



Sunshine Audit Report 2016



Dave Yost
Ohio Auditor of State

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SUMMARY OF FIRST YEAR

On March 12, 2015, Auditor of State Dave Yost announced the Sunshine Audit initiative – a way for average citizens to avoid long, expensive legal battles over public records. Sunshine Audits are limited scope reviews used to determine if a public entity has violated the Ohio Public Records Act. Private citizens and organizations can initiate a Sunshine Audit by filing a complaint with the Auditor of State’s Open Government Unit.

In the first year of the audits, the Auditor of State’s office received a total of 16 Sunshine Audit complaints against state agencies, counties, cities, universities, and school districts from across the state. Of those complaints, the Auditor of State’s Open Government Unit determined that eight entities were in compliance with the Ohio Public Records Act. A total of five entities were found to be initially noncompliant, meaning the entities did not release the public records at first, but did so after they were contacted by the Auditor of State’s office.

The entities involved in the remaining three public records complaints were found to be noncompliant, meaning the entities did not properly follow the Public Records Act. Upon a finding of noncompliance, the Sunshine Audit conclusions are forwarded to the entity’s region, and the findings are included in the entity’s regularly scheduled financial audit.

Feedback received from citizens who have initiated Sunshine Audits has been positive. Several have commented that Sunshine Audits are an easier, less costly, and less time consuming alternative to the courts. Complainants also are pleased with the option to remain anonymous throughout the process, which is not an option through the Attorney General’s Mediation Program. In addition, the five cases in which entities ultimately turned over public records after being contacted by the Auditor of State’s office demonstrate that entities have been responsive to the Sunshine Audit findings.

Compliant	Initially Noncompliant	Noncompliant
City of South Euclid	Huron County Developmental Council	Ohio Public Employees Retirement System
Ohio Department of Taxation	Ohio Environmental Protection Agency	Ohio Department of Agriculture
Athens County Prosecutor’s Office	The Ohio State University	City of Beachwood
Medina County Commissioners’ Office	Coventry Local School District	
Ohio Ethics Commission	City of Cleveland	
City of North Canton		
City of Findlay		
City of Beachwood		

SUNSHINE AUDIT SUMMARIES

Compliant:

- Complainant asserted that the **City of South Euclid** refused to release records in response to several properly submitted public records requests. The City asserted that the complainant was provided every public record that was requested, and provided evidence to support its assertion. Therefore, the City was found to be in compliance.
- Complainant asserted that the **Ohio Department of Taxation** refused to release records in response to a properly submitted public records request, including several 2014 natural gas tax returns received by the Ohio Department of Taxation. The Department asserted that Ohio Revised Code section 5703.21 prohibits the release of these records as the requested information pertains to a “transaction” under that section and therefore is exempt from disclosure in this instance. After review, the Department was found to be in compliance.
- Complainant asserted that the **Athens County Prosecutor’s Office** refused to release records in response to several properly submitted public records requests. The Prosecutor’s Office asserted that the complainant was provided every public record that was requested, and provided evidence to support its assertion. Therefore, the Prosecutor’s Office was found to be in compliance.
- Complainant asserted that the **Medina County Commissioners’ Office** refused to release records in response to a properly submitted public records request. The Commissioners’ Office asserted that, pursuant to Section 149.011(G), the records at issue were not subject to mandatory disclosure on the ground that they did not “... serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” After review, our office did not perceive any function of a county commissioner which would involve his acquisition or retention of the records here involved. The commissioner used the records to make a complaint to the Ohio Ethics Commission. Making such a complaint does not serve to document the regular and required organization, functions, policies, decisions, operations, or other activities of the office of the commissioner. Therefore, the Medina County Commissioner’s Office was found to be in compliance.
- Complainant asserted that the **Ohio Ethics Commission** refused to release records in response to a properly submitted public records request, including part of the annual financial disclosure statement of Dr. Michael V. Drake, President of The Ohio State University. The Commission provided a written statement indicating that the Commission had provided Mr. McKibben with the only financial statement prepared and submitted by Dr. Drake which was in the possession of the Commission at that time and provided documentation. Therefore, the Ohio Ethics Commission was found to be in compliance.

