

THE PUBLIC RECORDS ACT
SUMMARY AND PRACTICAL CONSIDERATIONS

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I. INTRODUCTION

A. Types of Cases in Which Public Records May Be Sought

1. Motor Vehicle Accidents
 - a. traffic crash reports
 - b. driving records
 - c. traffic studies
 - d. traffic light timing reports
2. Section 1983 Claims
 - a. training records
 - b. policies / procedures
 - c. criminal records from underlying proceedings
3. Construction Claims
 - a. permits
 - b. drawings
 - c. inspections
4. Property Disputes
 - a. land ownership issues
 - b. right of ways and easements
5. Premises Liability

- a. criminal activity on the property

B. Public Policy Considerations and the Balancing of Interests

- 1. Openness
 - a. inherent nature of public records
 - b. the public's right to know
 - c. democracy flourishes when public information is open to scrutiny
- 2. Privacy concerns
 - a. personal information
 - b. private interests
 - c. potential abuses

C. History of Laws Governing Public Records

- 1. Ohio has a long-standing public policy committed to open public records
- 2. Effective October 29, 2005, Am. Sub. H.B. 303 specifically exempted confidential records pertaining to mediations pursuant to Ohio's Uniform Mediation Act

II The Public Records Act

See complete copy of the Act, Ohio Rev. Code. § 149.43 attached.

III The Federal Freedom of Information Act (FOIA)

A. FOIA Does Not Apply to State Agencies or Officers. However, it is the Controlling Law When Requesting Information From a Federal Office Located in Ohio. *State ex rel Warren v. Warner*, 84 Ohio St. 3d 432 (1996).

B. How to Make a Successful FOIA Request:

- 1. Direct the request to the appropriate agency office(s)
- 2. Specify which agency offices should be searched for responsive records
- 3. Include as specific a description of the records as possible

4. Request fee waiver or reduction if appropriate and provide facts that support fee waiver or reduction
5. Specify maximum amount of research, review, and copy costs that may be accrued by agency without additional approval
6. Request expedited processing if needed and appropriate and include supporting facts
7. Specify the form or format in which the records should be provided
8. Include contact information for response or questions from agency personnel
9. Deliver to agency by means that allows confirmation of date of receipt

From The Federal Information Manual: How the Government Collects, Manages, and Discloses Information under FOIA and Other Statutes

IV Overview of Public Records Act

A. The Act Imposes Two Primary Obligations Upon *Public Offices*:

1. Provide *prompt* inspection of *public records*; and
2. Provide *copies* of public records within a *reasonable* period of time.

B. These Obligations Provide the Public with Two Primary Rights:

1. The right to prompt inspection of public records; and
2. The right to copies within a reasonable time

C. Liberal Rules of Construction

1. Underlying principle is that Ohio's citizens are entitled to access of the records of their government
2. The Public Records Act is to be interpreted liberally in favor of disclosure. *State ex rel Warren Newspapers v. Hutson*, 70 Ohio St. 3d 619, 1994-Ohio-5.
3. In matters concerning "close calls," the records should be disclosed.

4. If a statute expressly states that specific records are public, it does not mean that all other records are protected from disclosure. *Franklin County Sheriff's Dep't. v. State Employment Relations Bd.*, 63 Ohio St. 3d 498 (1992).
5. Exemptions to the Public Records Act should be narrowly construed. *State ex rel Warren Newspapers v. Hutson*, 70 Ohio St. 3d 619, 1994-Ohio-5.

PRACTICAL CONSIDERATION: Many Public Offices have designated a Public Information Officer. These individuals can be invaluable as a resource and should be consulted early on in the record request process.

D. "Public Record"

A *record kept* by a public office, 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 Ohio kept by a nonprofit or for profit entity. Ohio Rev. Code. § 149.43(A)(1)

E. What is a "Record"?

1. A "record" is any item that:
 - a. Contains information stored on a fixed medium (such as paper, computer, film, etc.);
 - b. Is created, received, or sent under the jurisdiction of a public office;
and
 - c. Documents the organization, functions, policies, decisions, procedures, operations or other activities of the office
Ohio Rev. Code. § 149.011(G)

PRACTICAL CONSIDERATION: Be sure what you are seeking is truly a "public record."

2. Actual Use Standard

The Supreme Court of Ohio has imposed an actual use standard in defining a "record." *State ex rel. Beacon Journal Publ'g. Co. v. Whitmore*, 83 Ohio St. 3d 61, 1998-Ohio-180.

