Dear Ohioans,

James Madison, the country's fourth president and one of the primary architects of our Constitution, clearly understood that public trust was critical to the success of the young American Democracy. Transparency and accountability was his focus when he said "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."

That principle has been embraced by the Ohio General Assembly, which has enacted both the Ohio Public Records Act and the Open Meetings Act, known collectively as the state's "Sunshine Laws." It has also been embraced by the Ohio Supreme Court, which has ruled that public records are the people's records and that anyone has the right to inspect them.

In order to foster the principle of open government, the legislature has given the offices of the Ohio Attorney General and the Ohio Auditor of State the primary responsibility for ensuring that public and elected officials have the training and materials they need to understand and comply with the Sunshine Laws. It is a responsibility that we, as officeholders, take very seriously.

As provided by House Bill 9, our offices are providing public records training sessions in addition to this publication. *Ohio Sunshine Laws 2008: An Open Government Resource Manual* offers valuable guidance to officials and the public about the state's Sunshine Laws. Furthermore, the Attorney General's office, as required by House Bill 9, has developed a model public records policy that local governments and institutions may use as a guide in crafting their own procedures for responding to public records requests.

It is important to note that while these resources provide a wealth of information about the Public Records and Open Meetings Acts, much of open government law comes from case law or the interpretation of statutes by the courts. For this reason, we strongly encourage you to seek guidance from your legal counsel when you are faced with specific legal questions about these important laws.

Thank you for your interest in Ohio's Sunshine Laws and for working with us to promote an open and accountable government for all Ohioans.

Sincerely,

Marc E. Dann
Attorney General

Mary Taylor, CPA
Auditor of State

Your comments and suggestions are invited and encouraged.

Please address correspondence to:

Ohio Attorney General, Marc Dann
Constitutional Offices Section
Public Records Unit
30 E Broad St., 16th Fl.
Columbus, Ohio 43215
(877)AG4-OHIO or (614) 466-2872
www.ag.state.oh.us

and

Ohio Auditor of State, Mary Taylor
Open Government Unit
Legal Division
88 E. Broad Street, 5th Fl.
Columbus, Ohio 43215
(800)282-0370 or (614) 466-4514

www.auditor.state.oh.us

Please visit our websites to download a copy of this manual

. You may also obtain a CD or hard copy version of this manual by contacting our offices via the addresses and phone numbers listed above.

Special thanks to all members of the Attorney General's Office and the Auditor of State's Office, both past and present, whose contributions made this publication possible, with special recognition to our authors/editors of this edition:

Lauren Lubow, Principal Assistant Attorney General
Patricia E. Doyle, Paralegal

Robin L. McGuire Rose, Director, Open Government Unit
Trisha Balthaser, Paralegal, Open Government Unit

Table of Contents

"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."

Patrick Henry

As you begin to study Ohio's Open Government Laws, you may find it beneficial to first tackle some fundamental matters that will provide you with a foundation for your research.

In Chapter I, a glossary will acquaint you with various legal terms associated with the Open Government Laws. Next, we furnish you with quick answers to some of the most frequently asked questions about open government, which questions are discussed more completely later in the manual. Finally, we provide you with an overview of the basic legal principles that apply to both the Open Meetings Act and the Public Records Act.

In Chapter II, we detail matters associated with the Open Meetings Act, while Chapter III is dedicated to the Public Records Act. We hope you will find this manual to be a useful resource.

🗁 *Glossary*

In learning about our Open Government Laws, you will confront some legal terms that may be unfamiliar to you. Below are the more common terms you will encounter in this area of the law.

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

►***DECLARATORY JUDGMENT.*** A declaratory judgment is a legal action initiated when a party is uncertain of their legal rights in a particular controversy. For instance, if a public office withholds records from public records disclosure because it believes they are exempt from disclosure,[1] the office can file a declaratory judgment action to test the correctness of its decision.[2]

►***DISCOVERY.*** Discovery is a pre-trial practice by which parties to a lawsuit, civil or criminal, 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 private." A judge will often review records that are at issue in a public records dispute *in camera* to ensure that they are not subject to public scrutiny in case the judge ultimately concludes that the records are not subject to public disclosure.

►***INJUNCTION.*** An injunction is a court order commanding or preventing a person from acting 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 is typically used to refer 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

---

[1] *See*, "Exceptions to Disclosure: The Catch-all Exception," page 62.

[2] *Safety 4th Fireworks v. Ohio Dept. of Commerce*, 2003 Ohio 3477, P10, 2003 Ohio App. LEXIS 3145 (7th Dist. June 26, 2003); *State ex rel. Fisher v. PRC Pub. Sector*, 99 Ohio App. 3d 387 (10th Dist. 1994).

party filing the action prevails, the court will issue a writ (or order) commanding the public office to release the records in dispute.

