

OHIO AUDITOR OF STATE
KEITH FABER

Ohio Sunshine Laws Certification Training

USING OHIO'S PUBLIC RECORDS ACT TO PROMOTE
OPEN AND ACCOUNTABLE GOVERNMENT

*A seminar for public officials, citizens, and the
media presented by the Ohio Auditor of State*

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2

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Credit and proof of attendance

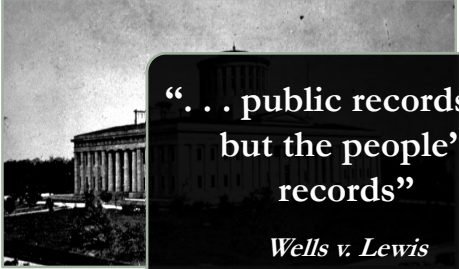


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Why are we here?



**“ . . . public records are
but the people’s
records”**

Wells v. Lewis
(Ohio 1901)

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Practical reasons for public records training



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5

Public Records Act overview

- ✓ What is a “public office”
- ✓ What is a “public record”
- ✓ What is a proper, enforceable request
- ✓ How must a public office respond
- ✓ Exemptions and redactions
- ✓ Litigation and remedies
- ✓ Records management and retention

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What is a “public record”?

- (1) every “record”
- (2) “kept by” a
- (3) “public office”

7

What is a “public office” subject to the Public Records Act?



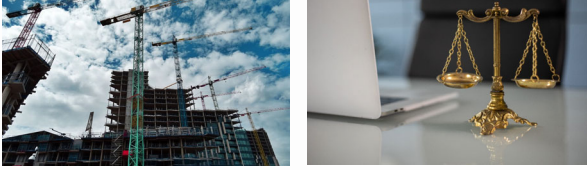
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The Public Records Act applies to “persons responsible for public records”

- (1) Did the private entity prepare the records to perform responsibilities normally belonging to the public office?
- (2) Can or does the office monitor the private entity’s performance?
- (3) Can the office access the records itself?

9

**The Public Records Act applies to
“persons responsible for
public records”**



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10

**A private entity can be the
“functional equivalent”
of a public office**

(1) Does the entity perform a government function?
 (2) How much government funding does it get?
 (3) How much does public office control the day-to-day operations?
 (4) Was it created to avoid the Public Records Act?

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**A private entity can be the
“functional equivalent”
of a public office**



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What is a “record”?

- (1) Exists on a fixed medium
- (2) Created, received by, or under jurisdiction of a public office
- (3) Documents activities of the office

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Public records must be on a fixed medium



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Public records must be created, received by, or under a public office’s jurisdiction



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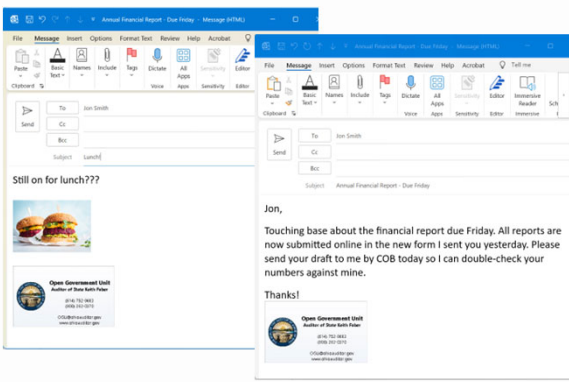
Public records must document the activities of the office



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Information or content determines whether records are public records




What does the information tell the public about what the office does?

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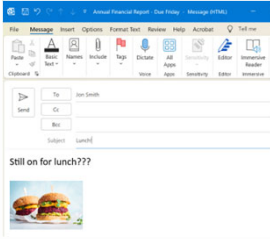
Messages on personal accounts or devices can be public records



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Records don't document activities of the office if information is purely personal



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Records kept for administrative use or convenience



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Records kept for administrative use or convenience

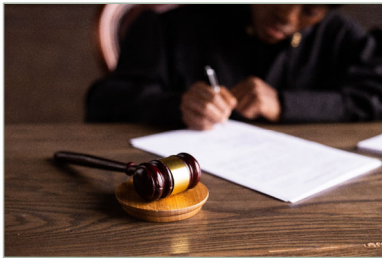


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A record doesn't document activities of the office if it's not used



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A record doesn't document activities of the office if it's not used



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Notes and drafts can be public records



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Notes can be public records depending on use

- ✓ Personal?
- ✓ Used for employee's own convenience?
- ✓ Accessed by others?