- Complainant asserted that the **City of North Canton** refused to release records in response to a properly submitted public records request, including the addresses of children who had a pool pass to the municipal pool for the year 2014. The City asserted that the personal information was not a public record pursuant to ORC 1347.01(E). Furthermore, according to *State ex re. McCleary v. Roberts*, 88 Ohio St.3d 365 (2000), “because of the inherent vulnerability of children, release of personal information of this nature create an unacceptable risk that a child could be victimized. We cannot in good conscience take that chance.” Therefore, due to the records being in regards to personal information of children, the City of North Canton was found to be in compliance.
- Complainant asserted that the **City of Findlay** refused to release records in response to a properly submitted public records request, including the names of the businesses and/or individuals whose city income taxes had been deferred or were being remitted on an installment plan. The City of Findlay asserted that the records fell under an exemption pursuant to ORC 718.13(A) of the Municipal Income Tax Chapter and asserted legal confidentiality as to the requested information. The names of each of the taxpayers who have permission to pay the city income tax when the annual returns are filed is information gained as a result of an investigation into each of the taxpayer’s record and thus exempt from the Public Records Act. Further, the City asserted that it does not maintain a compilation of the individuals and/or businesses which fall within these categories. After review, the City was found to be in compliance.
- Complainant asserted that the **City of Beachwood** refused to release records in response to a properly submitted public records request, including the City of Beachwood’s Mayor’s key card/access card logs for the calendar years 2013-2014. The City asserted that the requested records are prohibited from disclosure as “security records” under Ohio Revised Code section 149.433(A)(3) and pursuant to *State ex rel. Ohio Republican Party v. Fitzgerald*. After review, the City was found to be in compliance.

Initially Noncompliant:

- Complainant asserted that the **Huron County Developmental Council** refused to release records in response to a properly submitted public records request. During the course of the review process, our office contacted the Huron County Development Council and informed it of the complaint. The Huron County Development Council proceeded to provide all responsive records in its possession to complainant in a manner fully consistent with Ohio public records law.
- Complainant asserted that the **Ohio Environmental Protection Agency** refused to release records in response to a properly submitted public records request, including records related to invoices submitted to the Ohio EPA by Jonathan Downes and/or Zahin & Rich law firm. During the course of the review process, our office contacted the Agency and informed it of the complaint. The Agency proceeded to provide all responsive records in its possession to complainant in a manner fully consistent with Ohio public records law.

- Complainant asserted that **The Ohio State University** refused to release records in response to several properly submitted public records requests. During the course of the review process, our office contacted the University and informed it of the complaint. The University proceeded to provide all responsive records in its possession to complainant in a manner fully consistent with Ohio public records law.
- Complainant asserted that the **Coventry Local School District** refused to release records in response to a properly submitted public records request, including information regarding enrollment and class sizes. During the course of the review process, our office contacted the Coventry Local School District and informed it of the complaint. The Coventry Local School District proceeded to provide all responsive records in its possession to complainant in a manner fully consistent with Ohio public records law.
- Complainant asserted that the **City of Cleveland** refused to release records in response to a properly submitted public records request. During the course of the review process, our office contacted the City and informed it of the complaint. The City proceeded to provide all responsive records in its possession to complainant in a manner fully consistent with Ohio public records law.

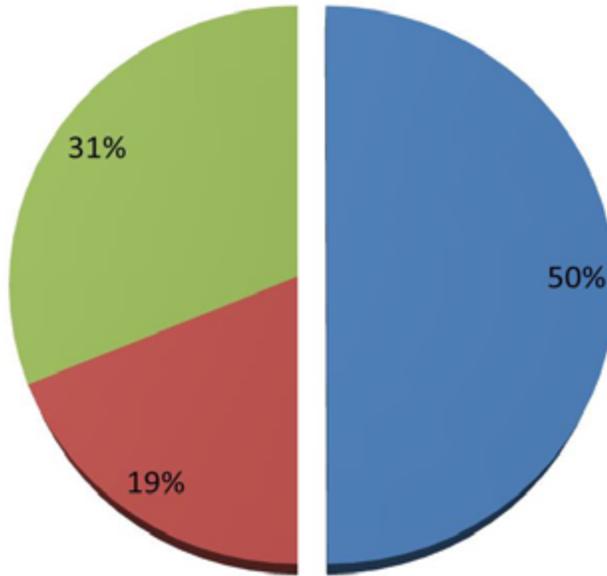
Noncompliant:

- Complainant asserted that the **Ohio Public Employees Retirement System (“OPERS”)** refused to release records in response to a properly submitted public records request, including records regarding an internal audit. The audit was completed by an investment training and consulting firm. OPERS asserted that the records were exempted based on attorney-client privilege due to the firm being under the guidance of the attorney for OPERS. However, since the firm was an investment training and consulting firm, not a law firm, and it was assisting OPERS, the attorney-client privilege was improperly applied and OPERS was found to be noncompliant.
- Complainant asserted that the **Ohio Department of Agriculture (“ODA”)** refused to release records in response to a properly submitted public records request, including records regarding the care of the animals confiscated from Mr. Kenny Hetrick. ODA failed to respond to the Auditor of State’s request for its position on the complaint. Therefore, after review of the information the complainant provided, which showed that a public records request was made and there was no response from ODA other than an acknowledgement of receipt of the request dated August 10, 2015, ODA was found to be noncompliant.
- Complainant asserted that the **City of Beachwood** failed to provide legal authority for redactions made to Mayor Gorden’s calendar. The City asserted that legal authority was given for all redactions. City officials ultimately provided legal authority which supports the propriety of the redactions for personal information. However, the City also justified a portion of the redactions on the basis that the redacted material related to trade

secrets, but legal authority was not provided. Therefore, since the City of Beachwood failed to provide legal authority for all redactions made to Mayor Gorden's calendar, the City was found compliant with regard to those areas where the redactions were legally supported and noncompliant where the redactions were unsupported.