►***PRO SE.*** The term *pro se* means "for oneself," and is typically used to refer to a person who represents themselves in court, acting as their own legal counsel.

►***REDACT.*** Generally, to redact is to edit or revise. In the context of public records law, "redacting" refers to the action by which non-public information is blacked out of an otherwise public record before public disclosure. For example, social security numbers are always redacted from public records before those records may be viewed by the public.

Can a public body's motion for executive session just say "for personnel"?

No. The open meetings law plainly requires a public body to specify the particular reason or reasons listed in the "personnel exception" for which the executive session is being called.[3]

Do I have to pay for copies of public records?

Most likely. The public records law permits a public office to charge its actual cost to duplicate a public record.[4]

What is required for notice of a regular meeting to be proper under the Open Meetings Act?

By law, a public body must have a rule in place by which a person can determine the time and place of all regular meetings.[5]

Can the police redact from the public record the name of a juvenile they arrested?

No. A suspect's identity is not confidential simply by virtue of the suspect's age – *i.e.*, just because the suspect is a juvenile does not entitle the suspect to anonymity.[6]

What are the permissible reasons for a public body to go into executive session?

Generally, to discuss various personnel issues, the purchase or sale of public property, to discuss with legal counsel pending or imminent court action, to conduct or discuss collective bargaining matters, for various matters required to be kept confidential by law, to discuss security matters, and to discuss county hospitals' trade secrets.[7] Veterans Service Commissions may also hold executive sessions for matters related to an applicant's request for financial assistance.[8]

Where can I find the salaries of my public officials?

The salaries of some public officials are set by statute,[9] while others are set by the public entity itself. If the salary is not set by statute, always contact the government employer to determine the salary in question.

---

[3] *See*, "Proper Procedure – The Motion," page 32.
[4] *See*, "Cost of Copies," page 43.
[5] *See generally*, "Duties: Notice," page 22.
[6] *See generally*, "Juvenile Records," page 100.
[7] *See generally*, "Executive Session: Permissible Reasons," page 29.
[8] Ohio Rev. Code Ann. §121.22 (J).
[9] *See, e.g.*, Ohio Rev. Code Ann. § 141.01 (statewide elected officials), § 101.27 (general assembly members), § 505.24 (township trustees), § 507.09 (township clerks), § 325.10 (county commissioners), §325.01 (county elected officials).

Are the home addresses of public employees considered "public records?"

Not always. The Ohio Supreme Court recently concluded that the home addresses of public employees may not be "public records that a public office is required to release."[10] Even when release is not required, the public office may, in most circumstances, release employee home addresses if it chooses to do so.

Can a court redact my social security number from its public records before disclosure?

Yes. The Ohio Supreme Court recently concluded that redacting SSNs from a court's public records is appropriate before disclosure.[11]

Can a public office use an outside contractor to copy records for a public records request?

Perhaps. If the reasons for the outsourcing are reasonable, and the cost differential is also reasonable, a court is likely to find that such an arrangement is permissible.[12]

Does HIPAA mean that the public can no longer receive general patient information?

No. A public office does not violate HIPAA by sharing information that constitutes "directory information," such as the patient's name, location in the facility, and a description of the patient's general condition.[13]

---

[10] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384 (2005). *See generally,* "Personal Privacy: Public Employees," page 95.
[11] *State ex rel. Office of Montgomery County Public Defender v. Siroki*, 108 Ohio St. 3d 206, 2006-Ohio-662 (2006).
[12] *See*, "Making the Copies: Outside Contractors," page 44.
[13] *See*, "HIPAA – Releasing PHI to the Media," page 67.

When a local charter provision conflicts with the open government laws, which prevails?

A charter municipality has the right to determine by charter the manner in which meetings will be held.[14] Ohio is a home rule state, which means that when the local law and the state open government laws conflict, the local law prevails.[15]

Does the federal Freedom of Information Act (FOIA) control state or local governmental agencies or officers?

No. The federal FOIA does not apply to state or local agencies or officers.[16] A request for government records from a state or local agency in Ohio is governed by Ohio's Public Records Act, which is codified in Ohio Rev. Code § 149.43. But, if you request records from a federal office that is located in Ohio, your request *will* be governed by the federal FOIA.

How long must a public office keep its records?

