delivery or Transmission, "At Cost"

A public office may charge costs for copies, and/or for delivery or transmission, and may require payment of both costs in advance.[144] "At cost" includes the actual cost of making copies,[145] packaging, postage, and any other costs of the method of delivery or transmission chosen by the requester.[146] The cost of employee time cannot be included in the cost of copies, or of delivery.[147] A public office may choose to employ the services, and charge the requester the costs of, a private contractor to copy public records so long as the decision to do so is reasonable.[148]

When a statute sets the cost of certain records or for certain requesters, the specific takes precedence over the general, and the requester must pay the cost set by the statute.[149] For example, because R.C. 2301.24 requires that parties to a common pleas court action must pay court reporters the compensation rate set by the judges for court transcripts, a requester who is a party to the action may not use R.C. 149.43(B)(1) to obtain copies of the transcript at the actual cost of duplication.[150] However, where a statute sets a fee for certified copies of an otherwise public record, and the requester does not request that the copies be certified, the office may only charge actual cost.[151] Similarly, where a statute sets a fee for "photocopies" and the request is for electronic copies rather than photocopies, the office may only charge actual cost.[152]

There is no obligation to provide free copies to someone who indicates an inability or unwillingness to pay for requested records.[153] The Ohio Public Records Act does not require that a public office

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[138] R.C. 149.43(B)(1).
[139] *State ex rel. Butler County Bar Ass'n v. Robb*, 62 Ohio App.3d 298 (12th Dist. 1990) (rejecting requester's demand that a clerk work certain hours different from the clerk's regularly scheduled horus).
[140] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 1994-Ohio-5 (allowing records requests during all hours of the entire police department's operations is unreasonable).
[141] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 624, 1994-Ohio-5; *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 37 ("The right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under R.C. 149.43.").
[142] 2014 Ohio Op. Att'y Gen. No. 009.
[143] *State ex rel. Sevayega v. Reis*, 88 Ohio St.3d 458, 459, 2000-Ohio-383; *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 427 (1994) (overruled on other grounds).
[144] R.C. 149.43(B)(6), (B)(7); *State ex rel. Watson v. Mohr*, 131 Ohio St.3d 338, 2012-Ohio-1006; *State ex rel. Dehler v. Mohr*, 129 Ohio St.3d 37, 2011-Ohio-959, ¶ 3 (requester was not entitled to copies of requested records, because he refused to submit prepayment).
[145] R.C. 149.43(B)(1) (copies of public records must be made available "at cost"); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 625, 1994-Ohio-5 (public office cannot charge $5.00 for initial page, or for employee labor, but only for "actual cost" of final copies).
[146] R.C. 149.43(B)(7); *State ex rel. Call v. Fragale*, 104 Ohio St.3d 276, 2004-Ohio-6589, ¶¶ 2-8.
[147] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 626, 1994-Ohio-5.
[148] *State ex rel. Gibbs v. Concord Twp. Trustees*, 152 Ohio App.3d 387, 2003-Ohio-1586, ¶ 31 (11th Dist. 2003); *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 29 (as long as the decision to hire a private contractor is reasonable, a public office may charge requester the actual cost to extract requested electronic raw data from an otherwise copyrighted database).
[149] R.C. 1.51 (rules of statutory construction); *State ex rel. Motor Carrier Serv., Inc. v. Rankin*, 2013-Ohio-1505, ¶¶ 26-32; State *ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 90, 2004-Ohio-4354, ¶¶ 5-15.
[150] *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 92, 2004-Ohio-4354, ¶ 15; for another example, *see* R.C. 5502.12 (Dept. of Public Safety may charge $4.00 for each accident report copy).
[151] *State ex rel. Call v. Fragale*, 104 Ohio St.3d 276, 2004-Ohio-6589 (court offered uncertified records at actual cost, but may charge up to $1.00 per page for certified copies pursuant to R.C. 2303.20); *State ex rel. Butler County Bar Ass'n v. Robb*, 66 Ohio St.3d 255, 2012-Ohio-753, ¶¶ 42-62.
[152] *State ex rel. Data Trace Info. Svcs. v. Cuyahoga Cty. Fiscal Offcr.*, 131 Ohio St.3d 255, 2012-Ohio-753, ¶¶ 42-62.
[153] *State ex rel. Call v. Fragale*, 104 Ohio St.3d 276, 2004-Ohio-6589, ¶ 6; *Breeden v. Mitrovich*, 2005-Ohio-5763, ¶ 10 (11th Dist.).

allow those seeking a copy of the public record to make copies with their own equipment,[154] nor does it prohibit the public office from allowing this.

13. What Responsive Documents can the Public Office Withhold?

a. Duty to Withhold Certain Records

A public office must withhold records subject to a mandatory, "must not release" exception to the Public Records Act in response to a public records request. (See Chapter Three: A.1. "Must Not Release").

b. Option to Withhold or Release Certain Records

Records subject to a discretionary exception give the public office the option to either withhold or release the record. (See Chapter Three: A.2. "May Release, But May Choose to Withhold").

c. No Duty to Release Non-Records

A public office need not disclose or create[155] items that are "non-records." There is no obligation that a public office produce items that do not document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.[156] A record must document something that the office does.[157] The Ohio Supreme Court expressly rejected the notion that an item is a "record" simply because the public office *could* use the item to carry out its duties and responsibilities.[158] Instead, the public office must actually use the item, otherwise it is not a record.[159] The Public Records Act itself does not *restrict* a public office from releasing non-records, but other laws may prohibit a public office from releasing certain information in non-records.[160]

A public office is not required to create new records to respond to a public records request, even if it is only a matter of compiling information from existing records.[161] For example, if a person asks a public office for a list of 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.[162] Nor must the office conduct a search for and retrieve records that contain described information that is of interest to the requester.[163]

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[154] R.C. 149.43(B)(6); for discussion of previous law, *see* 2004 Ohio Op. Att'y Gen. No. 011 (county recorder may not prohibit person from using digital camera to duplicate records nor assess a copy fee).

[155] R.C. 149.40 (". . . public office shall cause to be made *only* such records as are necessary to . . . adequate and proper documentation . . ." [emphasis added]).

[156] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, ¶ 25; *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188 (1993) ("To the extent that any item contained in a personnel file is not a 'record,' i.e., does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed."); R.C. 149.011(G).

[157] *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37 (1998) (allegedly racist e-mails circulated between public employees are not "records" when they were not used to conduct the business of the public office).

[158] *See, State ex rel. Beacon Journal Publ'g Co. v. Whitmore*, 83 Ohio St.3d 61, 1998-Ohio-180.

[159] *See*, 2007 Ohio Op. Att'y Gen. No. 034 (an item of physical evidence in the possession of the Prosecuting Attorney that was not introduced as evidence found not to be a "record"); *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶ 27 (judge used redacted information to decide whether to approve settlement); *State ex rel. Beacon Journal Publ'g Co. v. Whitmore*, 83 Ohio St.3d 61, 1998-Ohio-180 (judge read unsolicited letters but did not rely on them in sentencing, therefore, letters did not serve to document any activity of the public office and were not "records"); *State ex rel. Sensel v. Leone*, 85 Ohio St.3d 152, 1999-Ohio-446 (letters alleging inappropriate behavior of coach not "records" and can be discarded) (citing to *Whitmore, supra*); *State ex rel. Carr v. Caltrider*, Franklin C.P. No. 00CVH07-6001 (May 16, 2001); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37 (1998) (allegedly racist e-mail messages circulated between public employees were not "records").

[160] *E.g.*, R.C. 1347.01, et seq. (Ohio Personal Information Systems Act).

[161] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 1999-Ohio-447; *State ex rel. Warren v. Warner*, 84 Ohio St.3d 432, 1999-Ohio-475; *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 1998-Ohio-242; *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37, 42 (1998); *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197 (1991).

[162] *Fant v. Flaherty*, 62 Ohio St.3d 426 (1992); *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197 (1991); *Pierce v. Dowler*, 12th Dist. No. CA 93-08-024 (Nov. 1, 1993).

[163] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 1999-Ohio-447 (a public office has "no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records").

14. Denial of a Request, Redaction, and a Public Office's Duties of Notice

Both the withholding of an entire record and the redaction of any part of a record are considered a denial of the request to inspect or copy that particular item.[164] Any requirement by the public office that the requester disclose the requester's identity or the intended use of the requested public record also constitutes a denial of the request.[165]

a. Redaction – Statutory Definition

"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."[166] For records on paper, redaction is the blacking or whiting out of non-public information in an otherwise public document. A public office may redact audio, video, and other electronic records by processes that obscure or delete specific content. "If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt."[167] Therefore, a public office may redact only that part of a record subject to an exception or other valid basis for withholding. However, an office may withhold an entire record where excepted information is "inextricably intertwined" with the entire content of a particular record such that redaction cannot protect the excepted information.[168]

The Public Records Act states that "[a] redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if a federal or state law authorizes or requires the public office to make the redaction."[169]

b. Requirement to Notify of and Explain Redactions and Withholding of Records

Public offices must either "notify the requester of any redaction or make the redaction plainly visible."[170] In addition, if an office denies a request in part or in whole, the public office must "provide the requester with an explanation, including legal authority, setting forth why the request was denied."[171] If the requester made the initial request in writing, then the office must also provide its explanation for the denial in writing.[172]

c. No Obligation to Respond to Duplicate Request

Where a public office denies a request, and the requester sends a follow-up letter reiterating a request for essentially the same records, the public office is not required to provide an additional response.[173]

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[164] R.C. 149.43(B)(1).
[165] R.C. 149.43(B)(4).
[166] R.C. 149.43(A)(11).
[167] R.C. 149.43(B)(1).
[168] *See, State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340, 1996-Ohio-300. *See also, State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 60 (1990) (where exempt information is so "intertwined" with the public information as to reveal the exempt information from the context, the record itself, and not just the exempt information, may be withheld).
[169] R.C. 149.43(B)(1).
[170] R.C. 149.43(B)(1).
[171] R.C. 149.43(B)(3).
[172] R.C. 149.43(B)(3).
[173] *State ex rel. Laborers International v. Summerville*, 122 Ohio St.3d 1234, 2009-Ohio-4090.

d. No Waiver of Unasserted, Applicable Exceptions

If the requester later files a mandamus action against the public office, the public office is not limited to the explanation(s) previously given for denial, but may rely on additional reasons or legal authority in defending the mandamus action.[174]

15. Burden or Expense of Compliance

A public office cannot deny or delay response to a public records request on the grounds that responding will interfere with the operation of the public office.[175] However, when a request unreasonably interferes with the discharge of the public office's duties, the office may not be obligated to comply.[176] For example, a requester does not have the right to the complete duplication of voluminous files of a public office.[177]

B. Statutes that Modify General Rights and Duties

Through legislation, the General Assembly can change the preceding rights and duties for particular records, for particular public offices, for particular requesters, or in specific situations. Be aware that the general rules of public records law may be modified in a variety and combination of ways. Below are a few examples of modifications to the general rules.

1. Particular Records

(a) Although most DNA records kept by the Ohio Bureau of Criminal Identification and Investigation (BCI&I) are protected from disclosure by exceptions,[178] Ohio law requires that the results of DNA testing of an inmate who obtains post-conviction testing must be disclosed to any requester,[179] which would include results of testing conducted by BCI&I.

(b) Certain Ohio sex offender records must be posted on a public website, without waiting for an individual public records request.[180]

(c) Ohio law specifies that a public office's release of an "infrastructure record" or "security record" to a private business for certain purposes does not waive these exceptions,[181] despite the usual rule that voluntary release to a member of the public waives any exception(s).[182]

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[174] R.C. 149.43(B)(3).

[175] *State ex rel. Beacon Journal Publ'g Co. v. Andrews*, 48 Ohio St.2d 283 (1976) ("[n]o pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by the [public office] to evade the public's right to inspect and obtain a copy of public records within a reasonable amount of time.").

[176] *State ex rel. Dehler v. Mohr*, 129 Ohio St.3d 37, 2011-Ohio-959 (allowing inmate to personally inspect requested records in another prison would have created security issues, unreasonably interfered with the official's discharge of their duties, and violated prison rules); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 1994-Ohio-5 ("unreasonabl[e] interfere[nce] with the discharge of the duties of the officer having custody" of the public records creates an exception to the rule that public records should be generally available to the public) (citing *State ex rel. Natl. Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79, 81 (1988)); *Barton v. Shupe*, 37 Ohio St.3d 308 (1988); *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369 (1960) ("anyone may inspect [public] records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the records"); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989).

[177] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-788, ¶ 17 (the Public Records Act "does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies." (citation omitted)).

[178] R.C. 109.573(D), (E), (G)(1); R.C. 149.43(A)(j).

[179] R.C. 2953.81(B).

[180] R.C. 2950.08(A) (BCI&I sex offender registry and notification, or "SORN" information, not open to the public); *but*, R.C. 2950.13(A)(11) (certain SORN information must be posted as a database on the internet and is a public record under R.C. 149.43).

[181] R.C. 149.433(C).

[182] *See, e.g., State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041.

(d) Journalists may inspect, but not copy, some of the records to which they have special access, despite the general right to choose either inspection or copies.[183]

(e) Contracts and financial records of moneys expended in relation to services provided under those contracts to federal, state, or local government by another governmental entity or agency, or by most nonprofit corporations or associations, shall be deemed to be public records, except as otherwise provided by R.C. 149.431.[184]

(f) Regardless of whether the dates of birth of office officials and employees fit the statutory definition of "records," every public office must maintain a list of the names and dates of birth of every official and employee, which "is a public record and shall be made available upon request."[185]

2. Particular Public Offices

(a) The Ohio Bureau of Motor Vehicles is authorized to charge a non-refundable fee of four dollars for each highway patrol accident report for which it receives a request,[186] and a coroner's office may charge a record retrieval and copying fee of twenty-five cents per page, with a minimum charge of one dollar,[187] despite the general requirement that a public office may only charge the "actual cost" of copies.[188]

(b) Ohio courts' case records and administrative records are not subject to the Ohio Public Records Act. Rather, courts apply the records access rules of the Ohio Supreme Court Rules of Superintendence.[189]

(c) Information in a competitive sealed proposal and bid submitted to a county contracting authority becomes a public record subject to inspection and copying only *after* the contract is awarded. After the bid is opened by the contracting authority, any information that is subject to an exception set out in the Public Records Act may be redacted by the contracting authority before the record is made public.[190]

3. Particular Requesters or Purposes

(a) Directory information concerning public school students may not be released if the intended use is for a profit-making plan or activity.[191]

(b) Incarcerated persons, commercial requesters, and journalists are subject to combinations of modified rights and obligations, discussed below.

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[183] Ex., R.C. 4123.88(D) (Industrial Commission or Workers Compensation Bureau shall disclose to journalist addresses and telephone numbers of claimants, and the dependents of those claimants); R.C. 313.10(D) ("A journalist may submit to the coroner a written request to view preliminary autopsy and investigative notes and findings, suicide notes, or photographs of the decedent made by the coroner.").
[184] R.C. 149.431; *State ex rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, ¶¶ 30-40.
[185] R.C. 149.434.
[186] R.C. 5502.12 (also provides that other agencies which submit such reports may charge requesters who claim an interest arising out of a motor vehicle accident a non-refundable fee not to exceed four dollars).
[187] R.C. 313.10(B).
[188] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 1994-Ohio-5. *See also, State ex rel. Russell v. Thomas*, 85 Ohio St.3d 83, 1999-Ohio-435 (one dollar per page did not represent actual cost of copies); 2001 Ohio Op. Att'y Gen. No. 012.
[189] Rules of Superintendence for the Courts of Ohio. For additional discussion, *see* Chapter Six: D. "Court Records."
[190] R.C. 307.862(c), R.C. 307.87, and R.C. 307.88; 2012 Ohio Op. Att'y Gen. No. 036.
[191] R.C. 3319.321(A) (Further, the school "may require disclosure of the requester'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.").

4. Modified Records Access for Certain Requesters

The rights and obligations of the following requesters differ from those generally provided by the Ohio Public Records Act. Some are required to disclose the intended use of the records, or motive behind the request. Others may be required to provide more information, or make the request in a specific fashion. Some requesters are given greater access to records than other persons, and some are more restricted. These are only examples. Changes to the law are constantly occurring, so be sure to check for any current law modifying access to the particular public records with which you are concerned.

a. Prison Inmates

Prison inmates may request public records,[192] but must follow a statutorily-mandated process if requesting records concerning a criminal investigation or prosecution, or a juvenile delinquency investigation that otherwise would be a criminal investigation or prosecution if the subject were an adult.[193] An inmate's designee may not make a public records request on behalf of the inmate that the inmate is prohibited from making directly.[194] The criminal investigation records that may be requested by an inmate only by using this process are broader than those defined under the Confidential Law Enforcement Investigatory Records (CLEIRs) exception, and include offense and incident reports.[195] A public office is not required to produce such records in response to an inmate request unless the inmate obtains a finding from the judge who sentenced or otherwise adjudicated the inmate's case that the information sought is necessary to support what appears to be a justiciable claim.[196] The inmate's request must be filed in the original criminal action against the inmate, not in a separate, subsequent forfeiture action involving the inmate.[197] Unless an inmate requesting public records concerning a criminal prosecution has first followed these requirements, any suit to enforce his or her request will be dismissed.[198] The appropriate remedy for an inmate to seek if he or she follows these requirements is an appeal of the sentencing judge's findings, not a mandamus action.[199] Any public records that were obtained by a litigant prior to the ruling in *Steckman v. Jackson* are not excluded for use in the litigant's post-conviction proceedings.[200]

b. Commercial Requesters

Unless a specific statute provides otherwise,[201] it is irrelevant whether the intended use of requested records is for commercial purposes.[202] 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 transmit by United States mail to ten per month."[203]

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[192] *See, State ex rel. Dehler v. Collins*, 2010-Ohio-5436 (10th Dist.) (correctional facilities may be able to limit the access to, and provision of, requested records due to personnel and safety considerations); *see also, State ex rel. Dehler v. Kelly*, 2010-Ohio-3053 (11th Dist.) (prison officials had to comply with various requests submitted by inmate).

[193] R.C. 149.43(B)(8). NOTE: The statutory language is not limited to requests for criminal investigations concerning the inmate who is making the request.

[194] *State ex rel. Barb v. Cuyahoga Cty. Jury Commr.*, 128 Ohio St.3d 528, 2011-Ohio-1914.

[195] *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶¶ 9-18; *State ex rel. Sevayega v. Reis*, 88 Ohio St.3d 458, 2000-Ohio-383.

[196] R.C. 149.43(B)(8); *State v. Wilson*, 2011-Ohio-4195 (2nd Dist.), *discretionary appeal not allowed* 2012-Ohio-136 (application for clemency is not a "justiciable claim"); *State v. Rodriguez*, 2011-Ohio-1397 (6th Dist.) (relator identified no pending proceeding to which his claims of evidence tampering would be material).

[197] *State of Ohio v. Lather*, 2009-Ohio-3215 (6th Dist.); *State of Ohio v. Chatfield*, 2010-Ohio-4261 (5th Dist.) (inmate may file R.C. 149.43(B)(8) motion, even if currently represented by criminal counsel in the original action).

[198] *State ex rel. Barb v. Cuyahoga Cty. Jury Commr.*, 2009-Ohio-3301 (8th Dist.); *Hall v. State*, 2009-Ohio-404 (11th Dist.); *State ex rel. Russell v. Thornton*, 111 Ohio St.3d 409, 2006-Ohio-5858, ¶¶ 9-18; *State ex rel. Sevayega v. Reis*, 88 Ohio St.3d 458, 2000-Ohio-383.

[199] *State of Ohio v. Thornton*, 2009-Ohio-5049 (2nd Dist.).

[200] *State v. Broom*, 123 Ohio St.3d 114, 2009-Ohio-4778.

[201] *E.g.*, R.C. 3319.321(A) (prohibits schools from releasing student directory information "to any person or group for use in a profit-making plan or activity").

[202] 1990 Ohio Op. Att'y Gen. No. 050; *see also*, R.C. 149.43(B)(4).

[203] R.C. 149.43(B)(7) ("unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes"). NOTE: The limit only applies to requested transmission "by United States mail."

While the Revised Code does not specifically define "commercial purposes"[204] it does require that the term be narrowly construed, and lists specific activities excluded from the definition:

- Reporting or gathering news;
- Reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government; or
- Nonprofit educational research.[205]

c. Journalists

Several statutes grant "journalists"[206] enhanced access to certain records that are not available to other requesters. This enhanced access is sometimes conditioned on the journalist providing information or representations not normally required of a requester.

For example, a journalist may obtain the actual residential address of a peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the Bureau of Criminal Identification and Investigation. If the individual's spouse, former spouse, or child is employed by a public office, a journalist may obtain the name and address of that spouse or child's employer in this manner as well.[207] A journalist may also request customer information maintained by a municipally-owned or operated public utility, other than social security numbers and any private financial information such as credit reports, payment methods, credit card numbers, and bank account information.[208] To obtain this information, the journalist must:

- Make the request in writing and sign the request;
- Identify himself or herself by name, title, and employer's name and address; and
- State that disclosure of the information sought would be in the public interest.[209]

(See Journalist Requests table on next page for more details.)

[204] The statute does not contain a general definition of "commercial purposes" but does define "commercial" in the context of requests to the Bureau of Motor Vehicles. There, "commercial" is defined as "profit-seeking production, buying, or selling of any good, service, or other product." R.C. 149.43(F)(2)(c).
[205] R.C. 149.43(B)(7).
[206] R.C. 149.43(B)(9)(c) states, "As used in [division (B) of R.C. 149.43], 'journalist' means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public."
[207] R.C. 149.43(B)(9)(a).
[208] R.C. 149.43(B)(9)(b).
[209] R.C. 149.43(B)(9)(a) and (b); *see also*, 2007 Ohio Op. Att'y Gen. No. 039 ("[R.C. 2923.129(B)(2)] prohibits a journalist from making a reproduction of information about the licensees of concealed carry licenses by any means, other than through his own mental processes.").

Journalist Requests		
Type of Request	***Ohio Revised Code Section***	***Requester May:***
Actual personal residential address of a: • Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or BCI&I Agent	**149.43(B)(9)(a)**	**Inspect or copy the record(s)**
Employer name and address, if the employer is a public office, of a spouse, former spouse, or child of the following: • Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or BCI&I Agent	**149.43(B)(9)(a)**	**Inspect or copy the record(s)**
Customer information maintained by a municipally owned or operated public utility, other than: • Social security numbers • Private financial information such as credit reports, payment methods, credit card numbers, and bank account information	**149.43(B)(9)(b)**	**Inspect or copy the record(s)**
Coroner Records, including: • Preliminary autopsy and investigative notes • Suicide notes • Photographs of the decedent made by the coroner or those directed or supervised by the coroner	**313.10(D)**	**Inspect the record(s) only, but may *not* copy them or take notes**
Concealed Carry Weapon (CCW) Permits: • Name, county of residence, and date of birth of a person for whom the sheriff issued, suspended, or revoked a permit for a concealed weapon: o License o Replacement license o Renewal license o Temporary emergency license o Replacement temporary emergency license	**2923.129(B)(2)**	**Inspect the record(s) only, but may *not* copy them or take notes**

Workers' Compensation Initial Filings, including: • Addresses and telephone numbers of claimants, regardless of whether their claims are active or closed, and the dependents of those claimants	**4123.88(D)(1)**	**Inspect or copy the record(s)**
Actual confidential personal residential address of a: • Public children service agency employee • Private child placing agency employee • Juvenile court employee • Law enforcement agency employee Note: The journalist must adequately identify the person whose address is being sought, and must make the request to the agency by which the individual is employed or to the agency that has custody of the records	**2151.142(D)**	**Inspect or copy the record(s)**

5. Modified Access to Certain Public Offices' Records

As with requesters, the rights and obligations of public offices can be modified by law. Some of these modifications impose conditions on obtaining records in volume and setting permissible charges for copying. The following provisions are only examples. The law is subject to change, so be sure to check for any current law modifying access to particular public records with which you are concerned.

a. Bulk Commercial Requests from Ohio Bureau of Motor Vehicles

"The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten percent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law."[210] The statute sets out definitions of "actual cost," "bulk commercial extraction request," "commercial," "special extraction costs," and "surveys, marketing, solicitation, or resale for commercial purposes."[211]

b. Copies of Coroner's Records

Generally, all records of a coroner's office are public records subject to inspection by the public.[212] A coroner's office may provide copies to a requester upon a written request and payment by the requester of a statutory fee.[213] However, the following are not public records: preliminary autopsy and investigative notes and findings; photographs of a decedent made by the coroner's office; suicide notes; medical and psychological records of the decedent provided to the coroner; records of a deceased individual that are part of a confidential enforcement investigatory record; and laboratory reports generated from analysis of physical evidence by the coroner's laboratory that is

[210] R.C. 149.43(F)(1).
[211] These definitions are set forth at R.C. 149.43(F)(2) (a)-(d), and (F)(3).
[212] R.C. 313.10(B).
[213] R.C. 313.10(B).

discoverable under Ohio Criminal Rule 16.[214] The following three classes of requesters may request some or all of the records that are otherwise excepted from disclosure: 1) next of kin of the decedent or the representative of the decedent's estate (copy of full records),[215] 2) journalists (limited right to inspect),[216] and 3) insurers (copy of full records).[217] The coroner may notify the decedent's next of kin if a journalist or insurer has made a request.[218]

C. Going "Above and Beyond," Negotiation, and Mediation

1. Think Outside the Box – Go Above and Beyond Your Duties

Requesters may become impatient with the time a response is taking, and public offices are often concerned with the resources required to process a large or complex request, and either may believe that the other is pushing the limits of the public records laws. These problems can be minimized if one or both parties go above and beyond their duties in search of a result that works for both. Some examples:

- If a request is made for paper copies, and the office keeps the records electronically, the office might offer to e-mail digital copies instead (particularly if this is easier for the office). The requester may not know that the records are kept electronically, or that sending by e-mail is cheaper and faster for the requester. The worst that can happen is the requester declines.

- If a requester tells the public office that one part of a request is very urgent for them, and the rest can wait, then the office might agree to expedite that part, in exchange for relaxed timing for the rest.

- If a township fiscal officer's ability to copy 500 pages of paper records is limited to a slow ink-jet copier, then either the fiscal officer or the requester might suggest taking the documents to a copy store, where the copying will be faster, and likely cheaper.

2. How to Find a Win-Win Solution: Negotiate

The Public Records Act requires negotiated clarification when an ambiguous or overly broad request is denied (see Section A. 5. above), and offers optional negotiation when a public office believes that sharing the reason for the request or the identity of the requester would help the office identify, locate, or deliver the records (see Section A.7. above). But negotiation is not limited to these circumstances. If you have a concern, or a creative idea (see Section C. 1. above), remember that "it never hurts to ask." If the other party appears frustrated or burdened, ask them, "Is there another way to do this that works better for you?"

3. How to Find a Win-Win Solution: Mediate

If you believe that a neutral public records expert might help the parties resolve a conflict regarding a public records request, a free and voluntary Public Records Mediation Program is available through the Ohio Attorney General's Office. Either the requester or the public office can ask for a telephone conference with a mediator, as long as no court action has been filed yet (see Chapter Four). For more information, go to **http://www.ohioattorneygeneral.gov/publicrecordsmediation**. The teleconference should be conducted within 30 days or so, and it is always a less expensive option, for both parties, than filing a lawsuit.

[214] R.C. 313.10(A)(2)(a)-(f).
[215] R.C. 313.10(C).
[216] R.C. 313.10(D).
[217] R.C. 313.10(E).
[218] R.C. 313.10(F).

III. Chapter Three: Exceptions to the Required Release of Public Records[219]

While the Ohio Public Records Act presumes and favors public access to government records, the General Assembly has created exceptions to protect certain records from mandatory release.

A. Categories of Exceptions

There are two types of public records exceptions: 1) those that mandate that a public office cannot release certain documents; and 2) those that allow the public office to choose whether to release certain documents. These exceptions are almost always created by state or federal statutes or codes.

1. "Must Not Release"

The first type of exception prohibits a public office from releasing specific records or information to the public. Such records are prohibited from release in response to a public records request, often under civil or criminal penalty, and the public office has no choice but to deny the request. These mandatory restrictions are expressly included as exceptions to the Ohio Public Records Act by what is referred to as the "catch-all" exception in R.C. 149.43(A)(1)(v): "records the release of which is prohibited by state or federal law." These laws can include constitutional provisions,[220] statutes,[221] common law,[222] or authorized state or federal administrative codes.[223] Local ordinances, however, cannot create public records exceptions.

A few "must not release" exceptions apply to public offices on behalf of, and subject to the decisions of, another person. For example, a public legal or medical office may be restricted by the attorney-client or physician-patient privileges from releasing certain records of their clients or patients.[224] In such cases, if the client or patient chooses to waive the privilege, the public office would be released from the otherwise mandatory exception.[225]

2. "May Release, But May Choose to Withhold"

The other type of exception, a "discretionary" exception, gives a public office the choice of either withholding or releasing specific records, often by excluding certain records from the definition of public records.[226] This means that the public office does not have to disclose these records in response to a public records request; however, it may do so if it chooses without fear of punishment under the law. Such provisions are usually state or federal statutes. Some laws contain ambiguous titles or text such as "confidential" or "private," but the test for public records purposes is whether a particular law applied to a particular request actually *prohibits* release of a record, or just gives the public office the *choice* to withhold the record.

B. Multiple and Mixed Exceptions

Many records are subject to more than one exception. Some may be subject to both a discretionary exception (giving the public office the option to withhold), as well as a mandatory exceptions (which

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[219] For purposes of this section only, the term "exception" will be used to describe laws authorizing the withholding of records from public records requests. The term "exemption" is also often used in public records law, apparently interchangeably with "exception."

[220] *E.g., State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 1999-Ohio-264.

[221] *See e.g. State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557 (applying R.C. 2151.421).

[222] For example, common law attorney-client privilege. *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, ¶ 27.

[223] *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462, 467 (10th Dist. 1996) (STRS properly denied access to beneficiary form pursuant to Ohio Administrative Code); 2000 Ohio Op. Att'y Gen. No. 036 (federal regulation prohibits release of service member's discharge certificate without service member's written consent); *but compare, State ex. rel. Gallon & Takacs Co. v. Conrad*, 123 Ohio App.3d 554, 561 (10th Dist. 1997) (if regulation was promulgated outside of agency's statutory authority, the invalid rule will not constitute an exception to the public records act).

[224] *State ex rel. Nix v. City of Cleveland*, 83 Ohio St.3d 379, 1998-Ohio-290.

[225] *See, State ex rel. Dreamer v. Mason*, 115 Ohio St.3d 190, 2007-Ohio-4789 (illustrates the interplay of attorney-client privilege, waiver, public records law, and criminal discovery).

[226] 2000 Ohio Op. Att'y Gen. No. 021 ("R.C. 149.43 does not expressly prohibit the disclosure of items that are excluded from the definition of public records, but merely provides that their disclosure is not mandated."); *see also*, 2001 Ohio Op. Att'y Gen. No. 041.

prohibits release), so it is important for public offices to find all exceptions that apply to a particular record, rather than acting on the first one that is found to apply.

C. Waiver of an Exception

If a valid exception applies to a particular record, but the public office discloses it anyway, the office is deemed to have waived[227] (abandoned) that exception for that particular record, especially if the disclosure was to a person whose interests are antagonistic to those of the public office.[228] However, "waiver does not necessarily occur when the public office that possesses the information makes limited disclosures [to other public officials] to carry out its business."[229] Under such circumstances, the information has never been disclosed to the public.[230]

D. Applying Exceptions

In Ohio, the public records of a public office belong to the people, not to the government officials holding them.[231] Accordingly, the public records law must be liberally interpreted in favor of disclosure, and any exceptions in the law that permit certain types of records to be withheld from disclosure must be narrowly construed.[232] The public office has the burden of establishing that an exception applies, and does not meet that burden if it has not proven that the requested records fall squarely within the exception.[233] The Ohio Supreme Court has stated that "in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure."[234]

A "well-settled principle of statutory construction [is] that 'when two statutes, one general and the other special, cover the same subject matter, the special provision is to be construed as an exception to the general statute which might otherwise apply.'"[235] This means that when two different statutes apply to one issue, the more specific of the two controls. For example, where county coroner's statutes set a 25 cent per page (one dollar minimum) retrieval and copying fee for public records of the coroner's office,[236] the coroner's statute prevails over the general Public Records Act provision that copies of records must be provided "at cost." But the statutes must actually conflict – if a special statute sets a two dollar fee for "photocopies" of an office's records[237] and a person instead requests those records as

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[227] *State ex rel. Wallace v. State Med. Bd.*, 89 Ohio St.3d 431, 435 (2000) ("Waiver" is defined as a voluntary relinquishment of a known right).

[228] *See, e.g., State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041; *State ex rel. Gannett Satellite Network, Inc. v. Petro*, 80 Ohio St.3d 261, 1998-Ohio-319; *Dept. of Liquor Control v. B.P.O.E. Lodge 0107*, 62 Ohio St.3d 1452, 579 N.E.2d 1391 (1991) (introduction of record at administrative hearing waives any bar to dissemination); *State ex rel. Zuern v.* Leis, 45 Ohio St.3d 20, 22 (1990) (any exceptions applicable to sheriff's investigative material were waived by disclosure in civil litigation); *State ex rel. Coleman v. City of Norwood*, 1st Dist. No. C-890075 (Aug. 2, 1989) ("the visual disclosure of the documents to relator [the requester in this case] waives any contractual bar to dissemination of these documents"); *Covington v. Backner*, Franklin C.P. No. 98 CVH-07-5242, (June 1, 2000) (attorney-client privilege waived where staff attorney had reviewed, duplicated, and inadvertently produced documents to defendants during discovery).

[229] *State ex rel. Musial v. N. Olmstead*, 106 Ohio St.3d 459, 2005-Ohio-5521, ¶ 15 (forwarding police investigation records to a city's ethics commission did not constitute waiver); *State ex rel. Cincinnati Enquirer v. Sharp*, 151 Ohio App.3d 756, 761, 2003-Ohio-1186 (1st Dist.) (statutory confidentiality of documents submitted to municipal port authority not waived when port authority shares documents with county commissioners).

[230] *State ex rel. Musial v. N. Olmstead*, 106 Ohio St.3d 459, 465, 2005-Ohio-5521, ¶¶ 35-39; *State ex rel. Cincinnati Enquirer v. Sharp*, 151 Ohio App.3d 756, 761, 2003-Ohio-1186 (1st Dist.).

[231] *White v. Clinton Cty. Bd. of Comm'rs.*, 76 Ohio St.3d 416, 420 (1996); *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St.2d 107, 109 (1976) (quoting *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 371 (1960)).

[232] *State ex rel. Mahajan v. State Medical Bd.*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 21; *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 17; *State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 30 ("Insofar as Akron asserts that some of the requested records fall within certain exceptions to disclosure under R.C. 149.43, we strictly construe exceptions against the public records custodian, and the custodian has the burden to establish the applicability of an exception.").

[233] *State ex rel. Rocker v. Guernsey County Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, ¶ 7; *Cuyahoga Cty. Bd. of Health v. Lipson O'Shea Legal Group*, 8th Dist. No. CV-784-198, 2013-Ohio-5736, ¶¶ 31-32.

[234] *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 172, 1994-Ohio-246; NOTE: The Ohio Supreme Court has not authorized courts or other records custodians to create new exceptions to R.C. 149.43 based on a balancing of interests or generalized privacy concerns. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶ 31.

[235] *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 92, 2004-Ohio-4354, ¶¶ 4-15 (citing *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68 Ohio St.3d 426, 429, 1994-Ohio-340 (1994)); *see*, R.C. 1.51.

[236] R.C. 313.10(B).

[237] R.C. 317.32(I).

"electronic copies" on a CD, then there is no conflict, and the specific charge for photocopying does not apply.[238] (See Chapter Two: B. "Statutes That Modify General Rights and Duties").

Another rule of construction courts often apply when interpreting a statute is the maxim *expressio unius est exclusio alterius* – "the expression of one thing is the exclusion of another."[239] If this maxim applied to public records law, it would mean that where a statute expressly states that particular records of a public office *are* public, then the remaining records would *not* be public. However, Ohio's Supreme Court has clearly stated that this maxim does *not* apply to public records: so even if a statute expressly states that specific records of a public office are public, it does *not* mean that all other records of that office are exempt from disclosure.[240]

Where an office can show that non-exempt records are "inextricably intertwined" with exempt materials, the non-exempt records are not subject to disclosure under R.C. 149.43 insofar as they are inseparable.[241] Finally, a public office has no duty to submit a "privilege log" to preserve a claimed exemption.[242]

To summarize, if a record does not clearly fit into one of the exceptions listed by the General Assembly, and is not otherwise prohibited from disclosure by other state or federal law, it must be disclosed.