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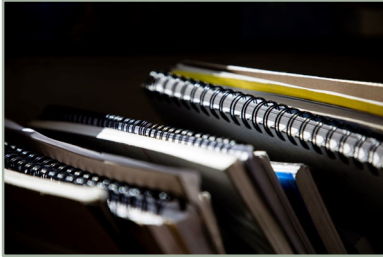
Drafts can be public records depending on use



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**Public record:
“kept by” a public office**

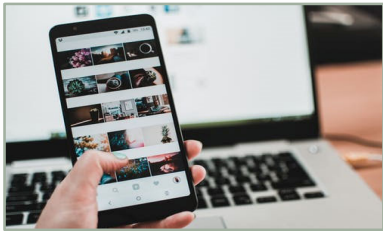


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**Records on personal devices
or accounts are records
“kept by” public office**

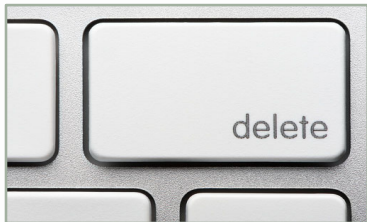


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**Record not “kept by”
public office if disposed of per
retention schedule**

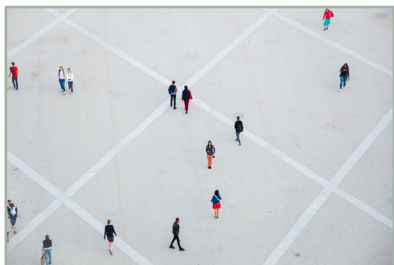


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"Any person" can make public records request



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No form or language required to make public records request

Submit a Public Records Request

Remember: You are not required to identify yourself to request records, but we do need at least one e-mail address to be notified when your records are available for pick-up.

Name (optional):

Email address:

Contact phone number (optional):

Case number/name:

Brief summary of request:

SAMPLE PUBLIC RECORDS REQUEST

This is Requestor. Please a copy of this request for your files. If you eventually need to file a Request for Records with the Court of Claims, you will need to attach a copy of your public records request.

Name and Address of Public Agency or Official Receiving Request: _____

Date Requested: _____

Request Submitted By: _____ E-Mail: _____ U.S. Mail: _____ Fax: _____ In Person: _____

Name of Requestor: _____

Street Address: _____

City/State/Country (if appropriate): _____ E-mail (Optional): _____

Fax (Optional): _____

Records Requested: ***Provide as much specific detail as possible to the public body you intend to request records that you are seeking. This may attach additional pages. (if necessary)***

Do you want copies of the documents? YES or NO

Do you want Electronic Copies or Paper Copies? _____

Do you need Electronic Copies in that format? _____

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Identity and motive of requesters irrelevant



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Identity and motive of requesters irrelevant

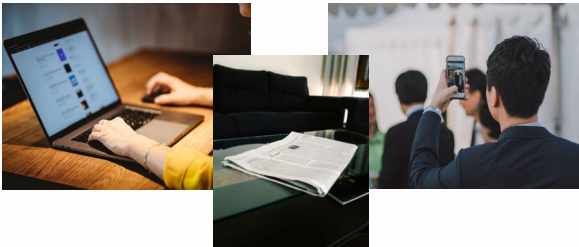


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Identity relevant if the requester is a journalist



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Identity relevant if the requester is an insurer or next of kin



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Identity relevant if the requester is an inmate seeking criminal records



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Identity relevant if a court declared the requester a vexatious litigator



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Request to inspect

Records must be prepared promptly for inspection

Request for copies

Copies must be produced in a reasonable period of time

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Can an office charge for responding to requests?

YES if the request is for copies of records.

NO if the request is to inspect records.

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What is “actual cost” of providing records?