As long as required by its records retention schedules, without which a public office may not transfer or destroy ANY record.[17] A retention schedule must be approved by an appropriate records commission, as well as by the Auditor of State's Office and the Ohio Historical Society.[18]

---

[14] *State ex rel. Bond v. City of Montgomery*, 63 Ohio App.3d 728, 580 N.E.2d 38 (1st Dist. 1989); *Hill & Dales, Inc. v. Wooster*, 4 Ohio App.3d 240, 448 N.E.2d 163 (9th Dist. 1982).

[15] Ohio Constitution, Article XVIII, Sections 3 and 7. *See, also State ex rel. Inskeep v. Staten*, 74 Ohio St.3d 676, 660 N.E.2d 1207 (1996)*; State ex rel. Fenley v. Kyger*, 72 Ohio St.3d 164, 648 N.E.2d 493 (1995); *State ex rel Lightfield v. Village of Indian Hill*, 69 Ohio St.3d 441, 633 N.E.2d 524 (1994); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990); *State ex rel. Craft v. Schisler*, 40 Ohio St.3d 149, 532 N.E.2d 719 (1988); *Fox v. City of Lakewood*, 39 Ohio St.3d 19, 528 N.E.2d 1254 (1988); *Butler Twp. Bd. of Trustees v. Winemiller*, 2003 Ohio 1258, 2003 Ohio App. LEXIS 1177, (2nd Dist. Mar. 14, 2003); *State ex rel. Gannett Satellite Info. Network v. Cincinnati City Counsel*, 137 Ohio App.3d 589, 739 N.E.2d 387 (1st Dist. 2000); *Klaban Ford, Inc. v. City of Kent*, No. 91-P-2342, 1992 Ohio App. LEXIS 1622 (11th Dist. Mar. 31, 1992); *Hill & Dales, Inc. v. City of Wooster*, 4 Ohio App.3d 240, 448 N.E.2d 163 (9th Dist. 1982).

[16] *State ex rel. Warren v. Warner*, 84 Ohio St.3d 432, 704 N.E.2d 1228 (1999); *State ex rel. Findlay Publ'g Co. v. Schroeder*, 76 Ohio St.3d 580, 669 N.E.2d 835 (1996).

[17] Ohio Rev. Code Ann. § 149.333 and § 149.351. *See, e.g.*, 1989 Ohio Atty. Gen. Ops. No. 89-042, 1989 Ohio AG LEXIS 49 (properly-approved retention schedule permits disposal of paper or other original documents after recording on optical disk, originals may be destroyed).

[18] Ohio Rev. Code Ann. § 121.211, § 149.331, and Ohio Rev. Code Ann. § 149.38-.42.

Simply put, Ohio's Open Government Laws are based on the principles of democracy. The Ohio Open Meetings Act is based on the notion that citizens must be able to observe and scrutinize the operations of their representative government. The purpose of the act is to ensure accountability of elected officials by prohibiting secret deliberations of public issues.[19]

To that end, the Open Meetings Act requires public bodies to deliberate, discuss, and conduct official business in open meetings. Government officials must liberally construe the law with these goals in mind.[20] There are only limited situations when a public body may adjourn into executive session to discuss matters privately.[21]

[19] *State ex rel. Cincinnati Enquirer v. Hamilton Cty. Bd. Of Cmsrs.,* 2002 Ohio 2038 , 2002 Ohio App. LEXIS 1977 (1st Dist. April 26, 2002).
[20] Ohio Rev. Code Ann. § 121.22(A).
[21] Ohio Rev. Code Ann. § 121.22(G).

🗁 *Open Meetings Act: "Public Body" Defined*

Not every entity is controlled by the provisions of the open meetings law -- only a "public body" must comply. Accordingly, the entity at issue must satisfy the legal definition of a "public body".

►***DEFINITION.*** By statute, a "public body" is "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," and any committee or subcommittee of such an entity.[22]

►***FACTORS.*** In analyzing whether an entity is a "public body" courts consider various factors, including, but not limited to: (1) the name or title of the entity;[23] (2) the membership composition of the entity;[24] (3) the manner in which the entity was created;[25] (4) whom the entity advises or to whom it reports;[26] and (5) whether the entity is a "decision-making" body.[27]

---

[22] Ohio Rev. Code Ann. § 121.22(B)(1)(a) and (b).

[23] *Wheeling Corporation v. Columbus & Ohio River Railroad Company*, 2001 Ohio App. LEXIS 5716 (10th Dist. Dec. 20, 2001) (in finding that Selection Committee was a "public body," court considered it pertinent that the entity was called a "committee," which term is included in definition of a "public body" in R.C. § 121.22); *Stegall v. Joint Twp. Dist. Memorial Hosp.*, 20 Ohio App.3d 100, 103, 484 N.E.2d 1381 (3rd Dist. 1985) (considering it pertinent whether entity is one of those listed in § 121.22(A)(1)).