E. Exceptions Enumerated in the Public Records Act

The Ohio Public Records Act contains a list of records and types of information removed from the definition of "public records."[243] The full text of those exceptions appears in R.C. 149.43(A)(1), a copy of which is included in Appendix A. Here, these exceptions are addressed in brief summaries. Note that although the language removing a record from the definition of "public records" gives the public office the *choice* of withholding or releasing the record, many of these records are further subject to other statutes that *prohibit* their release.[244]

(a) Medical records, which are defined as any document or combination of documents that:

1) pertain to a patient's medical history, diagnosis, prognosis, or medical condition,

and

2) were generated and maintained in the process of medical treatment.[245]

Records meeting this definition need not be disclosed.[246] Birth, death, and hospital admission or discharge records are not considered medical records for purposes of Ohio's public records law.[247] Reports generated for reasons other than medical diagnosis or treatment, such as for employment or litigation purposes, are not "medical records" exempt from disclosure under the Public Records Act.[248] However, other statutes or federal

[238] *State ex rel. Data Trace v. Cuyahoga Co. Fiscal Officer*, 2012-Ohio-753.
[239] Black's Law Dictionary, 581 (6th Ed. 1990).
[240] *Franklin County Sheriff's Dept. v. State Employment Relations Bd.*, 63 Ohio St.3d 498 (1992) (while categories of records designated in R.C. 4117.17 clearly are public records, all other records must still be analyzed under R.C. 149.43).
[241] *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶¶ 21-25; *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009, ¶ 29; *State ex rel. Master v. Cleveland*, 76 Ohio St.3d 340, 342, 1996-Ohio-300.
[242] *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, ¶ 24.
[243] R.C. 149.43(A)(1)(a)-(bb).
[244] *See* Chapter Three: B. "Multiple and Mixed Exceptions."
[245] R.C. 149.43(A)(1)(a) (applying Public Records Act definition of "medical records" at R.C. 149.43(A)(3)).
[246] R.C. 149.43(A)(3); *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 1997-Ohio-349; 1999 Ohio Op. Att'y Gen. No. 06; but compare, *State ex rel. Cincinnati Enquirer v. Adcock*, 2004-Ohio-7130 (1st Dist.).
[247] R.C. 149.43(A)(3).
[248] *See State ex rel. O'Shea & Assoc. v. Cuyahoga Metro. Housing Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶¶ 41-43 (questionnaires and release authorizations generated to address lead exposure in city-owned housing not "medical records" despite touching on childrens' medical histories); *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 144-145, 1995-Ohio-248 (a police psychologist report obtained to assist in the police hiring process is not a medical record); *State of Ohio v. Hall*, 141 Ohio App.3d 561, 2000-Ohio-4059 (4th Dist.) (psychiatric reports compiled solely to assist court with competency to stand trial determination are not medical records).

constitutional rights may prohibit disclosure,[249] in which case the records or information are not public records under the "catch-all exception," R.C. 149.43(A)(1)(v).

(b) Records pertaining to probation and parole proceedings or proceedings related to the imposition of community control sanctions[250] and post-release control sanctions.[251] Examples of records covered by this exception include:

- Pre-sentence investigation reports;[252]
- Records relied on to compile a pre-sentence investigation report;[253]
- Documents reviewed by the Parole Board in preparation for a parole hearing;[254] and
- Records of parole proceedings.[255]

(c) All records associated with the statutory process through which minors may obtain judicial approval for abortion procedures in lieu of parental consent. This exception includes records from both trial and appellate-level proceedings.[256]

(d), **(e)**, and **(f)** These three exceptions all relate to the confidentiality of adoption proceedings.

Documents removed from the definition of "public record" include:

- Records pertaining to adoption proceedings;[257]
- Contents of an adoption file maintained by the Department of Health;[258]
- A putative father registry;[259] and
- An original birth record after a new birth record has been issued.[260]

In limited circumstances, release of adoption records and proceedings may be appropriate. For example:

- The Department of Job and Family Services may release a putative father's registration form to the mother of the minor or to the agency or attorney who is attempting to arrange the minor's adoption.[261]
- Non-identifying social and medical histories may be released to an adopted person who has reached majority or to the adoptive parents of a minor.[262]
- An adult adopted person may be entitled to the release of identifying information or access to his or her adoption file.[263]

(g) Trial preparation records: "trial preparation record," for the purposes of the Ohio Public Records Act, is defined as "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding,

[249] *See, e.g.*, 42 U.S.C. §§ 12101 et seq. (1990) (Americans with Disabilities Act); 29 U.S.C. §§ 2601 et seq. (1993) (Family and Medical Leave Act).
[250] R.C. 149.43(A)(9) ("Community control sanction" has the same meaning as in R.C. 2929.01).
[251] R.C. 149.43(A)(1)(b); R.C. 149.43(A)(10) ("Post-release control sanction" has the same meaning as in R.C. 2967.01).
[252] *MADD v. Gosser*, 20 Ohio St.3d 30, 32 n. 2 (1985).
[253] *Hadlock v. Polito*, 74 Ohio App.3d 764, 766 (8th Dist. 1991).
[254] *Lipshutz v. Shoemaker*, 49 Ohio St.3d 88, 90, 551 N.E.2d 160 (1990).
[255] *Gaines v. Adult Parole Authority*, 5 Ohio St.3d 104, 449 N.E.2d 762 (1983).
[256] R.C. 149.43(A)(1)(c) (referencing R.C. 2505.073(B)).
[257] R.C. 149.43(A)(1)(d).
[258] R.C. 149.43(A)(1)(d) (referencing R.C. 3705.12).
[259] R.C. 149.43(A)(1)(e) (referencing R.C. 3107.062, 3111.69).
[260] R.C. 3705.12(A)(2).
[261] R.C. 3107.063.
[262] R.C. 3107.17(D).
[263] R.C. 149.43(A)(1)(f); R.C. 3107.38(B) (adopted person whose adoption was decreed prior to January 1, 1964 may request adoption file); R.C. 3107.40, 3107.41 (access to adoption file for person whose adoption was decreed after January 1, 1964 is dependent on whether the adoption file has either a denial of release form or an authorization of release form).

including the independent thought processes and personal trial preparation of an attorney."[264]

Documents that a public office obtains through discovery during litigation are considered trial preparation records.[265] In addition, material compiled for a public attorney's personal trial preparation constitutes a trial preparation record.[266] The trial preparation exception does not apply to settlement agreements or settlement proposals,[267] or where there is insufficient evidence that litigation was reasonably anticipated at the time records were prepared.[268]

(h) Confidential Law Enforcement Investigatory Records (see Chapter Six: A. "CLEIRs: Confidential Law Enforcement Investigatory Records Exception"): CLEIRs are defined[269] as records that (1) pertain to a law enforcement matter, and (2) have a high probability of disclosing any of the following:

- The identity of an uncharged suspect;
- The identity of an information source or witness to whom confidentiality has been "reasonably promised;"
- Information provided by an information source or witness to whom confidentiality has been reasonably promised, that would tend to reveal the identity of the source or witness;
- Specific confidential investigatory techniques or procedures, or specific investigatory work product; or
- Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(i) Records containing confidential "mediation communications" (R.C. 2710.03) or records of the Ohio Civil Rights Commission made confidential under R.C. 4112.05.[270]

(j) DNA records stored in the state DNA database pursuant to R.C. 109.573.[271]

(k) Inmate records released by the Department of Rehabilitation and Correction to the Department of Youth Services or a court of record pursuant to R.C. 5120.21(E).[272]

(l) Records of the Department of Youth Services (DYS) regarding children in its custody that are released to the Department of Rehabilitation and Correction (DRC) for the limited purpose of carrying out the duties of the DRC.[273]

(m) "Intellectual property records": While this exception seems broad, it has a specific definition for the purposes of the Ohio Public Records Act, and is limited to those records that are produced or collected: (1) by or for state university faculty or staff; (2) in relation to studies or research on an education, commercial, scientific, artistic, technical, or scholarly issue; and (3) which have not been publicly released, published, or patented.[274]

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[264] R.C. 149.43(A)(4).
[265] *Cleveland Clinic Found. v. Levin*, 120 Ohio St.3d 1210, 2008-Ohio-6197, 898 N.E.2d 589, ¶ 10.
[266] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 431-432, 639 N.E.2d 83 (1994).
[267] *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶¶ 16-21.
[268] *See State ex rel. O'Shea & Assoc. v. Cuyahoga Metro. Housing Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 44.
[269] R.C. 149.43(A)(2).
[270] R.C. 149.43(A)(1)(i).
[271] R.C. 149.43(A)(1)(j).
[272] R.C. 5120.21(A).
[273] R.C. 5139.05(D)(1); *see*, R.C. 5139.05(D) for all records maintained by DYS of children in its custody.
[274] R.C. 149.43(A)(1)(m); R.C. 149.43(A)(5); *see also, State ex rel. Physicians Comm. for Responsible Medicine v. Bd. of Trs. of Ohio State Univ.*, 108 Ohio St.3d 288, 2006-Ohio-903, 843 N.E.2d 174 (In finding university's records of spinal cord injury research to be exempt intellectual

(n) Donor profile records: Similar to the intellectual property exception, the "donor profile records" exception is given a specific, limited definition for the purposes of the Public Records Act. First, it only applies to records about donors or potential donors to public colleges and universities.[275] Second, the names and reported addresses of all donors and the date, amount, and condition of their donation(s), are all public information.[276] The exception applies to all other donor or potential donor records.

(o) Records maintained by the Ohio Department of Job and Family Services on statutory employer reports of new hires.[277]

(p) Peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT or investigator of the Bureau of Criminal Identification and Investigation residential and familial information.[278] See Chapter Six: C. "Residential and Familial Information of Covered Professions that are not Public Records."

(q) Trade secrets of certain county and municipal hospitals: "Trade secrets" are defined at R.C. 1333.61(D), the definitional section of Ohio's Uniform Trade Secrets Act.

(r) Information pertaining to the recreational activities of a person under the age of eighteen. This includes any information that would reveal the person's:

- Address or telephone number, or that of person's guardian, custodian, or emergency contact person;
- Social Security Number, birth date, or photographic image;
- Medical records, history, or information; or
- Information sought or required for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or obtain admission privileges to any recreational facility owned or operated by a public office.[279]

(s) Listed records of a child fatality review board (except for the annual reports the boards are required by statute to submit to the Ohio Department of Health).[280] The listed records are also prohibited from unauthorized release by R.C. 307.629(B).

(t) Records and information provided to the executive director of a public children services agency or prosecutor regarding the death of a minor from possible abuse, neglect, or other criminal conduct. Some of these records are prohibited from release to the public. Others may become public depending on the circumstances.[281]

(u) Nursing home administrator licensing test materials, examinations, or evaluation tools.[282]

(v) Records the release of which is prohibited by state or federal law; this is often called the catch-all exception. Although state and federal statutes can create both mandatory and

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property records, Court ruled that limited sharing of the records with other researchers to further the advancement of spinal cord injury research did not mean that the records had been "publicly released").

[275] R.C. 149.43(A)(6) ("'Donor profile record' means all records about donors or potential donors to a public institution of higher education…").

[276] R.C. 149.43(A)(6).

[277] R.C. 149.43(A)(1)(o) (referencing R.C. 3121.894).

[278] R.C. 149.43(A)(7).

[279] R.C. 149.43(A)(1)(r); R.C. 149.43(A)(8).

[280] R.C. 149.43(A)(1)(s) (referencing R.C. 307.621 - .629).

[281] R.C. 149.43(A)(1)(t) (referencing R.C. 5153.171).

[282] R.C. 149.43(A)(1)(u) (referencing R.C. 4751.04).

discretionary exceptions by themselves, this provision also incorporates as exceptions by reference any statutes or administrative code that prohibit the release of specific records. An agency rule designating particular records as confidential that is properly promulgated by a state or federal agency will constitute a valid catch-all exception[283] because such rules have the effect of law.[284]

But, if the rule was promulgated outside the authority statutorily granted to the agency, the rule is not valid and will not constitute an exception to disclosure.[285]

(w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio Venture Capital Authority.[286]

(x) Financial statements and data any person submits for any purpose to the Ohio Housing Finance Agency or the Controlling Board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency. [287]

(y) Records and information relating to foster caregivers and children housed in foster care, as well as children enrolled in licensed, certified, or registered child care centers. This exception applies only to records held by county agencies or the Ohio Department of Job and Family Services.[288] (See also Section G.13. "County Children Services Agency Records").

(z) Military discharges recorded with a county recorder.[289]

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility.[290]

(bb) Records described in division (C) of section 187.04 of the Revised Code that are not designated to be made available to the public as provided in that division.[291]

F. Exceptions Affecting Personal Privacy

There is no general "privacy exception" to the Ohio Public Records Act. Ohio has no general privacy law comparable to the federal Privacy Act.[292] However, a public office is obligated to protect certain *non-public record* personal information from unauthorized dissemination.[293] Though many of the exceptions to the Public Records Act apply to information people would consider "private," this section focuses specifically on records and information that are protected by: (1) the right to privacy found in the United States Constitution; and (2) R.C. 149.45 and R.C. 319.28(B), which are laws designed to protect personal information on the internet.

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[283] *State ex rel. Lindsay v. Dwyer*, 108 Ohio App.3d 462 (10th Dist. 1996) (State Teachers Retirement System properly denied access to beneficiary form pursuant to Ohio Administrative Code); 2000 Ohio Op. Att'y Gen. No. 036 (service member's discharge certificate prohibited from release by Governor's Office of Veterans Affairs, per federal regulation, without service member's written consent).

[284] *Columbus and Southern Ohio Elec. Co. v. Indus. Comm.*, 64 Ohio St.3d 119, 122, 592 N.E.2d 1367 (1992); *Doyle v. Ohio Bureau of Motor Vehicles*, 51 Ohio St.3d 46, 48, 554 N.E.2d 97 (1990); *State ex rel. DeBoe v. Indus. Comm.*, 161 Ohio St. 67, 117 N.E.2d 925 (1954) (paragraph one of syllabus).

[285] *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad*, 123 Ohio App.3d 554, 560-561 (10th Dist. 1997) (BWC administrative rule prohibiting release of managed care organization applications was unauthorized attempt to create exception to Public Records Act).

[286] R.C. 149.43(A)(1)(w); *see*, R.C. 150.01.

[287] R.C. 149.43(A)(1)(x).

[288] R.C. 149.43(A)(1)(y); *see*, R.C. 5101.29.

[289] R.C. 149.43(A)(1)(z); *see*, R.C. 317.24.

[290] R.C. 149.43(A)(1)(aa).

[291] R.C. 149.43(A)(1)(bb).

[292] 5 U.S.C. 552a.

[293] Ohio has a Personal Information Systems Act (PISA), Chapter 1347 of the Ohio Revised Code, that only applies to those items to which the Public Records Act does not apply; that is, PISA does not apply to public records but instead PISA only applies to records that have been determined to be non-public, and items of information that are not "records" as defined by the Public Records Act. Public offices can find more detailed guidance at http://privacy.ohio.gov/government/aspx. *See also State ex rel. Renfro v. Cuyahoga Cty. Dept. of Human Serv.*, 54 Ohio St.3d 25, 560 N.E.2d 239 (1990).

1. Constitutional Right to Privacy

The U.S. Supreme Court recognizes a constitutional right to informational privacy under the Fourteenth Amendment's Due Process Clause. This right protects people's "interest in avoiding divulgence of highly personal information,"[294] but must be balanced against the public interest in the information.[295] Such information cannot be disclosed unless disclosure "narrowly serves a compelling state interest."[296]

In Ohio, the U.S. Court of Appeals for the Sixth Circuit has limited this right to informational privacy to interests that "are of constitutional dimension," that are considered "fundamental rights" or "rights implicit in the concept of ordered liberty."[297] That is, the consequence of disclosure must implicate some other right protected by the Constitution.

The Ohio Supreme Court has "not authorized courts or other records custodians to create new exceptions to R.C. 149.43 based on a balancing of interests or generalized privacy concerns."[298] In matters which do not rise to fundamental constitutional levels, the Court notes that many state statutes address privacy rights, and defers to "the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizen's right to keep private certain information that becomes part of the records of public offices."[299] Cases finding a new or expanded constitutional right of privacy affecting public records are relatively infrequent.

In the Sixth Circuit case of *Kallstrom v. City of Columbus*, police officers sued the city for releasing their unredacted personnel files to an attorney representing members of a criminal gang whom the officers were testifying against in a major drug case. The personnel files contained the addresses and phone numbers of the officers and their family members, as well as banking information, Social Security Numbers, and photo IDs.[300] The Court held that, because release of the information could lead to the gang members causing the officers bodily harm, the officers' fundamental constitutional rights to personal security and bodily integrity were at stake.[301] The Court also described this constitutional right as a person's "interest in preserving [one's] life."[302] The Court then found that the Ohio Public Records Act did not require release of the files in this manner, because the disclosure did not "narrowly [serve] the states interest in ensuring accountable government."[303]

Based on the Sixth Circuit's holding in *Kallstrom*, the Ohio Supreme Court subsequently held that police officers have a constitutional right to privacy in their personal information that could be used by defendants in a criminal case to achieve nefarious ends.[304] The Ohio Supreme Court has also suggested that the constitutional right to privacy of minors would come into play where "release of personal information [would create] an unacceptable risk that a child could be victimized."[305] In another case based on *Kallstrom*, the Sixth Circuit held that names, addresses, and dates of birth of adult cabaret license applicants are exempted from the Ohio Public Records Act because their release to the public poses serious risk to their personal security.[306]

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[294] *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) (citing *Whalen v. Roe*, 429 U.S. 589, 598-600 (1977)).
[295] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1061 (6th Cir. 1998) (citing *Whalen v. Roe*, 429 U.S. 589, 602-604 (1977)); *Nixon v. Administrator of Gen. Servs.* (1977), 433 U.S. 425; *see also, J.P. v. DeSanti*, 653 F.2d 1080, 1091 (6th Cir. 1981).
[296] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1059 (6th Cir. 1998).
[297] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) (quoting *J. P. v. DeSanti*, 653 F.2d 1080, 1090 (6th Cir. 1981)).
[298] *State ex rel. WBNS TV v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶¶ 30-31, 36-37.
[299] *State ex rel. Toledo Blade Co. v. University of Toledo*, 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992).
[300] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1059 (6th Cir. 1998).
[301] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (quoting *Doe v. Clairborne County*, 103 F.3d 495, 507 (6th Cir. 1996)).
[302] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 1998) (quoting *Nishiyama v. Dickson County*, 814 F.2d 277, 380 (6th Cir. 1987) (en banc)).
[303] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1065 (6th Cir. 1998).
[304] *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 282, 1999-Ohio-264; *see also State ex rel. Cincinnati Enquirer v. Craig*, 132 Ohio St.3d 68, 2012-Ohio-1999, 969 N.E.2d 243, ¶¶ 13-23 (identities of officers involved in fatal accident with motorcycle club exempted from disclosure based on constitutional right of privacy, where release would create perceived likely threat of serious bodily harm or death).
[305] *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 372, 2000-Ohio-345.
[306] *Deja Vu of Cincinnati, LLC v. Union Twp. Bd. of Trustees*, 411 F.3d 777, 793-794 (2005).

In another Sixth Circuit case, a county sheriff held a press conference "to release the confidential and highly personal details" of a rape. The Court held that a rape victim has a "fundamental right of privacy in preventing government officials gratuitously and unnecessarily releasing the intimate details of the rape," where release of the information served no penalogical purpose.[307] The Court indicated that release of some of the details may have been justifiable if the disclosure would have served "any specific law enforcement purpose," including apprehending the suspect, but no such justification was offered in this case.

Neither the Ohio Supreme Court nor the Sixth Circuit has applied the constitutional right to privacy broadly. Public offices and individuals should thus be aware of this potential protection, but know that it is limited to circumstances involving fundamental rights, and that most personal information is not protected by it.[308]

2. Personal Information Listed Online

R.C. 149.45 requires public offices to redact, and permits certain individuals to request redaction of, specific personal information[309] from any records made available to the general public on the internet.[310] A person must make this request in writing on a form developed by the Attorney General, specifying the information to be redacted and providing any information that identifies the location of that personal information.[311] In addition to the right of all persons to request the redaction of personal information defined above, persons in certain covered professions can also request the redaction of their actual residential address from any records made available by public offices to the general public on the internet.[312] When a public office receives a request for redaction, it must act in accordance with the request within five business days, if practicable.[313] If the public office determines that redaction is not practicable, it must explain to the individual why the redaction is impracticable within five business days.[314]

R.C. 149.45 separately requires all public offices to redact, encrypt, or truncate the Social Security Numbers of individuals from any documents made available to the general public on the internet.[315] If a public office becomes aware than an individual's Social Security Number was not redacted, the office must redact the Social Security Number within a reasonable period of time.[316]

The statute provides that a public office is not liable in a civil action for any alleged harm as a result of the failure to redact personal information or addresses on records made available on the internet to the general public, unless the office acted with a malicious purpose, in bad faith, or in a wanton or reckless manner.[317]

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[307] *Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir. 1998).

[308] *State ex rel. Quolke v. Strongsville City Sch. Dist. Bd. of Educ.*, 8th Dist. No. 99733, 2013-Ohio-4481, ¶ 3 (court ordered public office to release replacement teachers' names because public office failed to establish that threats and violent acts continued after strike).

[309] "Personal information" is defined as an individual's: social security number, federal tax identification number, driver's license number or state identification number, checking account number, savings account number, or credit card number. R.C. 149.43(A)(1).

[310] R.C. 149.45(C)(1).

[311] This form is available at **http://www.OhioAttorneyGeneral.gov/Legal/Sunshine-Laws/Open-Government/Your-Rights-to-an-Open-and-Accountable-Government** under the "Forms" drop-down menu on the left.

[312] Covered professions include: peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or BCI & I Investigator. (R.C. 149.45(A)(2)). For additional discussion, *see* Chapter Six: C. "Residential and Familial Information of Covered Professions that are not Public Records"; R.C. 149.45(D)(1) (this section does not apply to county auditor offices). The request must be on a form developed by the Attorney General, which is available at **http://www.OhioAttorneyGeneral.gov/Legal/Sunshine-Laws/Open-Government/Your-Rights-to-an-Open-and-Accountable-Government** under the "Forms" drop-down menu on the left.

[313] R.C. 149.45(C)(2); R.C. 149.45(D)(2).

[314] R.C. 149.45(C)(2); R.C. 149.45(D)(2). NOTE: Explanation of the impracticability of redaction by the public office can be either oral or written.

[315] R.C. 149.45(B)(1),(2); NOTE: A public office is also obligated to redact social security numbers from records that were posted before the effective date of R.C. 149.45.

[316] R.C. 149.45(E)(1).

[317] R.C. 149.45(E)(2).

In addition to the protections listed above, R.C. 319.28 allows a covered professional[318] to submit a request, by affidavit, to remove his or her name from the general tax list of real and public utility property and insert initials instead.[319] Upon receiving such a request, the county auditor shall act within five days in accordance with the request.[320] If removal is not practicable, the auditor's office must explain why the removal and insertion is impracticable.[321]

G. Exceptions Created by Other Laws (by Topic)

Note: Additional statutory exceptions beyond those mentioned in this Chapter can be found online at: **http://www.OhioAttorneyGeneral.gov/Sunshine**, by clicking the link to "Publications," and then to "Appendix B – Statutory Provisions Excepting Records From the Ohio Public Records Act."

1. Attorney-Client Privilege, Discovery, and Other Litigation Items

a. Attorney-Client Privilege

"The attorney-client privilege is one of the oldest recognized privileges for confidential communications."[322] Attorney-client privileged records and information must not be revealed without the client's waiver.[323] Such records are thus prohibited from release by both state and federal law for purposes of the catch-all exception to the Ohio Public Records Act.

The attorney-client privilege arises whenever legal advice of any kind is sought from a professional legal advisor in his or her capacity as such, and the communications relating to that purpose, made in confidence by the client, are at the client's instance permanently protected from disclosure by the client or the legal advisor.[324] Records or information within otherwise public records that meet those criteria must be withheld or redacted in order to preserve attorney-client privilege.[325] For example, drafts of proposed bond documents prepared by an attorney are protected by the attorney-client privilege, and are not subject to disclosure.[326]

The privilege applies to records of communications between public office clients and their attorneys in the same manner that it does for private clients and their counsel.[327] Communications between a client and his or her attorney's agent may also be subject to the attorney-client privilege.[328] The privilege also applies to "documents containing communications between members of…a represented…public entity…about the legal advice given."[329] For example, the narrative portions of itemized attorney billing statements to a public office that contain descriptions of work performed may be protected by the attorney-client privilege, although the portions which reflect dates, hours, rates, and amount billed for the services are usually not protected.[330]

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[318] A peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT or investigator of the bureau of criminal identification and investigation. R.C. 319.28(B)(1).
[319] R.C. 319.28(B)(1).
[320] R.C. 319.28(B)(2).
[321] R.C. 319.28(B)(2).
[322] *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 19 (quoting *Swidler & Berlin v. United States*, 524 U.S. 399 (1998)).
[323] *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 18; *see, e.g., Reed v. Baxter*, 134 F.3d 351, 356 (6th Cir. 1998); *State ex rel. Nix v. City of Cleveland*, 83 Ohio St.3d 379, 383, 1998-Ohio-290; *TBC Westlake, Inc. v. Hamilton Cty. Bd. of Revision*, 81 Ohio St.3d 58, 1998-Ohio-445; *State ex rel. Besser v. Ohio State Univ.*, 87 Ohio St.3d 535, 2000-Ohio-475; *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 1994-Ohio-261.
[324] *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 265, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 21 (quoting *Reed v. Baxter*, 134 F.3d 351, 355-356 (6th Cir. 1998)).
[325] *State ex rel. Lanham v. DeWine*, 135 Ohio St.3d 191, 2013-Ohio-199, ¶¶ 26-31.
[326] *State ex rel. Benesch, Friedlander, Coplan & Aronoff, LLP v. City of Rossford*, 140 Ohio App.3d 149, 156 (6th Dist. 2000).
[327] *State ex rel. Leslie v. Ohio Hous. Fin. Agency*, 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 23 (attorney-client privilege applies to communications between state agency personnel and their in-house counsel); *American Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343 (1991).
[328] *State ex rel. Toledo Blade v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767 (a factual investigation may invoke the attorney-client privilege). *State v. Post*, 32 Ohio St.3d 380, 385 (1987).
[329] *See, State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 251, 1994-Ohio-261.
[330] *State ex rel. Anderson v. City of Vermilion*, Ohio Supreme Court No. 2012-0943, 2012-Ohio-5320 (Nov. 21, 2012), ¶¶ 13-15; *State ex rel. Dawson v. Bloom-Carroll Local School Dist.*, 131 Ohio St.3d 10, 2011-Ohio-6009.

b. Criminal Discovery

In a pending criminal proceeding, defendants may only obtain discovery under the Rules of Criminal Procedure.[331] Criminal defendants may use the Public Records Act to obtain otherwise public records in a pending criminal proceeding. However, Crim. R. 16 is the "preferred method to obtain discovery from the state."[332] This limitation does not extend to police initial incident reports, which must be made available immediately, even to the defendant.[333]

However, when the records requested by criminal defendants are not related to their ongoing criminal case, the discovery limitation does not apply.[334] Such requests must be analyzed in the same manner as any other public records request.

Note that when the prosecutor discloses materials to the defendant pursuant to the rules of criminal procedure, that disclosure does not mean those records automatically become available for public disclosure.[335] The prosecutor does not waive[336] applicable public records exceptions, such as trial preparation records or confidential law enforcement records,[337] simply by complying with discovery rules.[338]

c. Civil Discovery

Unlike in the criminal arena, in pending civil court proceedings the parties are not confined to the materials available under the civil rules of discovery. A civil litigant is permitted to use the Ohio Public Records Act in addition to the more restricted limits associated with civil discovery.[339] The exceptions or exemptions contained in the Public Records Act do not protect relevant documents from discovery in civil actions.[340] The nature of a request as either discovery or request for public records will determine available enforcement.[341]

As to the use of these public records as evidence in litigation, the Ohio Rules of Evidence govern.[342] Justice Stratton's concurring opinion in *Gilbert v. Summit County*, noted that "trial courts have discretion to admit or exclude evidence," and added, more directly, "trial courts have discretion to impose sanctions for discovery violations, one of which could be exclusion of that evidence," and she concluded that, "even though a party may effectively circumvent a discovery deadline by acquiring a document through a public records request, it is the trial court that ultimately determines whether those records will be admitted in the pending litigation."[343]

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[331] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 432 (1994) ("information, not subject to discovery pursuant to Crim.R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4).").

[332] *State v. Athon*, 136 Ohio St.3d 43, 2013-Ohio-1956, ¶ 19 (when a criminal defendant makes a public records request for information that could be obtained from the prosecutor through discovery, this request triggers a reciprocal duty on the part of the defendant to provide discovery as contemplated by Crim. R. 16).

[333] *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 120, 2002-Ohio-67 (criminal defendant's limitation to using only criminal discovery does not apply to initial incident reports, which are subject to immediate release upon request); *State of Ohio v. Twyford*, 2001-Ohio-3241 (7th Dist.).

[334] *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 281-282, 1999-Ohio-264 (where records sought have no relation to crime or case, *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420 (1994) is not applicable).

[335] *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 355, 1997-Ohio-271.

[336] *See* Chapter Three: C. "Waiver of an Exception."

[337] *See* Chapter Three: E.(g) "Trial preparation records"; *see also* Chapter Six: A. "CLEIRs: Confidential Law Enforcement Investigatory Records Exception."

[338] *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 354-355, 1997-Ohio-271.

[339] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 661-662, 2004-Ohio-7108.

[340] *Cockshutt v. Ohio Dept. of Rehabilitation and Correction*, No. 2:13-cv-532, 2013 WL 4052914 (S.D. Ohio 2013).

[341] *State ex rel. TP Mech. Contractors, Inc. v. Franklin Cty. Bd. of Comm'rs*, 2009-Ohio-3614 (10th Dist.).

[342] R.Evid. 803(8), 1005; *State of Ohio v. Curti*, 153 Ohio App.3d 183, 2003-Ohio-3286, ¶ 15 (7th Dist.).

[343] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 11.

d. Prosecutor and Government Attorney Files (Trial Preparation and Work Product)

R.C. 149.43(A)(1)(g) excepts from release any "trial preparation records," which are defined as "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney."[344] Documents that a public office obtains as a litigant through discovery will ordinarily qualify as "trial preparation records,"[345] as would the material compiled for a specific criminal proceeding by a prosecutor or the personal trial preparation by a public attorney.[346] Attorney trial notes and legal research are "trial preparation records," which may be withheld from disclosure.[347] Virtually everything in a prosecutor's file during an active prosecution is either material compiled in anticipation of a specific criminal proceeding or personal trial preparation of the prosecutor, and is therefore exempt from public disclosure as "trial preparation" material.[348] However, unquestionably non-exempt materials do not transform into "trial preparation records" simply by virtue of being held in a prosecutor's file.[349] For example, routine offense and incident reports are subject to release while a criminal case is active, including those in the files of the prosecutor.[350]

The common law attorney work product doctrine also protects a broader range of materials than attorney-client privilege.[351] The doctrine provides a qualified privilege,[352] and is incorporated into Rule 26 of the Ohio and Federal Rules of Civil Procedure. Ohio Civ.R. 26(B)(3) protects material "prepared in anticipation of litigation or for trial." The rule protects the "notes or documents containing the mental impressions, conclusions, opinions, or legal theories of its attorney or other representative concerning the litigation."[353]

e. Settlement Agreements and Other Contracts

Where a governmental entity is a party to a settlement, the trial preparation records exception will not apply to the settlement agreement.[354] But the parties are entitled to redact any information within the settlement agreement that is subject to the attorney-client privilege.[355] Any provision within the agreement that specifies it shall be kept confidential is void and unenforceable because a contractual provision will not supersede Ohio public records law.[356]

2. Income Tax Returns

Generally, any information gained as a result of municipal and State income tax returns, investigations, hearings, or verifications are confidential and may only be disclosed as permitted by law.[357] Ohio's municipal tax code provides that information may only be disclosed (1) in accordance with a judicial order; (2) in connection with the performance of official duties; or (3) in connection

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[344] R.C. 149.43(A)(4).
[345] *Cleveland Clinic Found. v. Levin*, 120 Ohio St.3d 1210, 2008-Ohio-6197, ¶ 10.
[346] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 431-432 (1994).
[347] *State ex rel. Nix v. City of Cleveland*, 83 Ohio St.3d 379, 384-385, 1998-Ohio-290.
[348] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 432 (1994); *State ex rel. Towler v. O'Brien*, 2005-Ohio-363, ¶¶ 14-16 (10th Dist.).
[349] *State ex rel. WLWT-TV-5 v. Leis*, 77 Ohio St.3d 357, 361, 1997-Ohio-273. *See also State ex rel. Fasul-Bey v. Onunwor*, 94 Ohio St.3d 199, 120, 2002-Ohio-67 (finding that a criminal defendant was entitled to immediate release of initial incident reports).
[350] *State ex rel. Fasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 120, 2002-Ohio-67 (finding that a criminal defendant's limitation to discovery does not apply to initial incident reports, which are subject to immediate release upon request); *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 435 (1994).
[351] *Schaefer, Inc. v. Garfield Mitchell Agency, Inc.*, 82 Ohio App.3d 322 (2nd Dist. 1992); *Hickman v. Taylor*, 329 U.S. 495 (1947).
[352] *Squire, Sanders & Dempsey, L.L.P. v. Givaudan Flavors Corp.*, 127 Ohio St.3d 161, 2010-Ohio-4469, ¶ 55.
[353] *Id.* ¶ 54, 60.
[354] *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶¶ 11-21; *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 663 (8th Dist. 1990); *State ex rel. Sun Newspapers v. City of Westlake Bd. of Educ.*, 76 Ohio App.3d 170-, 172-173 (8th Dist. 1991).
[355] *State ex rel. Sun Newspapers v. City of Westlake Bd. of Educ.*, 76 Ohio App.3d 170, 173 (8th Dist. 1991); *see* also Chapter Three: G.1.a. "Attorney-Client Privilege."
[356] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, ¶ 20; *State ex rel. Findley Publ'g Co. v. Hancock County Bd. of Comm'rs*, 80 Ohio St.3d 134, 136-137, 1997-Ohio-353; *see generally* Chapter Three: G.8. "Contractual Confidentiality."
[357] R.C. 5747.18(C); R.C. 718.13(A); *see also Reno v. City of Centerville*, 2004-Ohio-781 (2d Dist.).

with authorized official business of the municipal corporation.[358] One Attorney General Opinion found that W-2 federal tax forms prepared and maintained by a township as an employer are public records, but that W-2 forms filed as part of a municipal income tax return are confidential.[359] Release of municipal income tax information to the Auditor of State is permissible for purposes of facilitation of an audit.[360]

Federal tax returns and "return information" are also confidential.[361] W-4 forms are confidential as "return information," which includes data with respect to the determination of the existence of liability, or the amount thereof, of any person for any tax.[362]

3. Trade Secrets

Trade secrets are defined in R.C. 1333.61(D) and include "any information, including…any business information or plans, financial information, or listing of names" that:

1) Derives actual or potential independent economic value from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use;

   and

2) Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[363]

Information identified in records by its owner as trade secret is not automatically excepted from disclosure under R.C. 149.43(A)(1)(v) of the Public Records Act as "records the release of which is prohibited by state or federal law." Rather, identification of a trade secret requires a fact-based assessment.[364] "An entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy."[365] The Ohio Supreme Court has adopted the following factors in analyzing a trade secret claim: "(1) the extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information."[366] The maintenance of secrecy is important, but does not require that the trade secret be completely unknown to the public in its entirety. If parts of the trade secret are in the public domain, but the value of the trade secret derives from the parts being taken together with other secret information, then the trade secret remains protected under Ohio law.[367]

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[358] R.C. 718.13; *see also City of Cincinnati v. Grogan*, 141 Ohio App.3d 733, 755 (1st Dist. 2011) (finding that, under Cincinnati Municipal Code, the city's use of tax information in a nuisance-abatement action constituted an official purpose for which disclosure is permitted).
[359] 1992 Ohio Op. Att'y Gen. No. 013.
[360] *See* R.C. 5747.18(C); *see also* 1992 Ohio Op. Att'y Gen. No. 010.
[361] 26 U.S.C. 6103(a).
[362] 26 U.S.C. 6103(b)(2)(A).
[363] R.C. 1333.61(D) (adopts the Uniform Trade Secrets Act); *see also* R.C. 149.43(A)(1)(m); R.C. 149.43(A)(5).
[364] *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St.3d 171, 181 (finding that time, effort, or money expending in developing law firm's client list, as well as amount of time and expense it would take for others to acquire and duplicate it, may be among factfinder's considerations in determining if that information qualifies as a trade secret).
[365] *State ex rel. Besser v. Ohio St. Univ.*, 89 Ohio St.3d 396, 400, 2000-Ohio-207 ("*Besser II*").
[366] *State ex rel. Besser v. Ohio St. Univ.*, 89 Ohio St.3d 396, 399-400, 2000-Ohio-207; *State ex rel. Luken v. Corp. for Findlay Market*, 135 Ohio St.3d 416, 2013-Ohio-1532, ¶¶ 19-25 (court determined that information met the two requirements of *Besser* because 1) rental terms had independent economic value and 2) corporation made reasonable efforts to maintain secrecy of information).
[367] *State ex rel. Besser v. Ohio St. Univ.*, 89 Ohio St.3d 396, 399-400, 2000-Ohio-207.