- ✓ Blank record medium (i.e., paper or disc)
- ✓ Ink or toner
- ✓ Packaging, delivery, or transmission
- ✓ Final copy provided to requester

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Some public offices can charge more than “actual cost”

- ✓ BMV for accident reports
- ✓ Coroners for copies of records
- ✓ Law enforcement agencies up to \$75/hour for reviewing and producing video recordings



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45

Responding to request to inspect records

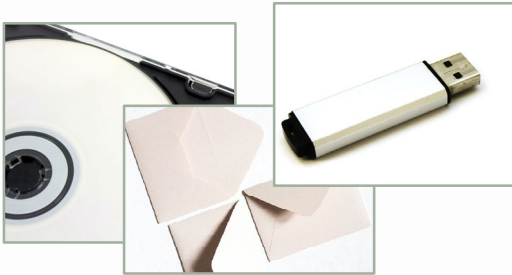


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Responding to a request for copies of records

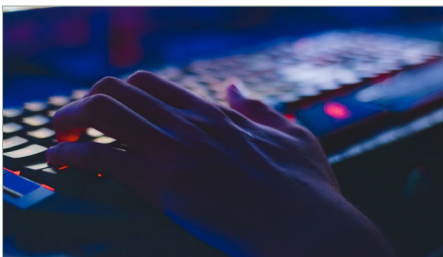


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Responding to a request for copies of records

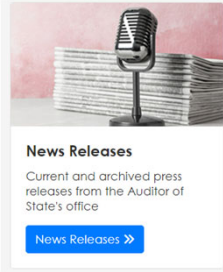


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Office must provide copies even if available elsewhere



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Office must provide copies even if available elsewhere



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Records must be provided in a "reasonable period of time"



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**Reasonable period of time:
communication with requester**

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    graph LR
      A[42 public records requests] --> B[No response from public office]
      B --> C[Requester sues]
  
```

Not a reasonable period of time

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**Reasonable period of time:
communication with requester**

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    graph LR
      A[Voluminous public records request] --> B[Public office acknowledges receipt promptly and provides updates]
      B --> C[Requester sues]
  
```

Reasonable period of time

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**Burden of responding is
not an excuse for delay**

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Tips for responding timely

- ✓ Acknowledge request promptly
- ✓ Produce records on rolling basis
- ✓ Communicate with requester

58

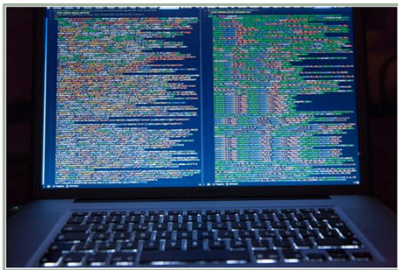
A proper request must ask for existing records

Records do not exist when

- ✓ They have been disposed of
- ✓ They were never created

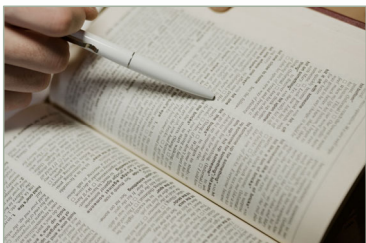
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A record might “exist” if it can be produced from a database



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Proper request: doesn't ask for information or research



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A proper request must describe records sought with "reasonable clarity"

Burden is on requester to properly frame request

AND

Requester must identify records based on how office organizes and maintains

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Whether a request is overly broad depends on the facts and circumstances

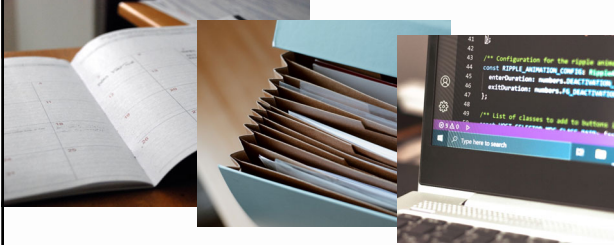


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Whether a request is overly broad depends on the facts and circumstances



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A proper request must identify records based on how the office organizes and maintains records



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A proper request must identify records based on how the office organizes and maintains records



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A proper request must identify records based on how the office organizes and maintains records



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Ambiguous request: office doesn't know what the requester wants or where to look for records



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Denying an overbroad or ambiguous request

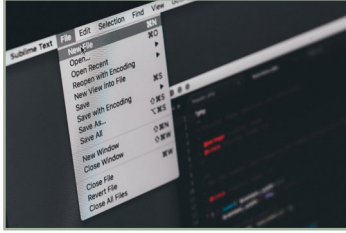
- ✓ Must give requester opportunity to revise request
- ✓ Must inform requester of how office's records are maintained and accessed

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A public office must inform requesters of how its records are kept