[24] *Wheeling Corporation v. Columbus & Ohio River Railroad Company*, 2001 Ohio App. LEXIS 5716 (10th Dist. Dec. 20, 2001) (in finding that Selection Committee was a "public body," court considered it pertinent that majority of members were also Rail Commission members). *See also*, 1976 Ohio Atty. Gen. Ops. No. 062, at 2-211 ("the General Assembly apparently intended the statute to apply to all bodies which are comprised of public officials").

[25] *Stegall v. Joint Twp. Dist. Memorial Hosp.*, 20 Ohio App.3d 100, 103, 484 N.E.2d 1381 (3rd Dist. 1985) (considering it pertinent whether entity was created by operation of law); *Wheeling Corporation v. Columbus & Ohio River Railroad Company*, 2001 Ohio App. LEXIS 5716 (10th Dist. Dec. 20, 2001) (fact that committee was established by Rail Commission without formal action is "immaterial"); *Beacon Journal Publ'g Co. v. City of Akron*, 3 Ohio St.2d 191, 209 N.E.2d 399 (1965) (where a public official who is not subject to the Open Meetings Act appoints a board or commission, the board or commission may not be subject to Ohio Rev. Code Ann. § 121.22 either).

[26] *Wheeling Corporation v. Columbus & Ohio River Railroad Company*, 2001 Ohio App. LEXIS 5716 (10th Dist. Dec. 20, 2001) (Selection Committee advised Rail Commission, which is a public body); *Cincinnati Enquirer v. City of Cincinnati*, 2001 Ohio App. LEXIS 3738 (1st Dist. Aug. 24, 2001) (a review board makes recommendation to city manager and/or city council); *Beacon Journal Publ'g Co. v. City of Akron*, 3 Ohio St.2d 191, 209 N.E.2d 399 (1965) (board or commission advises public official who is not subject to the Open Meetings Act may not be "public body").

[27] *Wheeling Corporation v. Columbus & Ohio River Railroad Company*, 2001 Ohio App. LEXIS 5716 (10th Dist. Dec. 20, 2001) (Selection Committee made decisions in formulating recommendations to Commission, therefore "decision-making body"); *Stegall v. Joint Twp. Dist. Memorial Hosp.*, 20 Ohio App.3d 100, 103, 484 N.E.2d 1381 (3rd Dist. 1985) (entity must be a "decision-making body"); *Cincinnati Enquirer v. City of Cincinnati*, 2001 Ohio App. LEXIS 3738 (1st Dist. Aug. 24, 2001) (review board makes decisions in process of reaching consensus recommendation for city manager and/or city council).

►***APPLIED TO INDIVIDUALS.*** The open meetings law does not apply to individuals or to meetings conducted by an individual.[28] Moreover, if an individual (as opposed to a public body) creates a group solely pursuant to their **executive authority or delegation of their authority**, the Open Meetings Act *probably* does not apply to the group's gatherings.[29] But, one court recently 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.[30]

►***DECISION-MAKING.*** Courts disagree as to whether an ad hoc staff or advisory committee that lacks final decision-making authority is a public body.[31]

►***PRIVATE BODIES.*** A private body may be a "public body" for purposes of the Open Meetings Act where it is organized pursuant to state statute and is statutorily authorized to receive and expend government funds for a governmental purpose.[32] A governmental decision-making body cannot assign its decision-making authority to a nominally private body to shield decisions from public scrutiny.[33]

There is a difference between a "public office" under public records law[34] and a "public body" under open meetings law. For instance, an entity may be a public office for purposes of public records, but *not* a public body for purposes of open meetings.[35]

---

[28] Ohio Rev. Code Ann. § 121.22(B)(1)(a) and (b); *Smith v. City of Cleveland,* 94 Ohio App. 3d 780, 641 N.E.2d 828 (8th Dist. 1994) (city safety director is not a public body, and may conduct disciplinary hearings without complying with the Open Meetings Act).

[29] *Beacon Journal Publ'g Co. v. City of Akron*, 3 Ohio St.2d 191, 209 N.E.2d 399 (1965); *Smith v. City of Cleveland*, 94 Ohio App.3d 780, 641 N.E.2d 828 (8th Dist. 1994); *eFunds v. Ohio Dept. of Job and Family Services*, No. 05CVH09-10276 (C.P. Franklin Cty Ohio, Mar. 6, 2006) ("evaluation committee" of government employees created under authority of state agency administrator is not a public body); 1994 Ohio Atty. Gen. Ops. No. 096.