Trade secret law is underpinned by "the protection of competitive advantage in private, not public, business."[368] However, the Ohio Supreme Court has held that certain governmental entities can have trade secrets in limited situations.[369] Signed non-disclosure agreements do not create trade secret status for otherwise publicly disclosable documents.[370]

An *in camera* inspection may be necessary to determine if disputed records contain trade secrets.[371]

4. Juvenile Records

Although it is a common misconception, there is no Ohio law that categorically excludes all juvenile records from public records disclosure.[372] As with any other record, a public office must identify a specific law that requires or permits a record regarding a juvenile to be withheld, or else it must be released.[373] Examples of laws that except specific juvenile records include:

Juvenile Court Records: Records maintained by the juvenile court and the parties therein typically are not available for public inspection and copying.[374] Although the juvenile court may exclude the general public from most hearings, serious youthful offender proceedings and their transcripts are open to the public unless the court orders a hearing closed.[375] The closure hearing notice, proceedings, and decision must themselves be public.[376] Records of social, mental, and physical examinations conducted pursuant to a juvenile court order,[377] records of juvenile probation,[378] and records of juveniles held in custody by the Department of Youth Services are not public records.[379] Sealed or expunged juvenile adjudication records must be withheld.[380]

Law Enforcement Records: Juvenile offender investigation records maintained by law enforcement agencies, in general, are treated no differently than adult records, including records identifying a juvenile suspect, victim, or witness in an initial incident report.[381] Specific additional juvenile exemptions apply to: 1) fingerprints, photographs, and related information in connection with specified juvenile arrest or custody;[382] 2) certain information forwarded from a children's services

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[368] *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 264 (1992).

[369] *State ex rel. Besser v. Ohio St. Univ.*, 87 Ohio St.3d 535, 543, 2000-Ohio-475 ("*Besser I*") (finding that a public entity can have its own trade secrets); *State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St.3d 166, 171, 2000-Ohio-282; *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 524-525, 1997-Ohio-75; *compare State ex rel. Gannett Satellite Info. Network v. Shirey*, 76 Ohio St.3d 1224, 1224-1225, 1997-Ohio-206 (finding that resumes are not trade secrets of a private consultant); *State ex rel. Rea v. Ohio Dept. of Ed.*, 81 Ohio St.3d 527, 533, 1998-Ohio-334 (finding that proficiency tests are public record after they have been administered; *but compare State ex rel. Perrea v. Cincinnati Pub. Sch.*, 123 Ohio St.3d 410, 2009-Ohio-4762, ¶¶ 32-33 (holding that a public school had proven that certain semester examination records met the statutory definition of "trade secret" in R.C. 1333.61(D))).

[370] *State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St.3d 513, 527, 1997-Ohio-75.

[371] *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland*, 63 Ohio St.3d 772, 776 (1992) (finding that an *in camera* inspection may be necessary to determine whether disputed records contain trade secrets); *State ex rel. Lucas County Bd. of Comm'rs v. Ohio EPA*, 88 Ohio St.3d 166, 2000-Ohio-282; *State ex rel. Besser v. Ohio St. Univ.*, 89 Ohio St.3d 396, 404-405, 2000-Ohio-207 ("*Besser II*") (following an *in camera* inspection, the Court held that a university's business plan and memoranda concerning a medical center did not constitute "trade secrets").

[372] 1990 Ohio Op. Att'y Gen. No. 101.

[373] 1990 Ohio Op. Att'y Gen. No. 101; *See* Chapter Two: A.14.b. "Requirement to Notify of and Explain Redactions and Withholding of Records."

[374] Juv. P. Rules 27 and 37(B), R.C. 2151.35; 1990 Ohio Op. Att'y Gen. No. 101.

[375] *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Ct. of Common Pleas*, 73 Ohio St.3d 19, 21-22 (1995) (the release of a transcript of a juvenile contempt proceeding was required when proceedings were open to the public).

[376] *State ex rel. Plain Dealer v. Floyd*, 111 Ohio St.3d 56, 2006-Ohio-4437, ¶¶ 44-52.

[377] Juv. R. of Civ. Proc. 32(B).

[378] R.C. 2151.14.

[379] R.C. 5139.05(D).

[380] R.C. 2151.355 through .358; *See State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 6, 9, 38, 43 (where records were sealed pursuant to R.C. 2151.356, the response, "There is no information available," was a violation of R.C. 149.43(B)(3) requirement to provide a sufficient explanation, with legal authority, for the denial); *see* also Chapter Six: D. "Court Records".

[381] *See* Chapter Six: A. "CLEIRs"; 1990 Ohio Op. Att'y Gen. No. 101.

[382] R.C. 2151.313; *State ex rel. Carpenter v. Chief of Police*, 8th Dist. No. 62482 (Sep. 17, 1992) (noting that "other records" may include the juvenile's statement or an investigator's report if they would identify the juvenile); *but see* R.C. 2151.313(A)(3) (stating that "[t]his section does not apply to a child to whom either of the following applies: (a) The child has been arrested or otherwise taken into custody for committing, or has been adjudicated a delinquent child for committing, an act that would be a felony if committed by an adult or has been convicted of or pleaded guilty to committing a felony. (b) There is probable cause to believe that the child may have committed an act that would be a felony if committed by an adult.") Also note that this statute does not apply to records of a juvenile arrest or custody that was *not* the basis of the taking of any fingerprints and photographs. 1990 Ohio Op. Att'y Gen. No. 101.

agency;[383] and 3) sealed or expunged juvenile records (see Juvenile Court Records, above). Most information held by local law enforcement offices may be shared with other law enforcement agencies and some may be shared with a board of education upon request.[384]

Federal law similarly prohibits disclosure of specified records associated with federal juvenile delinquency proceedings.[385] Additionally, federal laws restrict the disclosure of fingerprints and photographs of a juvenile found guilty in federal delinquency proceedings of committing a crime that would have been a felony if the juvenile were prosecuted as an adult.[386]

Some Other Exceptions for Juvenile Records: 1) reports regarding allegations of child abuse;[387] 2) certain records of children's services agencies;[388] 3) individually identifiable student records;[389] and 4) information pertaining to the recreational activities of a person under the age of eighteen.[390]

5. Social Security Numbers

Social Security Numbers (SSNs) should be redacted before the disclosure of public records, including court records.[391] The Ohio Supreme Court has held that while the federal Privacy Act (5 U.S.C. § 552a) does not expressly prohibit release of one's SSN, the Act does create an expectation of privacy as to the use and disclosure of the SSN.[392]

Any federal, state, or local government agency that asks individuals to disclose their SSNs must advise the person: (1) whether that disclosure is mandatory or voluntary and, if mandatory, under what authority the SSN is solicited; and (2) what use will be made of it.[393] In short, a SSN can only be disclosed if an individual has been given prior notice that the SSN will be publicly available.

However, the Ohio Supreme Court has ruled that 911 tapes must be made immediately available for public disclosure without redaction, even if the tapes contain SSNs.[394] The Court explained that there is no expectation of privacy when a person makes a 911 call. Instead, there is an expectation

[383] *E.g., State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶¶ 44-45 (information referred from a children's services agency as potentially criminal may be redacted from police files, including the incident report, pursuant to R.C. 2151.421(H)).
[384] R.C. 2151.14(D)(1)(e); 1990 Ohio Op. Att'y Gen. No. 099 (opining that a local board of education may request and receive information regarding student drug or alcohol use from certain records of law enforcement agencies); 1987 Ohio Op. Att'y Gen. No. 010.
[385] 18 U.S.C. §§ 5038(a), 5038(e) of the Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042) (these records can be accessed by authorized persons and law enforcement agencies).
[386] *See* 18 U.S.C. § 5038(d).
[387] R.C. 2151.421(H)(1); *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶¶ 44-45.
[388] R.C. 5153.17.
[389] *See* Chapter Three, G.6. "Student Records".
[390] R.C. 149.42(A)(1)(r); *see also State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 2000-Ohio-345.
[391] *State ex rel. Office of Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 18 (finding that the clerk of courts correctly redacted SSNs from criminal records before disclosure); *State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, ¶ 25 (noting that SSNs should be removed before releasing court records); *see also State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 25 (finding that the personal information of jurors was used only to verify identification, not to determine competency to serve on the jury, and SSNs, telephone numbers, driver's license numbers, may be redacted); *State ex rel. Wadd v.* Cleveland, 81 Ohio St.3d 50, 53, 1998-Ohio-444 (stating that "there is nothing to suggest that Wadd would not be entitled to public access […] following prompt redaction of exempt information such as Social Security Numbers"); *State ex rel. Beacon Journal Publ'g Co. v. Kent State*, 68 Ohio St.3d 40, 43, 1993-Ohio-146 (determining, on remand, that the court of appeals may redact confidential information the release of which would violate constitutional right to privacy); *Lambert v. Hartman*, 517 F.3d 433, 445 (6th Cir. 2008) (determining that, as a policy matter, a clerk of court's decision to allow public internet access to people's SSNs was "unwise").
[392] *State ex rel. Beacon Journal Publ'g v. City of Akron*, 70 Ohio St.3d 605, 607, 1994-Ohio-6 (determining that city employees had an expectation of privacy of their SSNs such that they must be redacted before release of public records to newspapers); *compare State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 378, 1996-Ohio-214 (finding that SSNs contained in 911 tapes are public records subject to disclosure); *but see* R.C. 4931.49(E), 4931.99(E) (providing that information from a database that serves public safety answering point of 911 system may not be disclosed); 1996 Ohio Op. Att'y Gen. No. 034 (opining that a county recorder is under no duty to obliterate SSN before making a document available for public inspection where the recorder presented with the document was asked to file it).
[393] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (5 U.S.C. § 552a (West 2000)).
[394] *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 1996-Ohio-214.

that the information will be recorded and disclosed to the public.[395] Similarly, the Ohio Attorney General has opined that there is no expectation of privacy in official documents containing SSNs.[396]

The Ohio Supreme Court's interpretation of Ohio law with respect to release and redaction of SSNs is binding on public offices within the state. However, a narrower view expressed by a 2008 federal appeals court decision[397] is worth noting, as it may impact future Ohio Supreme Court opinions regarding the extent of a person's constitutional right to privacy in his or her SSN. In *Lambert v. Hartman*, the U.S. Sixth Circuit Court of Appeals looked to its own past decisions to find a constitutional privacy right in personal information in only two situations: (1) where release of personal information could lead to bodily harm,[398] and (2) where the information released was of a sexual, personal, and humiliating nature.[399] The Court explained that it would only balance an individual's right to control the nature and extent of information when a fundamental liberty interest is involved.[400] The interest asserted in *Lambert* – protection from identity theft and the resulting financial harm – was found not to implicate a fundamental right, especially when compared to the fundamental interests found in earlier cases; i.e., preserving the lives of police officers and their family members from "a very real threat"[401] by a violent gang, and withholding the "highly personal and extremely humiliating details"[402] of a rape.

6. Student Records[403]

The federal Family Education Rights and Privacy Act of 1974 (FERPA)[404] prohibits educational institutions from releasing a student's "education records" without the written consent of the eligible student[405] or his or her parents, except as permitted by the Act.[406] "Education records" are records directly related to a student that are maintained by an education agency or institution or by a party acting for the agency or institution.[407] The term encompasses records such as school transcripts, attendance records, and student disciplinary records.[408] "Education records" covered by FERPA are not limited to "academic performance, financial aid, or scholastic performance."[409]

A record is considered to be "directly related" to a student if it contains "personally identifiable information." The latter term is defined broadly: it covers not only obvious identifiers such as student and family member names, addresses, and Social Security Numbers, but also personal characteristics or other information that would make the student's identity easily linkable.[410] In evaluating records for release, an institution must consider what the records requester already knows about the student to determine if that knowledge, together with the information to be disclosed, would allow the requester to ascertain the student's identity.

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[395] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685; *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 1996-Ohio-214.
[396] 1996 Ohio Op. Att'y Gen. No. 034 (opining that the federal Privacy Act does not require county recorders to redact SSNs from copies of official records); *but see* R.C. 149.45(B)(1) (specifying that no public office shall make any document containing an individual's SSN available on the internet without removing the number from that document).
[397] *Lambert v. Hartman*, 517 F.3d 433, 445 (6th Cir .2008).
[398] *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998).
[399] *Bloch v. Ribar*, 156 F.3d 673, 686-687 (6th Cir. 1998) (determining that a sheriff's publication of details of a rape implicated the victim's right to be free from governmental intrusion into matters touching on sexuality and family life, and permitting such an intrusion would be to strip away the very essence of her personhood).
[400] *Lambert v. Hartman*, 517 F.3d 433, 440 (6th Cir. 2008).
[401] *Lambert v. Hartman*, 517 F.3d 433, 441 (6th Cir. 2008) citing *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1063 (6th Cir. 2008).
[402] *Bloch v. Ribar*, 156 F.3d 673, 676 (6th Cir. 2008).
[403] *See* also Chapter Six: B.9. "School Records."
[404] 20 U.S.C. § 1232g.
[405] 34 C.F.R § 99.3 (eligible student means a student who has reached 18 years of age or is attending an institution of post-secondary education).
[406] 34 C.F.R. § 99.30.
[407] 34 C.F.R. § 99.3.
[408] *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶¶ 28-30 (university disciplinary records are education records); *see also United States v. Miami Univ.*, 294 F.3d 797, 802-803 (6th Cir. 2002).
[409] *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 30.
[410] 34 C.F.R. § 99.3.

The federal FERPA law applies to all students, regardless of grade level. In addition, Ohio has adopted laws specifically applicable to public school students in grades K-12.[411] Those laws provide that, unless otherwise authorized by law, no public school employee is permitted to release or permit access to personally identifiable information – other than directory information – concerning a public school student without written consent of the student's parent, guardian, or custodian if the student is under 18, or of the student if the student is 18 or older.[412]

"Directory information" is one of several exceptions to the requirement that an institution obtain written consent prior to disclosure. "Directory information" is "information…that would not generally be considered harmful or an invasion of privacy if disclosed."[413] It includes a student's name, address, telephone listing, date and place of birth, major field of study, participation in officially recognized activities and sports, weight and height of members of athletic teams, dates of attendance, date of graduation, and awards achieved.[414] Pursuant to federal law, post-secondary institutions designate what they will unilaterally release as directory information. For K-12 students, Ohio law leaves that designation to each school district board of education. Institutions at all levels must notify parents and eligible students and give them an opportunity to opt out of disclosure of their directory information.[415]

Ohio law prohibits release of directory information to any person or group for use in a profit-making plan or activity. A public office may require disclosure of the requester's identity of the intended use of directory information in order to ascertain if it will be used in a profit-making plan or activity.[416]

Although the release of FERPA-protected records is prohibited by law, a public office or school should redact the student's personal identifying information, instead of withholding the entire record, where possible.[417]

7. Infrastructure and Security Records

In 2002, the Ohio legislature enacted an anti-terrorism bill. Among other changes to Ohio law, the bill created two new categories of records that are exempt from mandatory public disclosure: "infrastructure records" and "security records."[418] Other state and federal[419] laws may create exceptions for the same or similar records.

a. Infrastructure Records

An "infrastructure record" is any record that discloses the configuration of a public office's "critical systems," such as its communications, computer, electrical, mechanical, ventilation, water, plumbing, or security systems.[420] Simple floor plans or records showing the spatial relationship of the public office are not infrastructure records.[421] Infrastructure records may be disclosed for purposes of construction, renovation, or remodeling of a public office without waiving the exempt status of that record.[422]

[411] R.C. 3319.321.
[412] R.C. 3319.321(B).
[413] 34 C.F.R. § 99.3.
[414] R.C. 3319.321(B)(1).
[415] 34 C.F.R. § 99.37.
[416] 34 C.F.R. § 99.3, R.C. 3319.321.
[417] *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 34.
[418] R.C. 149.433.
[419] *E.g.*, 6 U.S.C. §§ 131, *et seq.*, 6 C.F.R. 29 (providing that the federal Homeland Security Act of 2002 prohibits disclosure of certain "critical infrastructure information" shared between state and federal agencies).
[420] R.C. 149.433(A)(2).
[421] R.C. 149.433(A)(2).
[422] R.C. 149.433(C).

b. Security Records

A "security record" is "any record that contains information directly used for protecting or maintaining the security of a public office against attack, interference, or sabotage or to prevent, mitigate, or respond to acts of terrorism."[423] Security records may be disclosed for purposes of construction, renovation, or remodeling of a public office without waiving the exempt status of that record.[424]

8. Contractual Confidentiality

Parties to a public contract, including settlement agreements[425] and collective bargaining agreements, cannot nullify the Public Records Act's guarantee of public access to public records.[426] Nor can an employee handbook confidentiality provision alter the status of public records.[427] In other words, a contract cannot nullify or restrict the public's access to public records.[428] Absent a statutory exception, a "public entity cannot enter into enforceable promises of confidentiality with respect to public records."[429]

9. Protective Orders and Sealed / Expunged Court Records[430]

When the release of court records would prejudice the rights of the parties in an ongoing criminal or civil proceeding,[431] court rules may permit a protective order prohibiting release of the records.[432] Similarly, where court records have been properly expunged or sealed, they are not available for public disclosure.[433] However, when a responsive record is sealed, the public office must provide the explanation for withholding, including the legal authority under which the record was sealed.[434] Even absent statutory authority, trial courts, "in unusual and exceptional circumstances," have the inherent authority to seal court records.[435] When exercising this authority, however, courts should balance the individual's privacy interest against the government's legitimate need to provide public access to records of criminal proceedings.[436]

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[423] R.C. 149.433(A)(3)(a)-(b); *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, ¶¶ 68-70 (10th Dist.) (applying the statute).

[424] R.C. 149.433(C).

[425] Chapter Three: G.1.e. "Settlement Agreements and Other Contracts."

[426] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, ¶ 23 (stating that "[a]ny provision in a collective bargaining agreement that establishes a schedule for the destruction of public record is unenforceable if it conflicts with or fails to comport with all the dictates of the Public Records Act."); *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 40-41, 2000-Ohio-8; *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Comm'rs*, 80 Ohio St.3d 134, 137, 1997-Ohio-353; *Toledo Police Patrolman's Ass'n v. City of Toledo*, 94 Ohio App.3d 734, 739 (6th Dist. 1994); *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 663 (8th Dist. 1990); *Bowman v. Parma Bd. of Educ.*, 44 Ohio App.3d 169, 172 (8th Dist. 1988); *State ex rel. Dwyer v. City of Middletown*, 52 Ohio App.3d 87, 91 (12th Dist. 1988); *State ex rel. Toledo Blade Co. v. Telb*, Lucas C.P., 50 Ohio Misc.2d 1, 8 (Feb. 8, 1990); *State ex rel. Sun Newspapers v. City of Westlake Bd. of Educ.*, 76 Ohio App.3d 170, 173 (8th Dist. 1991).

[427] *State ex rel. Russell v. Thomas*, 85 Ohio St.3d 83, 85, 1999-Ohio-435.

[428] *State ex rel. Gannett Satellite Info. Network v. Shirey*, 76 Ohio St.3d 1224, 1997-Ohio-206.

[429] *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Comm'rs*, 80 Ohio St.3d 134, 137, 1997-Ohio-353; *State ex rel. Allright Parking of Cleveland, Inc. v. Cleveland*, 63 Ohio St.3d 772, 776 (1992) (reversing and remanding on the grounds that the court failed to examine records *in camera* to determine the existence of trade secrets); *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 82 Ohio App.3d 202 (8th Dist. 1992).

[430] Chapter Six: D. "Court Records."

[431] *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 137-138 (1993) (prohibiting disclosure of pretrial court records prejudicing rights of criminal defendant) (overruled on other grounds); *Adams v. Metallica*, 143 Ohio App.3d 482, 493-495 (1st Dist. 2001) (applying balancing test to determine whether prejudicial record should be released where filed with the court); *but see State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, ¶¶ 9-20 (pending appeal from court order unsealing divorce records does not preclude writ of mandamus claim).

[432] *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 730-733 (1st Dist. 2001) (finding that a trial judge was required to determine whether release of records would jeopardize defendant's right to a fair trial).

[433] *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶ 4 ("*Winkler* III") (affirming trial court's sealing order per R.C. 2953.52); *Dream Fields, LLC v. Bogart*, 175 Ohio App.3d 165, 2008-Ohio-152, ¶ 5 (1st Dist.) (stating that "[u]nless a court record contains information that is excluded from being a public record under R.C. 149.43, it shall not be sealed and shall be available for public inspection. And the party wishing to seal the record has the duty to show that a statutory exclusion applies […] [j]ust because the parties have agreed that they want the records sealed is not enough to justify the sealing."); *see* also Chapter Six: D. "Court Records."

[434] *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 6, 9, 38, 43 (response, "There is no information available," was a violation of R.C. 149.43(B)(3) requirement to provide a sufficient explanation, with legal authority, for the denial).

[435] *Pepper Pike v. Doe*, 66 Ohio St.2d 374, 376 (1981); *but compare State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, ¶ 1 (determining that divorce records were not properly sealed when an order results from "unwritten and informal court policy").

[436] *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), paragraph two of the syllabus.

10. Grand Jury Records

Ohio Criminal Rule 6(E) provides that "[d]eliberations of the grand jury and the vote of any grand juror shall not be disclosed," and provides for withholding of other specific grand jury matters by certain persons under specific circumstances.[437] Materials covered by Criminal Rule 6 include transcripts, voting records, subpoenas, and the witness book.[438] In contrast to those items that document the deliberations and vote of a grand jury, evidentiary documents that would otherwise be public records remain public records, regardless of their having been submitted to the grand jury.[439]

11. Copyright

Federal copyright law is designed to protect "original works of authorship," which may exist in one of several specified categories:[440] (1) literary works; (2) musical works (including any accompanying words); (3) dramatic works (including any accompanying music); (4) pantomimes and choreographic works; (5) pictorial, graphic, and sculptural works; (6) motion pictures and other audiovisual works; (7) sound recordings; and (8) architectural works.[441]

Federal copyright law provides certain copyright owners the exclusive right of reproduction,[442] which means public offices could expose themselves to legal liability if they reproduce copyrighted public records in response to a public records request. If a public record sought by a requester is copyrighted material that the public office does not possess the right to reproduce or copy via a copyright ownership or license, the public office is not typically authorized to make copies of this material under federal copyright law.[443] However, there are some exceptions to this rule. For example, in certain situations, the copying of a portion of a copyrighted work may be permitted.[444]

Note that copyright law only prohibits unauthorized *copying*, and should not affect a public records request for *inspection*.

12. EMS Run Sheets

When a run sheet created and maintained by a county emergency medical services (EMS) organization documents treatment of a living patient, the EMS organization may redact information that pertains to the patient's medical history, diagnosis, prognosis, or medical condition.[445] A patient's name, address, and other non-medical personal information does not fall under the "medical records" exception in R.C. 149.43(A)(1)(a), and may not be redacted unless some other exception applies to that information.[446] Run sheets cannot be categorized *per se* as either subject to, or exempt from, disclosure, so each run sheet must be examined to determine whether it falls, in

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[437] Ohio Crim.R. 6(E).
[438] *State ex rel. Beacon Journal v. Waters*, 67 Ohio St.3d 321 (1993); Fed Crim. R. 6.
[439] *State ex rel. Dispatch v. Morrow Co. Prosecutor*, 105 Ohio St.3d 172, 2005-Ohio-685, ¶ 5 (citing *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 378 (1996); *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 267 (1997)).
[440] 17 U.S.C. § 102(a).
[441] 17 U.S.C. § 102(a)(1)-(8).
[442] 17 U.S.C. § 102(a).
[443] Because of the complexity of copyright law and the fact-specific nature of this area, public bodies should resolve public records related copyright issues with their legal counsel.
[444] *See* 17 U.S.C. § 107; *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560-561 (1985) (providing that, in determining whether the intended use of the protected work is "fair use," a court must consider these facts, which are not exclusive: (1) the purpose and character of the use, including whether the intended use is commercial or for nonprofit educational purposes; (2) the nature of the protected work; (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and (4) the most important factor: the effect of the intended use upon the market for or value of the protected work); *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, ¶ 25 (because engineer's office cannot separate requested raw data from copyrighted and exempt software, nonexempt records are not subject to disclosure to the extent they are inseparable from copyrighted software).
[445] 2001 Ohio Op. Att'y Gen. No. 249; 1999 Ohio Op. Att'y Gen. No. 006; *State ex rel. National Broadcasting Co. v. Cleveland*, 82 Ohio App.3d 202, 214, 611 N.E.2d 838 (8th Dist. 1992).
[446] 2001 Ohio Op. Att'y Gen. No. 249; 1999 Ohio Op. Att'y Gen. No. 006.

whole or in part, within the "medical records" exception, the physician-patient privilege, or any other exception for information the release of which is prohibited by law.[447]

13. County Children Services Agency Records

Records prepared and kept by a public children services agency of investigations of families, children, and foster homes, and of the care of and treatment afforded children, and of other records required by the department of job and family services, are required to be kept confidential by the agency.[448] These records shall be open to inspection by the agency and certain listed officials, and to other persons upon the written permission of the executive director when it is determined that "good cause" exists to access the records (except as otherwise limited by R.C. 3107.17).[449]

14. FOIA Does Not Apply to Ohio Public Offices

The federal Freedom of Information Act (FOIA) is a federal law that does not apply to state or local agencies or officers.[450] A request for government records from a state or local agency in Ohio is governed by the Ohio Public Records Act. Requests for records and information from a federal office located in Ohio (or anywhere else in the country or the world) are governed by FOIA.[451]

15. Driver's Privacy Protection

An authorized recipient of personal information about an individual that the Bureau of Motor Vehicles obtained in connection with a motor vehicle record may redisclose the personal information only for certain purposes.[452]

[447] 2001 Ohio Op. Att'y Gen. No. 249.
[448] R.C. 5153.17; *State ex rel. Edinger v. C.C.D.C.F.S.*, 2005-Ohio-5453, ¶¶ 6-7 (8th Dist.).
[449] R.C. 5153.17; Ohio Op. Att'y Gen. No. 91-003.
[450] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, ¶ 35; *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶ 32.
[451] 5 U.S.C. § 552.
[452] 18 U.S.C.S. 2721 et seq. (Driver's Privacy Protection Act); R.C. 4501.27; O.A.C. 4501:1-12-01; *see also State ex rel. Motor Carrier Serv. v. Williams*, 2012-Ohio-2590 (10th Dist.) (requester motor carrier service was not entitled to unredacted copies of an employee's driving record from the BMV where requester did not comply with statutory requirements for access).

IV. Chapter Four: Enforcement and Liabilities

The Ohio Public Records Act is a "self-help" statute. A person who believes that the Act has been violated must independently pursue a remedy, rather than asking a public official such as the Ohio Attorney General to initiate legal action on his or her behalf. If a public office or person responsible for public records fails to produce requested records, or otherwise fails to comply with the requirements of division (B) of the Public Records Act, the requester can file a lawsuit to seek a writ of *mandamus*[453] to enforce compliance, and may apply for various sanctions. *Prior* to filing a lawsuit, either the requester or the (non-State) public office can propose voluntary mediation of the dispute through the Attorney General's Public Records Mediation Program (see Chapter Two: C. 3. "How to Find a Win-Win Solution: Mediate").

This section discusses the basic aspects of a mandamus suit and the types of relief available.

A. Public Records Act Statutory Remedies

1. Parties

A person allegedly "aggrieved by"[454] a public office's failure to comply with Division (B) of the Ohio Public Records Act may file an action in mandamus[455] against the public office or any person responsible for the office's public records.[456] The person who files the suit is called the "relator," and the named public office or person responsible for the records is called the "respondent."

2. Where to File

The relator can file the mandamus action in any one of three courts: the common pleas court of the county where the alleged violation occurred, the court of appeals for the appellate district where the alleged violation occurred, or the Ohio Supreme Court.[457] If a relator files in the Supreme Court, the Court may refer the case to mediation counsel for a settlement conference.[458]

3. When to File

When an official responsible for records has denied a public records request, no administrative appeal to the official's supervisor is necessary before filing a mandamus action in court.[459] The likely statute of limitations for filing a public records mandamus action is within ten years after the cause of action accrues.[460] However, the defense of laches may apply if the respondent can show that unreasonable and inexcusable delay in asserting a known right caused material prejudice to the respondent.[461]

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[453] "Mandamus" means a court command to a governmental office to correctly perform a mandatory function. Black's Law Dictionary (7th ed. 1999) 973.

[454] *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-538, ¶ 27 ("*Every* records requester is aggrieved by a violation of division (B), and division (C)(1) authorizes the bringing of a mandamus action by any requester.").

[455] R.C. 149.43(C)(1); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 12 (providing that "[m]andamus is the appropriate remedy to compel compliance with R.C. 149.43, Ohio's Public Records Act").

[456] *State ex rel. Cincinnati Post v. Schwekert*, 38 Ohio St.3d 170, 174 (1988) (finding that mandamus does not have to be brought against the person who actually withheld the records or committed the violation; it can be brought against any "person responsible" for public records in the public office); *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30 (1985), paragraph two of the syllabus (stating that "[w]hen statutes impose a duty on a particular official to oversee records, that official is the 'person responsible' under" the Public Records Act); *State ex rel. Doe v. Tetrault*, 2012-Ohio-3879, ¶¶ 23-26 (12th Dist.) (employee who created and disposed of requested notes was not the "particular official" charged with the duty to oversee records); *see also* Chapter One: A.3. "Quasi-Agency — A Private Entity, Even If not a 'Public Office,' can be 'A Person Responsible for Public Records.'"

[457] R.C. 149.43(C)(1).

[458] S.Ct. Prac. R. XIV, § 6 (providing that a Court may, on its own or on motion by a party, refer cases to mediation counsel and, unless otherwise ordered by the Court, this does not alter the filing deadlines for the action).

[459] *State ex rel. Multimedia, Inc. v. Whalen*, 48 Ohio St.3d 41, 42 (1990) (overruled on other grounds).

[460] R.C. 2305.14.

[461] *State ex rel. Carver v. Hull*, 70 Ohio St.3d 570, 577 (1994); *State ex rel. Moore v. Sanders*, 65 Ohio St.2d 72, 74 (1981).

4. Requirements to Prevail

To be entitled to a writ of mandamus, the relator must prove that he or she has a clear legal right to the requested relief and that the respondent had a clear legal duty to perform the requested act.[462] In a public records mandamus lawsuit, this usually includes showing that when the requester made the request, she or he specifically described the records being sought,[463] and specified in the mandamus action the records withheld or other failure to comply with R.C. 149.43(B).[464] A person is not entitled to file a mandamus action to request public records unless a prior request for those records has already been made and was denied.[465] Only those particular records that were requested from the public office can be litigated in the mandamus action.[466] If these requirements are met, the respondent then has the burden of proving in court that any items withheld are exempt from disclosure,[467] and of countering any other alleged violations of R.C. 149.43(B). The court, if necessary, will review *in camera* (in private) the materials that were withheld or redacted.[468] To the extent any doubt or ambiguity exists as to the duty of the public office, the public records law will be liberally interpreted in favor of disclosure.[469]

Unlike most mandamus actions, a relator in a statutory public records mandamus action need not prove the lack of an adequate remedy at law.[470] Also note that, if a respondent provides requested records to the relator after the filing of a public records mandamus action, all or part of the case may be rendered moot, or concluded.[471] Even if the case is rendered moot,[472] the relator may still be entitled to statutory damages, although not to attorney fees.[473]

B. Liabilities of the Public Office under the Public Records Act[474]

In a properly filed action, if a court determines that the public office or the person responsible for public records failed to comply with an obligation contained in R.C. 149.43(B) and issues a writ of mandamus, the relator shall be entitled to an award of all court costs,[475] and may receive an award of attorney fees and/or statutory damages, as detailed below.

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[462] *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376, 377 (1989) (overruled on other grounds); *State ex rel. Fields v. Cervenik*, 2006-Ohio-3969, ¶ 4 (8th Dist.)

[463] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 17; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 26 (stating that "it is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue."); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752 (10th Dist. 1989).

[464] *State ex rel. Citizens for Envtl. Justice v. Campbell*, 93 Ohio St.3d 585, 586, 2001-Ohio-1617; *State ex rel. Verhovec v. Marietta*, 4th Dist. Nos. 11CA29, 12CA52, 12CA53, 13CA2, 2013-Ohio-5414, ¶ 39 (failure to comply with public records policy does not establish a violation of R.C. 149.43(B)(1) (prompt access)); *State ex rel. Bott Law Group, L.L.C. v. Ohio Dept. of Natural Resources*, 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 32 (requester not required to prove harm or prejudice in order to obtain a writ of mandamus).

[465] *State ex rel. Taxpayers Coalition v. Lakewood*, 86 Ohio St.3d 385, 390, 1999-Ohio-114; *State ex rel. Ross v. Vivo*, 2008-Ohio-4819, ¶ 5 (7th Dist.); *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, ¶ 14; *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 22.

[466] *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, ¶ 14 (stating that "R.C. 149.43(C) requires a prior request as a prerequisite to a mandamus action"); *State ex rel. Bardwell v. Cordray*, 181 Ohio App.3d 661, 2009-Ohio-1265, ¶ 5 (10th Dist.) (finding that "[t]here can be no 'failure' of a public office to make a public record available 'in accordance with division (B),' without a request for the record under division (B).").

[467] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, ¶ 6 (citing *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79 (1988) ("NBC I").

[468] *State ex rel. Besser v. Ohio St. Univ.*, 89 Ohio St.3d 396, 400, 2000-Ohio-207 ("*Besser* II"); *State ex rel. Seballos v. SERS*, 70 Ohio St.3d 667, 1994-Ohio-80; *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79 (1988); *State ex rel. Lanham v. DeWine*, 135 Ohio.St.3d 191, 2013-Ohio-199, ¶ 21.

[469] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 17; *State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, ¶ 29 (finding that, when assessing a public records mandamus claim, R.C. 149.43 should be construed liberally in favor of broad access, and noting that any doubt is resolved in favor of disclosure of public records).

[470] *State ex rel. Gaydosh v. Twinsburg*, 93 Ohio St.3d 576, 580, 2001-Ohio-1613.

[471] *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, ¶ 22; *State ex rel. Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, ¶ 8; *State ex rel. Calvary v. Upper Arlington*, 89 Ohio St.3d 229, 231, 2000-Ohio-142.

[472] *State ex rel. Cincinnati Enquirer v. Heath*, 121 Ohio St.3d 165, 2009-Ohio-590, ¶ 11.

[473] *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-538, ¶¶ 19-32.

[474] Public offices may still be liable for the content of public records they release, *e.g.*, defamation. *Mehta v. Ohio Univ.*, 194 Ohio App.3d, 2011-Ohio-3484, ¶ 63 (10th Dist.) ("there is no legal authority in Ohio providing for blanket immunity from defamation for any and all content included within a public record.").

[475] R.C. 149.43(C)(2)(a).

1. Attorney Fees

Neither discretionary nor mandatory attorney fees may be awarded under R.C. 149.43(C)(2)(b) unless the court has issued a judgment that orders compliance with R.C. 149.43(B) of the Public Records Act.[476] An initial award of attorney fees is mandatory if either: (1) the public office failed to respond to the public records request in accordance with the time allowed under R.C. 149.43(B)[477]; or (2) the public office promised to permit inspection or deliver copies within a specified period of time but failed to fulfill that promise.[478] Otherwise, any initial award of attorney fees is discretionary.[479] If attorney fees are initially awarded under either mandatory or discretionary authority, they may be reduced or eliminated at the discretion of the court (see Section 6 below). Attorney fee awards are generally reviewed on appeal under an abuse of discretion standard.[480] Litigation expenses, other than court costs, are not recoverable at all.[481]

2. Amount of Fees

Only those attorney fees directly associated with the mandamus action,[482] and only fees paid or actually owed,[483] may be awarded. The opportunity to collect attorney fees does not apply when the relator appears before the court *pro se* (without an attorney), even if the *pro se* relator is an attorney.[484] The wages of in-house counsel[485] are not considered "paid or actually owed," nor are contingency fees.[486] The relator is entitled to fees only insofar as the requests had merit.[487] Reasonable attorney fees also include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees.[488] A relator may waive a claim for attorney fees by not including any argument in support for an award of fees in its merit brief.[489] Court costs and reasonable attorney fees awarded in public records mandamus actions are considered remedial rather than punitive.[490]

3. Statutory Damages

A person who transmits a valid written request for public records by hand delivery or certified mail[491] is entitled to receive statutory damages if a court finds that the public office failed to comply

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[476] R.C. 149.43(C)(2)(b); *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-538, ¶ 32 (Although the untimely response constituted a *violation*, the *mandamus* claim for a writ was moot due to production of all documents); *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-539, ¶¶ 2, 16-21.

[477] R.C. 149.43(C)(2)(b)(i); *State ex rel. Braxton v. Nichols*, 2010-Ohio-3193 (8th Dist.).

[478] R.C. 149.43(C)(2)(b)(ii).

[479] R.C. 149.43(C)(2)(b) ("If the court renders a judgment that orders the public office . . . to comply with division (B) of this section, the court *may* award reasonable attorney fees subject to reduction . . ." (emphasis added)); *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-539, ¶¶ 16-17; *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-538, ¶¶ 16-17.

[480] *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149.

[481] *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 10, 46; *Dillery v. Icsman*, 92 Ohio St.ed 312, 313, 318, 2001-Ohio-193 (litigation expenses sought included telephone, copying, mailing, filing, and paralegal expenses).