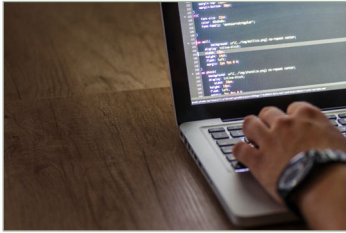


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A public office must inform requesters of how its records are kept



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Dear Requester,

In general, the Ohio Attorney General's Office organizes its records by service division. I am working on your request for records regarding the Ohio State University's financial records. We would be happy to work with you to revise your request so that we can identify the records you seek based on the manner in which public records are organized and maintained by the Ohio Attorney General's Office. Please feel free to contact us.

With reasonable effort, records at issue. *Mate* you seek
ex rel. Zidonis v. Columbus State Cmty. College, 133 Ohio St.3d 122, 2012-Ohio-4228, ¶ 21.

Ohio Attorney General's Office

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Exemptions can only be created by state or federal law



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73

Exemptions are always narrowly construed



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Mandatory exemptions:
office must withhold

AND →

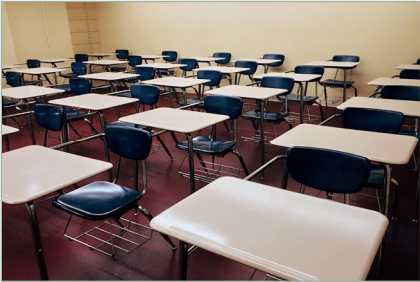
Discretionary exemptions:
office may withhold but not required to

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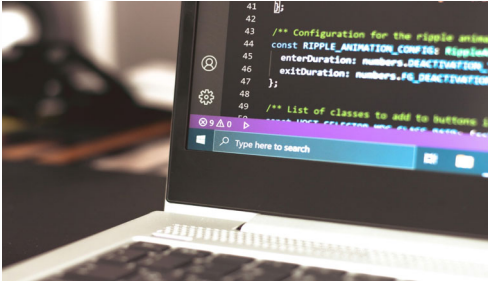
Mandatory exemption: FERPA



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76

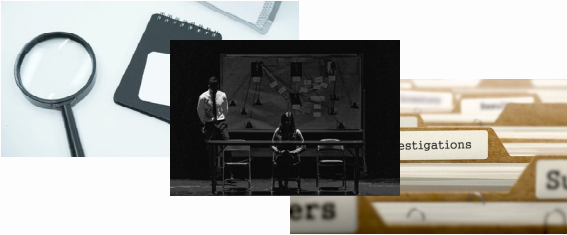
Mandatory exemption: LEADS



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Discretionary exemption: confidential law enforcement investigatory records (“CLEIRs”)



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Types of CLEIRs information:

- ✓ Identity of an uncharged suspect or confidential source
- ✓ Specific confidential investigatory techniques or procedures
- ✓ Investigatory work product
- ✓ Information that would endanger life or physical safety of law enforcement personnel, victim, witness, or confidential informant

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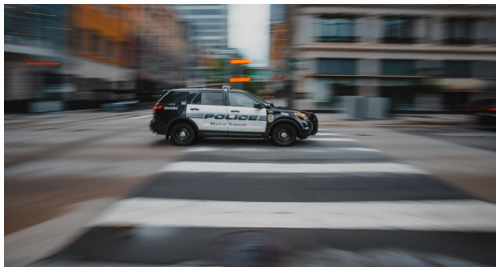
CLEIRs information: specific confidential investigatory techniques or procedures



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CLEIRs information: investigatory work product



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Investigatory work product is time limited

Law enforcement matter pending → Investigatory work product can be withheld

Law enforcement matter concluded → Investigatory work product must be produced

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15-Minute Break

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Routine offense and incident reports



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CLEIRs does not apply to 9-1-1 calls



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Discretionary exemption: security and infrastructure records

Infrastructure records:
Records disclosing configuration of critical systems

Security records :
Records used to protect against attack

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Discretionary exemption: security records

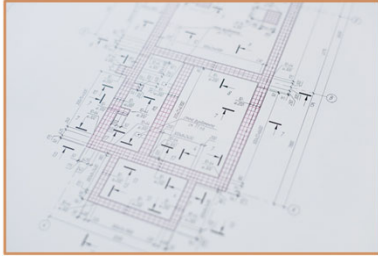


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Discretionary exemption: infrastructure records