[30] *Wheeling Corporation v. Columbus & Ohio River Railroad Co.,* 2001 Ohio App. LEXIS 5716 (10th Dist. Dec. 20, 2001) (chair of Rail Commission appointed members to Selection Committee).

[31] *Maser v. City of Canton*, 62 Ohio App.2d 174, 405 N.E.2d 731 (5th Dist. 1978); *Thomas v. White*, 85 Ohio App.3d 410, 620 N.E.2d 85 (2nd Dist. 1992); *State ex rel. Vindicator Printing Co. v. Fuda,* No. 91-T-4531, 1991 Ohio App. LEXIS 5797 (11th Dist. Dec. 6, 1991); *Ungaro v. Reuben McMillan Free Library Ass'n*, No. 89CA-190, 1991 Ohio App. LEXIS 1899 (7th Dist. Apr. 24, 1991); 1994 Ohio Atty. Gen. Ops No. 096; 1992 Ohio Atty. Gen. Ops. No. 077; 1992 Ohio Atty. Gen. Ops. No. 065; 1979 Ohio Atty. Gen. Ops. No. 110; 1979 Ohio Atty. Gen. Ops. No. 061. *But, see, Cincinnati Enquirer v. City of Cincinnati*, 2001 Ohio App. LEXIS 3738 (1st Dist. Aug. 24, 2001) (whether a review board has the ultimate decision making authority is not controlling).

[32] *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Ass'n of Greater Toledo*, 61 Ohio Misc.2d 631, 582 N.E.2d 59 (1990); *see, also, Stegall v. Joint Township Dist. Memorial Hosp*., 20 Ohio App.3d 100, 484 N.E.2d 1381 (3rd Dist. 1985).

[33] *State ex rel. Toledo Blade Co. v. Economic Opportunity Planning Assn.*, 61 Ohio Misc.2d 631, 640, 582 N.E.2d 59, 65 (1990).

[34] *See*, discussion on what constitutes a "Public Office," page 48.

[35] *See Sabo v. Hollister Water Ass'n, Inc.*, No. 93-CA-1582, 1994 Ohio App. LEXIS 33 (4th Dist. Jan. 12, 1994).

►***EXEMPT PUBLIC BODIES.*** The open meetings law specifically lists some entities or gatherings that *are* public bodies or are being organized and attended by public bodies but are nevertheless exempt from the requirements of the open meetings laws.[36] In short, these bodies may deliberate and conduct specified business outside of the public view:

- Grand juries;
- Audit conferences;
- Adult parole authority hearings to interview inmates for parole or pardon;
- Organized crime investigations commission;
- Child Fatality Review Board;
- State medical board when determining whether to suspend a certificate without a hearing;
- Board of nursing when determining whether to suspend a license without a hearing;
- State board of pharmacy when determining whether to suspend a license without a hearing;
- State chiropractic board when determining whether to suspend a license without a hearing;
- Emergency response commission's executive committee when meeting to determine whether to issue an enforcement order or decide whether to litigate.

►***PERMISSIBLE CLOSURE.*** Separately, the open meetings law also permits certain public bodies, when handling particular business, to close their meeting by **unanimous vote** of the members present.[37] So, while these bodies must otherwise comply with the open meetings law,[38] when considering the specified matters, they can vote to close the meeting:

- ***The Entities:*** The controlling board, development financing advisory council, industrial technology and enterprise advisory council, tax credit authority, community improvement corporations,[39] and minority development financing advisory board.[40]
- ***The Business:*** When considering whether to grant assistance for purposes of community or economic development, a meeting of these entities may be closed by unanimous vote when evaluating marketing plans, specific business strategies, production techniques, trade secrets, financial projections, personal financial statements, or tax records and other similar information not open to public inspection.[41]
- ***The Limitation:*** Voting to accept or reject the application for assistance, and all other proceedings of these entities, must comply with the open meetings law.[42]

---

[36] Ohio Rev. Code Ann. §121.22(D).
[37] Ohio Rev. Code Ann. § 121.22(E).
[38] Ohio Rev. Code Ann. § 121.22(E)(5).
[39] Ohio Rev. Code Ann. § 1724.11(B)(1) (board or any committee or subcommittee when meeting to consider information that is not a public record may, by unanimous vote of all members present, close the meeting and discuss only that matter).
[40] Ohio Rev. Code Ann. § 121.22(E).
[41] Ohio Rev. Code Ann. § 121.22(E)(1) – (5).
[42] Ohio Rev. Code Ann. § 121.22(E).