[482] *State ex rel. Gannett Satellite Info. Network v. Petro*, 81 Ohio St.3d 1234, 1236, 1998-Ohio-638 (determining that fees incurred as a result of other efforts to obtain the same records were not related to the mandamus action and were excluded from the award); *State ex rel. Quolke v. Strongsville City Sch. Dist. Bd. of Educ.*, 8th Dist. No. 99733, 2013-Ohio-4481, ¶¶ 10-11 (court reduced attorney fee award because counsel billed for time that did not advance public records case or was extraneous to the case).

[483] *See State ex rel. O'Shea & Assoc. v. Cuyahoga Metro. Housing Auth.*, 2012-Ohio-115, ¶ 45.

[484] *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 1996-Ohio-234; *State ex rel. Thomas v. Ohio St. Univ.*, 71 Ohio St.3d 245, 251, 1994-Ohio-261; *State ex rel. O'Shea & Assoc. v. Cuyahoga Metro. Housing Auth.*, 2012-Ohio-115, ¶ 45.

[485] *State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶ 62; *State ex rel. Bott Law Group, L.L.C. v. Ohio Dept. of Natural Resources*, 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 45 (award of attorney fees is not available to relator law firm, where no evidence that the firm paid or was obligated to pay any attorney to pursue the public records action).

[486] *State ex rel. Housing Advocates, Inc. v. City of Cleveland*, 2012-Ohio-1187, ¶¶ 6-7 (8th Dist.) (in-house counsel taking case on contingent fee basis not entitled to award of attorney fees).

[487] *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, ¶ 25 (denying relator's attorney fees due to "meritless request"); *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 317, 2001-Ohio-193; *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, ¶ 39; *State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-5320, ¶ 26.

[488] R.C. 149.43(C)(2)(c); *State ex rel. Miller v. Brady*, 123 Ohio St.3d 255, 2009-Ohio-4942.

[489] *State ex rel. Data Trace Info. Svcs. v. Cuyahoga Cty. Fiscal Offcr.*, 2012-Ohio-753, ¶ 69, citing *Mun. Constr. Equip. Operators' Labor Council*, 114 Ohio St.3d 183, 2007-Ohio-3831, ¶ 83.

[490] R.C. 149.43(C)(2)(c).

[491] *State ex rel. Data Trace Info. Svcs. v. Cuyahoga Cty. Fiscal Offcr.*, 2012-Ohio-753, ¶ 70; *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 59; *State ex rel. Miller v. Brady*, 123 Ohio St.3d 255, 2009-Ohio-4942; *see also State ex rel. Petranek v. City of Cleveland*, 2012-Ohio-2396, ¶ 8 (8th Dist.) (later repeat request by certified mail does not trigger entitlement to statutory damages).

with its obligations under R.C. 149.43(B).[492] The award of statutory damages is not considered a penalty, but is intended to compensate the requester for injury arising from lost use[493] of the requested information, and if lost use is proven, then injury is conclusively presumed. Statutory damages are fixed at $100 for each business day during which the respondent fails to comply with division (B), beginning with the day on which the relator files a mandamus action to recover statutory damages, up to a maximum of $1000. This means that a respondent may stop further accrual of statutory damages by fully complying with division (B) before the maximum is reached. The Act "does not permit stacking of statutory damages based on what is essentially the same records request."[494]

4. Requirement of Public Benefit for Discretionary Attorney Fees

The award of discretionary attorney fees is dependent on demonstrating that the release of the requested public records provides a public benefit that is greater than the benefit to the requester.[495] Several courts have held that merely encouraging and promoting compliance with the Public Records Act and subjecting the public records keeper to public exposure, review, and criticism does not establish a sufficient public benefit to allow for the award of statutory attorney fees.[496]

5. Recovery of Deleted E-mail Records

The Ohio Supreme Court has determined that if there is evidence showing that records in e-mail format have been deleted in violation of a public office's records retention schedule, the public office has a duty to recover the contents of deleted e-mails and to provide access to them.[497] The courts will consider the relief available to the requester based on the following factors:

1) There must be a determination made as to whether deleted e-mails have been destroyed, as there is no duty to create or provide non-existent records.

2) The requester must make a *prima facie* showing that the e-mails were deleted in violation of applicable retention schedules, unrebutted by defendant(s).

3) There must be some evidence that recovery of the e-mails may be successful.

4) While the expense of the recovery services is not a consideration, the recovery efforts need only be "reasonable, not Herculean," consistent with a public office's general duties under the Public Records Act; and

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[492] R.C. 149.43(C)(1); *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-538, ¶ 22 (failure of city to respond to request in a reasonable period of time triggered statutory damages award).

[493] R.C. 149.43(C)(1); *See State ex rel. Bardwell v. Rocky River Police Dep't*, 2009-Ohio-727, ¶ 63 (8th Dist.) (finding that a public official's improper request for requester's identity, absent proof that this resulted in actual "lost use" of the records requested, does not provide a basis for statutory damages).

[494] *State ex rel. Dehler v. Kelly*, 127 Ohio St.3d 309, 2010-Ohio-5724, ¶ 4; *State ex rel. Bardwell v. City of Cleveland*, 2009-Ohio-5688, ¶¶ 28, 29 (8th Dist.).

[495] *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-539, ¶ 15; *State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, 940 N.E.2d 1280, ¶ 60 ("any minimal benefit conferred by the writ granted here is beneficial mainly to Mahajan rather than to the public in general."); *State ex rel. Laborers Int'l Union No. 500 v. Summerville*, 122 Ohio St.3d 1234, 2009-Ohio-4090, 857 N.E.2d 452, ¶ 6 ("The release of the requested records to relator primarily benefits relator itself rather than the public in general."); *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 20, 33, 38; *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012-06-122, 2013-Ohio-2270, ¶¶ 54-57; *State ex rel. Quolke v. Strongsville City Sch. Dist. Bd. of Educ.*, 8th Dist. No. 99733, 2013-Ohio-4481, ¶ 8 (release of replacement teachers' names would allow the public to determine qualifications for teaching and is thus a sufficient public benefit); *State ex rel. Hartkemeyer v. Fairfield Twp.*, 2012-Ohio-5842, ¶¶ 30-33 (12th Dist.) ("relator uses the public documents she requests to inform interested members of the public as the goings on of Fairfield Township.").

[496] *State ex rel. Petranek*, 2012-Ohio-2396, ¶¶ 7, 8 (8th Dist.); *State ex rel. Morabito v. City of Cleveland*, 2012-Ohio-6012, ¶ 16 (8th Dist.) (merely ensuring the fulfillment of public records duties is an insufficient basis to award attorney fees).

[497] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 41 (note that board did not contest the status of the requested e-mails as public records).

5) There must be a determination made as to who should bear the expense of forensic recovery.[498]

6. Reduction of Attorney Fees and Statutory Damages

After any reasonable attorney's fees and any statutory damages are calculated and awarded, the court may reduce or eliminate either or both such awards, if the court determines both of the following:[499]

1) That, based on the law as it existed at the time, a well-informed person responsible for the requested public records reasonably would have believed that the conduct of the respondent did not constitute a failure to comply with an obligation of R.C. 149.43(B);[500] and,

2) That a well-informed person responsible for the requested public records reasonably would have believed that the conduct of the public office would serve the public policy that underlies the authority that it asserted as permitting that conduct.[501]

C. Liabilities Applicable to Either Party

The following remedies may be available against a party under the circumstances set out by statute or rule. They are applicable regardless of whether the party represents him or herself ("*pro se*"), or is represented by counsel.

1. Frivolous Conduct

Any party adversely affected by frivolous conduct of another party may file a motion with the court, not more than 30 days after the entry of final judgment, for an award of court costs, reasonable attorney fees, and other reasonable expenses incurred in connection with the lawsuit or appeal.[502] Where the court determines that the accused party has engaged in frivolous conduct, a party adversely affected by the conduct may recover the full amount of the reasonable attorney fees incurred, even fees paid or in the process of being paid, or in the process of being paid by an insurance carrier.[503]

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[498] *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 51 (finding that, where newspaper sought to inspect improperly deleted e-mails, the public office had to bear the expense of forensic recovery).

[499] R.C. 149.43(C)(1)(a)-(b) (providing for a reduction of civil penalty); R.C. 149.43(C)(2)(c)(i)-(ii) (providing for a reduction in attorney's fees); *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, ¶ 17 (even if court had found denial of request contrary to statute, requester would not have been entitled to attorney fees because the public office's conduct was reasonable); *State ex rel. Rohm v. Fremont City Sch. Dist. Bd. of Educ.*, 2010-Ohio-2751 (6th Dist.) (respondent did not demonstrate reasonable belief that its actions did not constitute a failure to comply); *State ex rel. Brown v. Village of North Lewisburg*, 2nd Dist. No. 2012-CA-30, 2013-Ohio-3841, ¶ 19 (it was not unreasonable for public office to believe that village council member would have access to requested council records, and was not entitled to duplicative voluminous copies of same records); *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012-06-122, 2013-Ohio-2270, ¶¶ 51-54.

[500] *State ex rel. Anderson v. City of Vermilion*, 2012-Ohio-5320, ¶ 26; *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 37, 39, 40; *State ex rel. Bardwell v. Rock River Police Dep't*, 2009-Ohio-717, ¶ 58 (8th Dist.); *State ex rel. Toledo Blade Co. v. Toledo*, 6th Dist. No. No L-12-1183, 2013-Ohio-3094, ¶ 17 (police department's refusal to release gang map was not unreasonable given court precedent and thus attorney fee request denied); *State ex rel. DiFranco v. City of S. Euclid*, Slip Opinion No. 2014-Ohio-539, ¶ 15.

[501] *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶ 40; *Rohm v. Fremont City Sch. Dist. Bd. of Educ*, 2010-Ohio-2751, ¶ 14 (6th Dist.).

[502] R.C. 2323.51; *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, affirming award of attorney fees against relator in *State ex rel. Striker v. Cline*, 2011-Ohio-983 (5th Dist.).

[503] *State ex rel. Striker v. Cline*, 130 Ohio St.3d 214, 2011-Ohio-5350, ¶¶ 7, 23-25; *State ex rel. Verhovec v. Marietta*, 4th Dist. Nos. 11CA29, 12CA52, 12CA53, 13CA2, 2013-Ohio-5414, ¶¶ 44-94; *State ex rel. Davis v. Metzger*, 5th Dist. No. 11-CA-130, 2013-Ohio-1620, ¶¶ 15-23 (requester filed mandamus within hours of being told request was being reviewed and did not dismiss action after receiving the records later that same day).

2. Civil Rule 11[504]

Civ.R. 11 provides, in part:

> "The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney's or party's knowledge, information, and *belief* there is *good ground* to support it; and that it is not interposed for delay . . . For a willful violation of this rule, an attorney or *pro se* party, upon motion of a party or upon the court's own motion, may be subjected to appropriate action, including an award to the opposing party of expenses and reasonable attorney fees incurred in bringing any motion under this rule."

[504] *State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs*, 127 Ohio St.3d 202, 2010-Ohio-5073, 937 N.E.2d 1274; *State ex rel. Verhovec v. Marietta*, 4th Dist. No. 11CA29, 12CA52, 12CA53, 13CA2, 2013-Ohio-5414, ¶¶ 44-94 (relator engaged in frivolous conduct under Civ. R. 11 by feigning interest in records access when their actual intent was to seek forfeiture award).

V. Chapter Five: Other Obligations of a Public Office

Public offices have other obligations with regard to the records that they keep. These include:

- Managing public records by organizing them such that they can be made available in response to public records requests,[505] and ensuring that all records – public or not – are maintained and disposed of only in accordance with properly adopted, applicable records retention schedules;[506]
- Maintaining a copy of the office's current records retention schedules at a location readily available to the public;[507]
- Adopting and posting an office public records policy;[508] and
- Ensuring that all elected officials associated with the public office, or their designees, obtain three hours of certified public records training through the Ohio Attorney General's Office once during each term of office.[509]

Additionally, the Ohio Auditor of State's Office recommends that public offices log and track the public records requests they receive to ensure compliance with the access provision of the Ohio Public Records Act. Auditor of State Bulletin 2011-006 sets out and explains the office's recommended Best Practices for Complying with Public Records Requests.[510]

A. Records Management

Records are a crucial component of the governing process. They contain information that supports government functions affecting every person in government and within its jurisdiction. Like other important government resources, records and the information they contain must be well managed to ensure accountability, efficiency, economy, and overall good government.

The term "records management" encompasses two distinct obligations of a public office, each of which furthers the goals of the Ohio Public Records Act. First, in order to facilitate broader access to public records, a public office must organize and maintain the public records it keeps in a manner such that they can be made available for inspection or copying in response to a public records request.[511] Second, in order to facilitate transparency in government and as one means of preventing the circumvention of Ohio Public Records Act, Ohio's records retention law R.C. 149.351, prohibits unauthorized removal, destruction, mutilation, transfer, damages, or disposal of any record or part of a record, except as provided by law or under the rules adopted by the records commissions (i.e., pursuant to approved records retention schedules).[512] Therefore, in the absence of a law or retention schedule permitting disposal of particular records, an office lacks the required authority to dispose of those records, and must maintain them until proper authority to dispose of them is obtained. In the meantime, the records remain subject to public records requests. Public offices at various levels of government, including state agencies, county boards and commissions, and local political subdivisions, have different resources and processes for adopting records retention schedules. Those are described in this section.

A public office shall only create records that are "necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and for the protection of the legal and financial rights of the state and persons directly affected by the

[505] R.C. 149.43(B)(2).
[506] R.C. 149.351(A).
[507] R.C. 149.43(B)(2).
[508] R.C. 149.43(E)(1), R.C. 109.43(E).
[509] R.C. 149.43(E)(1), R.C. 109.43(B).
[510] *See* Auditor of State Bulletin 2011-006 at http://www.auditor.state.oh.us/services/lgs/bulletins/2011/2011-006.pdf.
[511] R.C. 149.43(B)(2); *see* Chapter Two: A. "Rights and Obligations of Public Records Requesters and Public Offices" (providing more information about records management in the context of public records requests).
[512] R.C. 149.351(A); *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 851 N.E.2d 782, ¶ 14.

agency's activities."[513] This standard only addresses the records required to be created by a public office, which may receive many records in addition to those it creates.

1. Records Management Programs

a. Local Government Records Commissions

Authorization for disposition of local government records is provided by applicable statutes, and by rules adopted by records commissions at the county,[514] township,[515] and municipal[516] levels. Records commissions also exist for each library district,[517] special taxing district,[518] school district,[519] and educational service center.[520]

Records commissions are responsible for reviewing applications for one-time disposal of obsolete records, as well as records retention schedules submitted by government offices within their jurisdiction.[521] Once a commission has approved an application or schedule, it is forwarded to the State Archives at the Ohio Historical Society for review and identification of records[522] that the State Archives deems to be of continuing historical value.[523] Upon completion of that process, the Ohio Historical Society will forward the application or schedule to the Auditor of State for approval or disapproval.[524]

b. State Records Program

The Ohio Department of Administrative Services (DAS) administers the records program for the legislative and judicial branches of government[525] and for all state agencies, with the exception of state-supported institutions of higher education.[526] Among its other duties, the state records program is responsible for establishing "general schedules" for the disposal of certain types of records common to most state agencies. State agencies must affirmatively adopt any existing general schedules they wish to utilize.[527] Once a general schedule has been officially adopted by a state agency, when the time specified in the general schedule has elapsed, the records identified should no longer have sufficient administrative, legal, fiscal, or other value to warrant further preservation by the state.[528]

If a state agency keeps a record series that does not fit into an existing state general schedule, or if it wishes to modify the language of a general schedule to better suit its needs, the state agency can submit its own proposed retention schedules to DAS via the online Records and Information Management System (RIMS) for approval by DAS, the Auditor of State, and the State Archivist.

The state's records program works in a similar fashion to local records commissions, except that applications and schedules are forwarded to the Ohio Historical Society and the Auditor of State

[513] R.C. 149.40.
[514] R.C. 149.38.
[515] R.C. 149.42.
[516] R.C. 149.39.
[517] R.C. 149.411.
[518] R.C. 149.412.
[519] R.C. 149.41.
[520] R.C. 149.41.
[521] R.C. 149.38, .381.
[522] R.C. 149.38, .381.
[523] R.C. 149.38, .381.
[524] R.C. 149.39.
[525] R.C. 149.332.
[526] R.C. 149.33(A); Information about records management for state agencies is available at: http://www.das.ohio.gov/Divisions/GeneralServices/StatePrintingandMailServices/RecordsManagement/tabid/265/Default.aspx.
[527] Instructions for how to adopt DAS general retention schedules are on page 20 of the RIMS User Manual, available at: http://www.das.ohio.gov/LinkClick.aspx?fileticket=D6T7Sb1qZ0k%3d&tabid=265.
[528] R.C. 149.331(C); General retention schedules (available for adoption by all state agencies) and individual state agency schedules are available at: http://apps.das.ohio.gov/rims/General/General.asp.

for review simultaneously following the approval of DAS.[529] Again, the Ohio Historical Society focuses on identifying records with enduring historical value. The State Auditor decides whether to approve, reject, or modify applications and schedules based on the continuing administrative and fiscal value of the state records to the state or to its citizens.[530]

c. Records Program for State-supported Colleges and Universities

State-supported institutions of higher education are unique, in that their records programs are established and administered by their respective boards of trustees rather than a separate records commission or the State's records program.[531] Through their records programs, these state offices are charged with applying efficient and economical management methods to the creation, utilization, maintenance, retention, preservation, and disposition of records.[532]

2. Records Retention and Disposition

a. Retention Schedules

Records of a public office may be destroyed, but only if they are destroyed in compliance with a properly approved records retention schedule.[533] In a 2008 decision, the Ohio Supreme Court emphasized that, "in cases in which public records, including e-mails, are properly disposed of in accordance with a duly adopted records retention policy, there is no entitlement to those records under the Ohio Public Records Act."[534] However, if the retention schedule does not address the particular type of record in question, the record must be kept until the schedule is properly amended to address that category of records.[535] Also, if a public record is retained beyond its properly approved destruction date, it keeps its public record status until it is destroyed and is thus subject to public records requests.[536]

In crafting proposed records retention schedules, a public office must evaluate the length of time each type of record warrants retention for administrative, legal, or fiscal purposes after it has been received or created by the office.[537] Consideration should also be given to the enduring historical value of each type of record, which will be evaluated by the State Archives at the Ohio Historical Society when that office conducts its review. Local records commissions may consult with the State Archives at the Ohio Historical Society during this process;[538] the state records program offers consulting services for state offices.[539]

b. Transient Records

Adoption of a schedule for transient records – that is, records containing information of short term usefulness – allows a public office to dispose of these records once they are no longer of administrative value.[540] Examples of transient records include voicemail messages, telephone message slips, post-it notes, and superseded drafts.

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[529] R.C. 149.333.
[530] R.C. 149.333.
[531] R.C. 149.33(B).
[532] R.C. 149.33.
[533] R.C. 149.351; R.C. 121.11.
[534] *State ex rel. Toledo Blade Co. v. Seneca Bd. of Comm'rs*, 120 Ohio St.3d 372, 2008-Ohio-6253, ¶ 23.
[535] *Wagner v. Huron Cty. Bd. of Cty. Commrs.*, 6th Dist. No. H-12-008, 2013-Ohio-3961, ¶ 17 (public office must dispose of records in accordance with then-existing retention schedule and cannot claim that it disposed of records based on a schedule implemented after disposal of requested records).
[536] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599; *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 41, 2000-Ohio-8 (police department violated R.C. 149.43 when records were destroyed in contravention of City's retention schedule).
[537] R.C. 149.34.
[538] R.C. 149.31(A) (providing that "[t]he archives administration shall be headed by a trained archivist designated by the Ohio Historical Society and shall make its services available to county, municipal, township, school district, library, and special taxing district records commissions upon request.").
[539] R.C. 149.331(D).
[540] *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, ¶ 24, n. 1.

c. Records Disposition

It is important to document the disposition of records after they have satisfied their approved retention periods. Local governments should file a Certificate of Records Disposal (RC-3) with the State Archives at the Ohio Historical Society at least fifteen business days prior to the destruction in order to allow the Historical Society to select records of enduring historical value. State agencies can document their records disposals on the RIMS system or in-house. Even with recent changes to R.C. 149.38 and R.C. 149.381 concerning times when it is not necessary to submit the RC-3 to the State Archives, it is important for a government entity to internally track records disposals, particularly tracking which schedule the records were disposed under, the record series title, inclusive dates of the records, and the date of disposal.

3. Liability for Unauthorized Destruction, Damage, or Disposal of Records

All records are considered to be the property of the public office, and must be delivered by outgoing officials and employees to their successors in office.[541] Improper removal, destruction, damage or other disposition of a record is a violation of R.C. 149.351(A).

a. Injunction and Civil Forfeiture

Ohio law allows "any person * * * aggrieved by"[542] the unauthorized "removal, destruction, mutilation, transfer, or other damage to or disposition of a record," or by the threat of such action, to file either or both of the following types of lawsuits in the appropriate common pleas court:

- A civil action for an injunction to force the public office to comply with R.C. 149.351(A), as well as any reasonable attorney fees associated with the suit.[543]
- A civil action to recover a forfeiture of $1,000 for each violation of R.C. 149.351(A), not to exceed a cumulative total of $10,000 (regardless of the number of violations), as well as reasonable attorney fees associated with the suit, not to exceed the forfeiture amount recovered.[544]

A person is not "aggrieved" unless he establishes, as a threshold matter, that he made an enforceable public records request for the records claimed to have been disposed of in violation of R.C. 149.351.[545] Also, a person is not "aggrieved" by a violation of R.C. 149.351(A) if clear and convincing evidence shows that the request for a record was contrived as a pretext to create liability under the section.[546] If pretext is so proven, the court may order the requester to pay reasonable attorney fees to the defendant(s).[547]

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[541] R.C. 149.351(A).
[542] *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 851 N.E.2d 782; *Walker v. Ohio St. Univ. Bd. of Tr.*, 2010-Ohio-373, ¶¶ 22-27 (10th Dist.) (determining that a person is "aggrieved by" a violation of R.C. 149.351(A) when (1) the person has a legal right to disclosure of a record of a public office, and (2) the disposal of the record, not permitted by law, allegedly infringes the right); *see also State ex rel. Cincinnati Enquirer v. Allen*, 2005-Ohio-4856, ¶ 15 (1st Dist.), appeal not allowed, 108 Ohio St.3d 1439, 2006-Ohio-421; *State ex rel. Sensel v. Leone*, 12th Dist. No. CA97-05-102 (Feb. 9, 1998), reversed on other grounds, 85 Ohio St.3d 152 (1999), Black's Law Dictionary, 77 (9th ed. 2009).
[543] R.C. 149.351(B)(1). NOTE: The term "aggrieved" has a different legal meaning in this context than it has under R.C. 149.43(C) when a public office allegedly fails to properly respond to a public records request.
[544] R.C. 149.351(B)(2).
[545] *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, ¶ 16; *Walker v. Ohio St. Univ. Bd. of Tr.*, 2010-Ohio-373, ¶¶ 22-27 (10th Dist.); *State ex rel. Todd v. City of Canfield*, 2014-Ohio-569, ¶ 22 (7th Dist.).
[546] R.C. 149.351(C); *Rhodes v. City of New Philadelphia*, 129 Ohio St.3d 304, 2011-Ohio-3279, 851 N.E.2d 782; *State ex rel. Verhovec v. Marietta*, 4th Dist. No. 12CA32, 2013-Ohio-5415, ¶ 48 (court considered the intent of the real party-in-interest, Relator's husband, to determine whether requester was an aggrieved party; because all evidence indicated that requester's intent was pecuniary gain, trial court properly determined that requester not aggrieved and not entitled to civil forfeiture); *State ex rel. Rhodes v. Chillicothe*, 4th Dist. No. 12CA3333, 2013-Ohio-1858, ¶ 44 (because appellant's interest was purely pecuniary, appellant did not have an interest in accessing records and was not aggrieved).
[547] R.C. 149.351(C)(2); *State ex rel. Verhovec v. Marietta*, 4th Dist. No. 12CA32, 2013-Ohio-5415, ¶ 63.

b. Limits on Filing Action for Unauthorized Destruction, Damage, or Disposal

A person has five years from the date of the alleged violation or threatened violation to file the above actions,[548] and has the burden of providing evidence that records were destroyed in violation of R.C. 149.351.[549] When any person has recovered a forfeiture in a civil action under R.C. 149.351(B)(2), no other person may recover a forfeiture for that same record, regardless of the number of persons "aggrieved," or the number of civil actions commenced.[550] Determining the number of "violations" involved is an *ad hoc* determination which may depend on the nature of the records involved.[551]

c. Attorney Fees

The aggrieved person may seek an award of reasonable attorney fees for either the injunctive action or an action for civil forfeiture.[552] An award of attorney fees under R.C. 149.351 is discretionary,[553] and the award of attorney fees for the forfeiture action may not exceed the forfeiture amount.[554]

4. Availability of Records Retention Schedules

All public offices must maintain a copy of all current records retention schedules at a location readily available to the public.[555]

B. Records Management – Practical Pointers

1. Fundamentals

Create Records Retention Schedules, and Follow Them
Every record, public or not, that is kept by a public office must be covered by a records retention schedule. Without an applicable schedule dictating how long a record must be kept and when it can be destroyed, a public office must keep that record forever. Apart from the inherent long-term storage problems and associated cost this creates for a public office, the office is also responsible for continuing to maintain the record in such a way that it can be made available at any time if it is responsive to a public records request. Creating and following schedules for all of its records allows a public office to dispose of records once they are no longer necessary or valuable.

Content – Not Medium – Determines How Long to Keep a Record
Deciding how long a record is to be kept should be based on the *content* of the record, not on the medium on which it exists. Not all paper documents are "records" for purposes of the Public Records Act; similarly, not all documents transmitted via e-mail are "records" that must be maintained and destroyed pursuant to a records retention schedule. Accordingly, in order to fulfill both its records management and public records responsibilities, a public office should categorize all of the items it keeps that are deemed to be records – regardless of the *form* or transmission method in which they exist – based on content, and store them based on those content categories, or "records series," for as long as the records have legal, administrative, fiscal, or historic value. (Note that storing e-mail records unsorted on a server does not satisfy records retention requirements, because the server does not allow for the varying disposal schedules of different record series.)

[548] R.C. 149.351(E).
[549] *Snodgrass v. City of Mayfield Heights*, 2008-Ohio-5095, ¶ 15 (8th Dist.); *State ex rel. Doe v. Register*, 2009-Ohio-2448 (12th Dist.).
[550] R.C. 149.351(D).
[551] *Kish v. City of Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, ¶¶ 25-44; *see also Cwynar v. Jackson Twp. Bd. of Trs.*, 178 Ohio App.3d 345, 2008-Ohio-5011 (5th Dist.).
[552] R.C. 149.351(B)(1)-(2).
[553] *Cwynar v. Jackson Twp. Bd. of Trs.*, 178 Ohio App.3d 345, 2008-Ohio-5011, ¶ 56 (5th Dist.).
[554] R.C. 149.351(B)(2).
[555] R.C. 149.43(B)(2).

Practical Application
Creating and implementing a records management system might sound daunting. For most public offices, though, it is a matter of simple housekeeping. Many offices already have the scaffolding of existing records retention schedules in place, which may be augmented in the manner outlined below.

2. Managing Records in Five Easy Steps:

a. Conduct a Records Inventory

The purpose of an inventory is to identify and describe the types of records an office keeps. Existing records retention schedules are a good starting point for determining the types of records an office keeps, as well as identifying records that are no longer kept or new types of records for which new schedules need to be created.

For larger offices, it is helpful to designate a staff member from each functional area of the office who knows the kinds of records their department creates and why, what the records document, and how and where they are kept.

b. Categorize Records by Record Series

Records should be grouped according to record series. A record series is a group of similar records that are related because they are created, received or used for, or result from the same purpose or activity. Record series descriptions should be broad enough to encompass all records of a particular type ("Itemized Phone Bills" rather than "FY07-FY08 Phone Bills" for instance), but not so broad that it fails to be instructive (such as "Finance Department e-mails") or leaves the contents open to interpretation or "shoehorning."

c. Decide How Long to Keep Each Records Series

Retention periods are determined by assessing four values for each category of records:

Administrative Value: A record maintains its administrative value as long as it is useful and relevant to the execution of the activities that caused the record to be created. Administrative value is determined by how long the record is needed by the office to carry out – that is, to "administer" – its duties. Every record created by government entities should have administrative value, which can vary from being transient (a notice of change in meeting location), to long-term (a policies and procedures manual).

Legal Value: A record has legal value if it documents or protects the rights or obligations of citizens or the agency that created it, provides for defense in litigation, or demonstrates compliance with laws, statutes, and regulations. Examples include contracts, real estate records, retention schedules, and licenses.

Fiscal Value: A record has fiscal value if it pertains to the receipt, transfer, payment, adjustment, or encumbrance of funds, or if it is required for an audit. Examples include payroll records and travel vouchers.

Historical Value: A record has historical value if it contains significant information about people, places, or events. The State Archives suggests that historical documents be retained permanently. Examples include board or commission meeting minutes and annual reports.

Retention periods should be set to the highest of these values and should reflect how long the record <u>needs</u> to be kept, not how long it <u>can</u> be kept.

d. Dispose of Records on Schedule

Records retention schedules indicate how long particular record series must be kept and when and how the office can dispose of them. Records kept past their retention schedule are still subject to public records requests, and can be unwieldy and expensive to store. As a practical matter, it is helpful to designate a records manager or records custodian to assist in crafting retention schedules, monitoring when records are due for disposal, and ensuring proper completion of disposal forms.

e. Review Schedules Regularly and Revise, Delete, or Create New Schedules as the Law and the Office's Operations Change

Keep track of new records that are created as a result of statutory and policy changes. Ohio law requires all records to be scheduled within one year after the date that they are created or received.[556]

C. Helpful Resources for Local Government Offices

Ohio Historical Society/State Archives – Local Government Records Program
The Local Government Records Program of the State Archives (see: www.ohiohistory.org/lgr) provides records-related advice, forms, model retention manuals, and assistance to local governments in order to facilitate the identification and preservation of local government records with enduring historical value. Please direct inquiries and send forms to:

The Ohio Historical Society/State Archives
Local Government Records Program
800 East 17th Avenue
Columbus, Ohio 43211
(614) 297-2553 (phone)
(614) 297-2546 (fax)
localrecs@ohiohistory.org

D. Helpful Resources for State Government Offices

1. Ohio Department of Administrative Services Records Management Program

The Ohio Department of Administrative Services' State Records Administration can provide records management advice and assistance to state agencies, as well as provide training seminars on request. Information available on their website includes:

- Access to the Records Information Management System (RIMS) retention schedule database;
- RIMS User Manual;
- General Retention Schedules; and
- Records Inventory and Analysis template.

[556] R.C. 149.34(C).

For more information, contact DAS at 614-466-1105 or visit the Records Management page of the DAS website at **www.das.ohio.gov/divisions/generalservices/stateprintingandmailservices/recordsmanagement/tabid/265/Default.aspx**.

2. The Ohio Historical Society, State Archives

The State Archives can assist state agencies with the identification and preservation of records with enduring historical value.

For more information or to schedule a records appraisal, contact State Archives at 614-297-2536.

E. Helpful Resources for All Government Offices

Ohio Electronic Records Committee

Electronic records present unique challenges for archivists and records managers. As society shifts from traditional methods of recordkeeping to electronic recordkeeping, the issues surrounding the management of electronic records become more significant. Although the nature of electronic records is constantly evolving, these records are being produced at an ever-increasing rate. As these records multiply, the need for leadership and policy becomes more urgent.

The goal of the Ohio Electronic Records Committee (OhioERC) is to draft guidelines for the creation, maintenance, long term preservation of, and access to electronic records created by Ohio's state government. Helpful documents available on the OhioERC's website include:

- Social Media: The Records Management Challenges;
- Hybrid Microfilm Guidelines;
- Digital Document Imaging Guidelines;
- Electronic Records Management Guidelines;
- General Schedules for Electronic Records;
- Electronic Records Policy;
- Managing Electronic Mail;
- Trustworthy Information Systems Handbook; and
- Topical Tip Sheets.

For more information and to learn about ongoing projects, visit the Ohio Electronic Records Committee website at **http://www.OhioERC.org**.

F. Public Records Policy

A public office must create and adopt a policy for responding to public records requests. The Ohio Attorney General's Office has developed a model public records policy, which may serve as a guide.[557] The public records policy must be distributed to the records manager, records custodian, or the employee who otherwise has custody of the records of the office, and that employee must acknowledge receipt. In addition, a poster describing the policy must be posted in the public office in a conspicuous location, as well as in all branch offices.[558] The public records policy must be included in the office's policies and procedures manual, if one exists, and may be posted on the office's website.[559] Compliance

[557] R.C. 149.43(E)(1); Attorney General's Model Policy available at **www.OhioAttorneyGeneral.gov/Sunshine** under the "Publications" drop-down menu on the left.
[558] R.C. 149.43(E)(2).
[559] R.C. 149.43(E)(2).

with these requirements will be audited by the Auditor of State in the course of a regular financial audit.[560]

A public records policy may…

limit the number of records that the office will transmit *by United States mail* to a particular requester to ten per month, unless the requester certifies in writing that the requested records and/or the information those records contain will not be used or forwarded for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering of news, reporting or gathering of information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.[561]

A public records policy may not…

- limit the number of public records made available to a single person;
- limit the number of records the public office will make available during a fixed period of time; or
- establish a fixed period of time before the public office will respond to a request for inspection or copying of public records (unless that period is less than eight hours).[562]

G. Required Public Records Training for Elected Officials

All local and statewide elected government officials[563] or their designees[564] must attend a three-hour public records training program during each term of elective office[565] during which the official serves.[566] The training must be developed and certified by the Ohio Attorney General's Office, and presented either by the Ohio Attorney General's Office or an approved entity with which the Attorney General's Office contracts.[567] The Attorney General shall ensure that the training programs and seminars are accredited by the Commission on Continuing Legal Education established by the Supreme Court.[568] Compliance with the training provision will be audited by the Auditor of State in the course of a regular financial audit.[569]

[560] R.C. 109.43(G).
[561] R.C. 149.43(B)(7). In addition, a public office may adopt policies and procedures it will follow in transmitting copies by U.S. mail or other means of delivery or transmission, but adopting these policies and procedures is deemed to create an enforceable duty on the office to comply with them.
[562] R.C. 149.43(E)(1).
[563] R.C. 109.43(A)(2) (definition of "elected official"); NOTE: the definition excludes justices, judges, or clerks of the Supreme Court of Ohio, courts of appeals, courts of common pleas, municipal courts, and county courts.
[564] R.C. 109.43(A)(1) (providing that training may be received by an "appropriate" designee, R.C. 109.43(B) (no definition of "appropriate" in the statute), who may be the designee of the sole elected official in a public office, or of all the elected officials if the public office includes more than one elected official).
[565] R.C. 109.43(B) (providing that training shall be three hours for every term of office for which the elected official was appointed or elected to the public office involved).
[566] R.C. 109.43(E)(1); R.C. 109.43(B) (providing that this training is intended to enhance an elected official's knowledge of his or her duty to provide access to public records, and to provide guidance in developing and updating his or her office's public records policies); R.C. 149.43(E)(1) (providing that another express purpose of the training is "[t]o ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of [the Public Records Act].").
[567] R.C. 109.43(B)-(D) (providing that the Attorney General's Office may not charge a fee to attend the training programs it conducts, but outside contractors that provide the certified training may charge a registration fee that is based on the "actual and necessary" expenses associated with the training, as determined by the Attorney General's Office).
[568] R.C. 109.43(B).
[569] R.C. 109.43(G).

VI. Chapter Six: Special Topics

A. CLEIRs: Confidential Law Enforcement Investigatory Records Exception[570]

This exception is often mistaken as one that applies only to police investigations. In fact, the Confidential Law Enforcement Investigatory Records exception, commonly known as "CLEIRs," applies to investigations of alleged violations of criminal, quasi-criminal, civil, and administrative law. It does not apply to most investigations conducted for purposes of public office employment matters, such as internal disciplinary investigations,[571] pre-employment questionnaires and polygraph tests,[572] or to public records that later become the subject of a law enforcement investigation.[573]

1. CLEIRs Defined:

Under CLEIRs, a public office may withhold any records that both:

(1) Pertain to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature;[574]

and

(2) If released would create a high probability of disclosing any of the following information:[575]

- Identity of an uncharged suspect;
- Identity of a source or witness to whom confidentiality was reasonably promised;
- Specific confidential investigatory techniques or procedures;
- Specific investigatory work product; or
- Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

2. Determining Whether the CLEIRs Exception Applies

Remember that the CLEIRs exception is a strict two-step test, and a record must first qualify as pertaining to a "law enforcement matter" under Step One before any of the exception categories in Step Two will apply to the record.[576]

Step One: Pertains to "A Law Enforcement Matter"

An investigation is only considered a "law enforcement matter" if it meets each prong of the following 3-part test:

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[570] R.C. 149.43(A)(1)(h),(A)(2).

[571] *Mehta v. Ohio Univ.*, Ct. of Cl. No. 2006-06752, 2009-Ohio-4699, ¶¶ 36-38 (determining that a public university's internal report of investigation of plagiarism was not excepted from disclosure under the Public Records Act).

[572] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142, 1995-Ohio-248.

[573] *See State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 42, 2006-Ohio-6365, ¶ 51 (records "made in the routine course of public employment" that related to but preceded a law enforcement investigation are not confidential law enforcement investigatory records); *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 316, 2001-Ohio-193.