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No exemption for some categories of records

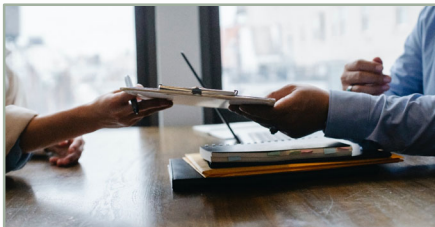
- ✓ Job application materials
- ✓ Juvenile records
- ✓ Right to privacy

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Discretionary exemptions can be waived

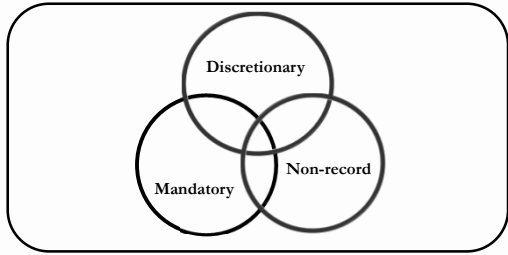


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More than one exemption may apply



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Exempted records or information may be withheld or redacted

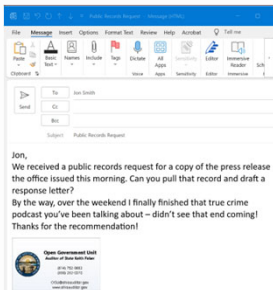


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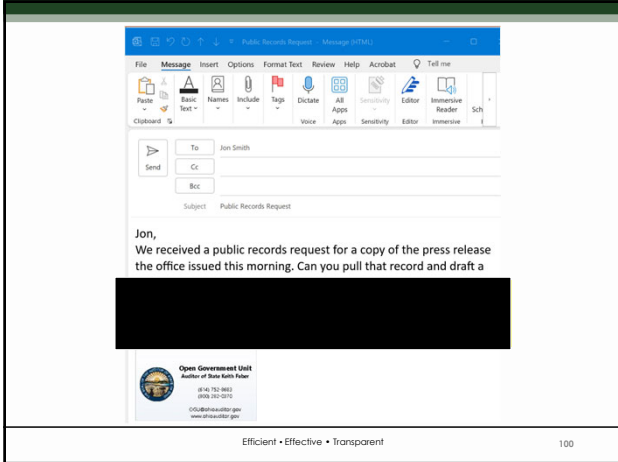
Non-record information may be withheld or redacted



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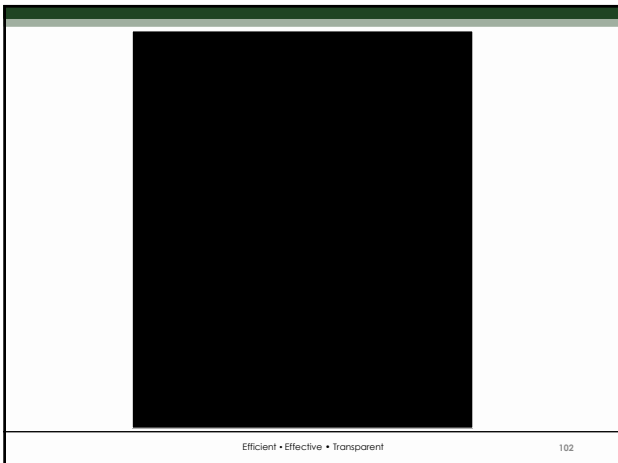
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100



101



102

Dear Requester,

I am writing in response to the public records request you submitted to this Public Office on DATE. Specifically, you requested "a copy of the personnel file for Public Employee."

Please find attached the records responsive to your request. Note that we have withheld records that are subject to the following:

- Medical records, pursuant to R.C. 149.43(A)(1)(a) and R.C. 149.43(3).


If you have any questions or concerns regarding this response, please feel free to contact me at 555-555-5555.