►***THE OHIO LEGISLATURE.*** The Ohio Legislature is *not* subject to the provisions of the open meetings law (R.C. 121.22). Instead, committees of the legislature are required to follow the guidelines set forth in the legislature's own open meetings law.[43] Similar to the Open Meetings Act in R.C. 121.22, there are exceptions to the legislature's open meetings law.[44] Meetings of a party caucus are *not* subject to the open meeting requirements.[45]

[43] Ohio Rev. Code Ann. § 101.15.
[44] Ohio Rev. Code Ann. § 101.15(F).
[45] Ohio Rev. Code Ann. § 101.15(F)(2).

🗁 *Open Meetings Act: "Meeting" Defined*

Whether a gathering of public officials is subject to the open meetings law depends on whether the gathering is a "meeting" as defined in Ohio law.

►***DEFINITION.*** For a gathering to be a "meeting," the gathering must have **three characteristics**: it must be (1) a **prearranged** gathering; (2) that is attended by a **majority** of the members of the public body; *and* (3) arranged for the purpose of **conducting, transacting, deliberating, or discussing** public business.[46] Where *all* three of these characteristics are present, the gathering is a "meeting" for purposes of the open meetings law, and the provisions of that law must be satisfied; specifically, the meeting must be open, proper notice must be given, and minutes must be maintained.[47]

- ***Prearranged Gathering:*** This statute is not intended to prohibit *truly* impromptu encounters between members of public bodies.[48] For example, an unsolicited e-mail from one board member to other board members is not "pre-arranged," and a spontaneous one-on-one telephone conversation between two board members is similarly not "pre-arranged."[49]

- ***Majority of Members:*** This is a simple majority,[50] and the requirement attaches no matter whether it is the whole body or only a committee or subcommittee of the body that is at issue.[51] For instance, if council is comprised of seven members, four would constitute a majority for purposes of this requirement. But, if council appoints a finance committee, which is comprised of only three members, then two of those members constitute a majority

---

[46] Ohio Rev. Code Ann. § 121.22(B)(2). *See, also, State ex rel. Long. v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001) (the requirements are to be liberally construed and therefore committee meetings of a majority of council are open meetings); *State ex rel. Plain Dealer Publ'g Co. v. Barnes*, 38 Ohio St.3d 165, 527 N.E.2d 807 (1988).
[47] *See, generally*, "A Public Body's Duties," page 22.
[48] *Compare with, State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 544, 1996 Ohio 372, 668 N.E.2d 903, 906 (1996) (while holding that the back-to-back, prearranged discussions of city council members constitutes a "majority," the Court clarified that the statute does not prohibit impromptu meetings between council members, but concerns itself only with situations where a majority meets).
[49] *Haverkos v. Northwest Local School District Bd. Of Education*, 2005 Ohio 3489, 2005 Ohio App. LEXIS 3237 (1st Dist. July 8, 2005).
[50] Ohio Rev. Code Ann. § 121.22(B)(2). *See generally, State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 1996 Ohio 372, 668 N.E.2d 903 (1996) (where back-to-back meetings of the city manager and council members are held, liberal construction of the statute deems that a "majority" of council attended the meeting); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990) (where a "workshop" to discuss public business is attended by a majority of township trustees and a majority of council, it is a "meeting" under the statute for each public body.)
[51] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 58-59, 2001 Ohio 130, 748 N.E.2d 58, 63 (2001).

of the finance committee. In other words, the finance committee is a "public body" in and of itself, and it must separately comply with the open meetings law.[52]

- ***Conference Calls:*** Teleconferencing and videoconferencing are prohibited – a member must be present *in person* in order to deliberate, vote, or to be counted in a quorum.[53] Nevertheless, members ought not circumvent the open meetings law by conducting a conference call, claiming that a majority is not "present" at the meeting.[54]

- ***Discussions or Deliberations:*** The intent of the open meetings law is "to require governmental bodies to **deliberate** public issues in public."[55] Much debate has occurred as to what activity constitutes "discussions" or "deliberations" of a public body, such that a gathering may constitute a "meeting."