[574] R.C. 149.43(A)(2).

[575] R.C. 149.43(A)(2)(a)-(d).

[576] *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 377, 1996-Ohio-214 (because 911 tapes are not part of an investigation, "it does not matter that the release of the tapes might reveal the identity of an uncharged suspect or contain information which, if disclosed, would endanger the life or physical safety of a witness."); *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 170 (1994) (respondent attempted to apply CLEIRs Step Two "confidential informant" exception to evaluator's notes in personnel records).

(a) Has an Investigation Been Initiated Upon Specific Suspicion of Wrongdoing?[577]

Investigation records must be generated in response to specific alleged misconduct, not as the incidental result of routine monitoring.[578] However, "routine" investigations of the use of deadly force by officers, even if the initial facts indicate accident or self-defense, are sufficient to meet this requirement.[579]

(b) Does the Alleged Conduct Violate Criminal,[580] Quasi-criminal,[581] Civil, or Administrative Law?[582]

So long as the conduct is prohibited by statute or administrative rule, whether the punishment is criminal, quasi-criminal, civil, or administrative in nature is irrelevant.[583] "Law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature" refers directly to the enforcement of the law, and not to employment or personnel matters ancillary to law enforcement matters.[584]

Disciplinary investigations of alleged violations of internal office policies or procedures are *not* law enforcement matters,[585] including disciplinary matters and personnel files of law enforcement officers.[586]

(c) Does the Public Office Have the Authority to Investigate or Enforce the Law Allegedly Violated?

If the office does not have legally-mandated investigative[587] or enforcement authority over the alleged violation of the law, then the records it holds are not "a law enforcement matter" for that office.[588] For example, if an investigating law enforcement agency obtains a copy of an otherwise public record of another public

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[577] *E.g.*, *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 53 (1990).

[578] *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 53 (1990); *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 445, 2000-Ohio-214.

[579] *See State ex rel. Nat'l Broadcasting Co. v. Cleveland*, 57 Ohio St.3d 77, 79-80 (1991); *see also State ex rel. Oriana House v. Montgomery*, 2005-Ohio-3377, ¶ 77 (10th Dist.) (redacted portions of audit records were directed to specific misconduct and were not simply part of routine monitoring).

[580] *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 187, 1995-Ohio-19.

[581] *See Goldberg v. Maloney*, 111 Ohio St.3d 211, 2006-Ohio-5485, ¶¶ 41-43 (providing bankruptcy as an example of a "quasi-criminal" matter); *State ex rel. Oriana House, Inc. v. Montgomery*, 2005-Ohio-3377, ¶ 76 (10th Dist.) (noting that the special audit by the Auditor of State clearly qualifies as both a "law enforcement matter of a […] civil, or administrative nature" and a "law enforcement matter of a criminal [or] quasi-criminal" matter); *In re Fisher*, 39 Ohio St.2d 71, 75-76 (1974) (juvenile delinquency is an example of a "quasi-criminal" matter).

[582] *E.g.*, *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 684, 1996-Ohio-234; *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 53 (1990) ("The issue is whether records compiled by the committee pertain to a criminal, quasi-criminal or administrative matter. Those categories encompass the kinds of anti-fraud and anti-corruption investigations undertaken by the committee. The records are compiled by the committee in order to investigate matter prohibited by state law and administrative rule."); *State ex rel. McGee v. Ohio St. Bd. of Psychology*, 49 Ohio St.3d 59, 60 (1990) ("The reference in R.C. 149.43(A)(2) to four types of law enforcement matters – criminal, quasi-criminal, civil, and administrative – evidences a clear statutory intention to include investigative activities of state licensing boards."); *State ex rel. Oriana House, Inc. v. Montgomery*, 2005-Ohio-3377, ¶ 76 (10th Dist.) (the special audit by the Auditor of State clearly qualifies as both a "law enforcement matter of a […] civil, or administrative nature" and a "law enforcement matter of a criminal [or] quasi-criminal matter").

[583] *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51 (1990); *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59 (1990).

[584] *State ex rel. Freedom Commc'n, Inc. v. Elida Cmty. Fire Co.*, 82 Ohio St.3d 578, 581, 1998-Ohio-411; *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142, 1995-Ohio-248 (polygraph test results, questionnaires, and all similar materials gathered in the course of a police department's hiring process, are not "law enforcement matters" for purposes of CLEIRs. "Law enforcement matters" refers "directly to the enforcement of the law, and not to employment or personnel matters ancillary to law enforcement matters.").

[585] *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 49.

[586] *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth.*, 78 Ohio St.3d 518, 519, 1997-Ohio-191; *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142, 1995-Ohio-248 (the personal records of police officers reflecting the discipline of police officers are not confidential law enforcement investigatory records excepted from disclosure).

[587] *State ex rel. Oriana House, Inc. v. Montgomery*, 2005-Ohio-3377, ¶ 76 (10th Dist.).

[588] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 1997-Ohio-349 (records of alleged child abuse do not pertain to a law enforcement matter in the hands of county ombudsman office that has no legally mandated enforcement or investigative authority).

office as part of an investigation, the original record kept by the other public office is not covered by the CLEIRs exception.[589]

Step Two: High Probability of Disclosing Certain Information

If an investigative record does pertain to a "law enforcement matter," the CLEIRs exception applies only to the extent that release of the record would create a high probability of disclosing at least one of the following five types of information:[590]

(a) Identity of an Uncharged Suspect in Connection with the Investigated Conduct

An "uncharged suspect" is a person who at some point in the investigatory agency's investigation was believed to have committed a crime or offense,[591] but who has not been arrested[592] or charged[593] for the offense to which the investigative record pertains. The purposes of this exception include: (1) protecting the rights of individuals to be free from unwarranted adverse publicity; and (2) protecting law enforcement investigations from being compromised.[594]

Only the particular information that has a high probability of revealing the identity of an uncharged suspect can be redacted from otherwise non-exempt records prior to the records' release.[595] Where the contents of a particular record in an investigatory file are so "inextricably intertwined" with the suspect's identity that redacting will fail to protect the person's identity in connection with the investigated conduct, that entire record may be withheld.[596] However, the application of this exception to some records in an investigative file does not automatically create a blanket exception covering all other records in an investigative file, and the public office must still release any investigative records that do not individually have a high probability of revealing the uncharged suspect's identity.[597] Note: use of any exception must be conformed to the requirement

[589] *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 51 ("records made in the routine course of public employment before" an investigation began were not confidential law enforcement records); *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 316, 2001-Ohio-193 (a records request of city's public works superintendent for specified street repair records were "unquestionably public records" and "[t]he mere fact that these records might have subsequently become relevant to Dillery's criminal cases did not transform them into records exempt from disclosure."); *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 378, 1996-Ohio-214 (a public record that "subsequently came into the possession and/or control of a prosecutor, other law enforcement officials, or even the grand jury has no significance" because "[o]nce clothed with the public records cloak, the records cannot be defrocked of their status.").

[590] R.C. 149.(A)(2); *State ex rel. Multimedia v. Snowden*, 72 Ohio St.3d 141, 1995-Ohio-248.

[591] *State ex rel. Musial v. City of N. Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, ¶ 23.

[592] *State ex rel. Outlet Commc'n v. Lancaster Police Dep't*, 38 Ohio St.3d 324, 328 (1998) ("it is neither necessary nor controlling to engage in a query as to whether or not a person who has been arrested or issued a citation for minor criminal violations and traffic violations […] has been formally charged. Arrest records and intoxilyzer records which contain the names of persons who have been formally charged with an offense, as well as those who have been arrested and/or issued citations but who have not been formally charged, are not confidential law enforcement investigatory records with the exception of R.C. 149.43(A)(2)(a).") (overruled on other grounds).

[593] *State ex rel. Musial v. City of N. Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, ¶¶ 23-24 (a "charge" is a "formal accusation of an offense as a preliminary step to prosecution" and that a formal accusation of an offense requires a charging instrument, i.e., an indictment, information, or criminal complaint); *see also* Crim. R. 7; *Black's Law Dictionary* 249 (8th ed. 2004); *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 30, 1996-Ohio-228 ("*Master* I"); *State ex rel. Moreland v. City of Dayton*, 67 Ohio St.3d 129, 130 (1993).

[594] *State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340, 343, 1996-Ohio-300 ("*Master* II") (citing "avoidance of subjecting persons to adverse publicity where they may otherwise never have been identified with the matter under investigation" and a law enforcement interest in not "compromising subsequent efforts to reopen and solve inactive cases" as two of the purposes of the uncharged suspect exception).

[595] *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 30, 1996-Ohio-228 ("*Master* I") ("when a government body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question" and "[i]f the court finds that these records contain excepted information, this information must be redacted and any remaining information must be released.") citing *State ex rel. Nat'l Broad. Co. v. City of Cleveland*, 38 Ohio St.3d 79, 85 (1998); *State ex rel. White v. Watson*, 2006-Ohio-5234, ¶ 4 (8th Dist.) ("[t]he government has the duty to disclose public records, including the parts of a record which do not come within an exemption" and therefore, "if only part of a record is exempt, the government may redact the exempt part and release the rest.").

[596] *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 448, 2000-Ohio-214 (the protected identities of uncharged suspects were inextricably intertwined with the investigatory records); *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 60 (1990) (where exempt information is so "intertwined" with the public information as to reveal the exempt information from the context, the record itself, and not just the exempt information, may be withheld).

[597] *State ex rel. Rocker v. Guernsey County Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, ¶¶ 11-15.

that an explanation, including legal authority, must be provided in any response that denies access to records.[598]

The uncharged suspect exception applies even if:

- time has passed since the investigation was closed;[599]
- the suspect has been accurately identified in media coverage;[600] or
- the uncharged suspect is the person requesting the information.[601]

(b) Identity of a Confidential Source

For purposes of the CLEIRs exception, "confidential sources" are those who have been "reasonably promised confidentiality."[602] A promise of confidentiality is considered reasonable if it was made on the basis of the law enforcement investigator's determination that the promise is necessary to obtain the information.[603] Where possible, it is advisable – though not required – that the investigator document the specific reasons why promising confidentiality was necessary to further the investigation.[604] Promises of confidentiality contained in policy statements or given as a matter of course during routine administrative procedures are not "reasonable" promises of confidentiality for purposes of the CLEIRs exception.[605]

This exception exists only to protect the identity of the information source, not the information he or she provides.[606] However, where the contents of a particular record in an investigatory file are so inextricably intertwined with the confidential source's identity that redacting will fail to protect the person's identity in connection with the investigated conduct, the identifying material, or even the entire record may be withheld.[607]

(c) Specific Confidential Investigatory Techniques or Procedures

Specific confidential investigatory techniques or procedures,[608] including sophisticated scientific investigatory techniques or procedures such as forensic laboratory tests and their results, may be redacted pursuant to this exception.[609] One purpose of the exception is to avoid compromising the effectiveness of confidential investigative techniques.[610] Routine investigative techniques are not covered under the exception.[611]

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[598] R.C. 149.43(B)(3); *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 6, 9, 38, 43 (The Supreme Court found that an explanation including legal authority must be provided even where that explanation reveals the otherwise deniable existence of sealed records. The response, "no information available," violated R.C. 149.43(B)(3).).

[599] *State ex rel. Musial v. City of N. Olmsed*, 106 Ohio St.3d 459, 2005-Ohio-5521, ¶¶ 23-24.

[600] *State ex rel. Rocker v. Guernsey County Sheriff's Office*, 126 Ohio St.3d 224, 2010-Ohio-3288, ¶ 10; *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 447, 2000-Ohio-214.

[601] *State ex rel. Musial v. City of N. Olmsted*, 106 Ohio St.3d 459, 2005-Ohio-5521, ¶¶ 17-23.

[602] *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 682, 1996-Ohio-234.

[603] *State ex rel. Toledo Blade Co. v. Telb*, Lucas C.P. No. 90-0324, 50 Ohio Misc.2d 1, 9 (Feb. 8, 1990).

[604] *State ex rel. Toledo Blade Co. v. Telb*, Lucas C.P. No. 90-0324, 50 Ohio Misc.2d 1, 9 (Feb. 8, 1990); *see also State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 156-157, 1993-Ohio-192 (to trigger an exception, a promise of confidentiality or a threat to physical safety need not be within the "four corners" of a document).

[605] *State ex rel. Toledo Blade Co. v. Telb*, Lucas C.P. No. 90-0324, 50 Ohio Misc.2d 1, 9 (Feb. 8, 1990).

[606] *State ex rel. Toledo Blade Co. v. Telb*, Lucas C.P. No. 90-0324, 50 Ohio Misc.2d 1, 9 (Feb. 8, 1990).

[607] *State x rel. Beacon Journal Publ'g Co. v. Kent State Univ.*, 68 Ohio St.3d 40, 44, 1993-Ohio-146 (overruled on other grounds); *State ex rel. Strothers v. McFaul*, 122 Ohio App.3d 327, 332 (8th Dist. 1997).

[608] R.C. 149.43(A)(2)(c); *State ex rel. Walker v. Balraj*, No. 77967 (8th Dist. 2000).

[609] *See State ex rel. Dayton Newspapers, Inc. v. Rauch*, 12 Ohio St.3d 100, 100-101 (1984) (an autopsy report may be exempt as a specific investigatory technique or work product); *superceded by* R.C. 313.10 (final autopsy reports are specifically declared public records); *State ex rel. Lawhorn v. White*, 8th App. No. 63290 (Mar. 7, 1994); *State ex rel. Williams v. City of Cleveland*, 8th App. No. 59571 (Jan. 24, 1991); *State ex rel. Jester v. City of Cleveland*, 8th Dist. No. 56438 (Jan. 17, 1991); *State ex rel. Apanovitch v. City of Cleveland*, 8th Dist. No. 58867 (Feb. 6, 1991). The three preceding cases were affirmed in *State ex rel. Williams v. City of Cleveland*, 64 Ohio St.3d 544, 1992-Ohio-115.

[610] *State ex rel. Broom v. Cleveland*, 8th Dist. No. 59571 (Aug. 27, 1992) (where "the records mention confidential investigatory techniques, the effectiveness of which could be compromised by disclosure" and "[t]o insure the continued effectiveness of these techniques, this court orders such may be done without compromising the confidential technique."); *State ex rel. Toledo Blade Co. v. Toledo*, 6th Dist. No. L-12-1183, 2013-

(d) Investigative Work Product

Statutory Definition: Information, including notes, working papers, memoranda, or similar materials, assembled by law enforcement officials in connection with a probable or pending criminal proceeding is work product under R.C. 149.43(A)(2)(c).[612] These materials may be protected even when they appear in a law enforcement office's files other than the investigative file.[613] "It is difficult to conceive of anything in a prosecutor's file, in a pending criminal matter, that would not be either material compiled in anticipation of a specified criminal proceeding or the personal trial preparation of the prosecutor."[614] However, there are some limits to the items in an investigative file covered by this exception.[615]

Time Limits on Investigatory Work Product Exception: Once a law enforcement matter has commenced, the investigative work product exception applies until the matter has concluded.[616] A law enforcement matter is concluded only when all potential actions, trials, and post-trial proceedings in the matter have ended. Thus, the investigatory work product exception remains available as long as any opportunity exists for direct appeal or post-conviction relief,[617] or habeas corpus proceedings.[618] Even if no suspect has been identified, "once it is evident that a crime has occurred, investigative materials developed are necessarily compiled in anticipation of litigation and so fall squarely within the *Steckman* definition of work product."[619] However, the work product exception is not merely an "ongoing investigation" exception. The investigating agency must be able to show that work product is being assembled in connection with a pending or highly probable criminal proceeding, not merely the possibility of future criminal proceedings.[620]

Where a criminal defendant who is the subject of the records agrees not to pursue appeal or post-conviction relief, the case is considered concluded, even if the time period for appeal or post-conviction relief has not expired.[621]

Not Waived by Criminal Discovery: The work product exception is not waived when a criminal defendant is provided discovery materials as required by law.[622]

Ohio-3094, ¶ 10 (release of a gang territory map created by police department would not reveal any specific confidential investigatory technique, procedure, source of information, or location being surveilled).

[611] *State ex rel. Beacon Journal v. Univ. of Akron*, 64 Ohio St.2d 392, 397 (1980).

[612] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St.3d 54, 56-57, 2011-Ohio-282 citing *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420 (1994).

[613] *State ex rel. Mahajan v. State Medical Bd.*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶¶ 51-52 (investigative work product incidentally contained in chief enforcement attorney's general personnel file).

[614] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 431-432 (1994) (expanding the previous definition of "investigative work product" expressly and dramatically, which had previously limited the term to only those materials that would reveal the investigator's "deliberative and subjective analysis" of a case).

[615] *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 448, 2000-Ohio-214 (certain records, e.g., copies of newspaper articles and statutes, are unquestionably nonexempt and do not become exempt simply because they are placed in an investigative or prosecutorial file); *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 361, 1997-Ohio-273 ("An examination […] reveals the following nonexempt records: The […] indictment, copies of various Revised Code Provisions, newspaper articles, a blank charitable organization registration statement form, the Brotherhood's Yearbook and Buyer's Guide, the transcript of the […] plea hearing, a videotape of television news reports, and a campaign committee finance report filed with the board of elections.").

[616] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420 (1994).

[617] *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 1997-Ohio-273.

[618] *Perry v. Onunwor*, 8th App. No. 78398 (Dec. 7, 2000) ("possibilities for further proceedings and trials [include] federal habeas corpus proceedings").

[619] *State ex rel. Leonard v. White*, 75 Ohio St.3d 516, 518, 1996-Ohio-204.

[620] *State ex rel. Ohio Patrolmen's Ass'n v. City of Cleveland*, 89 Ohio St.3d 440, 446, 2000-Ohio-214.

[621] *State ex rel. Cleveland Police Patrolmen's Ass'n v. City of Cleveland*, 84 Ohio St.3d 310, 311-312, 1999-Ohio-352 (when a defendant signed an affidavit agreeing not to pursue appeal or post-conviction relief, trial preparation and investigatory work product exceptions were inapplicable).

[622] *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 1997-Ohio-271.

(e) Information that Would Endanger Life or Physical Safety if Released

Information that, if released, would endanger the life or physical safety of law enforcement personnel,[623] a crime victim, a witness, or a confidential informant may be redacted before public release of a record.[624] The danger must be self-evident; bare allegations or assumed conclusions that a person's physical safety is threatened are not sufficient reasons to redact information.[625] Alleging that disclosing the information would infringe on a person's privacy does not justify a denial of release under this exception.[626]

Note: Non-expiring Step Two exceptions: When a law enforcement matter has concluded, only the work product exception expires. The courts have expressly or impliedly found that investigatory records which fall under the uncharged suspect,[627] confidential source or witness,[628] confidential investigatory technique,[629] and information threatening physical safety[630] exceptions apply despite the passage of time.

Note: Law Enforcement Records not Covered by the CLEIRs Exception: As noted above, personnel files and other administrative records not pertaining to a law enforcement matter would not be covered by the CLEIRs exception. In addition, the courts have specifically ruled that the following records are not covered:

Offense and Incident Reports: Offense-and-incident reports are form reports in which the law enforcement officer completing the form enters information in the spaces provided.[631] Police offense or incident reports initiate investigations, but are not considered part of the investigation, and are therefore not a "law enforcement matter" covered by the CLEIRs exception.[632] Therefore, none of the information explained in Step Two above can be redacted from an initial incident report.[633] However, if an offense or incident report contains information that is otherwise exempt from disclosure under state or federal law, the exempt information may be redacted.[634] This could include social security numbers, information referred from a children services agency,[635] or other independently applicable exemptions.

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[623] *State ex rel. Cleveland Police Patrolmen's Ass'n v. City of Cleveland*, 122 Ohio App.3d 696 (8th Dist. 1997) (a "Strike Plan" and related records prepared in connection with the possible strike by teachers were not records because their release could endanger the lives of police personnel).

[624] R.C. 149.43(A)(2)(d); *see State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 156, 1993-Ohio-192 (a document does not need to specify within its four corners the promise of confidentiality or threat to physical safety).

[625] *See e.g., State ex rel. Johnson v. City of Cleveland*, 65 Ohio St.3d 331, 333-334 (1992) (overruled on other grounds).

[626] *See e.g., State ex rel. Johnson v. City of Cleveland*, 65 Ohio St.3d 331, 333-334 (1992).

[627] *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 54 (1990) ("One purpose of the exemption in R.C. 149.43(A)(2) is to protect a confidential informant" and "[t]his purpose would be subverted if a record in which the informant's identity is disclosed were deemed subject to disclosure simply because a period of time had elapsed with no enforcement action.").

[628] R.C. 149.43(A)(2)(d); *see State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 156, 1993-Ohio-192 (a document does not need to specify within its four corners the promise of confidentiality or threat to physical safety).

[629] *State ex rel. Broom v. Cleveland*, 8th Dist. No. 59571 (Aug. 27, 1992).

[630] *State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 1993-Ohio-192.

[631] *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609,¶ 13 ("*See, e.g., State ex rel. Beacon Journal Publishing Co. v. Maurer* (2001), 91 Ohio St.3d 54, 2001 Ohio 282, 741 N.E.2d 511 (referring to an "Ohio Uniform Incident Form").").

[632] *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, ¶ 13; *State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 104 Ohio St.3d 339, 2004-Ohio-6557, ¶ 55; *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St.3d 54, 57, 2001-Ohio-282 (noting that it ruled the way it did "despite the risk that the report may disclose the identity of an uncharged suspect").

[633] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St.3d 54, 57, 2001-Ohio-282.

[634] *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, ¶ 13; *State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 104 Ohio St.3d 339, 2004-Ohio-6557, ¶ 55 (explaining that "in *Maurer*, we did not adopt a *per se* rule that all police offense and incident reports are subject to disclosure notwithstanding the applicability of any exemption").

[635] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, ¶¶ 44-45 (information referred from a children services agency as potentially criminal may be redacted from police files, including the incident report, pursuant to R.C. 2151.421(H)).

911 Records: Audio records of 911 calls are not considered to pertain to a "law enforcement matter," or constitute part of an investigation, for the purposes of the CLEIRs exception.[636] Further, the courts have determined that a caller has no reasonable expectation of privacy in matters communicated in a 911 call, and since there is no basis to find a constitutional right of privacy in such calls – even Social Security Numbers may not be redacted.[637] As with other public records, a requester is entitled to access either the audio record, or a paper transcript.[638] However, information concerning telephone numbers, addresses, or names obtained from a 911 database maintained pursuant to R.C. 128.32 may not be disclosed or used for any purpose other than as permitted in that section.[639]

Note: Exceptions other than CLEIRs may apply to documents within a law enforcement investigative file, such as Social Security Numbers, Law Enforcement Automated Data System (LEADS) computerized criminal history documents,[640] and information, data, and statistics gathered or disseminated through the Ohio Law Enforcement Gateway (OHLEG).[641]

Final Note: A public records request for any criminal or juvenile adjudicatory investigation, made by an incarcerated adult or juvenile, must be pre-approved by the sentencing judge.[642] After pre-approval, the request is still subject to any exceptions and defenses that apply to the requested records.

B. Employment Records[643]

Public employee personnel records are generally regarded as public records.[644] However, if any item contained within a personnel file or other employment record[645] is not a "record" of the office, or is subject to an exception, it may be withheld. We recommend that Human Resource officers prepare a list of information and records in the office's personnel files that are subject to withholding, including the explanation and legal authority related to each item. The office can then use this list for prompt and consistent responses to public records requests. A sample list can be found at the end of this chapter.

1. Non-Records

To the extent that any item contained in a personnel file is not a "record," i.e., does not serve to document the organization, operations, etc., of the public office, it is not a public record and need not be disclosed.[646] Based on this reasoning, the Ohio Supreme Court has found that in most instances the home addresses of public employees kept by their employers solely for administrative convenience are not "records" of the office.[647] Although Ohio case law is silent on other specific non-record personnel items, a public office may want to carefully evaluate home and personal cell

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[636] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 10 Ohio St.3d 172, 2005-Ohio-685; *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012-06-122, 2013-Ohio-2270, ¶¶ 15-21 (recording of outbound call by dispatcher initiating following inbound 911 call is not exempt from disclosure either as trial preparation or confidential law enforcement investigatory records)

[637] *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 377, 1996-Ohio-214 (911 tapes at issue had to be released immediately).

[638] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 10 Ohio St.3d 172, 2005-Ohio-685, ¶ 5.

[639] R.C. 128.99 establishes criminal penalties for violation of R.C. 128.32.

[640] O.A.C. 4501:2-10-06(B).

[641] R.C. 109.57(D)(1)(b).

[642] R.C. 149.43(B)(8); see Chapter Two: B.4.a. "Prison Inmates".

[643] The following categories may not include all exceptions (or inclusions) which could apply to every public office's personnel records.

[644] 2007 Ohio Op. Att'y Gen. No. 026; *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 143, 1995-Ohio-248; *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. Mentor*, 89 Ohio St.3d 440, 444, 2000-Ohio-214 (addressing police personnel records).

[645] The term "personnel file" has no single definition in public records law. *See State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 57 (inferring that "records that are the functional equivalent of personnel files exist and are in the custody of the city" where a respondent claimed that no personnel files designated by the respondent existed); *Cwynar v. Jackson Twp. Bd. of Trs.*, 178 Ohio App.3d 345, 2008-Ohio-5011, ¶ 31 (5th Dist.) (finding that, where the appellant requested only the complete personnel file and not the records relating to an individual's employment, that "[i]t is the responsibility of the person making the public records request to identify the records with reasonable clarity.").

[646] *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 367, 2005-Ohio-345; *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188 (1993) ("[t]o the extent that any item contained in a personnel file is not a 'record,' i.e., does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed.").

[647] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2000-Ohio-4384, ¶ 39 (an employee's home address may constitute a "record" when it documents an office policy or practice, as when the employee's work address is also the employee's home address).

phone numbers, emergency contact information, employee banking information, insurance beneficiary designations, personal e-mail address, and other items if they are maintained only for administrative convenience and not to document the formal duties and activities of the office. Non-record items may be redacted from materials which are otherwise records, such as a civil service application form.

2. Names and Dates of Birth of Public Officials and Employees

"Each public office or person responsible for public records shall maintain a database or a list that includes the name and date of birth of all public officials and employees elected to or employed by that public office. The database or list is a public record and shall be made available upon a request made pursuant to section 149.43 of the Revised Code."[648]

3. Resumes and Application Materials

There is no public records exception which generally protects resumes and application materials obtained by public offices in the hiring process.[649] The Ohio Supreme Court has found that the public has "an unquestioned public interest in the qualifications of potential applicants for positions of authority in public employment."[650] For example, when a city board of education used a private search firm to help hire a new treasurer, it was required to disclose the names and resumes of the interviewees.[651] The fact that a public office has promised confidentiality to applicants is irrelevant.[652] A public office's obligation to turn over application materials and resumes extends to records in the sole possession of private search firms used in the hiring process.[653] As with any other category of records, if an exception for home address, Social Security Number, or other specific item applies, it may be used to redact only the protected information.

Application Materials Not "Kept By" a Public Office: Application materials may not be public records if they are not "kept by"[654] the office at the time of the request. In *State ex rel. Cincinnati Enquirer v. Cincinnati Board of Education*, the school board engaged a private search firm to assist in its search for a new superintendent. During the interview process, the school board members reviewed and then returned all application materials and resumes submitted by the candidates. The Enquirer made a public records request for any resumes, documents, etc., related to the superintendent search. Because no copies of the materials had been provided to the board at any time outside the interview setting and had never been "kept," the court denied the writ of mandamus.[655] Keep in mind that this case is limited to a narrow set of facts, including compliance with records retention schedules, in returning such materials.

4. Background Investigations

Background investigations are not subject to any general public records exception,[656] although specific statutes may except defined background investigation materials kept by specific public

[648] R.C. 149.434.
[649] *State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 41; *State ex rel. Gannett v. Shirey*, 78 Ohio St.3d 400, 403, 1997-Ohio-206.
[650] *State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 53 (opponents argued that disclosing these materials would prevent the best candidates from applying); *but see State ex rel. The Plain Dealer Publishing Co. v. Cleveland*, 75 Ohio St.3d 31, 36, 1996-Ohio-379 ("it is not evident that disclosure of resumes of applicants for public offices like police chief necessarily prevents the best qualified candidates from applying.").
[651] *State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311.
[652] *State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 46; *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 403, 1997-Ohio-206.
[653] *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 403, 1997-Ohio-206.
[654] For a discussion on "kept by" *see* Chapter One: C.2. "What 'Kept By' Means."
[655] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 99 Ohio St.3d 2003-Ohio-2260, ¶ 14.
[656] *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. City of Mentor*, 89 Ohio St.3d 440, 445, 2000-Ohio-214, citing *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142-145, 1995-Ohio-248 (addressing all personnel, background, and investigation reports for police recruit class); *Dinkins v. Ohio Div. of State Highway Patrol*, 116 F.R.D. 270, 272 (N.D.Ohio 1987).

offices.[657] However, criminal history "rap sheets" obtained from the federal National Crime Information Center system (NCIC) or through the state Law Enforcement Automated Data System (LEADS) are subject to a number of statutory exceptions.[658]

5. Evaluations and Disciplinary Records

Employee evaluations are not subject to any general public records exception.[659] Likewise, records of disciplinary actions involving an employee are not excepted.[660] Specifically, the CLEIRs exception does not apply to routine office discipline or personnel matters,[661] even when such matters are the subject of an internal investigation within a law enforcement agency.[662]

6. Employee Assistance Program (EAP) Records

Records of the identity, diagnosis, prognosis, or treatment that are maintained of any person in connection with EAP are not public records.[663] Their use and release is strictly limited.

7. Physical Fitness, Psychiatric, and Polygraph Examinations

As used in the Ohio Public Records Act, the term "medical records" is limited to records generated and maintained in the process of medical *treatment* (see "Medical Records" below). Accordingly, records of examinations performed for the purpose of determining fitness for hiring or for continued employment, including physical fitness,[664] psychiatric,[665] and psychological[666] examinations, are not excepted from disclosure as "medical records." Similarly, polygraph, or "lie detector," examinations are not "medical records," nor do they fall under the CLEIRs exception when performed in connection with hiring.[667] Note, though, that a separate exception does apply to "medical information" pertaining to those professionals covered under R.C. 149.43(A)(7)(c).

While fitness for employment records do not fit within the definition of "medical records," they may nonetheless be excepted from disclosure under the so-called "catch all" provision of the Public Records Act as "records the release of which is prohibited by state or federal law."[668] Specifically, the federal Americans With Disabilities Act (ADA) and its implementing regulations[669] permit employers to require employees and applicants to whom they have offered employment to undergo medical examination and/or inquiry into their ability to perform job-related functions.[670]

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[657] *See e.g.*, R.C. 113.041(E) (providing for criminal history checks of employees of the state treasurer); R.C. 109.5721(E) (information of arrest or conviction received by a public office from BCI&I is retained in the applicant fingerprint database); R.C. 2151.86(E) (addressing the results of criminal history checks of children's day care employees); R.C. 3319.39(D) (addressing the results of criminal history check of teachers). Note that statutes may also require dissemination of notice of an employee's or volunteer's conviction. *See e.g.*, R.C. 109.576 (providing for notice of a volunteer's conviction).

[658] R.C. 109.57(D) and (H); O.A.C. 4501:2-10-06(B); 42 U.S.C. § 3789g; 28 C.F.R. § 20.33(a)(3); *In the Matter of: C.C.*, 2008-Ohio-6776, ¶¶ 8-10 (11th Dist.) (providing that there are three different analyses of the interplay between Juv. R. 37 (juvenile court records), O.A.C. 4501:2-10-06(B) (LEADS records and BMV statutes); *Patrolman X v. Toledo*, Lucas C.P. No CI94-2884, 132 Ohio App.3d 381, 389 (Apr. 22, 1996); *State ex rel. Nat'l Broadcasting Co. v. Cleveland*, 82 Ohio App.3d 202, 206-207 (8th Dist. 1992); *Ingraham v. Ribar*, 80 Ohio App.3d 29, 33-34 (9th Dist. 1992); 1994 Ohio Op Att'y Gen. No. 046.

[659] *State ex rel. Medina County Gazette v. City of Brunswick*, 109 Ohio App.3d 661, 664 (9th Dist. 1996).

[660] *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 49.

[661] *State ex rel. Freedom Commc'n, Inc. v. Elida Cmty. Fire Co.*, 82 Ohio St.3d 578, 581-582, 1998-Ohio-411 (an investigation of an alleged sexual assault conducted internally as a personnel matter is not a law enforcement matter).

[662] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 142, 1995-Ohio-248 (personnel records of police officers reflecting the discipline of police officers are not confidential law enforcement investigatory records excepted from disclosure).

[663] R.C. 124.88(B).

[664] *State ex rel. Ohio Patrolmen's Benevolent Ass'n v. Lucas County Sheriff's Office*, 2007-Ohio-101, ¶ 16 (7th Dist.) (a "fitness for duty evaluation" did not constitute "medical records").

[665] *State of Ohio v. Hall*, 141 Ohio App.3d 561, 568, 2001-Ohio-4059 (4th Dist.) (psychiatric reports compiled solely to assist the court with "competency to stand trial determination" were not medical records).

[666] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 143, 1995-Ohio-248 (a police psychologist report obtained to assist the police hiring process is not a medical record).

[667] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 143, 1995-Ohio-248, citing *State ex rel. Lorain Journal v. City of Lorain*, 87 Ohio App.3d 112 (9th Dist. 1993).

[668] R.C. 149.43(A)(1)(v).

[669] 42 U.S.C. § 12112; 29 C.F.R. §§ 1630.14(b)(1), (c)(1).

[670] 29 CFR 1630.14(c); *See also State ex rel. Mahajan v. State Med. Bd. of Ohio*, 127 Ohio St.3d 497, 2010-Ohio-5995, ¶ 44, 47 (employer's questioning of court reporter and opposing counsel was properly redacted as inquiry into whether employee was able to perform job-related

Information regarding medical condition or history must be collected and kept on separate forms and in separate medical files, and must be treated as confidential, except as otherwise provided by the ADA. As non-public records, the examinations may constitute "confidential personal information" under Ohio's Personal Information Systems Act.[671]

8. Medical Records

"Medical records" are not public records,[672] and a public office may withhold any medical records in a personnel file. "Medical records" are those generated and maintained in the process of medical treatment.[673] Note that the federal Health Insurance Portability and Accountability Act (HIPAA),[674] does not apply to records in employer personnel files, but that the federal Family and Medical Leave Act (FMLA),[675] or the Americans With Disabilities Act (ADA)[676] may apply to medical-related information in personnel files.

9. School Records

Education records, which include but are not limited to school transcripts, attendance records, and discipline records, that are directly related to a student and maintained by the educational institution, as well as personally identifiable information from education records, are generally protected from disclosure by the school itself through the federal Family Educational Rights and Privacy Act (FERPA). However, when a student or former student directly provides such records to a public office they are not protected by FERPA[677] and are considered public records.

10. Social Security Numbers and Taxpayer Records

Social Security Numbers (SSNs) should be redacted before the disclosure of public records.[678] The Ohio Supreme Court has held that although the Federal Privacy Act (5 U.S.C. §552a) does not expressly prohibit release of one's SSN, the Act does create an expectation of privacy as to the use and disclosure of the SSN. Ohio statutes or administrative code may provide other exceptions for SSNs for specific employees[679] or in particular locations,[680] and/or upon request.[681]

Information obtained from municipal tax returns is confidential.[682] One Attorney General Opinion found that W-2 federal tax forms prepared and maintained by a township as an employer are public records. However, W-2 forms filed as part of a municipal income tax return are confidential.[683] W-4 forms are confidential pursuant to 26 U.S.C. 6103(b)(2)(A) as "return information," which includes "data with respect to the determination of the existence of liability (or the amount thereof) of any person for any tax." The term "return information" is interpreted broadly to include any

functions, as pertinent ADA provision does not limit the confidential nature of such inquiries to questions directed to employees or medical personnel).

[671] R.C. 1347.15(A)(1).

[672] R.C. 149.43(A)(1)(a), (A)(3).

[673] R.C. 149.43(A)(3) (extends to "any document […] that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment"); *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 1997-Ohio-349 (emphasizing that both parts of this conjuctive definition must be met in order to fall under the medical records exception: "a record must pertain to a medical diagnosis and be generated and maintained in the process of medical treatment").

[674] *See* 45 C.F.R. §§ 160 *et seq.*; 45 C.F.R. §§ 164 *et seq.*

[675] *See* 29 U.S.C. §§ 2601 *et seq.*; 29 C.F.R. § 825.500(g).

[676] *See* 42 U.S.C. §§ 12101 *et seq.*

[677] 20 U.S.C. § 1232g; *See* Chapter Three: G.6. "Student Records."

[678] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St.3d 605, 612, 1994-Ohio-6 (noting that there is a "high potential for fraud and victimization caused by the unchecked release of city employee SSNs"); *see also* Chapter Three: G.5. "Social Security Numbers."

[679] *See e.g.*, R.C. 149.43(A)(1)(p), (7)(c) (protecting residential and familial information of certain covered professionals); *see also* R.C. 149.45(D)(1).

[680] R.C. 149.45(B)(1) (providing that no public office or person responsible for a public office's public records shall make available to the general public on the internet any document that contains an individual's SSN without otherwise redacting, encrypting, or truncating the SSN).