3. Typically, a public office has discretion to determine the form in which it will keep its records, and how that information is organized. *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St. 3d 163 (1989).

PRACTICAL CONSIDERATION: Identify the medium used by a particular office to store public records. Inquire about databases that may be available and computer programs in use.

4. Pleadings of a court are public records. *State ex rel. Miami Valley Broad. Corp. v. Davis*, 158 Ohio App. 3d 98, 2004-Ohio-3860.
5. Records are still public if they satisfy the three conditions above, even if they are in the custody of a private entity or the actual record-keeping function is transferred to a private entity as long as the following conditions are also met:
 - a. the private entity prepared the records to perform responsibilities normally belonging to the public office;
 - b. the public office is able to monitor the private entity's performance; and
 - c. the public office may access the records itself
State ex rel. Cincinnati Enquirer v. Krings, 93 Ohio St. 3d 654, 2001-Ohio-1895.

F. What is a "Kept" Record?

1. A public office may 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 agency's activities." Ohio Rev. Code. § 149.40.
2. To be public, there is no necessity that the record be "required" to be maintained by the public office. Rather, the item must simply be the type of item typically and actually retained by the office in the ordinary course of its business in order to carry out its duties and functions.
3. If an item is not "kept" in this sense, then the public office has no obligation to provide access to the item. *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Ed.*, 99 Ohio St. 3d 6, 2003-Ohio-2260.
4. If an item does not exist, the public office has no obligation to create a requested item, even if the request could be satisfied by compiling information from existing records. *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St. 3d 273, 1998-Ohio-242; *State ex rel. Fant v. Mengel*, 62 Ohio St. 3d 197 (1991).

PRACTICAL CONSIDERATION: Be courteous and helpful. There is no obligation for public offices or public officers to go to extraordinary lengths to help you, but they may nonetheless.

G. Public Office

1. A "Public office" is statutorily defined as a "state agency, public institution, political subdivision or any other organized body, office, agency, institution or entity established by the laws of this state for the exercise of any function of government." Ohio Rev. Code § 149.011(A).
2. Essentially, a public office is any entity that:
 - a. performs a public service; and
 - b. is supported by public funds
State ex rel. Strothers v. Wertheim, 80 Ohio St. 3d 155, 1997-Ohio-349..
3. An entity need not be operated by the state or a political subdivision to constitute a "public office." For example: public hospitals, community action agencies, private non-profit water corporations supported by public money, and non-profit corporations that receive and solicit gifts for a public university and receive support from taxes have all been deemed public offices.

PRACTICAL CONSIDERATION: Identify where you are likely to find the public records sought in advance.

H. Prompt Inspection Obligation

1. "Prompt" means without delay and with reasonable speed, but this standard is judged within the context of the circumstances in each individual case. *State ex rel. Consumer News Servs., Inc. v. Worthington Bd. of Ed.*, 97 Ohio St. 3d 58, 2002-Ohio-5311.
2. The opportunity for legal review by the public office is also contemplated under the standard. *State ex rel. Taxpayers Coalition v. City of Lakewood*, 86 Ohio St. 3d 385, 1999-Ohio-114.
3. Inspections are to be allowed during regular business hours, or a public office may adopt file room hours that approximate normal administrative hours.

Ohio Rev. Code. § 149.43(B); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 1994-Ohio-5.

I. Copies

1. The Act does not permit a public office to charge a service fee for the inspection of public records, but the actual cost of producing a copy of the records is allowed.
2. A private contractor may be employed to copy records at the requester's expense.

PRACTICAL CONSIDERATION: Consider hiring a private contractor to retrieve and copy items.

J. Proper Requests Under the Public Records Act

1. Any person, including corporations, individuals, and even other governmental agencies may request to inspect public records.
2. No specific language is required to make a request, and it need not be made in writing.
3. The requester must identify the records requested with sufficient clarity so the public office can identify, retrieve and review the records.
4. Motive for the request is usually not relevant.
5. As long as the request does not unreasonably interfere with the discharge of the public office's duties the request should be fulfilled.

PRACTICAL CONSIDERATION: Clearly articulate what is being requested. A vague or overly comprehensive request is likely to yield a corresponding result or go unfulfilled.

PRACTICAL CONSIDERATION: Remember, just because a record is public and obtainable does not necessarily mean that it is admissible as evidence.