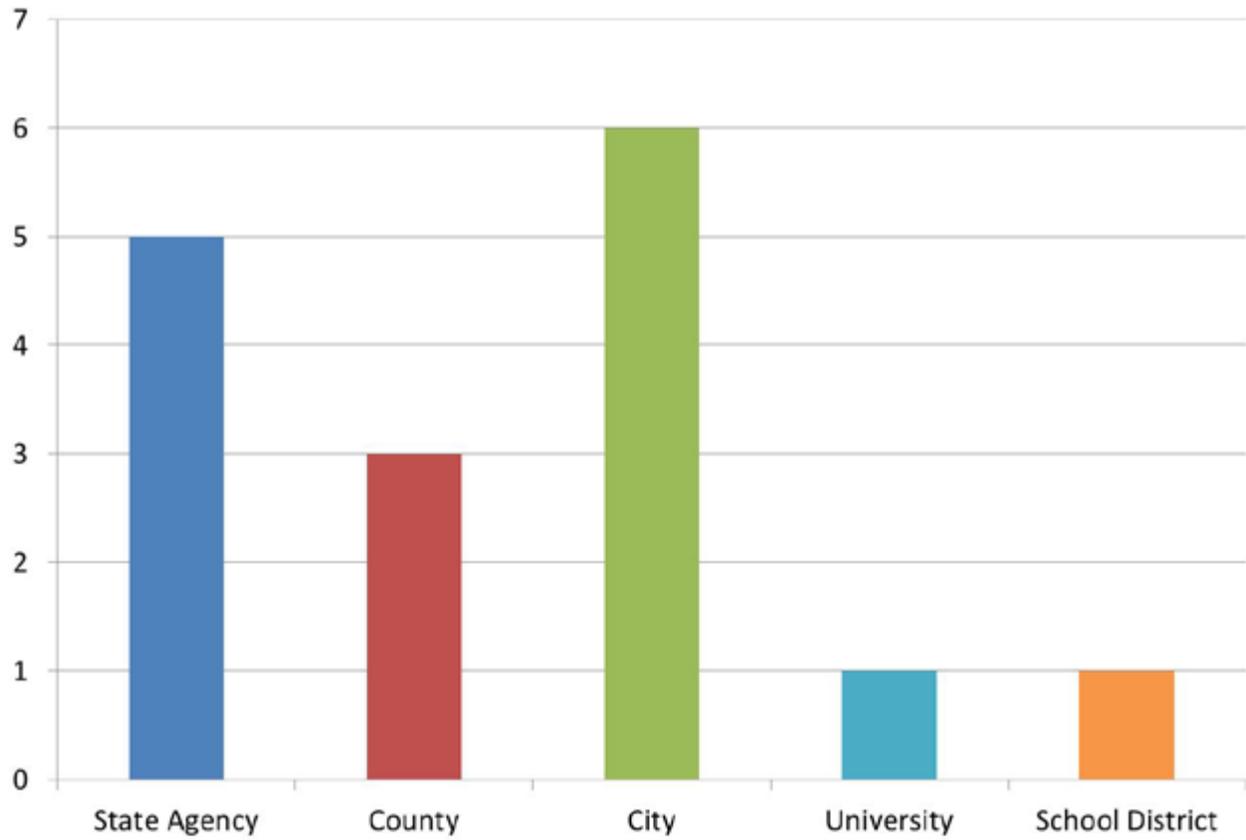
Sunshine Audit Results

■ Compliant: 8 ■ Noncompliant: 3 ■ Initially Noncompliant: 5



Compliant means the entity was found to be properly following the Public Records Act. Noncompliant means the entity was found to be improperly withholding public records. Initially noncompliant means the entity initially did not release public records, but upon contact from the Auditor of State's Office, the entity properly released the public records.

Sunshine Audits by Entity Type



SUNSHINE AUDIT PROTOCOL

The purpose of this process and the following protocol is to afford individuals who believe they are aggrieved as the result of a public entity's refusal to release records, recourse to seek release without the necessity of protracted and potentially expensive litigation. It is required that complaints will be considered under this process only after the complainant has attempted to secure resolution of the matter through the mediation processes provided by the Ohio Attorney General. The scope of this procedure is to be limited.

1. Public records complaint related to a state agency or local subdivision is received, via telephone, mail, email, or website;
2. Administrative staff logs complaint and reviews complaint information;
3. Administrative staff determines if additional information is needed to complete complaint in-take form;
4. Administrative staff contacts complainant to secure additional information needed to complete complaint in-take form, as is necessary;
5. Administrative staff completes complaint in-take form;
6. Administrative staff determines if the complainant has made efforts to utilize the Attorney General's Public Records Mediation Program or if the mediation program has been utilized without successfully resolving the matter. The mediation process is not available to complaints involving state agencies. As such, the requirement of utilizing mediation is not applicable to such complaints, and Open Government Counsel may review the complaint and related material as stated in step 9;
7. If the complainant has not made efforts to utilize the mediation process, the Open Government Unit will refer the complainant to the Mediation Program;
8. If it is determined that the complainant has not made efforts to utilize the mediation process, the matter is referred to inactive status. The complaint remains subject to reactivation and further consideration upon presentation, within a period of one hundred and eighty days, that the complainant attempted to initiate the mediation process;
9. In the event the complainant made efforts to utilize the mediation process but the public body declined to participate in mediation, or if mediation was undertaken, but failed to resolve the matter, Open Government Counsel reviews the complaint and related material;
10. The Open Government Counsel may contact the Complainant to secure additional information, or clarification as to information already provided. Open Government Counsel will request a statement of position and supporting documentation from the public body, requiring a response within five (5) business days. Any contact will be fully

documented, and information secured will be preserved as part of the file;

11. If Open Government Counsel determines that the complaint is without merit, or involves issues which require judicial interpretation and resolution, or is beyond the scope and limitations of the process, the parties will be so advised via written communication;
12. In the event that, at any time during the process, either party advises the Auditor of State's Office that the matter has been resolved to the satisfaction of both parties, the result will be confirmed, and if accurate, no further action will be taken;
13. If it is determined that there is a violation of relevant provisions of the Ohio Public Records Act, the Auditor of State's Office will issue a finding of noncompliance and the matter will be referred to audit staff for consideration as part of the next regular audit of the public office. Notice of final action by the Auditor of State's Office will be sent to both parties. Notice to the complainant will include information as to the complainant's rights and enforcement prerogatives under the Ohio Public Records Act.

DRAFT POSITION LETTER

Dear _____:

This office has received a complaint about your office, alleging that your office has failed to provide public records upon request. A copy of the complaint is attached.

The Auditor of State will review this complaint under its “Sunshine Audit” program. The purpose of this program is to afford individuals, who believe they are aggrieved as the result of a public entity’s refusal to release records, recourse to seek release without the necessity of protracted and potentially expensive litigation. Sunshine Audits are conducted under our authority under Ohio Revised Code section 117.01(G)(2)(b) to make a determination of “whether a public office has complied with all the laws, rules, ordinances, or orders pertaining to the public office.” In this instance, the law involved is Ohio’s Public Records Act, Ohio Revised Code section 149.43.