[681] R.C. 149.45(C)(1) (providing that an individual may request that a public office or a person responsible for a public office's public records redact personal information of that individual from any record made available to the general public on the internet).

[682] R.C. 718.13; *see also Reno v. City of Centerville*, 2004-Ohio-781 (2nd Dist.).

[683] 1992 Ohio Op. Att'y Gen. No. 005.

information gathered by the IRS with respect to a taxpayer's liability under the Internal Revenue Code.[684]

With respect to Ohio income tax records, any information gained as the result of returns, investigations, hearings, or verifications required or authorized by R.C. Chapter 5747 is confidential.[685]

11. Residential and Familial Information of Listed Safety Officers

As detailed elsewhere in this manual, the residential and familial information[686] of certain listed public employees may be withheld from disclosure.[687]

12. Bargaining Agreement Provisions

Courts have held that collective bargaining agreements concerning the confidentiality of records cannot prevail over the Public Records Act. For example, a union may not legally bar the production of available public records through a provision in a collective bargaining agreement.[688]

13. Statutes Specific to a Particular Agency's Employees

Statutes may protect particular information or records concerning specific public offices, or particular employees[689] within one or more agencies.[690]

[684] *See McQueen v. United States*, 264 F. Supp.2d 502, 516 (S.D. Tex. 2003), aff'd, 100 F. App'x 964 (5th Cir. 2004); *LaRouche v. Dep't of Treasury*, 112 F. Supp.2d 48, 54 (D.D.C. 2000) ("return information is defined broadly").
[685] R.C. 5747.18(C).
[686] R.C. 149.43(A)(7); Chapter Six: C. "Residential and Familial Information of Covered Professions that are not Public Records."
[687] R.C. 149.43(A)(1)(p).
[688] *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 40-43, 2000-Ohio-8 (the FOP could not legally bar the production of available public records through a records disposition provision in a collective bargaining agreement); *State ex rel. Dispatch Printing Co. v. Wells*, 18 Ohio St.3d 382, 384 (1995).
[689] E.g., R.C. 149.43(A)(7) (Covered Professionals' Residential and Familial Information); R.C. 149.43(A)(7)(g) (photograph of a peace officer who works undercover or plainclothes assignments).
[690] E.g., R.C. 2151.142 (providing for confidentiality of residential address of public children services agency or private child placing agency personnel).

Personnel Files*

Items from personnel files that are subject to release with appropriate redaction

- Payroll records ♦ Timesheets ♦ Employment application forms ♦ Resumes
- Training course certificates ♦ Position descriptions ♦ Performance evaluations
- Leave conversion forms ♦ Letters of support or complaint
- Forms documenting receipt of office policies, directives, etc.
- Forms documenting hiring, promotions, job classification changes, separation, etc.
- Background checks, other than LEADS throughput, NCIC and CCH
- Disciplinary investigation/action records, unless exempt from disclosure by law

Items from personnel files that may or must be withheld

- Social Security Numbers (based on the federal Privacy Act: 5 USC § 552a) (*State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 70 Ohio St.3d 605, 612, 1994-Ohio-6)
- Public employee home addresses, generally (as non-record)
- Residential and familial information of a peace office, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, or BCI&I investigator, other than residence address of prosecutor (See R.C. 149.43(A)(1)(p))
- Charitable deductions and employment benefit deductions such as health insurance (as non-records)
- Beneficiary information (as non-record)
- Federal tax returns and "return information" filed under the jurisdiction of the IRS (26 USC § 6103)
- Personal history information of state retirement contributors (R.C. 145.27(A); R.C. 742.41(B); R.C. 3307.20(B); R.C. 3309.22; R.C. 5505.04(C))
- Taxpayer records maintained by Ohio Dept. of Taxation and by municipal corporations (R.C. 5703.21; R.C. 718.13)
- "Medical records" that are generated and maintained in the process of medical treatment (R.C. 149.43(A)(1)(a) and (A)(3))
- LEADS, NCIC, or CCH criminal record information (42 USC § 3789g; 28 CFR § 20.21, § 20.33(a)(3); R.C. 109.57(D) & (E); OAC 109:05-1-01; OAC 4501:2-10-06)

** These lists are not exhaustive, but are intended as a starting point for each public office in compiling lists appropriate to its employee records.*

C. Residential and Familial Information of Covered Professions that are not Public Records[691]

Residential and Familial Information Defined:[692] The "residential and familial information" of peace officers,[693] parole officers, probation officers, bailiffs, prosecuting attorneys, assistant prosecuting attorneys,[694] correctional employees,[695] community-based correctional facility employee, youth services employees,[696] firefighters,[697] or emergency medical technicians (EMTs),[698] and investigators of the Bureau of Criminal Identification and Investigation is excepted from mandatory disclosure under the Ohio Public Records Act.[699] "Residential and familial information" means any information that discloses any of the following about individuals in the listed employment categories (see following chart):

Information that is not Public Record (*Peace Officer, Parole Officer, Probation Officer, Bailiff, Prosecuting Attorney, Assistant Prosecuting Attorney, Correctional Employee, Youth Services Employee, Firefighter, EMT or investigator of the Bureau of Criminal Identification and Investigation[700])	
Residential	♦ Address of the covered employee's actual personal residence, except for state or political subdivision; residential phone number, and emergency phone number[701] ♦ Residential address, residential phone number, and emergency phone number of the spouse, former spouse, or child of a covered employee[702]
Medical	♦ Any information of a covered employee that is compiled from referral to or participation in an employee assistance program[703] ♦ Any medical information of a covered employee[704]

[691] Individuals in these covered professions can also request to have certain information redacted, or prohibit its disclosure. For additional discussion, *see* Chapter Three: F.2. "Personal Information Listed Online."

[692] For purposes of this section, "covered professions" is the term used to describe all of the persons covered under the residential and familial exception (i.e., peace officer, firefighter, etc.).

[693] R.C. 149.43(A)(7); For purposes of this statute, "peace officer" has the same meaning as in R.C. 109.71 and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff, R.C. 149.43(A)(7)(g).

[694] *State ex rel. Bardwell v. Rocky River Police Dept.*, 2009-Ohio-727, ¶¶ 31-46 (8th Dist.) (the home address of an elected law director who at times serves as a prosecutor is not a public record, pursuant to R.C. 149.43(A)(1)(p) in conjunction with (7)(a)).

[695] R.C. 149.43(A)(7)(g) ("As used in divisions (A)(7) and (B)(5) of this section, 'correctional employee' means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.").

[696] R.C. 149.43(A)(7)(g) ("As used in divisions (A)(7) and (B)(5) of this section, 'youth services employee' means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.").

[697] R.C. 149.43(A)(7)(g) ("As used in divisions (A)(7) and (B)(9) of this section, 'firefighter' means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.").

[698] R.C. 149.43(A)(7)(g) ("As used in divisions (A)(7) and (B)(9) of this section, 'EMT' means EMTs-basic, EMTs-I, and paramedic that provide emergency medical services for a public emergency medical service organization. 'Emergency medical service organization,' 'EMT-basic,' 'EMT-I,' and 'paramedic' have the same meanings as in section 4765.01 of the Revised Code.").

[699] R.C. 149.43(A)(1)(p), (A)(7); For discussion of application by public offices, *see* 2000 Ohio Op. Att'y Gen. No. 21.

[700] R.C. 2151.142(B) and (C) (providing that, in additional to the "covered professions" listed above, certain residential addresses of employees of a public children services agency or private child placing agency and that employee's family members are exempt from disclosure).

[701] R.C. 149.43(A)(7)(a), and (c). Because prosecuting attorneys are elected officials, the actual personal residential address of elected prosecuting attorneys is not excepted from disclosure (some published versions of Chapter 149 incorrectly include prosecuting attorneys in R.C. 149.43(A)(7)(a)).

[702] R.C. 149.43(A)(7)(f).

[703] R.C. 149.43(A)(7)(b).

[704] R.C. 149.43(A)(7)(c).

Employment	♦ The name of any beneficiary of employment benefits of a covered employee, including, but not limited to, life insurance benefits[705] ♦ The identity and amount of any charitable or employment benefit deduction of a covered employee[706] ♦ A photograph of a peace officer who holds a position that may include undercover or plain clothes positions or assignments[707]
Personal	The information below, which is not a public record, applies to both a covered employee and spouse, former spouse, or children ♦ Social Security Number[708] ♦ Account numbers of bank accounts and debit, charge, and credit cards[709] The information below, which is not a public record, applies to only a covered employee's spouse, former spouse, or children ♦ Name, residential address, name of employer, address of employer[710]

D. Court Records

Although records kept by the courts of Ohio meet the definition of public records under the Ohio Public Records Act, most court records are subject to additional rules concerning access.

1. Courts' Supervisory Power over their Own Records

Ohio courts[711] are subject to the Rules of Superintendence for the Courts of Ohio,[712] adopted by the Supreme Court of Ohio. The Rules of Superintendence establish rights and duties regarding court case documents and administrative documents, starting with the statement that "[c]ourt records are presumed open to public access."[713] Sup. R. 45(A). While similar to the Ohio Public Records Act, the Rules of Superintendence contain some additional or different provisions, including language:

- Allowing courts to adopt a policy limiting the number of records they will release per month unless the requester certifies that there is no intended commercial use. Sup. R. 45(B)(3).
- For Internet records, allowing courts to announce that a large attachment or exhibit was not scanned but is available by direct access. Sup. R. 45(C)(1).
- Establishing definitions of "court record," "case document," "administrative document," "case file," and other terms. Sup. R. 44(A) through (M).

[705] R.C. 149.43(A)(7)(d).
[706] R.C. 149.43(A)(7)(e).
[707] R.C. 149.43(A)(7)(g).
[708] R.C. 149.43(A)(7)(f).
[709] R.C. 149.43(A)(7)(f).
[710] R.C. 149.43(A)(7)(f).
[711] Sup. R. 1(B) (defining county courts, municipal courts, courts of common pleas, and courts of appeals).
[712] Rules of Superintendence for the Courts of Ohio are cited as "Sup. R. n."
[713] *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶¶ 24-27 (Rules of Superintendence do not require that a document be used by court in a decision to be entitled to presumption of public access specified in Sup.R. 45(A). The document must merely by "submitted to a court or filed with a clerk of court in a judicial action or proceeding" and not be subject to exclusions specified in Rule.).

- A process for the sealing of part or all of any case document, including a process for any person to request access to a case document or information that has been granted limited public access. Sup. R. 45(F).[714]
- Requiring that documents filed with the court omit or redact personal identifiers that might contribute to identity theft. The personal identifiers would instead be submitted on a separate standard form submitted only to the court, clerk of courts, and parties. Sup. R. 45(D).[715]

(This is a partial list – see Sup. Rules 44-47 for all provisions.)

The provisions of Rules 44 through 47 of the Rules of Superintendence apply to all court administrative documents, but only apply to court case documents in actions commenced on or after the effective date of the rule.[716] The Rules of Superintendence for the Courts of Ohio are currently available online at:
http://www.sconet.state.oh.us/LegalResources/Rules/superintendence/Superintendence.pdf.

2. Rules of Court Procedure

Rules of Procedure, which are also adopted through the Ohio Supreme Court, can create exceptions to public record disclosure.[717] Examples include certain records related to grand jury proceedings,[718] and most juvenile court records.[719]

3. Sealing Statutes

Where court records have been properly expunged or sealed, they are not available for public disclosure.[720] However, when a responsive record is sealed, the public office must provide the explanation for withholding, including the legal authority under which the record was sealed.[721] Even absent statutory authority, trial courts have the inherent authority to seal court records in unusual and exceptional circumstances.[722] When exercising this authority, however, courts should balance the individual's privacy interest against the government's legitimate need to provide public access to records of criminal proceedings.[723]

4. Non-Records

As with any public office, courts are not obligated to provide documents that are not "records" of the court. Examples include a judge's handwritten notes,[724] completed juror questionnaires,[725] Social Security Numbers in certain court records,[726] and unsolicited letters sent to a judge.[727]

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[714] *State ex rel. Cincinnati Enquirer v. Hunter*, 1st Dist. No. C-130072, 2013-Ohio-4459, ¶ 12 (Rules of Superintendence do not permit a court to substitute initials for the full names of juveniles in delinquency cases).
[715] Effective September 1, 2011, the Ohio Supreme Court adopted a new probate form to comply with Sup. R. 45(D).
[716] Sup. R. 47(A); Sup. R. 99; *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, fn. 2.
[717] *State ex rel. Beacon Journal v. Waters*, 67 Ohio St.3d 321, 323, 1993-Ohio-77.
[718] Ohio R. Crim. Pro. 6(E); *State ex rel. Beacon Journal v. Waters*, 67 Ohio St.3d 321, 323-325, 1993-Ohio-77.
[719] Ohio R. Juv. Pro. 37(B).
[720] R.C. 2953.41, et seq. (conviction of first-time offenders); R.C. 2953.51, et seq. (findings of not guilty, or dismissal); *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶¶ 12-13 ("*Winkler* III") (affirming the trial court's sealing order per R.C. 2953.52); *Dream Fields, LLC v. Bogart*, 175 Ohio App.3d 165, 2008-Ohio-152, ¶ 3 (1st Dist.) ("Unless a court record contains information that is excluded from being a public record under R.C. 149.43, it shall not be sealed and shall be available for public inspection. And the party wishing to seal the record has the duty to show that a statutory exclusion applies […] [j]ust because the parties have agreed that they want the records sealed is not enough to justify the sealing.").
[721] *State ex rel. Doe v. Smith*, 123 Ohio St.3d 44, 2009-Ohio-4149, ¶¶ 6, 9, 28, 43 (response, "There is no information available," was a violation of R.C. 149.43(B)(3) requirement to provide a sufficient explanation, with legal authority, for the denial).
[722] *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981); *but see State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, ¶ 1 (divorce records are not properly sealed when the order results from "unwritten and informal court policy").
[723] *Pepper Pike v. Doe*, 66 Ohio St.2d 374 (1981), paragraph two of the syllabus.
[724] *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 439-441, 1993-Ohio-32 ("A trial judge's personal handwritten notes made during the course of a trial are not public records.").
[725] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 25 (the personal information of jurors used only to verify identification, not to determine competency to serve on the jury, such as SSNs, telephone numbers, and driver's license numbers may be redacted).

5. General Court Records Retention

See Sup. R. 26 governing Court Records Management and Retention, and the following Rules setting records retention schedules for each type of court: Sup. R. 26.01 through Sup. R. 26.05.

Other Case Law Prior to Rules of Superintendence

Constitutional Right of Access: Based on constitutional principles, and separate from the public records statute, Ohio common law grants the public a presumptive right to inspect and copy court records.[728] Both the United States and the Ohio Constitutions create a qualified right[729] of public access to court proceedings that have historically been open to the public and in which the public's access plays a significantly positive role.[730] This qualified right includes access to the live proceedings, as well as to the records of the proceedings.[731]

Even where proceedings are not historically public, the Ohio Supreme Court has determined that "any restriction shielding court records from public scrutiny should be narrowly tailored to serve the competing interests of protecting the individual's privacy without unduly burdening the public's right of access."[732] This high standard exists because the purpose of this common-law right "is to promote understanding of the legal system and to assure public confidence in the courts."[733] But, the constitutional right of public access is not absolute, and courts have traditionally exercised "supervisory power over their own records and files."[734]

Unless otherwise superseded, the Public Records Act applies to court records.[735] Once an otherwise non-public document is filed with the court (such as pretrial discovery material), that document becomes a public record when it becomes part of the court record.[736]

However, in circumstances where the release of the court records would prejudice the rights of the parties in an ongoing criminal or civil proceeding, a narrow exception to public access exists.[737] Under such circumstances, the court may impose a protective order prohibiting release of the records.[738]

Constitutional Access and Statutory Access Compared: The Ohio Supreme Court has distinguished between *public records* access and *constitutional* access to jurors' names, home addresses, and other personal information in their responses to written juror questionnaires.[739]

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[726] *State ex rel. Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 18 (SSNs in court records do not "shed light on any government activity").
[727] *State ex rel. Beacon Journal Publ'g Co. v. Whitmore*, 83 Ohio St.3d 61, 62-64, 1998-Ohio-180 (where a judge read unsolicited letters but did not rely on them in sentencing, the letters did not serve to document any activity of the public office and were not "records").
[728] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117; *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶¶ 2-7 ("*Winkler* III") (citations omitted); *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Ct. of Common Pleas*, 73 Ohio St.3d 19, 22 (1995).
[729] *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶ 9 ("*Winkler* III") ("The right, however, is not absolute.").
[730] *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St.3d 19, 20 (1995), citing *In re. T.R.*, 52 Ohio St.3d 6 (1990), at paragraph two of the syllabus; *Press-Enterprise Co. v. Superior Ct.*, 478 U.S. 1 (1986) ("*Press-Enterprise* II").
[731] *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581 ("*Winkler* III"); *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St.3d 19, 21 (1995) (citations omitted).
[732] *State ex rel. Cincinnati Enquirer v. Winkler*, 149 Ohio App.3d 350, 354, 2002-Ohio-4803 (1st Dist.) ("*Winkler* I") citing *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio App.3d 19, 21 (1995).
[733] *State ex rel. Cincinnati Enquirer v. Winkler*, 149 Ohio App.3d 350, 354, 2002-Ohio-4803 (1st Dist.) ("*Winkler* I").
[734] *State ex rel. Cincinnati Enquirer v. Winkler*, 149 Ohio App.3d 350, 354-355, 2002-Ohio-4803 (1st Dist.) ("*Winkler* I").
[735] *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St.3d 382, 2004-Ohio-1581, ¶ 5 ("*Winkler* III") ("It is apparent that court records fall within the broad definition of 'public record.'").
[736] *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 730 (1st Dist. 2001).
[737] *State ex rel. Vindicator Printing Co. v. Wolff*, 132 Ohio St.3d 481, 2012-Ohio-3328, ¶ 34 (there must be clear and convincing evidence of the prejudicial effect of pretrial publicity sufficient to prevent Defendant from receiving a fair trial in order to overcome the presumptive right of access under Sup.R. 45(A)); *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 137-139 (1993) (prohibiting disclosure of pretrial court records prejudicing rights of criminal defendant) (overruled on other grounds); *also see State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, ¶¶ 9-22 (a pending appeal from a court order unsealing divorce records does not preclude a writ of mandamus claim); *State ex rel. Cincinnati Enquirer v. Sage*, 12th Dist. No. CA2012-06-122, 2013-Ohio-2270, ¶¶ 28-33 (protective order did not satisfy criteria for closure because there was no evidence that any disclosure of call recording would endanger right to a fair trial).
[738] *State ex rel. Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App.3d 725, 730 (1st Dist. 2001) (a trial judge was required to determine whether the release of records would jeopardize the defendant's right to a fair trial).
[739] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117.

While such information is not a "public record,"[740] it is presumed to be subject to public disclosure based on constitutional principles.[741] The Court explained that the personal information of these private citizens is not "public record" because it does nothing to "shed light" on the operations of the court.[742] However, there is a constitutional presumption that this information will be publicly accessible in criminal proceedings.[743] As a result, the jurors' personal information will be publicly accessible unless there is an "overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[744]

Nevertheless, the Ohio Supreme Court also concluded, in a unanimous decision, that Social Security Numbers contained in criminal case files are appropriately redacted before public disclosure.[745] According to the Court, permitting the court clerk to redact SSNs before disclosing court records "does not contravene the purpose of the Public Records Act, which is 'to expose government activity to public scrutiny.' Revealing individuals' Social Security Numbers that are contained in criminal records does not shed light on any government activity."[746]

E. HIPAA & HITECH

Regulations implementing the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") became fully effective in April 2003. Among the regulations written to implement HIPAA was the "Privacy Rule," which is a collection of federal regulations seeking to maintain the confidentiality of individually identifiable health information.[747] For some public offices, the Privacy Rule and HITECH[748] affect the manner in which they respond to public records requests. Recent amendments to HIPAA and HITECH are reflected in the *Federal Register* publication, "Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules," 78 Fed. Reg. 5565 (Jan. 25, 2013) (codified at 45 C.F.R. §§ 160 and 164).

1. HIPAA Definitions

The Privacy Rule protects all individually identifiable health information, which is called "protected health information" or "PHI."[749] PHI is information that could reasonably lead to the identification of an individual, either by itself or in combination with other reasonably available information.[750] The HIPAA regulations apply to the three "covered entities"[751] listed below:

- **Healthcare provider**: Generally, a "healthcare provider" is any entity providing mental or health services that electronically transmits individually identifiable health information for any financial or administrative purpose subject to HIPAA.
- **A health plan**: A "health plan" is an individual or group plan that provides or pays the cost of medical care, such as an HMO.

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[740] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 1 syllabus (juror names, addresses, and questionnaire responses are not "public records" because the information does not shed light on the court's operations).
[741] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 2 syllabus (the First Amendment qualified right of access extends to juror names, addresses, and questionnaire responses).
[742] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117 citing *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 2000-Ohio-345; *see also State ex rel. Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, ¶ 18 (SSNs in court records do not "shed light on any governmental activity").
[743] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117.
[744] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, ¶ 2 syllabus quoting *Press-Enterprise Co. v. Superior Court* (1984), 464 U.S. 501, 510 (internal citations omitted); *see also* 2004 Ohio Op. Att'y Gen. No. 045 (restricting public access to information in a criminal case file may be accomplished only where concealment "is essential to preserve higher values and is narrowly tailored to serve an overriding interest").
[745] *State ex rel. Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662.
[746] *State ex rel. Montgomery County Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662.
[747] 45 C.F.R. §§ 160 *et seq.*; 45 C.F.R. §§ 164 *et seq.*
[748] Health Information Technology Economic Clinical Health Act, Public Law No. 111-5, Division A, Title XIII, Subtitle D (2009).
[749] 45 C.F.R. § 160.103.
[750] 45 C.F.R. § 160.103.
[751] 45 C.F.R. § 160.103.

- **Healthcare clearinghouse**: A "healthcare clearinghouse" is any entity that processes health information from one format into another for particular purposes, such as a billing service.

Legal counsel should be consulted if there is uncertainty about whether or not a particular public office is a "covered entity" or "business associate" of a covered entity for purposes of HIPAA.

2. HIPAA Does Not Apply Where Ohio Public Records Act Requires Release

The Privacy Rule permits a covered entity to use and disclose protected health information as required by other law, including state law.[752] Thus, where state public records law mandates that a covered entity disclose protected health information, the covered entity is permitted by the Privacy Rule to make the disclosure, provided the disclosure complies with and is limited to the relevant requirements of the public records law.[753] For this purpose, note that the Ohio Public Records Act only mandates disclosure when no other exception applies.

So, where the public records law only permits, and does not mandate, the disclosure of protected health information – where exceptions or other qualifications apply to exempt the protected health information from the state's law disclosure requirement – then such disclosures are not "required by law" and would not fall within the Privacy Rule. For example, if state public records law includes an exception that gives a state agency discretion not to disclose medical[754] or other information, the disclosure of such records is not required by the public records law, and therefore the Privacy Rule would cover those records.[755] In such cases, a covered entity only would be able to make the disclosure if permitted by another provision of the Privacy Rule. The Supreme Court of Ohio has held that HIPPA did not supersede state disclosure requirements, even if requested records contained protected health information. Specifically, the Court found that "[a] review of HIPAA reveals a 'required by law' exception to the prohibition against disclosure of protected health information. With respect to this position, Section 164.512(a)(1), Title 45 C.F.R., provides, 'A covered entity may * * * disclose protected health information to the extent that such * * * disclosure is *required* by law * * *.'" (Emphasis added). However, the Ohio Public Records Act requires disclosure of records unless the disclosure or release is prohibited by federal law. R.C. 149.43(A)(1)(v).[756] While the Court found the interaction of the federal and state law somewhat circular, the Court resolved it in favor of disclosure under the Ohio Public Records Act.[757]

Additional Resources:

The HITECH Act of 2009, effective on February 17, 2010, materially affects the privacy and security of PHI. A number of resources are available on the Internet about HITECH legislation. See **www.hhs.gov/ocr/privacy/hipaa/understanding/special/healthit/index.html**, **www.hipaasurvivalguide.com**, and Modifications to the HIPAA Privacy, Security, Enforcement, and Breach Notification Rules, 78 Fed. Reg. 5565 (Jan. 25, 2013) (codified at 45 C.F.R. §§ 160 and 164).

F. Ohio Personal Information Systems Act[758]

Ohio's Personal Information Systems Act (PISA) applies to those items to which the Ohio Public Records Act does not apply; that is, records that have been determined to be non-public, and items and information that are not "records" as defined by the Ohio Public Records Act.[759] The General Assembly

[752] 45 C.F.R. § 164.512(a).
[753] 65 C.F.R. § 82485; *see* **http://www.hhs.gov/hipaafaq/permitted/require/506.html**.
[754] E.g. R.C. 149.43(A)(1)(a) (providing for an exception for state "medical records").
[755] 45 C.F.R. § 164.512(a).
[756] *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, ¶ 25.
[757] *State ex rel. Cincinnati Enquirer v. Daniels*, 108 Ohio St.3d 518, 2006-Ohio-1215, ¶¶ 26, 34.
[758] R.C. Chapter 1347.
[759] R.C. 149.011(G).

has made clear that PISA is not designed to deprive the public of otherwise public information by incorporating the following provisions with respect to the Ohio Public Records and Open Meetings Acts:

- "The provisions of this chapter shall not be construed to prohibit the release of public records, or the disclosure of personal information in public records, as defined in [the Ohio Public Records Act], or to authorize a public body to hold an executive session for the discussion of personal information if the executive session is not authorized under division (G) of [the Ohio Open Meetings Act]."[760]

- "The disclosure to members of the general public of personal information contained in a public record, as defined in section 149.43 of the Revised Code, is not an improper use of personal information under this chapter."[761]

- As used in the Personal Information Systems Act, "'confidential personal information' means personal information that is **not** a public record for purposes of [the Ohio Public Records Act]."[762]

The following definitions apply to the non-records and non-public records that are covered by PISA:

"Personal information" means any information that:

- Describes anything about a person; **or**
- Indicates actions done by or to a person; **or**
- Indicates that a person possesses certain personal characteristics; **and**
- Contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person.[763]

"Confidential personal information" means personal information that is <u>not</u> a public record for purposes of section 149.43 of the Revised Code.[764]

A personal information "system" is:

- Any collection or group of related records that are kept in an organized manner and maintained by a state or local agency; **and**
- From which personal information is retrieved by the name of the person or by some identifying number, symbol, or other identifier assigned to the person; **including**
- Records that are stored manually and electronically.[765]

The following are not "systems" for purposes of PISA:

- Collected archival records in the custody of or administered under the authority of the Ohio Historical Society;
- Published directories, reference materials or newsletter; or
- Routine information that is maintained for the purpose of internal office administration, the use of which would not adversely affect a person.[766]

[760] R.C. 1347.04(B).
[761] R.C. 1347.04(B).
[762] R.C. 1347.15(A)(1).
[763] R.C. 1347.01(E).
[764] R.C. 1347.15(A)(1).
[765] R.C. 1347.01(F).

PISA generally requires accurate maintenance and prompt deletion of unnecessary personal information from "personal information systems" maintained by public offices, and protects personal information from unauthorized dissemination.[767] Based on provisions added to the law in 2009, state agencies[768] must adopt rules under Chapter 119 of the Revised Code regulating access to confidential personal information the agency keeps, whether electronically or on paper.[769] No person shall knowingly access "confidential personal information" in violation of these rules,[770] and no person shall knowingly use or disclose "confidential personal information" in a manner prohibited by law.[771] A state agency may not employ persons who have violated access, use, or disclosure laws regarding confidential personal information.[772] In general, state and local agencies must "[t]ake reasonable precautions to protect personal information in the system from unauthorized modification, destruction, use, or disclosure."[773]

Sanctions for Violations of PISA

The enforcement provisions of PISA can include injunctive relief, civil damages, and/or criminal penalties, depending on the nature of the violation(s).[774]

Note: Because PISA concerns the treatment of non-records and non-public records, it is not set out in great detail in this Sunshine Law Manual. Public offices can find more detailed guidance on implementing the provision of PISA concerning limitations on access to confidential personal information at **http://privacy.ohio.gov/government.aspx**, under the heading "ORC 1347.15 Guidance." Public offices should also consult with their legal counsel.

[766] R.C. 1347.01(F).
[767] R.C. 1347.01 *et seq.*
[768] R.C. 1347.15(A)(2); 2010 Ohio Op. Att'y Gen. No. 016 (Ohio Bd. of Tax Appeals is a "judicial agency" for purposes of R.C. 1347.15).
[769] R.C. 1347.15(B).
[770] R.C. 1347.15(H)(1).
[771] R.C. 1347.15(H)(2).
[772] R.C. 1347.15(H)(3).
[773] R.C. 1347.15(G
[774] R.C. 1347.10, 1347.15, and 1347.99.

The Ohio Open Meetings Act

Overview of the Ohio Open Meetings Act

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.

Executive sessions are closed-door sessions convened by a public body, after a roll call vote, and attended by only the members of the public body and persons they invite. A public body may hold an executive session only for a few specific purposes, detailed below in Chapter III. Further, no vote or other decision-making on the matter(s) discussed may take place during the executive session.

If any person believes that a public body has violated the Open Meetings Act, that person may file an injunctive action in the common pleas court to compel the public body to obey the Act. If an injunction is issued, the public body must correct its actions and pay court costs, a fine of $500, and reasonable attorney fees subject to possible reduction by the court. If the court does not issue an injunction, and the court finds the lawsuit was frivolous, it may order the person who filed the suit to pay the public body's court costs and reasonable attorney fees. Any action taken by a public body while that body is in violation of the Open Meetings Act is invalid. A member of a public body who violates an injunction imposed for a violation of the Open Meetings Act may be subject to removal from office.

Like the Public Records Act, the Open Meetings Act is intended to be read broadly in favor of openness. However, while they share an underlying intent, the terms and definitions in the two laws are not interchangeable: the Public Records Act applies to the *records of public offices*; the Open Meetings Act addresses *meetings of public bodies*.[775]

A Note about Case Law

When the Ohio Supreme Court issues a decision interpreting a statute, that decision must be followed by all lower Ohio courts. Ohio Supreme Court decisions involving the Public Records Act are plentiful because a person may file a public records petition at any level of the judicial system, and often will choose to file in the Court of Appeals, or directly with the Ohio Supreme Court. By contrast, a complaint to enforce the Ohio 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 Ohio Open Meetings Act comes from courts of appeals, whose opinions are binding only on lower courts within their district, but may be cited for the persuasive value of their reasoning in cases filed in other districts.

[775] "[The Ohio Supreme Court has] never expressly held that once an entity qualifies as a public body for purposes of R.C. 121.22, it is also a public office for purposes of R.C. 149.011(A) and 149.43 so as to make all of its nonexempt records subject to disclosure. In fact, R.C. 121.22 suggests otherwise because it contains separate definitions for 'public body,' R.C. 121.22(B)(1), and 'public office,' R.C. 121.22(B)(4), which provides that '[p]ublic office' has the same meaning as in section 149.011 of the Revised Code.' Had the General Assembly intended that a 'public body' for the purposes of R.C. 121.22 be considered a 'public office' for purposes of R.C. 149.911(A) and 149.43, it would have so provided." *State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm'rs*, 128 Ohio St.3d 256, 2011-Ohio-625, ¶ 38.

I. Chapter One: "Public Body" and "Meeting" Defined

Only a "public body" is required to comply with the Open Meetings Act and conduct its business in open "meetings." The Open Meetings Act defines a "meeting" as any prearranged gathering of a public body by a majority of its members to discuss public business.[776]

A. "Public Body"

1. Statutory Definition – R.C. 121.22(B)(1)

The Open Meetings Act defines a "public body" as:

a. 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;[777]

b. Any committee or subcommittee thereof;[778] or

c. A court[779] of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for the purpose of the appointment, removal, or reappointment of a member of the board of directors of such a district or for any other matter related to such a district other than litigation involving the district.[780]

2. Identifying Public Bodies

The term "public body" applies to many different decision-making bodies at the state and local level. Where it is unclear, Ohio courts have applied several factors in determining what constitutes a "public body" for purposes of the Ohio Open Meetings Act, including:

a. The manner in which the entity was created;[781]

b. The name or official title of the entity;[782]

c. The membership composition of the entity;[783]

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[776] R.C. 121.22(B)(2).

[777] R.C. 121.22(B)(1)(a).

[778] R.C. 121.22(B)(1)(b); *State ex rel. Long v Council of Cardington*, 92 Ohio St.3d 54, 58-59, 2001-Ohio-130 (providing that "R.C. 121.22(B)(1)(b) includes any committee or subcommittee of a legislative authority of a political subdivision, e.g., a village council, as a 'public body' for purposes of the Sunshine Law, so that the council's personnel and finance committees constitute public bodies in that context.").

[779] With the exception of sanitary courts, the definition of "public body" does not include courts. *See Walker v. Muskingum Watershed Conservancy Dist.*, 2008-Ohio-4060, ¶ 27 (5th Dist.).

[780] R.C. 121.22(B)(1)(c). NOTE: R.C. 121.22(G) prohibits executive sessions for public bodies defined in R.C. 121.22(B)(1)(c).

[781] *Beacon Journal Publ'g Co. v. Akron*, 3 Ohio St.2d 191 (1965) (boards and commissions created by law (e.g., ordinance or statute) are controlled by the provisions of that enactment in the conduct of their meetings; however, those created by executive order of individual officials are not); *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472, 2001-Ohio-8751 (10th Dist.) (noting that the fact that the Selection Committee was established by the committee without formal action is immaterial and that the Open Meetings Act is not intended to allow a public body to informally establish committees that are not subject to the law). Compare *State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm'rs*, 128 Ohio St.3d 256, 2011-Ohio-625 (groups formed by private entities to provide community input, to which no government duties or authority have been delegated, were found not to be "public bodies").

[782] *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472, 2001-Ohio-8751 (10th Dist.) (determining that a Selection Committee was a "public body" and noting that it was relevant that the entity was called a "committee," a term included in the definition of a "public body" in R.C. 121.22); *Stegall v. Joint Twp. Dist. Mem'l Hosp.*, 20 Ohio App.3d 100, 103 (3d Dist. 1985) (considering it pertinent whether an entity is one of those listed in R.C. 121.22(B)(1)).

[783] *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472, 2001-Ohio-8751 (10th Dist.) (finding it relevant that a majority of the Selection Committee's members were commissioners of the commission itself).

d. Whether the entity engages in decision-making;[784] and

e. Whom the entity advises or to whom it reports.[785]

3. Close-up: Applying the Definition of "Public Body"

Using the above factors, the following types of entities have been found by some courts of appeals to be public bodies:

a. A selection committee established on a temporary basis by a state agency for the purpose of evaluating responses to a request for proposals and making a recommendation to a commission.[786]

b. An urban design review board that provided advice and recommendations to a city manager and city council about land development.[787]

c. A board of hospital governors of a joint township district hospital.[788]

d. A citizens' advisory committee of a county children services board.[789]

e. A board of directors of a county agricultural society.[790]

Courts have found that the Open Meetings Act does not apply to individual public *officials* (as opposed to public *bodies*) or to meetings held by individual officials.[791] Moreover, if an individual public official creates a group solely pursuant to his or her executive authority or as a delegation of that authority, the Open Meetings Act probably does not apply to the group's gatherings.[792]

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[784] *Thomas v. White*, 85 Ohio App.3d 410, 412 (9th Dist. 1992) (determining that tasks such as making recommendations and advising involve decision-making); *Cincinnati Enquirer v. Cincinnati*, 145 Ohio App.3d 335, 339 (1st Dist. 2001) (determining whether an urban design review board, a group of architectural consultants for the city, had ultimate authority to decide matters was not controlling; as the board actually made decisions in the process of formulating its advice); *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472, 2001-Ohio-8751 (10th Dist.) (determining that, in its role of reviewing and evaluating proposals and making a recommendation to the Ohio Rail Development Commission, the Selection Committee made decisions).

[785] *Cincinnati Enquirer v. Cincinnati*, 145 Ohio App.3d 335, 339 (1st Dist. 2001) (finding that an urban design review board advised not only the city manager, but also the city council, a public body).

[786] *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472, 2001-Ohio-8751 (10th Dist.) (finding it relevant that the group was called a "committee," a term included in the definition of a "public body" in R.C. 121.22, and that a majority of the Selection Committee's members were commissioners of the commission itself; in its role of reviewing and evaluating proposals and making a recommendation to the Ohio Rail Development Commission (a public body), the Selection Committee made decisions; the fact that the Selection Committee was established by the committee without formal action is immaterial).

[787] *Cincinnati Enquirer v. Cincinnati*, 145 Ohio App.3d 335, 339 (1st Dist. 2001) (determining that whether an urban design review board, a group of architectural consultants for the city, had ultimate authority to decide matters was not controlling, as the board actually made decisions in the process of formulating its advice; the board advised not only the city manager, but also the city council, a public body).

[788] *Stegall v. Joint Twp. Dist. Mem. Hosp.*, 20 Ohio App.3d 100, 102-103 (3d Dist. 1985) (finding that the Board of Governors of a joint township hospital fell within the definition of "public body" because definition includes "boards"; further, the board made decisions essential to the construction and equipping of a general hospital and the board was of a "township" or of a "local public institution" because it existed by virtue of authority granted by the legislature for the creation of joint township hospital facilities).