Very respectfully yours,
Public Office Employee

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**Withhold in good faith,
talk to attorney when in doubt**



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**The Public Records Act is a
"self-help" statute**



**Individuals can sue a public office
themselves or through a private attorney**

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Two litigation options:

Mandamus lawsuit in court of common pleas, court of appeals, or Supreme Court of Ohio

OR


Public records procedure in Ohio Court of Claims

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Pre-filing complaint requirement

- ✓ Requesters must serve a pre-filing complaint on the public office before they can sue
- ✓ Court of Claims provides the complaint form



<https://ohiocourtclaims.gov/public-record>

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Pre-filing complaint requirement

- ✓ If alleged violation not resolved requester can file in mandamus or Court of Claims after three-day period expired
- ✓ Must file affirmation that pre-filing complaint process followed, otherwise court will automatically dismiss

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108

Mandamus asks court to order office to comply with Public Records Act



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109

Statutory damages may be awarded in successful mandamus lawsuit

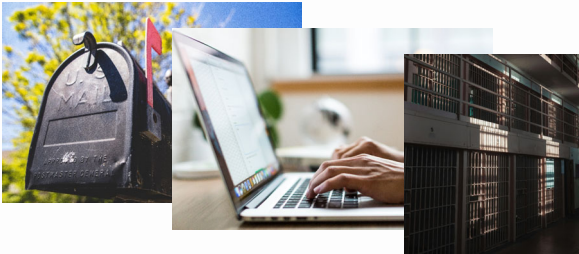


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Statutory damages: requirements for service of request, not available to inmates



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Attorney fees in successful mandamus lawsuit

- ✓ Court order to comply with PRA
- ✓ Fails to respond in reasonable period of time
- ✓ Promises records in certain timeframe
- ✓ Office acted in bad faith in providing records after lawsuit filed

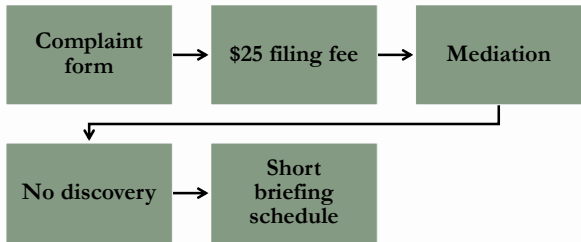
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Complaint in Court of Claims



113

Complaint in Court of Claims



114

Best practices to avoid litigation



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115

Document all requests the office receives

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

Date Rec'd	Form of Request	Date of Response	Name of Requesting Person or Entity	Description of Records Requested	Copy of Released Records		Exemption Indicated		Legal Authority for Exemption Indication	Name of Person Fulfilling Request
					Yes	No	Yes	No		
1										
2										
3										
4										
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Sample public records request log

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116

Document all requests the office receives

- ✓ Request
- ✓ Communications
- ✓ Steps taken
- ✓ Response

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Stay up-to-date on public records law



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Public offices must have a public records policy



www.OhioAttorneyGeneral.gov/Publications

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Public records policy

DO NOT:

- ✓ Limit number of records available to one person
- ✓ Limit number of records available in fixed period of time
- ✓ Establish fixed period before office will respond to request

DO:


- ✓ Distribute policy
- ✓ Include policy in existing manual of policies
- ✓ Display poster of policy conspicuously in office

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Offices must organize and maintain records for inspection and copying



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Importance of good records management

- More records means more work
- Identification of records that can be destroyed
- Defensible and consistent disposition of records
- Removal of inactive or useless records from public office
- Compliance with laws and regulations

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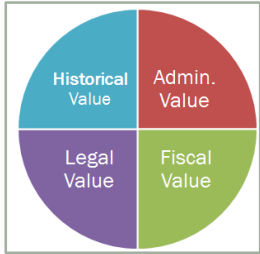
Contents of records retention schedules

- ✓ Title
- ✓ Description of purpose/function of records and types of information
- ✓ Retention period
- ✓ Retention format
- ✓ Disposal method

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Factors determining record retention period



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Retention schedule approval process

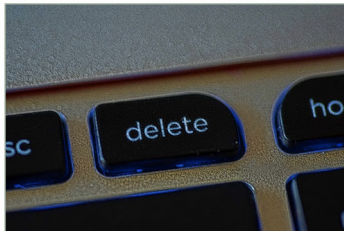


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An office can only dispose of records pursuant to an approved retention schedule



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Keep up with records retention schedules

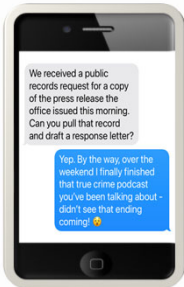


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Managing electronic records



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Best practices for managing electronic records



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Update retention schedules to keep up with technology

Record Series Title	Agency and Series Authorization Numbers	Record Series Description	Confidential Description	Vital Description	Retention Period	Retention Justification	Method of Disposal	Date Schedule Approved
AGO Podcasts	88-OAG-11 10551681	Outward-facing communications to the public to educate or relay information concerning the work/services of the AGO. Records include, but are not limited to, emails, draft scripts, and podcast recordings.			Machine Readable – Retain 4 years, prior to destroying have reviewed by State Archives.		Machine Readable – Delete	4/26/2018

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Managing transient records

“Thank you” emails, accepted/declined meeting requests, read receipts, etc.