The public records of a public office belong to the people, not to the government officials holding them. *State ex rel. Musial v. N. Olmstead*, 106 Ohio St.3d 459 (2005). Therefore, The Ohio Supreme Court has held that ORC 149.43 must be liberally interpreted in favor of disclosure, and any exceptions that permit the withholding of records from disclosure must be narrowly construed. *State ex rel. Toledo Blade Co. v. Senecra Cty. Bd. Of Commrs.*, 120 Ohio St.3d 372 (2008). The public office has the burden of establishing that an exception applies, and thus the records should not be produced. *State ex rel. Rucker v. Guernsey Cty. Sheriff’s Office*, 126 Ohio St.3d 224 (2010). In the absence of such a demonstration of exception, records are presumed to be subject to public disclosure.

The complaint regarding your office relates to _____. Please provide us, in writing, the reasons for refusing to disclose the requested public records. The burden of proof for an exception rests with you, as the public officer. If you fail to cite proper grounds for your refusal, a noncompliance finding against your office will be issued.

Your response need not be a legal document, but should identify the exception in the law, and include any facts or document that support your decision. We request that you provide a response to this email within five (5) business days. You will be notified of our decision in writing as well.

If you have already provided the public records requested, please, advise us of that fact, and we will close this matter without a finding.

For additional information regarding the “Sunshine Audit” program, please go to: <https://ohioauditor.gov/sunshineaudits/default.html>.

If you have any questions or concerns about this request, please feel free to contact the Open Government Unit at 614-466-2929.

DRAFT NOTICE LETTER

Date

Entity/Complainant Address

RE: Sunshine Audit Complaint_____

The Auditor of State may determine, as required by section 117.11 of the Revised Code, whether a public office has complied with all the laws, rules, ordinances, or orders pertaining to the public office. Due to the significant number of public records disputes in Ohio, the Auditor created the “Sunshine Audit” protocol which affords individuals who believe they are aggrieved as the result of a public entity’s refusal to release records a mechanism to seek release without the necessity of filing a lawsuit. Upon receipt and review of a properly submitted Sunshine Audit complaint, both parties will be advised via written communication of the final determination of the Auditor of State’s Office. In addition, violation of relevant provisions of Ohio’s public records law will be referred to audit staff for consideration as part of the next regularly scheduled audit of the public entity. An audit released by this office has the presumption of validity when introduced as evidence¹.

A person aggrieved by the alleged failure of a public office to comply with an obligation of the Public Records Act may file a mandamus lawsuit against the public office. In any such lawsuit, the requester has the burden of showing that he or she made a proper public records request. In turn, the public office has the burden of showing the court that it complied with its obligation(s) which it is alleged to have violated. If it cannot, the court will order the public office to provide any improperly withheld record(s), and the public office may be subject to a civil penalty and the payment of the requester’s attorney fees.

Our office has received a complaint which asserts that (public entity) has refused to release records in response to a properly submitted records request. (Insert summary of facts)

¹ Audit report of non-profit foster home placement agency prepared by Auditor of State was admissible under the business records exception to the hearsay rule, in disregard and exploitation action brought by the State against the incorporator and directors of the agency, where the Auditor was required by statute to obtain information through audits of private agencies, the audit report was compiled and prepared by Auditor’s employees in furtherance of Auditor’s statutory duties, and the information in the report came from agency’s officers, directors and employees, and agency’s business records. R.C. §§ 117.28, 117.29; Rules of Evid., Rules 801(D)(2), 803(8). *State ex rel. Atty. Gen. v. Vela*, 2013-Ohio-1049, 987 N.E.2d 722

ORC 149.43(B)(1) provides that,

“Upon request...all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. [U]pon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time. 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. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.”

1. At this time, pursuant to the facts presented and the current state of the public records law of the state, the Auditor of State has found, by a preponderance of the evidence, that _____ has violated the Public Records Act as has been alleged and as described above.
2. At this time, pursuant to the facts presented and the current state of the public records law of the state, the Auditor of State has found ____ to be in compliance with the Public Records Act.
3. At this time, the Auditor of State has determined that the issue(s) presented by this complaint falls outside the scope of the Sunshine Audit protocol; and/or the matter involves issues which require judicial interpretation and resolution.

Enclosed is a copy of the complaint related to this matter which was received by the Auditor of State's Office, along with an explanation of our finding. Please, do not hesitate to contact our office to secure further information, or to discuss this issue.

Very truly yours,
/signed/

CC: Robert Hinkle, Chief Deputy Auditor