[789] *Thomas v. White*, 85 Ohio App.3d 410, 412 (9th Dist. 1992) (the committee was a public body because the subject matter of the committee's operations is the public business, and each of its duties involves decisions as to what will be done; moreover, the committee by law elects a chairman who serves as an *ex officio* voting member of the children services board, which involves decision-making).

[790] 1992 Ohio Op. Att'y Gen. No. 078 (opining that the board of directors of a county agricultural society is a public body subject to the open meetings requirements of R.C. 121.22); *see also Greene County Agric. Soc'y v. Liming*, 89 Ohio St.3d 551, 2000-Ohio-486, at syllabus (deeming a county agricultural society to be a political subdivision pursuant to R.C. 2744.01(F)).

[791] *Smith v. City of Cleveland*, 94 Ohio App.3d 780, 784-785 (8th Dist. 1994) (finding that a city safety director is not a public body, and may conduct disciplinary hearings without complying with the Open Meetings Act).

[792] *Beacon Journal Publ'g Co. v. Akron*, 3 Ohio St.2d 191 (1965) (finding that boards, commissions, committees, etc., created by executive order of the mayor and chief administrator without the advice and consent of city council were not subject to the Open Meetings Act); *eFunds v. Ohio Dept. of Job & Family Serv.*, Franklin C.P. No. 05CVH09-10276 (Mar. 6, 2006) (finding that an "evaluation committee" of government employees under the authority of a state agency administrator is not a public body); 1994 Ohio Op. Att'y Gen. No. 096 (when a committee of private citizens and various public officers or employees is established solely pursuant to the executive authority of the administrator of a general health district for the purpose of providing advice pertaining to the administration of a grant, and establishment of the committee is not required or authorized by the grant or board action, such a committee is not a public body for purposes of R.C. 121.22(B)(1) and is not subject to the requirements of the open meetings law).

However, at least one court has determined that a selection committee whose members were appointed by the chair of a public body, not by formal action of the body, is nevertheless itself a public body and subject to the Open Meetings Act.[793]

4. When the Open Meetings Act Applies to Private Bodies

Some otherwise private bodies are considered "public bodies" for purposes of the Open Meetings Act when they are organized pursuant to state statute and are statutorily authorized to receive and expend government funds for a governmental purpose.[794] For example, an Equal Opportunity Planning Association was found to be a public body within the meaning of the Act based on (1) its designation by the Ohio Department of Development as a community action organization pursuant to statute;[795] (2) its responsibility for spending substantial sums of public funds in the operation of programs for the state welfare; and (3) its obligation to comply with state statutory provisions in order to keep its status as a community action organization.[796]

B. Entities to Which the Open Meetings Act Does Not Apply

1. Public Bodies / Officials that are NEVER Subject to the Open Meetings Act:[797]

- The Ohio General Assembly;[798]
- Grand juries;[799]
- An audit conference conducted by the State Auditor or independent certified public accountants with officials of the public office that is the subject of the audit;[800]
- The Organized Crime Investigations Commission;[801]
- Child fatality review boards;[802]
- The board of directors of JobsOhio Corp., or any committee thereof, and the board of directors of any subsidiary of JobsOhio Corp., or any committee thereof;[803] and
- An audit conference conducted by the audit staff of the Department of Job and Family Services with officials of the public office that is the subject of that audit under R.C 5101.37.[804]

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[793] *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 472, 2001-Ohio-8741 (10th Dist.) (noting that the Chairman of the Rail Commission appointed members to the Selection Committee).
[794] *State ex rel. Toledo Blade Co. v. Econ. Opportunity Planning Ass'n*, 61 Ohio Misc.2d 63 (C.P. Lucas 1990); *see also Stegall v. Joint Twp. Dist. Mem'l Hosp.*, 20 Ohio App.3d 100 (3d Dist. 1985).
[795] R.C. 122.69.
[796] *State ex rel. Toledo Blade Co. v. Econ. Opportunity Planning Ass'n*, 61 Ohio Misc.2d 631, 640-641 (C.P. Lucas 1990) (finding that the association is a public body subject to the Ohio Open Meetings Act: "The language of the statute and its role in the organization of public affairs in Ohio make clear that this language is to be given a broad interpretation to ensure that the official business of the state is conducted openly," and "Consistent with that critical objective, a governmental decision-making body cannot assign its decisions to a nominally private body in order to shield those decisions from public scrutiny.").
[797] R.C. 121.22(D).
[798] While the General Assembly as a whole is not governed by the Open Meetings Act, legislative committees are required to follow the guidelines set forth in the General Assembly's own open meetings law (R.C. 101.15), which requires committee meetings to be open to the public and that minutes of those meetings be made available for public inspection. Like the Open Meetings Act, the legislature's open meetings law includes some exceptions. For example, the law does not apply to meetings of the Joint Legislative Ethics Committee other than those meetings specified in the law (R.C. 101.15(F)(1)), or to meetings of a political party caucus (R.C. 101.15(F)(2)).
[799] R.C. 121.22(D)(1).
[800] R.C. 121.22(D)(2).
[801] R.C. 121.22(D)(4).
[802] R.C. 121.22(D)(5).
[803] R.C. 121.22(D)(11).
[804] R.C. 121.22(D)(12).

2. Public Bodies that are SOMETIMES Subject to the Open Meetings Act:

a. Public Bodies Meeting for Particular Purposes

Some otherwise public bodies are not subject to the Open Meetings Act when they meet for particular purposes. Those are:

- The Adult Parole Authority, when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine pardon or parole;[805]
- The State Medical Board,[806] the State Board of Nursing,[807] the State Board of Pharmacy,[808] and the State Chiropractic Board,[809] when determining whether to suspend a certificate without a prior hearing;[810] and
- The Emergency Response Commission's executive committee, when meeting to determine whether to issue an enforcement order or to decide whether to litigate.[811]
- The Occupational Therapy Section, Physical Therapy Section, and Athletic Trainers Section of the Occupational Therapy, Physical Therapy, and Athletic Trainers Board, when determining whether to suspend a license or limited permit without a hearing.[812]

b. Public Bodies Handling Particular Business

The following public bodies, when meeting to consider "whether to grant assistance for purposes of community or economic development," may close their meetings by *unanimous* vote of the members present in order to protect the interest of the applicant or the possible investment of public funds:[813]

- The Controlling Board;
- The Development Financing Advisory Council;
- The Tax Credit Authority; and
- The Minority Development Financing Advisory Board.

The meetings of these bodies may only be closed "during consideration of the following information received . . . from the applicant:"

- Marketing plans;
- Specific business strategy;
- Production techniques and trade secrets;
- Financial projections; and

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[805] R.C. 121.22(D)(3).
[806] R.C. 4730.25(G); R.C. 4731.22(G).
[807] R.C. 4723.281(B).
[808] R.C. 4729.16(D).
[809] R.C. 4734.37.
[810] R.C. 121.22(D)(6)-(9).
[811] R.C. 121.22(D)(10).
[812] R.C. 121.22(D)(13)-(15); R.C. 4755.11; R.C. 4755.47; R.C. 4755.64.
[813] R.C. 121.22(E).

- Personal financial statements of the applicant or family, including, but not limited to, tax records or other similar information not open to public inspection.[814]

The board of directors of a community improvement corporation, when acting as an agent of a political subdivision, may close a meeting by *majority* vote of members present during consideration of specified, non-public record information set out in R.C. 1724.11(A).[815]

C. "Meeting"

1. Definition

The Open Meetings Act applies to members of a public body when they are taking official action, conducting deliberations, or discussing the public's business, which they must do in an open meeting, unless the subject matter is specifically excepted by law.[816] The Act defines a "meeting" as: (1) a prearranged gathering of (2) a majority of the members of a public body (3) for the purpose of discussing public business.[817]

a. Prearranged

The Open Meetings Act addresses prearranged discussions,[818] but does not prohibit impromptu encounters between members of public bodies, such as hallway discussions. One court has found that an unsolicited and unexpected e-mail sent from one board member to other board members is clearly not a prearranged meeting; nor is a spontaneous one-on-one telephone conversation between two members of a five member board.[819]

b. Majority of Members

For there to be a "meeting" as defined under the Open Meetings Act, "a majority of a public body's members must come together."[820] The term "majority" applies not only to the entire body, but also to any committee or subcommittee of that body.[821] For instance, if a council is comprised of seven members, four would constitute a majority in determining whether the council as a whole is a "meeting." However, if the council appoints a three-member finance committee, two of those members would constitute a majority of the finance committee.

1) Attending in Person

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,[822] unless a specific law permits otherwise.[823] In the absence of statutory authority, public bodies may not meet via electronic or telephonic conferencing.[824]

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[814] R.C. 121.22(E)(1)-(5).
[815] R.C. 1724.11(B)(1) (The board, committee, or subcommittee shall consider no other information during the closed session).
[816] R.C. 121.22(A), (C).
[817] R.C. 121.22(B)(2).
[818] *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 1996-Ohio-372 (holding that the back-to-back, prearranged discussions of city council members constitutes a "majority," but clarifying that the statute does not prohibit impromptu meetings between council members or prearranged member-to-member discussion, but concerns itself only with situations where a majority meets).
[819] *Haverkos v. Nw. Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489, ¶ 7 (1st Dist.).
[820] *Berner v. Woods*, 2007-Ohio-6207, ¶ 17 (9th Dist.); *Tyler v. Vill. of Batavia*, 2010-Ohio-4078, ¶ 18 (12th Dist.) (No "meeting" occurred when only two of five Commission members attended a previously scheduled session).
[821] *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 58-59, 2001-Ohio-130.
[822] R.C. 121.22(C).
[823] For example, the General Assembly has specifically authorized the Ohio Board of Regents to meet via videoconferencing. R.C. 333.02. R.C. 3316.05(K) also permits members of a school district Financial Planning and Supervision Commission to attend a meeting by teleconference if provisions are made for public attendance at any location involved in such teleconference.
[824] *See Haverkos v. Nw. Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-3489, ¶ 9 (1st Dist.) (The court noted that during a 2002 revision of the open meetings law, the legislature did not amend the statute to include "electronic communication" in the definition of a "meeting." According to the court, this omission indicates the legislature's intent not to include e-mail exchanges as potential "meetings.").

2) Round-robin or Serial "Meetings"

Unless two members constitutes a majority, isolated one-on-one conversations between individual members of a public body regarding its business, either in person or by telephone, do not violate the Ohio Open Meetings Act.[825] However, a public body may not "circumvent the requirements of the Act by setting up back-to-back meetings of less than a majority of its members, with the same topics of public business discussed at each." Such conversations may be considered multiple parts of the same, improperly private, "meeting."[826]

c. Discussing Public Business

With narrow exceptions, the Ohio Open Meetings Act requires the members of a public body to discuss and deliberate on official business only in open meetings.[827] "Discussion" is the exchange of words, comments, or ideas by the members of a public body.[828] "Deliberation" means the act of weighing and examining reasons for and against a choice.[829] One court has described "deliberation" as a thorough discussion of all factors involved, a careful weighing of positive and negative factors, and a cautious consideration of the ramifications of the proposal, while gradually arriving at a decision.[830] Another court described the term as involving "a decisional analysis, i.e., an exchange of views on the facts in an attempt to reach a decision."[831]

In evaluating whether particular gatherings of public officials constituted "meetings," several courts of appeals have opined that the Open Meetings Act "is intended to apply to situations where there has been actual formal action taken; to wit, formal *deliberation* concerning the public business."[832] Under this analysis, those courts have determined that gatherings strictly of an investigative and information-seeking nature that do not involve actual discussion or deliberation of public business are not "meetings" for purposes of the Open Meetings Act.[833] More importantly, the Ohio Supreme Court has not ruled as to whether "investigative and informational" gatherings are or are not "meetings." Consequently, public bodies should seek guidance from their legal counsel about how such gatherings are viewed by the court of appeals in their district, before convening this kind of private gathering as other than a regular or special meeting.

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[825] *State ex rel. Cincinnati Post v. City of* Cincinnati, 76 Ohio St.3d 540, 544, 1996-Ohio-372 ("[The statute] does not prohibit member-to-member prearranged discussions."); *Haverkos v. Nw. Local Sch. Dist. Bd. of Educ.*, 2005-Ohio-2489, ¶ 9 (1st Dist.) (finding that a spontaneous telephone call from one board member to another to discuss election politics, not school board business, did not violate the Open Meetings Act); *Master v. City of Canton*, 62 Ohio App.2d 174, 178 (5th Dist. 1978) (agreeing that the legislature did not intend to prohibit one committee member from calling another to discuss public business).

[826] *See generally State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 542-544, 1996-Ohio-372 (the very purpose of the Open Meetings Act is to prevent such a game of "musical chairs" in which elected officials contrive to meet secretly to deliberate on public issues without accountability to the public); *State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, ¶ 16-17, 43 (pre-meeting decision of school board president and superintendent to narrow field of applicants was prohibited and invalid), citing to *Floyd v. Rock Hill Local School Bd. of Educ.*, 4th Dist. No. 1862 (Feb. 10, 1988) **4, 13-16 (school board president improperly discussed and deliberated dismissal of principal with other board members in multiple one-on-one conversations, and came to next meeting with letter of non-renewal ready for superintendent to deliver to principal, which the board then, without discussion, voted to approve); *Wilkins v. Harrisburg*, 10th Dist. No. 12AP-1046, 2013-Ohio-2751 (June 27, 2013) (finding that two presentations were not serial meetings where the gatherings were separated by two months, the presentations were discussed at regularly scheduled meetings, and a regularly scheduled meeting was held between the two presentations).

[827] R.C. 121.22(A); R.C. 121.22(B)(2).

[828] *Devere v. Miami Univ. Bd. of Trs.*, 12th Dist. No. CA85-05-065 (June 10, 1986).

[829] *Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees*, 106 Ohio App.3d 855, 864 (9th Dist. 1998).

[830] *Theile v. Harris*, No. C-860103 (1st Dist. 1986).

[831] *Piekutowski v. South Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App.3d 372, 379, 2005-Ohio-2868 (4th Dist.).

[832] *Holeski v. Lawrence*, 85 Ohio App.3d 824 (11th Dist. 1993).

[833] *Holeski v. Lawrence*, 85 Ohio App.3d 824, 829 (11th Dist. 1993) (where the majority of members of a public body meet at a prearranged gathering in a "ministerial, fact-gathering capacity," the third characteristic of a meeting is not satisfied – i.e., there are no discussions or deliberations occurring in which case, no open meeting is required); *Theile v. Harris*, No. C-860103 (1st Dist. 1986) (a prearranged discussion between prosecutor and majority of board was not violation where conducted for investigative and information-seeking purposes); *Piekutowski v. S. Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App.3d 372, 379, 2005-Ohio-2868, ¶¶ 14-18 (4th Dist.) (it is permissible for a board to gather information on proposed school district in private, but it cannot deliberate privately in the absence of specifically authorized purposes); *State ex rel. Chrisman v. Clearcreek Twp.*, 12th Dist. No. CA2012-08-076, 2013-Ohio-2396 (Jun. 10, 2013) (while information-gathering and fact finding meetings for ministerial purposes do not violate the Open Meetings Act, whether or not a township's pre-meeting meetings violated the Open Meetings Act was a question of fact where there was conflicting testimony about whether the meetings were prearranged, what the purpose of the meeting was, and whether deliberations took place).

Those courts that have distinguished between "discussions" or "deliberations" that must take place in public, and other exchanges between a majority of its members at a prearranged gathering, have opined that the following are not "meetings" subject to the Open Meetings Act:

- Question-and-answer sessions between board members and others who were not public officials, unless a majority of the board members also entertain a discussion of public business with one another;[834]
- Conversations between employees of a public body;[835]
- A presentation to a public body by its legal counsel when the public body receives legal advice;[836] or
- A press conference.[837]

2. Close-up: Applying the Definition of "Meeting"

If a gathering meets all three elements of this definition, a court will consider it a "meeting" for the purposes of the Open Meetings Act, regardless of whether the public body initiated the gathering itself, or whether it was initiated by another entity. Further, if majorities of multiple public bodies attend one large meeting, a court may construe the gathering of each public body's majority of members to be separate "meetings" of each public body.[838]

a. Work Sessions

A "meeting" by any other name is still a meeting. "Work retreats" or "workshops" are "meetings" when a public body discusses public business among a majority of the members of a public body at a prearranged time.[839] Just as with any other meeting, the public body must open these work sessions to the public, properly notify the public, and maintain meeting minutes.[840]

b. Quasi-judicial Proceedings

Public bodies whose responsibilities include adjudicative duties, such as boards of tax appeals and state professional licensing boards, are considered "quasi-judicial." The Ohio Supreme Court has determined that public bodies conducting quasi-judicial hearings, "like all judicial bodies, [require] privacy to deliberate, i.e., to evaluate and resolve the disputes."[841] Quasi-judicial proceedings and the deliberations of public bodies when acting in their quasi-judicial capacities are not "meetings," and are not subject to the Open Meetings Act.[842] Accordingly,

[834] *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 192 Ohio App.3d 566, 2011-Ohio-703 (1st Dist.) (in the absence of deliberations or discussions by board members during a nonpublic information-gathering and investigative session with legal counsel, the session was not a "meeting" as defined by the Open Meetings Act, and thus was not required to be held in public); *Holeski v. Lawrence*, 85 Ohio App.3d 824, 830 (11th Dist. 1993) ("The Sunshine Law is instead intended to prohibit the majority of a board from meeting and discussing public business with one another.").
[835] *Kandell v. City Council of Kent*, 11th Dist. No. 90-P-2255 (Aug. 2, 1991); *State ex rel. Bd. of Educ. for Fairfiew Park Sch. Dist. v. Bd. of Educ. for Rocky River Sch. Dist.*, 40 Ohio St.3d 136, 140 (1988) (determining that an employee's discussions with a superintendent did not amount to secret deliberations within the meaning of R.C. 121.22(H)).
[836] *Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 192 Ohio App.3d 566, 2011-Ohio-703 (1st Dist.); *Theile v. Harris*, No. C-860103 (1st Dist. 1986).
[837] *Holeski v. Lawrence*, 85 Ohio App.3d 824 (11th Dist. 1993).
[838] *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990).
[839] *State ex rel. Singh v. Schoenfeld*, Nos. 92AP-188, 92AP-193 (10th Dist. 1993).
[840] *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990).
[841] *TBC Westlake v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 62, 1998-Ohio-445.
[842] *TBC Westlake v. Hamilton County Bd. of Revision*, 81 Ohio St.3d 58, 62, 1998-Ohio-445 ("[T]he Sunshine Law does not apply to adjudications of disputes in quasi-judicial proceedings, such as the [Board of Tax Appeals]."); *State ex rel. Ross v. Crawford County Bd. of Elections*, 125 Ohio St.3d 438, 445, 2010-Ohio-2167; *See also Walker v. Muskingum Watershed Conservancy Dist.*, 2008-Ohio-4060 (5th Dist.); *Angerman v. State Med. Bd. of Ohio*, 70 Ohio App.3d 346, 352 (10th Dist. 1990).

when a public body is acting in its quasi-judicial capacity, the public body does not have to vote publicly to adjourn for deliberations or to take action following those deliberations.[843]

c. County Political Party Central Committees

The convening of a county political party central committee for the purpose of conducting purely internal party affairs, unrelated to the committee's duties of making appointments to vacated public offices, is not a "meeting" as defined by R.C. 121.22(B)(2). Thus, R.C. 121.22 does not apply to such a gathering.[844]

d. Collective Bargaining

Collective bargaining meetings between public employers and employee organizations are private, and are not subject to the Open Meetings Act.[845]

[843] *State ex rel. Ross v. Crawford County Bd. of Elections*, 125 Ohio St.3d 438, 445, 2010-Ohio-2167 (finding that because R.C. 121.22 did not apply to the elections board's quasi-judicial proceeding, the board neither abused its discretion nor clearly disregarded the Open Meetings Act by failing to publicly vote on whether to adjourn the public hearing to deliberate and by failing to publicly vote on the matters at issue following deliberations); *In re Application for Additional Use of Property v. Allen Twp. Zoning Bd. of Appeals*, 6th Dist. No. OT-12-008, ¶ 15 (Mar. 1, 2013) (board of zoning appeals was acting in quasi-judicial function in reviewing applications for conditional use); *Beachland Ents., Inc. v. Cleveland Bd. of Review*, 8th Dist. No. 99770, 2013-Ohio-5385, ¶¶ 44-46 (Dec. 19, 2013) (board of review was acting in quasi-judicial capacity in adjudicating tax dispute between the city commissioner of assessments and licenses and the taxpayer).

[844] 1980 Ohio Op. Att'y Gen. No. 083.

[845] R.C. 4117.21; *see also Springfield Local Sch. Dist. Bd. of Educ. v. Ohio Ass'n of Pub. Sch. Employees*, 106 Ohio App.3d 855, 869 (9th Dist. 1995) (R.C. 4117.21 manifests a legislative interest in protecting the privacy of the collective bargaining process); *Back v. Madison Local Sch. Dist. Bd. of Educ.*, 2007-Ohio-4218, ¶¶ 6-10 (12th Dist.) (school board's consideration of a proposed collective bargaining agreement with the school district's teachers was properly held in a closed session because the meeting was not an executive session but was a "collective bargaining meeting," which, under RC. 4117.21, was exempt from the open meeting requirements of R.C. 121.22).

II. Chapter Two: Duties of a Public Body

The Open Meetings Act requires public bodies to provide: (A) openness; (B) notice; and (C) minutes.

A. Openness

The Open Meetings Act declares all meetings of a public body to be public meetings open to the public at all times.[846] The General Assembly mandates that the Act be liberally construed to require that public officials take official action and "conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."[847]

1. Where Meetings May be Held

A public body must conduct its meetings in a venue that is open to the public.[848] Although the Open Meetings Act does not specifically address where a public body must hold meetings, some authority suggests that a public body must hold meetings in a public meeting place[849] that is within the geographical jurisdiction of the public body.[850] Clearly, a meeting is not "open" where the public body has locked the doors to the meeting facility.[851]

Where space in the facility is too limited to accommodate all interested members of the public, closed circuit television may be an acceptable alternative.[852] Federal law requires that a meeting place be accessible to individuals with disabilities;[853] however, violation of this requirement has no ramifications under the Open Meetings Act.

2. Method of Voting

Unless a particular statute requires a specified method of voting, the public cannot insist on a particular form of voting. The body may use its own discretion in determining the method it will use, such as voice vote, show of hands, or roll call.[854] The Open Meetings Act only defines a method of voting when a public body is adjourning into executive session (vote must be by roll call).[855] The Act does not specifically address the use of secret ballots; however, the Ohio Attorney General has opined that a public body may not vote in an open meeting by secret ballot.[856] Voting by secret ballot contradicts the openness requirement of the Open Meetings Act by hiding the decision-making process from public view.

3. Right to Hear, but Not to be Heard or to Disrupt

Openness requires that the public be permitted to attend and observe all meetings of any public body.[857] A court found that members of a public body who whispered audibly and passed

[846] R.C. 121.22(C).
[847] R.C. 121.22(A).
[848] R.C. 121.22(C). *State ex rel. Randles v. Hill*, 66 Ohio St.3d 32, 35 (1993) (locking the doors to the meeting hall, whether or not intentional, is not an excuse for failing to comply with the requirement that meetings be held open to the public); *Paridon v. Trumbull Cty. Children Servs. Bd.*, 2013-Ohio-881, ¶ 22 (11th Dist.) (noting that a public body may place limitations on the time, place, and manner of access to its meetings, as long as the restrictions are content-neutral and narrowly tailored to serve a significant governmental interest).
[849] *Crist v. True*, 39 Ohio App.2d 11 (12th Dist. 1972); 1992 Ohio Op. Att'y Gen. No. 032.
[850] 1944 Ohio Op. Att'y Gen. No. 7038; 1992 Ohio Op. Att'y Gen. No. 032.
[851] *Specht v. Finnegan*, 149 Ohio App.3d 201, 2002-Ohio-4660 , ¶¶ 33-35 (6th Dist.).
[852] *Wyse v. Rupp*, No. F-94-19 (6th Dist. 1995) (finding that the Ohio Turnpike Commission dealt with the large crowd in a reasonable and impartial manner).
[853] 42 U.S.C. § 12101 (Americans with Disabilities Act of 1990, P.L. §§ 201-202).
[854] *But see State ex rel. Roberts v. Snyder*, 149 Ohio St. 333, 335 (1948) (finding that council was without authority to adopt a conflicting rule where enabling law limited council president's vote to solely in the event of a tie).
[855] R.C. 121.22(G).
[856] 2011 Ohio Op. Att'y Gen. No. 038 (opining that secret ballot voting by a public body is antagonistic to the ability of the citizenry to observe the workings of their government and to hold their government representatives accountable).
[857] R.C. 121.22(C); *Wyse v. Rupp*, 6th Dist. No. F-94-19 (1995); *Cmty. Concerned Citizens v. Union Twp. Bd. of Zoning Appeals*, 12 Dist. No. CA91-01-009 (1991), aff'd 66 Ohio St.3d 452 (1993); *Black v. Mecca Twp. Bd. of Trs.*, 91 Ohio App.3d 351, 356 (11th Dist. 1993) (finding that R.C. 121.22 does not require that a public body provide the public with an opportunity to comment at its meetings, but if public participation is

documents among themselves constructively closed their meeting by intentionally preventing the audience from hearing or knowing the business the body discussed.[858] However, the Open Meetings Act does not provide (or prohibit) attendees the right to be heard at meetings. Further, a disruptive person waives his or her right to attend, and the body may remove that person from the meeting.[859]

4. Audio and Video Recording

A public body cannot prohibit the public from audio or video recording a public meeting.[860] A public body may, however, establish reasonable rules regulating the use of recording equipment, such as requiring equipment to be silent, unobtrusive, self-contained, and self-powered to limit interference with the ability of others to hear, see, and participate in the meeting.[861]

5. Executive Sessions

Executive sessions (discussed below in Chapter III), are an exception to the openness requirement; however, public bodies may not vote or take official action in an executive session.[862]

B. Notice

Every public body must establish, by rule, a reasonable method for notifying the public in advance of its meetings.[863] The requirements for proper notice vary depending upon the type of meeting a public body is conducting, as detailed below.

1. Types of Meetings and Notice Requirements

a. Regular Meetings

"Regular meetings" are those held at prescheduled intervals,[864] such as monthly or annual meetings. A public body must establish, by rule, a reasonable method that allows the public to determine the *time* and *place* of regular meetings.[865]

b. Special Meetings

A "special meeting" is any meeting other than a regular meeting.[866] A public body must establish, by rule, a reasonable method that allows the public to determine the *time*, *place*, and *purpose* of special meetings.[867]

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permitted, it is subject to the protections of the First and Fourteenth Amendments); *Forman v. Blaser*, 3rd Dist. No. 12-87-12 (1988) (R.C. 121.22 guarantees the right to observe a meeting, but not necessarily the right to be heard); 1992 Ohio Op. Att'y Gen. No. 032; *see also* 2007 Ohio Op. Att'y Gen. No. 019; *Paridon v. Trumbull Cty. Children Servs. Bd.*, 2013-Ohio-881, ¶ 29 (11th Dist.) (noting that the anonymity requirement of the Public Records Act does not apply to the Open Meetings Act, the court allowed a sign-in requirement to attend board meetings where the meetings were held in the children services' building and the policy was designed to protect confidential records and the security of children in the board's care).

858 *Manogg v. Stickle*, No. 98CA00102 (5th Dist. 1998).

859 *Forman v. Blaser*, No. 13-87-12 (3d Dist. 1988) ("When an audience becomes so uncontrollable that the public body cannot deliberate, it would seem that the audience waives its right to, or is estopped from claiming a right under the Sunshine Law to continue to observe the proceedings."); *see also Jones v. Heyman*, 888 F.2d 1328, 1333 (11th Cir. 1989) (finding no violation of 1st and 14th Amendments where disruptive person was removed from a public meeting).

860 *McVey v. Carthage Twp. Trs.*, 2005-Ohio-2869, ¶¶ 14-15 (4th Dist.) (trustees violated R.C. 121.22 by banning videotaping).

861 *Kline v. Davis*, 2001-Ohio-2625 (4th Dist.) (blanket prohibition on recording a public meeting not justified); 1988 Ohio Op. Att'y Gen. No. 087 (opining that trustees have authority to adopt reasonable rules for use of recording equipment at their meetings). *See also Mahajan v. State Med. Bd. of Ohio*, 2011-Ohio-6728 (10th Dist.) (where rule allowed board to designate reasonable location for placement of recording equipment, requiring appellant's court reporter to move to the back of the room was reasonable, given the need to transact board business).

862 R.C. 121.22(A); *Mansfield City Council v. Richland City Council AFL-CIO*, No. 03CA55 (5th Dist. 2003) (reaching a consensus to take no action on a pending matter, as reflected by members' comments, is impermissible during an executive session).

863 R.C. 121.22(F).

864 *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990); 1988 Ohio Op. Att'y Gen. No. 029.

865 R.C. 121.22(F). *See also Wyse v. Rupp*, No. F-94-19 (6th Dist. 1995) (a public body must specifically identify the time at which a public meeting will commence).

- Public bodies must provide at least 24 hours advance notification of special meetings to all media outlets that have requested such notification,[868] except in the event of an emergency requiring immediate official action (see "Emergency Meetings," below).
- When a public body holds a special meeting to discuss particular issues, the statement of the meeting's purpose must specifically indicate those issues, and the public body may only discuss those specified issues at that meeting.[869] When a special meeting is simply a rescheduled "regular" meeting occurring at a different time, the statement of the meeting's purpose may be for "general purposes."[870] Discussing matters at a special meeting that were not disclosed in its notice of purpose, either in open session or executive session, is a violation of the Open Meetings Act.[871]

c. Emergency Meetings

An emergency meeting is a type of special meeting that a public body convenes when a situation requires immediate official action.[872] Rather than the 24-hours advance notice usually required, a public body scheduling an emergency meeting must immediately notify all media outlets that have specifically requested such notice of the time, place, and purpose of the emergency meeting.[873] The purpose statement must comport with the specificity requirements discussed above.

2. Rules Requirement

The Open Meetings Act requires every public body to adopt rules establishing reasonable methods for the public to determine the time and place of all regularly scheduled meetings, and the time, place, and purpose of all special meetings.[874] Those rules must include a provision for any person, upon request and payment of a reasonable fee, to obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed.[875] The statute suggests that provisions for advance notification may include mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person requesting notice.[876]

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[866] *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 100 (1990) ("The council either meets in a regular session or it does not, and any session that is not regular is special."); 1988 Ohio Op. Att'y Gen. No. 029 (opining that "[w]hile the term 'special meeting' is not defined in R.C. 121.22, its use in context indicates that references to all meetings other than 'regular' meetings was intended").

[867] R.C. 121.22(F). *See also Doran v. Northmont Bd. of Educ.*, 147 Ohio App.3d 268, 272-273, 2002-Ohio-386 (2nd Dist.) ("*Doran* I") (a board violated R.C. 121.22(F) by failing to establish, by rule, method to provide reasonable notice to the public of time, place, and purpose of special meetings); *Stiller v. Columbiana Exempt Vill. Sch. Dist. Bd. of Educ.*, 74 Ohio St.3d 113, 119-120 (1995) (policy adopted pursuant to R.C. 121.22(F) that required notice of "specific or general purposes" of special meeting was not violated when general notice was given that nonrenewal of contract would be discussed, even though ancillary matters were also discussed).

[868] R.C. 121.22(F); 1988 Ohio Op. Att'y Gen. No. 029.

[869] *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995); *State ex rel. Young v. Lebanon City School Dist. Bd. of Edn.*, 12th Dist. No. CA2012-02-013, 2013-Ohio-1111 (Mar. 25, 2013) (school board failed to comply with special meeting notice requirements where notice indicated that the purpose of the special meeting was "community information", but during the meeting the board entered executive session "to discuss negotiations with public employees concerning their compensation and other terms and conditions of their employment.").

[870] *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995); *see also Satterfield v. Adams County Ohio Valley Sch. Dist.*, No. 95CA611 (4th Dist. 1996) (although specific agenda items may be listed, use of agenda term "personnel" is sufficient for notice of special meeting).

[871] *Hoops v. Jerusalem Twp. Bd. of Trs.*, No. L-97-1240 (6th Dist. 1998) (business transacted at special meetings exceeded scope of published purpose and thus violated R.C. 121.22(F)).

[872] Compare *Neuvirth v. Bds. of Trs. of Bainbridge Twp.*, No. 919 (11th Dist. 1981) (business transacted at special meetings exceeded scope of published purpose and thus violated R.C. 121.22(F)).

[873] R.C. 121.22(F).

[874] R.C. 121.22(F).

[875] R.C. 121.22(F).

[876] These requirements notwithstanding, many courts have found that actions taken by a public body are not invalid simply because the body failed to adopt notice rules. These courts reason that the purpose of the law's invalidation section (R.C. 121.22(H)) is to invalidate actions taken where insufficient notice of the meeting was provided. *See Doran v. Northmont Bd. of Educ.*, 147 Ohio App.3d 268, 271, 2002-Ohio-386 (2nd Dist.) ("*Doran* I"); *Hoops v. Jerusalem Twp. Bd. of Trs.*, No. L-97-1240 (6th Dist. 1998); *Barber v. Twinsburg Twp.*, 73 Ohio App.3d 587 (9th Dist. 1992).

3. Notice by Publication

Many public bodies routinely notify their local media of all regular, special, and emergency meetings, whether by rule or simply by practice. If the media misprints the meeting information, a court will not likely hold the public body responsible for violating the notice requirement so long as it transmitted accurate information to the media as required by its rule.[877] Notice must be consistent and "actually reach the public" to satisfy the statute.[878]

C. Minutes

1. Content of Minutes

A public body must keep full and accurate minutes of its meetings.[879] Those minutes are not required to be a verbatim transcript of the proceedings, but must include enough facts and information to permit the public to understand and appreciate the rationale behind the public body's decisions.[880] Because executive sessions are not open to the public, the meeting minutes need to reflect only the general subject matter of the executive session via the motion to convene the session for a permissible purpose or purposes (see "Executive Session," discussed below in Chapter Three).[881] Including details of members' pre-vote discussion following an executive session may prove helpful, though. At least one court has found that the lack of pre-vote comments reflected by the minutes supported the trial court's conclusion that the body's discussion of the pros and cons of the matter at issue must have improperly occurred during executive session.[882]

2. Making Minutes Available

A public body must promptly prepare, file, and make available its minutes for public inspection.[883] The final version of the official minutes approved by members of the public body is a public record. Note that a draft version of the meeting minutes that the public body circulates for approval is also a public record under the Public Records Act.[884]

3. Medium on Which Minutes are Kept

Because neither the Open Meetings Act nor the Public Records Act addresses the medium on which a public body must keep the official meeting minutes, a public body may make this determination for itself. Some public bodies document that choice by adopting a formal rule or by passing a

[877] *Black v. Mecca Twp. Bd. of Trs.*, 91 Ohio App.3d 351 (11th Dist. 1993).
[878] *Doran v. Northmont Bd. of Educ.*, 147 Ohio App.3d 268, 272, 2002-Ohio-386 (2nd Dist.) ("*Doran* I") (where publication of the notice is at the newspaper's discretion, such notice is not "reasonable notice" to the public).
[879] *White v. Clinton County Bd. of Comm'rs*, 76 Ohio St.3d 416, 420 (1996) ("[k]eeping full minutes allows members of the public who are unable to attend the meetings in person to obtain complete and accurate information about the decision-making process of their government […]. Accurate minutes can reflect the difficult decision-making process involved, and hopefully bring the public to a better understanding of why unpopular decisions are sometimes necessary").
[880] *See generally State ex rel. Citizens for Open, Responsive & Accountable Gov't v. Register*, 116 Ohio St.3d 88, 2007-Ohio-5542 (construing R.C. 121.22, 149.43, and 507.04 together, a township fiscal officer has a duty to maintain full and accurate minutes and records of the proceedings as well as the accounts and transactions of the board of township trustees); *White v. Clinton County Bd. of Comm'rs*, 76 Ohio St.3d 416 (1996) (the minutes of board of county commissioners meetings are required to include more than a record of roll call votes); *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 2001-Ohio-130; *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295 , ¶¶ 9-11 (May 30, 2013) (absent evidence as to any alleged missing details or discussions, meeting minutes providing the resolution number being voted on and noting that a vote was taken were not too generalized).
[881] R.C. 121.22(C).
[882] *Piekotowski v. South Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App.3d 372, 380, 2005-Ohio-2868 (4th Dist.).
[883] R.C. 121.22(C); *see also White v. Clinton County Bd. of Comm'rs*, 76 Ohio St.3d 416 (1996); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990) (because the members of a public body had met as a majority group, R.C. 121.22 applied, and minutes of the meeting were therefore necessary); *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 57, 2001-Ohio-130 (finding that audiotapes that are later erased do not meet requirement to maintain); *State ex rel. Young v. Lebanon City School. Dist. Bd. of Edn.*, 12th Dist. No. CA2012-02-013, 2013-Ohio-1111, ¶ 33 (Mar. 25, 2013) (reading R.C. 121.22 in pari materia with R.C. 3313.26, school board failed to "promptly" prepare minutes where it was three months behind in approving minutes and did not approve minutes at the next respective meeting.)
[884] *State ex rel. Doe v. Register*, 2009-Ohio-2448, ¶ 28 (12th Dist.).

resolution or motion at a meeting.[885] Many public bodies make a contemporaneous audio recording of the meeting to use as a back-up in preparing written official minutes. The Ohio Attorney General has opined that such a recording constitutes a public record that the public body must make available for inspection upon request.[886]

D. Modified Duties of Public Bodies Under Special Circumstances

1. Declared Emergency

During a declared emergency, R.C. 5502.24(B) provides a limited exception to fulfilling the requirements of the open meetings law. If, due to a declared emergency, it becomes "imprudent, inexpedient, or impossible to conduct the affairs of local government" at the regular or usual place, the governing body may meet at an alternate site previously designated (by ordinance, resolution, or other manner) as the emergency location of government.[887] Further, the public body may exercise its powers and functions in the light of the exigencies of the emergency without regard to or compliance with time-consuming procedures and formalities of the Open Meetings Act. Even in an emergency, however, there is no exception to the "in person" meeting requirement of R.C. 121.22(C), and the provision does not permit the public body to meet by teleconference.[888]

2. Municipal Charters

The Open Meetings Act applies to public bodies at both the state and local government level. However, because the Ohio Constitution permits "home rule" (self-government), municipalities may adopt a charter under which their local governments operate.[889] A charter municipality has the right to determine by charter the manner in which its meetings will be held.[890] Charter provisions take precedence over the Open Meetings Act where the two conflict.[891] If a municipal charter includes specific guidelines regarding the conduct of meetings, the municipality must abide by those guidelines.[892] In addition, if a charter expressly requires that all meetings of the public bodies must be open, the municipality may not adopt ordinances that permit executive session.[893]

[885] In *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 57, 2001-Ohio-130, the Ohio Supreme Court found council's contention that audiotapes complied with Open Meetings Act requirements to be meritless because they were not treated as official minutes, e.g., council approved written minutes, did not tape all meetings, and voted to erase tapes after written minutes had been approved.