  Some courts draw a distinction between "discussions" and "deliberations" on one hand, and "information-gathering" or "fact-finding" on the other.[56] Courts, by and large, agree that "**discussion**" of the public business means the exchange of words, comments or ideas by the public body.[57] And a single unsolicited e-mail from one board member to two other members, with no responses or counter-responses, does not constitute "discussion" in violation of the open meetings act.[58]

  The term "deliberation" means the act of weighing and examining reasons for and against a choice.[59] Moreover, "**deliberation**" requires a thorough discussion of all factors involved, a careful weighing of positive and negative factors, a cautious consideration of the ramifications of the proposal, while gradually arriving at decision.[60]

---

[52] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 59, 2001 Ohio 130, 748 N.E.2d 58, 63 (2001).
[53] Ohio Rev. Code Ann. § 121.22(C). *But, see, e.g.,* Ohio Rev. Code Ann. § 3333.02 in which Ohio Board of Regents is specifically granted authority to meet via videoconferencing.
[54] *See generally, State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 1996 Ohio 372, 668 N.E.2d 903 (1996) (back-to-back meetings of members of a public body, in which less than a majority attend each meeting but the same item of public business is discussed, cannot be used to circumvent the clear intent of the law).
[55] *Springfield Local School Dist. Bd. Of Educ. V. Ohio Assn. of Public School Employees, Local 530,* 106 Ohio App. 3d 855, 864 667 N.E.2d 458, 464 (9th Dist. 1995) (citing *Moraine v. Bd. Of Cty. Cmsrs.,* 67 Ohio St.2d 139, 145, 423 N.E.2d 184 (1981)).
[56] *See e.g., Mansfield City Council v. Richland County Council AFL-CIO*, Case No. 03 CA 55, 2003 Ohio App. LEXIS 6654 at *10 (5th Dist. Dec. 24, 2003) (citing *Holeski v. Lawrence,* 85 Ohio App. 3d 824, 621 N.E.2d 802 (11th Dist. 1993)); *Springfield Local School Dist. Bd. Of Educ. V. Ohio Assn. of Public School Employees, Local 530,* 106 Ohio App. 3d 855, 667 N.E.2d 458 (9th Dist. 1995) (citing *Holeski v. Lawrence,* 85 Ohio App. 3d 824, 621 N.E.2d 802 (11th Dist. 1993)).
[57] *Devere v. Miami Univ. Bd. Of Trustees,* Case No. CA85-05-065, 1986 Ohio App. LEXIS 7171 at *10 (12th Dist. June 10, 1986)).
[58] *Haverkos v. Northwest Local School District Bd. Of Education*, 2005 Ohio 3489, 2005 Ohio App. LEXIS 3237 (1st Dist. July 8, 2005).
[59] *Springfield Local School Dist. Bd. Of Educ. V. Ohio Assn. of Public School Employees, Local 530,* 106 Ohio App. 3d 855, 864, 667 N.E.2d 458, 464 (9th Dist. 1995).
[60] *Theile v. Harris,* Case No. C-860103, 1986 Ohio App. LEXIS 7096 at *15 (1st Dist. June 11, 1986).

Consequently, conversation between *employees* of a public body does not constitute deliberation of the public body.[61] In addition, a presentation to a public body by its legal counsel, where legal advice is received by the public body may not constitute deliberation by the public body.[62] Also, a press conference is probably not a gathering where deliberation occurs.[63]

- ***Fact-Finding or Information-Gathering:*** Some courts distinguish "discussions" or "deliberations," which must be held in public, from information-gathering, investigation, or fact-finding, which do *not* have to be held in open session.[64] In fact, some courts conclude that before "deliberations" can even begin, the public body must *first* obtain all "relevant and salient facts necessary to reach a correct, proper, prudent and responsible decision."[65]

  Accordingly, these courts conclude that "question-and-answer sessions between board members and other persons who are not public officials *do not* constitute 'deliberations' unless a majority of the board members also entertain a discussion of public business with one another."[66]

  In short, these courts believe that 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.[67] In which case, no open meeting is required.[68]

---

[61] *Kandell v. City Council of Kent*, No. 90-P-2255, 1991 Ohio App. LEXIS 3640 (11th Dist. Aug. 2, 1991); *State ex rel. Bd. of Educ. for Fairview Park School Dist. v. Bd. of Educ. for Rocky River School Dist.*, 40 Ohio St.3d 136, 532 N.E.2d 715 (1988).

[62] *Theile v. Harris*, No. C-860103, 1986 Ohio App. LEXIS 7096 (1st Dist. June 11, 1986); *Holeski v. Lawrence*, 85 Ohio App.3d 824 (11th Dist. 1983); *Wyse v. Rupp*, No. F-94-19, 1995 Ohio App. LEXIS 4008 (6th Dist. Sept. 15, 1995); *State ex rel. Cincinnati Enquirer v. Hamilton County Commissioners*, 2002 Ohio App. LEXIS 1977 (1st Dist. Apr. 26, 2002). *See, also,* discussion re "Fact Finding or Information Gathering" this page.

[63] *Holeski v. Lawrence*, 85 Ohio App.3d 824, 612 N.E.2d 802 (11th Dist. 1993).