Applicable records retention schedule in place

No records retention schedule in place

Delete immediately

Retain indefinitely

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131

Transient records retention schedule

Record Series Title	Agency and Series Authorization Numbers	Record Series Description	Confidential Description	Vital Description	Retention Period
Transient Documents	GAR-CM-04 10551778	All informal communications which convey information of temporary importance in lieu of oral communication including telephone voicemail, chats, posts, instant, and text messages, post-it notes, drafts, generic emails, social media posts, and shared departmental calendars. These communications have very little administrative value as they do not set policy, establish guidelines, define procedures, certify a transaction, or become a receipt.			Electronic – Retain until no longer of administrative value, then destroy. Paper – Retain until no longer of administrative value, then destroy.

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Litigation and remedies for improper disposal

- ✓ Civil lawsuit
- ✓ Court of Claims proceeding
- ✓ Forfeiture of \$1,000 per violation
- ✓ Attorney fees

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Records management resources

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134

Open Meetings Act overview

- ✓ What is a “public body”
- ✓ What is a “meeting”
- ✓ Obligations of public bodies
- ✓ Executive session
- ✓ Litigation and liabilities

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135


The Open Meetings Act applies to the “meetings” of “public bodies”



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136

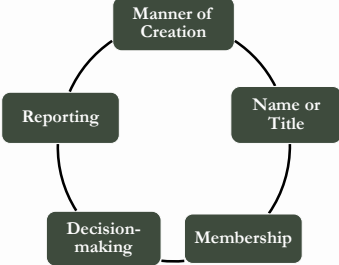
What is a “public body”?



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137

What is a “public body”?



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138

What is a “public body”?



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139

What is a “meeting”?

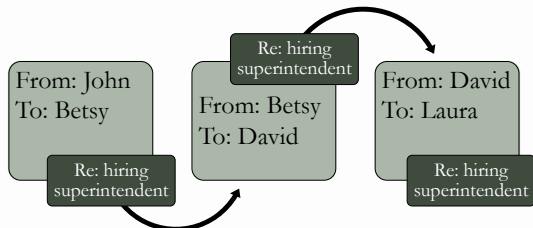
- (1) A prearranged
- (2) Discussion of public business
- (3) By a majority of members of public body

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140

When is a meeting “prearranged”?

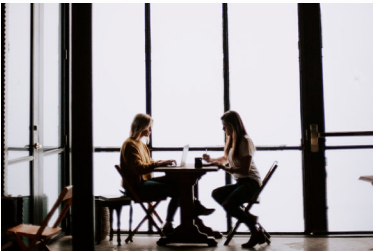


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When is a meeting “prearranged”?



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142

A “meeting” has discussion and deliberation of “official business”

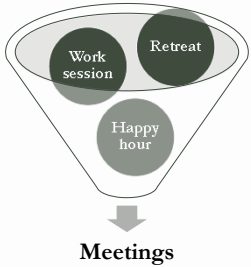


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A meeting is still a meeting even if called something else



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When a public body meets it must:

```

    graph TD
      A[Give notice] --> B[Keep meetings open]
      B --> C[Keep minutes]
  
```

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Open meeting obligation 1: Notice

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Regular meeting: prescheduled intervals, e.g., first Thursday of every month