[886] 2008 Ohio Op. Att'y Gen. No. 019 (opining that an audio tape recording of a meeting that is created for the purpose of taking notes to create an accurate record of the meeting is a public record for purposes of R.C. 149.43; the audio tape recording must be made available for public inspection and copying, and retained in accordance with the terms of the records retention schedule for such a record).

[887] R.C. 5502.24(B).

[888] 2009 Op. Att'y Gen. No. 034; R.C. 5502.24(B).

[889] Ohio Const., Art. SVIII, §§ 3, 7; *see also State ex rel. Inskeep v. Staten*, 74 Ohio St.3d 676, 1996-Ohio-236; *State ex rel. Fenley v. Kyger*, 72 Ohio St.3d 164 (1995); *State ex rel. Lightfield v. Vill. of Indian Hill*, 69 Ohio St.3d 441 (1994); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990); *State ex rel. Craft v. Schisler*, 40 Ohio St.3d 149 (1988); *Fox v. City of Lakewood*, 39 Ohio St.3d 19 (1988).

[890] *State ex rel. Plain Dealer Publ'g Co. v. Barnes*, 38 Ohio St.3d 165, 168 (1988) (finding it unnecessary to decide the applicability of the Ohio Open Meetings Act because the charter language expressly provided for open meetings and encompassed the meeting at issue); *Hills & Dales, Inc. v. Wooster*, 4 Ohio App.3d 240, 242-243 (9th Dist. 1982) (a charter municipality, in the exercise of its sovereign powers of local self-government as established by the Ohio Constitution need not adhere to the strictures of R.C. 121.22. "We find nothing in the Wooster Charter which mandates that all meetings of the city council and/or the city planning commission must be open to the public.").

[891] *State ex rel. Lightfield v. Indian Hill*, 69 Ohio St.3d 441, 442 (1994) ("[i]n matters of local self-government, if a portion of a municipal charter expressly conflicts with parallel state law, the charter provisions will prevail").

[892] *State ex rel. Bond v. Montgomery*, 63 Ohio App.3d 728 (1st Dist. 1989); *Johnson v. Kindig*, No. 00CA0095 (9th Dist. 2001) (where charter explicitly states all council meetings shall be public and the council must also explicitly state exception for executive session).

[893] *State ex rel. Inskeep v. Staten*, 74 Ohio St.3d 676, 1996-Ohio-236; *State ex rel. Plain Dealer Publ'g Co. v. Barnes*, 38 Ohio St.3d 165 (1998); *State ex rel. Gannett Satellite Info. Network v. Cincinnati City Council*, 137 Ohio App.3d 589, 592 (1st Dist. 2001) (when a city charter mandates all meetings be open, rules of council cannot supersede this mandate).

III. Chapter Three: Executive Session

A. General Principles

An "executive session" is a conference between members of a public body from which the public is excluded.[894] The public body, however, may invite anyone it chooses to attend an executive session.[895] The Open Meetings Act strictly limits the use of executive sessions. First, the Open Meetings Act limits the matters that a public body may discuss in executive session.[896] Second, the Open Meetings Act requires that a public body follow a specific procedure to adjourn into an executive session.[897] Finally, a public body may not take any formal action in an executive session – any formal action taken in an executive session is invalid.[898]

A public body may only discuss matters specifically identified in R.C. 121.22(G) in executive session, and may only hold executive sessions at regular and special meetings.[899] One court has held that a public body may discuss other, related issues if they have a direct bearing on the permitted matter(s).[900] If a public body is challenged in court over the nature of discussions or deliberations held in executive session, the burden of proof lies with the public body to establish that one of the statutory exceptions permitted the executive session.[901]

The Open Meetings Act does not prohibit the public body or one of its members from disclosing the information discussed in executive session.[902] However, other provisions of law may prohibit such disclosure.[903]

Note: The privacy afforded by the Ohio Open Meetings Act to executive session discussions does not impart confidentiality on any documents that a public body may discuss in executive session. If a document is a "public record" and is not otherwise exempt under one of the exceptions to the Public Records Act, the record will still be subject to public disclosure notwithstanding the appropriateness of confidential discussions about it in executive session. For instance, if a public body properly discusses pending litigation in executive session, a settlement agreement negotiated during that executive session and reduced to writing may be subject to public disclosure.[904]

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[894] *Weisel v. Palmyra Twp. Bd. of Zoning Appeals*, No. 90-P-2193 (11th Dist. 1991); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624 (9th Dist. 1990).

[895] *Chudner v. Cleveland City Sch. Dist.*, No. 68572 (8th Dist. 1995) (inviting select individuals to attend an executive session is not a violation as long as no formal action of the public body will occur); *Weisel v. Palmyra Twp. Bd. of Zoning Appeals*, No. 90-P-2193 (11th Dist. 1991); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624 (9th Dist. 1990).

[896] R.C. 121.22(G)(1)-(7), (J).

[897] R.C. 121.22(G)(1), (7) (requiring roll call vote and specificity in motion); *see also State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130 (respondents violated R.C. 121.22(G)(1) by using general terms like "personnel" and "personnel and finances" instead of one or more of the specified statutory purposes listed in division (G)(1)); *Wheeling Corp. v. Columbus & Ohio River R.R. Co.*, 147 Ohio App.3d 460, 473, 2001-Ohio-8751 (10th Dist.) (a majority of a quorum of the public body must determine, by roll call vote, to hold executive session); *Wright v. Mt. Vernon City Council*, No. 97-CA-7 (5th Dist. 1997) (a public body must strictly comply with both the substantive and procedural limitations of R.C. 121.22(G)); *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995) ("Police personnel matters" does not constitute substantial compliance because it does not refer to any of the specified purposes listed in R.C. 149.43(G)(1)); *Vermillion Teachers' Ass'n v. Vermillion Local Sch. Dist. Bd. of Educ.*, 98 Ohio App.3d 524, 531-532 (6th Dist. 1994) (a board violated 121.22(G) when it went into executive session to discuss a stated permissible topic but proceeded to discuss another, non-permissible topic); 1988 Ohio Op. Att'y Gen. No. 029.

[898] R.C. 121.22(H); *Mathews v. E. Local Sch. Dist.*, 2001-Ohio-2372 (4th Dist.) (a board was permitted to discuss employee grievance in executive session, but was required to take formal action by voting in an open meeting); *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 664 (8th Dist. 1990) (once a conclusion is reached regarding pending or imminent litigation, the conclusion is to be made public, even though the deliberations leading to the conclusion were private).

[899] R.C. 121.22(G).

[900] *Chudner v. Cleveland City Sch. Dist.*, No. 68572 (8th Dist. 1995) (issues discussed in executive session each had a direct bearing on topic that was permissible subject of executive session discussion).

[901] *State ex rel. Bond v. City of Montgomery*, 63 Ohio App.3d 728 (1st Dist. 1989); *State ex rel. Young v. Lebanon City School Dist. Bd. of Edn.*, 12th Dist. No. CA2012-02-013, 2013-Ohio-1111, ¶ 61 (Mar. 25, 2013) (board violated Open Meetings Act where the board minutes failed to indicate the stated purpose for the executive session).

[902] But compare R.C. 121.22(G)(2) (providing that "no member of a public body shall use [executive session under property exception] as a subterfuge for providing covert information to prospective buyers or sellers").

[903] *See e.g.*, R.C. 102.03(B) (providing that a public official must not disclose or use any information acquired in course of official duties that is confidential because of statutory provisions, or that has been clearly designated as confidential).

[904] *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Comm'rs*, 80 Ohio St.3d 134, 138 (1997) (quoting *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 664 (8th Dist. 1990) ("Since a settlement agreement contains the result of the bargaining process rather than revealing the details of the negotiations which led to the result, R.C. 121.22(G)(3), which exempts from public view only the conferences themselves, would not exempt a settlement agreement from disclosure.")).

B. Permissible Discussion Topics in Executive Session

There are very limited topics that the members of a public body may consider in executive session:

1. Certain Personnel Matters[905]

A public body may adjourn into executive session:

- To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official; and
- To consider the investigation of charges or complaints against a public employee, official, licensee, or regulated individual,[906] unless the employee, official, licensee, or regulated individual requests a public hearing;[907]

but

- A public body may not hold an executive session to consider the discipline of an elected official for conduct related to the performance of the official's duties or to consider that person's removal from office.

A motion to adjourn into executive session must specify which of the *particular* personnel matter(s) listed in the statute the movant proposes to discuss. A motion "to discuss personnel matters" is not sufficiently specific and does not comply with the statute.[908] The motion need not include the name of the person involved in the specified personnel matter.[909]

Appellate courts disagree on whether a public body must limit its discussion of personnel in an executive session to a specific individual, or may include broader discussion of employee matters. At least two appellate courts have held that the language of the Open Meetings Act clearly limits discussion in executive session to consideration of a specific employee's employment, dismissal, etc.[910] These decisions are based on the premise that the plain language in the Act requires that "all meetings of any public body are declared to be open to the public at all times,"[911] thus, any exceptions to openness are to be drawn narrowly. A different appellate court, however, looked to a different provision in the Act that permits the public body to exclude the name of any person to be considered during the executive session as allowing general personnel discussions.[912]

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[905] R.C. 121.22(G)(1).

[906] R.C. 121.22(B)(3) (defining "regulated individual" as (a) a student in a state or local public educational institution or (b) a person who is, voluntarily or involuntarily, an inmate, patient, or resident of a state or local institution because of criminal behavior, mental illness or retardation, disease, disability, age, or other condition requiring custodial care).

[907] *See Brownfield v. Bd. of Educ.*, No. 89 CA 26 (4th Dist. 1990) (upon request, a teacher was entitled to have deliberations regarding his dismissal in open meetings); *Stewart v. Lockland School Dist. Bd. of Edn.*, 1st Dist. No. C-130263, 2013-Ohio-5513 (Dec. 18, 2013) (R.C. 121.22(G)(1) does not allow an employee to mandate that his entire pre-termination hearing be held publically and does not allow employee to prevent the board from adjourning into executive session). NOTE: This exception does not grant a substantive right to a public hearing. Such a right must exist elsewhere in Ohio or federal law before a person may demand a public hearing under this exception. *See Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624 (9th Dist. 1990) (citing *Matheny v. Bd. of Educ.*, 62 Ohio St.2d 362, 368 (1980) ("the term 'public hearing' in subdivision (G)(1) of this statute refers only to the hearings elsewhere provided by law"); *State ex rel. Harris v. Indus. Comm'n of Ohio*, No. 95APE07-891 (10th Dist. 1995).

[908] R.C. 121.22(G)(1), (7) (requiring roll call vote and specificity in motion); *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130 (respondents violated R.C. 121.22(G)(1) by using general terms like "personnel" and "personnel and finances" instead of one or more of the specified statutory purposes listed in division (G)(1)); *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995) (stating that "[p]olice personnel matters" does not constitute substantial compliance because it does not refer to any of the specific purposes listed in R.C. 149.43(G)(1)), 1988 Ohio Atty. Gen. Ops. No. 88-029, 2-120 to 2-121, fn. 1; *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295, ¶ 25 (May 30, 2013) (minutes stating that executive session was convened for "personnel issues" do not comply with R.C. 121.22(G)(1)); *see also State ex rel. Young v. Lebanon City School Dist. Bd. of Edn.*, 12th Dist. No. CA2012-02-013, 2013-Ohio-1111, ¶¶ 63-65 (Mar. 25, 2013).

[909] R.C. 121.22(G)(1).

[910] *Gannett Satellite Info. Network v. Chillicothe City Sch. Dist.*, 41 Ohio App.3d 218 (4th Dist. 1988); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624 (9th Dist. 1990) (rejecting the argument that an executive session was illegally held for a dual, unauthorized purpose when it was held to discuss termination of a specific employee's employment due to budgetary considerations).

[911] R.C. 121.22(C).

[912] *Wright v. Mt. Vernon City Council*, No. 97-CA-7 (5th Dist. 1997) (finding it permissible for a public body to discuss merit raises for exempt city employees in executive session without referring to individuals in particular positions).

2. Purchase or Sale of Property

A public body may adjourn into executive session to consider the purchase of property of any sort – real, personal, tangible, or intangible.[913] A public body may also adjourn into executive session to consider the sale of real or personal property by competitive bid if disclosure of the information would result in a competitive advantage to the person whose personal, private interest is adverse to the general public interest.[914] No member of a public body may use this exception as subterfuge to provide covert information to prospective buyers or sellers.[915]

3. Pending or Imminent Court Action

A public body may adjourn into executive session with the public body's attorney to discuss a pending or imminent court action.[916] Court action is "pending" if a lawsuit has been commenced and is "imminent" if it is on the brink of commencing.[917] A public body may not use this exception to adjourn into executive session for discussions with a board member who also happens to be an attorney. The attorney should be the duly appointed counsel for the public body.[918] Nor is a general discussion of legal matters a sufficient basis for invoking this provision.[919]

4. Collective Bargaining Matters

A public body may adjourn into executive session to prepare for, conduct, or review a collective bargaining strategy.[920]

5. Matters Required to be Kept Confidential

A public body may adjourn into executive session to discuss matters that federal law, federal rules, or state statutes require the public body to keep confidential.[921]

6. Security Matters

A public body may adjourn into executive session to discuss details of security arrangements and emergency response protocols for a public body or public office, if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office.[922]

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[913] R.C. 121.22(G)(2); *see also* 1988 Ohio Op. Att'y Gen. No. 003.
[914] R.C. 121.22(G)(2); *see also* 1988 Ohio Op. Att'y Gen. No. 003.
[915] R.C. 121.22(G)(2).
[916] R.C. 121.22(G)(3).
[917] *State ex rel. Cincinnati Enquirer v. Hamilton County Comm'rs*, 2002-Ohio-2038 (1st Dist.) (determining that "imminent" is satisfied when a public body has moved beyond mere investigation and assumed an aggressive litigative posture manifested by the decision to commit government resources to the prospective litigation); *State ex rel. Bond v. City of Montgomery*, 63 Ohio App.3d 728 (1st Dist. 1989); *but see Greene County Guidance Ctr., Inc. v. Greene-Clinton Cmty. Mental Health Bd.*, 19 Ohio App.3d 1, 5 (2nd Dist. 1984) (a discussion with legal counsel in executive session under 121.22(G)(3) is permitted where litigation is a "reasonable prospect").
[918] *Awadalla v. Robinson Mem'l Hosp.*, No. 91-P-2385 (11th Dist. 1992) (a board's "attorney" was identified as "senior vice president" in meeting minutes); *see also Bd. of Trs. of the Tobacco Use Prevention and Control Found. v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, ¶¶ 66-69 (10th Dist.), *aff'd*, 127 Ohio St.3d 511, 2010-Ohio-6207 (four board members who are also attorneys are not the attorneys for the public body).
[919] *Bd. of Trs. of the Tobacco Use Prevention and Control Found. v. Boyce*, 185 Ohio App.3d 707, 2009-Ohio-6993, ¶¶ 66-69 (10th Dist.) (Executive Director, a licensed attorney, cannot act as "attorney for the public body" for purposes of this provision, because R.C. 109.02 declares Attorney General to be legal counsel for all state agencies); *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295, ¶ 25 (May 30, 2013) (minutes stating that executive session was convened for "legal issues" do not comply with R.C. 121.22(G)(1)); *see also*, *Dispatch Printing Co. v. Columbus City School Dist. Bd. of Edn.*, Franklin C.P. No. 12CVH10-12707 (Feb. 20, 2014).
[920] R.C. 121.22(G)(4); *see also Back v. Madison Local Sch. Dist. Bd. of Educ.*, 2007-Ohio-4218, ¶ 8 (12th Dist.) (a school board's meeting with a labor organization to renegotiate teachers' salaries was proper because the meeting was not an executive session but was a "collective bargaining meeting," which, under R.C. 4117.21, was exempt from the open meeting requirements of R.C. 121.22).
[921] R.C. 121.22(G)(5); *see also State ex rel. Cincinnati Enquirer v. Hamilton County Cmm'r*, 2002-Ohio-2038 (1st Dist.) (R.C. 121.22(G)(5) is intended to allow a public body to convene an executive session to discuss matters that they are legally bound to keep from the public); *J.C. Penney Prop., Inc. v. Bd. of Revision of Franklin County*, Ohio Bd. of Tax Appeals Nos. 81-D-509, 81-D-510 (Jan. 19, 1982) (common law may not be available under R.C. 121.22(G)(5) given the presence of R.C. 121.22(G)(3)); *but see Theile v. Harris*, No. C-860103 (1st Dist. 1986) (public officials have right and duty to seek legal advice from their duly constituted legal advisor).
[922] R.C. 121.22(G)(6).

7. Hospital Trade Secrets

A public body may adjourn into executive session to discuss trade secrets of a county hospital, a joint township hospital, or a municipal hospital.[923]

8. Confidential Business Information of an Applicant for Economic Development Assistance[924]

This topic requires that the information to be discussed in executive session be directly related to economic development assistance of specified types listed in the statute.[925] A unanimous quorum of the public body must determine, by roll call vote, that "the executive session is necessary to protect the interests of the applicant or the possible investment or expenditure of public funds to be made in connection with the economic development project."[926]

9. Veterans Service Commission Applications

A Veterans Service Commission must hold an executive session when considering an applicant's request for financial assistance, unless the applicant requests a public hearing.[927] Note that, unlike the previous seven discussion topics, discussion of Veterans Service Commission applications in executive session is mandatory.

C. Proper Procedures for Executive Session

A public body may only hold an executive session at a regular or special meeting, and a meeting that includes an executive session must always begin and end in an open session.[928] In order to begin an executive session, there must be a proper motion approved by a majority[929] of a quorum of the public body, using a roll call vote.[930]

1. The Motion

A motion for executive session must specifically identify "which one or more of the approved matters listed…are to be considered at the executive session."[931] Thus, if the public body intends to discuss one of the matters included in the personnel exception in executive session, the motion must specify which of those specific matters it will discuss (e.g., "I move to go into executive session to consider the promotion or compensation of a public employee.").[932] It is not sufficient to simply state "personnel" as a reason for executive session.[933] The motion does not need to specify by name the person whom the public body intends to discuss.[934] Similarly, "reiterating the laundry list of possible matters from R.C. 121.22(G)(1) without specifying which of those purposes [will] be discussed in executive session" is improper.[935]

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[923] R.C. 121.22(G)(7).
[924] R.C. 121.22(G)(8).
[925] R.C. 121.22(G)(8)(1).
[926] R.C. 121.22(G)(8)(2).
[927] R.C. 121.22(J).
[928] R.C. 121.22(G).
[929] To consider confidential business information of an application for economic development assistance under R.C. 121.22(G)(8), the motion must be approved by a unanimous quorum. R.C. 121.22(G)(8)(2).
[930] *Vermillion Teachers' Ass'n v. Vermillion Local Sch. Dist. Bd. of Educ.*, 98 Ohio App.3d 524 (6th Dist. 1994); 1988 Ohio Op. Att'y Gen. No. 029 (detailing proper procedure for executive session).
[931] R.C. 121.22(G)(1), (7).
[932] *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995); 1988 Ohio Op. Att'y Gen. No. 029; *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130.
[933] *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130 (by using general terms like "personnel" instead of one or more of the specified statutory purposes is a violation of R.C. 121.22(G)(1)); *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995) ("a reference to 'police personnel issues' does not technically satisfy [the R.C. 121.22(G)(1)] requirement because it does not specify which of the approved purposes was applicable in this instance"); 1988 Ohio Op. Att'y Gen. No. 029, 2-120 to 2-121, fn. 1.
[934] R.C. 121.22(G)(1); *Beisel v. Monroe County Bd. of Educ.*, No. CA-678 (7th Dist. 1990).
[935] *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 59, 2001-Ohio-130.

2. The Roll Call Vote

Members of a public body may adjourn into executive session only after a majority of a quorum of the public body approves the motion by a roll call vote.[936] The vote may not be by acclamation or by show of hands, and the public body must record the vote in its minutes.[937]

Although a proper motion is required before entering executive session, a motion to end the executive session and return to public session is not necessary because the closed-door discussion is "off the record." Similarly, a public body does not take minutes during executive session. The minutes of the meeting need only document a motion to go into executive session that properly identifies the permissible topic or topics that the public body will discuss, as well as the return to open session (e.g., "We are now back on the record.").

[936] R.C. 121.22(G).
[937] R.C. 121.22(G); 1988 Ohio Op. Att'y Gen. No. 029; *see Shaffer v. Vill. of W. Farmington*, 82 Ohio App.3d 579, 584 (11th Dist. 1992) (minutes may not be conclusive evidence as to whether roll call vote was taken).

IV. Chapter Four: Enforcement and Remedies

In Ohio, no state or local government official has the authority to enforce the Open Meetings Act. Rather, if any person believes a public body has violated or intends to violate the Open Meetings Act, that person may file suit in common pleas court to enforce the law's provisions.[938]

Courts reviewing alleged violations will strictly construe the Open Meetings Act in favor of openness.[939] In practice, this has included the courts looking beyond the express reason stated by a public body for an executive session to find an implied or circumstantial violation of the Act.[940]

A. Enforcement

1. Injunction

Any person may file a court action for an injunction to address an alleged or threatened violation of the Open Meetings Act.[941] This action must be "brought within two years after the date of the alleged violation or threatened violation."[942] If granted by a court, an injunction compels the members of the public body to comply with the law by either refraining from the prohibited behavior or by lawfully conducting their meetings where they previously failed to do so.

a. Who May File

"Any person" has standing to file for an injunction to enforce the Open Meetings Act.[943] The person need not demonstrate a personal stake in the outcome of the lawsuit.[944]

b. Where to File

Unlike the Public Records Act, which permits an aggrieved person to initiate a legal action in either a common pleas court, a district court of appeals, or the Ohio Supreme Court, the Open Meetings Act requires that an action for injunction be filed only in the court of common pleas in the county where the alleged Act violation took place.[945]

c. Finding a Violation

Upon proof of a violation or threatened violation of the Open Meetings Act, the court will conclusively and irrebuttably presume harm and prejudice to the person who brought the suit[946] and will issue an injunction.[947]

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[938] R.C. 121.22(I)(1).

[939] *Gannett Satellite Info. Network v. Chillicothe City Sch. Dist.*, 41 Ohio App.3d 218 (4th Dist. 1988).

[940] *Sea Lakes, Inc. v. Lipstreu*, No. 90-P-2254 (11th Dist. 1991) (finding a violation where board was to discuss administrative appeal merits privately, appellant's attorney objected, board immediately held executive session "to discuss pending litigation," then emerged to announce decision on appeal); *In the Matter of Removal of Smith*, No. CA-90-11 (5th Dist. 1991) (finding a violation where county commission emerged from executive session held "to discuss legal matters" and announced decision to remove Smith from Board of Mental Health, where there was no county attorney present in executive session and a request for public hearing on removal decision was pending).

[941] R.C. 121.22(I)(1). *See Fahl v. Athens*, 2007-Ohio-4925 (4th Dist.) and *Stainfied v. Jefferson Emergency Rescue Dist.*, 2010-Ohio-2282, ¶ 40 (11th Dist.) (appellate courts declined to consider arguments alleging Open Meetings Act violations as part of administrative appeals because appellants failed to bring original actions and request appropriate relief in courts of common pleas); *but see Brenneman Bros. v. Allen Cty. Cmmrs.*, 3rd Dist. No. 1-13-14, 2013-Ohio-4635 (Oct. 21, 2013), appeal not accepted, 2014-Ohio-556 (finding that trial court had jurisdiction to consider whether a resolution was invalid based on a purported violation of the Open Meetings Act in the context of an administrative appeal).

[942] R.C. 121.22(I)(1); *see also Mollette v. Portsmouth City Council*, 179 Ohio App.3d 455, 2008-Ohio-6342 (4th Dist.); *State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295, ¶ 16 (May 30, 2013).

[943] R.C. 121.22(I)(1); *McVey v. Carthage Twp. Trs.*, 2005-Ohio-2869 (4th Dist.).

[944] *Doran v. Northmont Bd. of Educ.*, 153 Ohio App.3d 499, 2003-Ohio-4084, ¶ 20 (2nd Dist.) ("*Doran* II"); *State ex rel. Mason v. State Employment Relations Bd.*, No. 98AP-780 (10th Dist. 1999); *Thompson v. Joint Twp.*, No. 2-82-8 (3rd Dist. 1983); *Foreman v. Blaser*, No. 12-87-12 (3rd Dist. 1988); *but see Korchnak v. Civil Serv. Comm'n of Canton*, No. CA-8133 (5th Dist. 1991) (a party had no standing to challenge notice of a violation without a formal request and payment of a fee established by a public body).

[945] R.C. 121.22(I)(1).

[946] R.C. 121.22(I)(3); *Ream v. Civil Serv. Comm'n of Canton*, No. CA-8033 (5th Dist. 1990).

d. Curing a Violation

Once a violation is proven, the court must grant the injunction, regardless of the public body's intervening or subsequent attempts to cure the violation.[948] Indeed, Ohio courts have differing views as to whether a public body can ever cure an invalid action with new, compliant discussions followed by official action taken in an open session.[949]

2. Mandamus

Where a person seeks access to the public body's minutes, that person may also file a mandamus action under the Public Records Act to compel the creation of or access to meeting minutes.[950] Mandamus is also an appropriate action to order a public body to give notice of meetings to the person filing the action.[951]

3. Quo Warranto

Once a court issues an injunction finding a violation of the Open Meetings Act, members of the public body who later commit a "knowing" violation of the injunction may be removed from office through a *quo warranto* action, that may only be brought by the county prosecutor or the Ohio Attorney General.[952]

B. Remedies

1. Invalidity

A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.[953] However, courts have refused to allow public bodies to benefit from their own violations of the Open Meetings Act.[954] For instance, a public body may not attempt to avoid a contractual obligation by arguing that approval of the contract is invalid due to a violation of the Act.[955]

a. Formal Action

Even without taking a vote or a poll, members of a public body may inadvertently take "formal action" in an executive session when they indicate how they intend to vote about a matter

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[947] R.C. 121.22(I)(1); *see also Doran v. Northmont Bd. of Educ.*, 153 Ohio App.3d 499, 2003-Ohio-4084, ¶ 21 (2nd Dist.) ("*Doran* II") (an injunction is mandatory upon finding violation of statute); *Fayette Volunteer Fire Dept. No. 2, Inc. v. Fayette Twp. Bd. of Trs.*, 87 Ohio App.3d 51, 54 (4th Dist. 1993).

[948] *McVey v. Carthage Twp. Trs.*, 2005-Ohio-2869, ¶ 9 (4th Dist.) ("Because the statute clearly provides that an injunction is to be issued upon finding a violation of the Sunshine Law, it is irrelevant that the Trustees nullified their prior [offending] action."); *Doran v. Northmont Bd. of Educ.*, 153 Ohio App.3d 499, 2003-Ohio-4084 (2nd Dist.) ("*Doran* II"); *Beisel v. Monroe County Bd. of Educ.*, No. CA-678 (7th Dist. 1990).

[949] **Courts finding that violations cannot be cured**: *Danis Montco Landfill Co. v. Jefferson Twp. Zoning Comm'n*, 85 Ohio App.3d 494 (2nd Dist. 1993); *M.F. Mon. Waste Ventures, Inc. v. Bd. of Amanda Twp. Trs.*, No. 1-87-46 (3rd Dist. 1988); *Gannett Satellite Info. Network, Inc. v. Chillicothe City Sch. Dist. Bd. of Educ.*, 41 Ohio App.3d 218, 221 (4th Dist. 1988) ("A violation of the Sunshine Law cannot be 'cured' by subsequent open meetings if the public body initially discussed matters in executive session that should have been discussed before the public."). **Courts finding violations can be cured**: *State ex rel. Cincinnati Enquirer v. Hamilton County Cmm'r*, 2002-Ohio-2038 (1st Dist.); *Theile v. Harris*, No. C-860103 (1st Dist. 1986); *Kuhlman v. Vill. of Leipsic*, No. 12-94-9 (3rd Dist. 1995); *Carpenter v. Bd. of Comm'r*, No. 1-81-33 (3rd Dist. 1982); *Fox v. City of Lakewood*, 39 Ohio St.3d 19 (1988); *Beisel v. Monroe County Bd. of Educ.*, No. CA-678 (7th Dist. 1990) (discussing a permitted matter in executive session, without a proper motion, was cured by rescinding the resulting action, and then conducting the action in compliance with the OMA); *Brownfield v. Bd. of Educ.*, No. 89-CA_26 (4th Dist. 1990).

[950] *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 2001-Ohio-130; *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97 (1990).

[951] *State ex rel. Vindicator Printing Co. v. Kirila*, No. 91-T-4550 (11th Dist. 1991) (overruled on other grounds).

[952] R.C. 121.22(I)(4); *State ex rel. Newell v. City of Jackson*, 118 Ohio St.3d 138, 2008-Ohio-1965, ¶¶ 8-14 (to be entitled to a writ of *quo warranto* to oust a good-faith appointee, a relator must either file a *quo warranto* action or an injunction challenging the appointment before the appointee completes the probationary period and becomes a permanent employee; further, this duty applies to alleged violations of the open meeting provisions of R.C. 121.22); *Randles v. Hill*, 66 Ohio St.3d 32 (1993); *McClarren v. City of Alliance*, No. CA-7201 (5th Dist. 1987).

[953] R.C. 121.22(H); *Bd. of Trs. of the Tobacco Use Prevention & Control Foundation v. Boyce*, 127 Ohio St.3d 511, 2010-Ohio-6207, ¶¶ 28-29; *State ex rel. Holliday v. Marion Twp. Bd. of Trs.*, 2000-Ohio-1877 (3rd Dist.).

[954] *Jones v. Brookfield Twp. Trs.*, No. 92-T-4692 (11th Dist. 1995); *Roberto v. Brown County Gen. Hosp.*, No. CA87-06-009 (12th Dist. 1988).

[955] *Roberto v. Brown County Gen. Hosp*, No. CA87-06-009 (12th Dist. 1988).

pending before them.[956] For instance, while council members properly deliberated in executive session about whether to take action on a union request, they improperly took formal action during the executive session when they decided not to take action on the request and to announce as much via a press release. Those decisions were deemed invalid and of no effect.[957] In addition, even a formal action taken in an open meeting may be invalid if it results from deliberations that improperly occurred outside of an open meeting, e.g., at an informal, private meeting or in an executive session that was held for other than an authorized purpose.[958]

b. Improper Notice

A formal action taken by a public body in a meeting for which it did not properly give notice is invalid.[959]

c. Minutes

At least one court has found that minutes are merely the record of actions; they are not actions in and of themselves. Thus, failure to properly approve minutes does not invalidate the actions taken during the meeting.[960]

2. Mandatory Civil Forfeiture

If the court issues an injunction, the court will order the public body to pay a civil forfeiture of $500 to the person who filed the action.[961] Courts that find that a public body has violated the law on repeated occasions have awarded a $500 civil forfeiture for each violation.[962]

3. Court Costs and Attorney Fees

If the court issues an injunction, it will order the public body to pay all court costs[963] and the reasonable attorney fees of the person who filed the action.[964] Courts have discretion to reduce or completely eliminate attorney fees, however, if they find that, (1) based on the state of the law when the violation occurred, a well-informed public body could have reasonably believed it was not violating the law; and (2) it was reasonable for the public body to believe its actions served public policy.[965]

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[956] *Mansfield City Council v. Richland County Council AFL-CIO*, No. 03 CA 55 (5th Dist. 2003); *see also Piekutowski v. S. Cent. Ohio Educ. Serv. Ctr. Governing Bd.*, 161 Ohio App.3d 372, 2005-Ohio-2868, ¶ 19 (4th Dist.) (in an executive session, board members gave personal opinions and indicated how they would vote on a proposal to create new school district; resolution to adopt proposal was deemed invalid, though it was also later adopted in open session).

[957] *Mansfield City Council v. Richland County Council AFL-CIO*, No. 03 CA 55 (5th Dist. 2003).

[958] R.C. 121.22(H); *Mansfield City Council v. Richland County Council AFL-CIO*, No. 03 CA 55 (5th Dist. 2003) (council reached its conclusion based on comments in executive session and acted according to that conclusion); *State ex rel. Holliday v. Marion Twp. Bd. of Trs.*, 2000-Ohio-1877 (3rd Dist.); *see also State ex rel. Delph v. Barr*, 44 Ohio St.3d 77 (1989).

[959] R.C. 121.22(H); *see also State ex rel. Stiller v. Columbiana Exempted Vill. Sch. Dist. Bd. of Educ.*, 74 Ohio St.3d 113, 118 (1995); *but see Hoops v. Jerusalem Twp. Bd. of Trs.*, No. L-97-1240 (6th Dist. 1998) (illustrating that actions are not invalid merely because a reasonable method of notice had not been enacted by "rule"); *Barber v. Twinsburg Twp.*, 73 Ohio App.3d 587 (9th Dist. 1992).

[960] *Davidson v. Hanging Rock*, 97 Ohio App.3d 723, 733 (4th Dist. 1994).

[961] R.C. 121.22(I)(2)(a); *but see State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295, ¶ 32 (May 30, 2013) (court declined to award civil forfeiture damages and attorney fees where case was filed as mandamus action in the court of appeals instead of a request for an injunction in the court of common pleas).

[962] *Specht v. Finnegan*, 2002-Ohio-4660 (6th Dist.); *Manogg v. Stickle*, No. 98CA00102 (5th Dist. 1998), *distinguished by Doran v. Northmont Bd. of Educ.*, 2003-Ohio-7097, ¶ 18 (2nd Dist.) ("*Doran* III") (determining that the failure to adopt rule is one violation with one $500 fine – fine not assessed for each meeting conducted in absence of rule where meetings were, in fact, properly noticed and held in an open forum); *Weisbarth v. Geauga*, 2007-Ohio-6728, ¶ 30 (11th Dist.) (the only violation alleged was Board's failure to state a precise statutory reason for going into executive session; this "technical violation entitled appellant to only one statutory injunction and one civil forfeiture").

[963] R.C. 121.22(I)(2)(a).

[964] R.C. 121.22(I)(2)(a); *State ex rel. Long v. Council of Cardington*, 92 Ohio St.3d 54, 60, 2001-Ohio-130 and 93 Ohio St.3d 1230, 2001-Ohio-1888 (awarding a citizen over $17,000 in attorney's fees); *Cincinnati Enquirer v. Cincinnati*, 145 Ohio App.3d 335, 339 (1st Dist. 2001); *but see State ex rel. Dunlap v. Violet Twp. Bd. of Trustees*, 5th Dist. No. 12-CA-8, 2013-Ohio-2295, ¶ 32 (May 30, 2013) (court declined to award civil forfeiture damages and attorney fees where case was filed as mandamus action in the court of appeals instead of a request for an injunction in the court of common pleas).

[965] R.C. 121.22(I)(2)(a)(i), (ii); *Mansfield City Council v. Richland County Council AFL-CIO*, No. 03 CA 55 (5th Dist. 2003); *but see Mathews v. E. Local Sch. Dist.*, 2001-Ohio-2372 (4th Dist.) (where two board members knew not to take formal action during executive session, the board was not entitled to reduction).

If the court does not issue an injunction and deems the lawsuit to have been frivolous, the court will order the person who filed the suit to pay all of the public body's court costs and reasonable attorney fees as determined by the court.[966]

[966] R.C. 121.22(I)(2)(b); *McIntyre v. Westerville City Sch. Dist. Bd. of Educ.*, Nos. 90AP-1024, 90AP-1063 (10th Dist. 1991) (a plaintiff engaged in frivolous conduct because her actions subjected the board to a baseless suit and the incurring of needless expense).

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