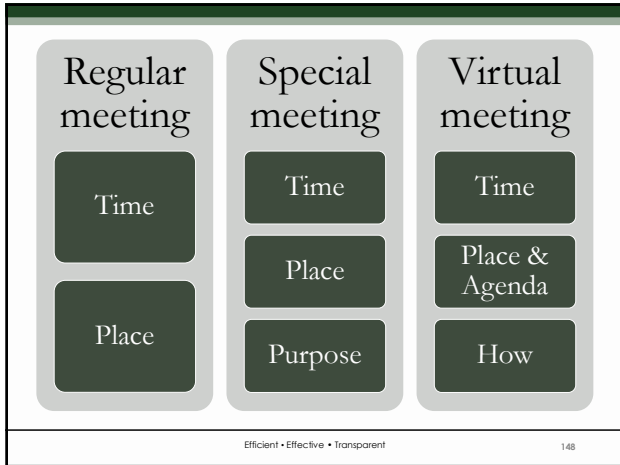
Special meeting: any meeting that is not held on the regular meeting date

Emergency meeting: a special meeting when an issue requires immediate action

Virtual meeting: meeting via video- or teleconference (only bodies with authority)

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Open meeting obligation 2: Openness

- ✓ Deliberate in public
- ✓ Vote in public
- ✓ Take official actions in public

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Forum requirements of open meetings



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All deliberation and decision-making must be in open meetings



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No secret ballots, whispering, and caution if voting on a consent agenda



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Some public bodies have statutes that authorize them to meet virtually



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A public body can meet by video conference or other electronic means if its members:

- ✓ *Are not compensated for their positions*

OR

- ✓ *Are not elected by the general public*



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Virtual Meeting Policy Requirements:

- ✓ **At least 72-hours' notice with time, location, agenda, and how meeting will be conducted**
- ✓ **A way for the public to see and hear the meeting, e.g., livestreaming or other similar electronic technology**
- ✓ **All votes taken by roll call unless a unanimous consent motion is adopted**
- ✓ **Members attending remotely must notify chair at least 48 hours before meeting**

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Recording and speaking at open meetings



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Open meeting obligation 3: Minutes

Minutes must be:

- ✓ Promptly prepared
- ✓ Filed
- ✓ Maintained by public body

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Meeting minutes (including drafts) are public records

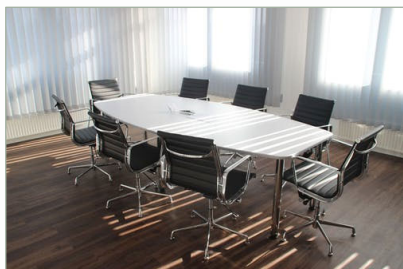


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Openness exception: executive session



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Voting procedure to convene executive session

```

    graph TD
      A[Motion] --> B[Second]
      B --> C[Roll Call Vote]
    
```

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Executive session must occur after meeting opens and before meeting closes

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Nine permissible executive session topics

- 1) Certain personnel matters (must be specific)
- 2) Purchase or sale of property
- 3) Pending or imminent court action
- 4) Collective bargaining matters
- 5) Matters required to be kept confidential
- 6) Security matters
- 7) Hospital trade secrets
- 8) Confidential business information of an applicant for economic development assistance
- 9) Veterans Service Commission applications

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Executive session topic: personnel matters



- ✓ Appointment
- ✓ Employment
- ✓ Dismissal
- ✓ Discipline
- ✓ Promotion
- ✓ Demotion
- ✓ Compensation

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163

Executive session topic: pending or imminent court action



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Executive session topic: matters required to be confidential



*There must be a
state or federal law
or regulation that
makes the matter
confidential*

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Who can be present in executive session?

- ✓ Members of the public body
- ✓ Majority cannot exclude minority
- ✓ Anyone members invite

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Do not vote or make decisions in executive session

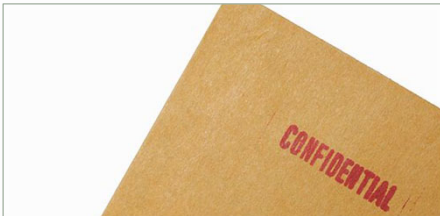


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167


Discussion and documents in executive session may not be confidential



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168




Documents discussed in executive session may be public records

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The Open Meetings Act is a “self-help” statute

Individuals can sue a public body themselves or through a private attorney



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Remedies for violating the Open Meetings Act

- ✓ Fine of \$500 per violation
- ✓ Attorney fees (if applicable)
- ✓ Invalidation of action(s)
- ✓ Removal from office

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**Auditor of State's Office
Open Government Unit**

**Open Government Unit
Ohio Auditor of State
65 East State Street, Suite 1400
Columbus, Ohio 43215
614-752-8683
OGU@OhioAuditor.gov**

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Credit and proof of attendance



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175