[64] *Springfield Local School Dist. Bd. Of Educ. V. Ohio Assn. of Public School Employees, Local 530*, 106 Ohio App. 3d 855, 667 N.E.2d 458 (9th Dist. 1995) (citing *Holeski v. Lawrence*, 85 Ohio App. 3d 824, 621 N.E.2d 802 (11th Dist. 1993)).

[65] *Theile v. Harris*, Case No. C-860103, 1986 Ohio App. LEXIS 7096 at *15 (1st Dist. June 11, 1986).

[66] *Mansfield City Council v. Richland County Council AFL-CIO*, Case No. 03 CA 55, 2003 Ohio App. LEXIS 6654 (5th Dist. Dec. 24, 2003) (quoting *Springfield Local Dist. Bd. Of Educ. V. Ohio Assn. of Public School Employees, Local 530*, 106 Ohio App. 3d 855 (9th Dist. 1995)) (internal quotations omitted). *See also, Pickutowski v. South Central Ohio Educational Service Center Governing Bd.*, 2005 Ohio App. LEXIS 2691, 2005-Ohio-2868 (4th Dist. June 3, 2005) (permissible for board to gather information on proposed school district in private setting).

[67] *Holeski v. Lawrence*, 85 Ohio App. 3d 824, 829, 621 N.E.2d 802 (11th Dist. 1993) (trustees met in ministerial, fact-gathering capacity, which does not necessitate an open meeting). *See also, Theile v. Harris*, Case No. C-860103, 1986 Ohio App. LEXIS 7096 (1st Dist. June 11, 1986) (prearranged discussion between prosecutor and majority of board was not violation where conducted for investigative and information-seeking purposes).

[68] *Holeski v. Lawrence*, 85 Ohio App. 3d 824, 829, 621 N.E.2d 802 (11th Dist. 1993) (trustees met in ministerial, fact-gathering capacity, which does not necessitate an open meeting). *See also, Theile v. Harris*, Case No. C-860103, 1986 Ohio

►***MULTIPLE PUBLIC BODIES.*** Where the gathering satisfies all three of these characteristics, it is a "meeting," regardless of whether the public body initiated the gathering itself, or whether it was initiated by another entity.[69] And if the meeting is attended by representatives of multiple public bodies, the gathering may be construed to be a separate "meeting" for each public body.[70]

►***WORK SESSIONS.*** "Work sessions" are "meetings" where public business is discussed among a majority of the members of a public body at a prearranged time.[71] Accordingly, these "work sessions" must be open to the public, properly noticed, and minutes must be maintained, just as with any other meeting.

►***QUASI-JUDICIAL BODIES.*** The Ohio Supreme Court has determined that quasi-judicial hearings and the deliberations of the quasi-judicial bodies are not "meetings," and are not subject to the Open Meetings Act.[72]

►***INFORMAL CONVERSATION.*** Some courts have concluded that *one-on-one* conversations between individual members of a public body, either in person or by telephone, do *not* violate the Open Meetings Act.[73] However, members must not conduct *back-to-back* discussions of public business, which, taken together, are attended by a majority of the members.[74] Such "round-robin" or "serial" meetings appear to violate the Open Meetings Act.[75]

► ***E-MAIL COMMUNICATION.*** At least one appellate court in Ohio has concluded that "Ohio's Sunshine Law does not cover e-mails."[76] In *Haverkos v. Northwest Local School District Bd.*

App. LEXIS 7096 (1st Dist. June 11, 1986) (prearranged discussion between prosecutor and majority of board was not violation where conducted for investigative and information-seeking purposes).

[69] *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990).

[70] *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990).

[71] *State ex rel. Singh v. Schoenfeld*, Nos. 92AP-188, 92AP-193, 1993 Ohio App. LEXIS 2409 (10th Dist. May 4, 1993).

[72] *TBC Westlake, Inc. v. Hamilton County Bd. of* Revision, 81 Ohio St.3d 58, 689 N.E.2d 32 (1998); *Groff-Knight v. Bd. of Zonings Appeals of Liberty Twp.*, 2004 Ohio App LEXIS 2856 (5th Dist., June 14, 2004); *Jones v. Liquor Control Commission*, 2001 Ohio App. LEXIS 5719 (10th Dist. Dec. 20, 2001); *Carver v. Twp. of Deerfield*, 2000 Ohio App. LEXIS 4588 (11th Dist. Sept. 29, 2000); *Angerman v. State Medical Bd. of Ohio*, 70 Ohio App.3d 346, 591 N.E.2d 3 (10th Dist. 1990); *City of Westerville v. Hahn*, 52 Ohio App.3d 8, 556 N.E.2d 200 (10th Dist. 1988).

[73] *Haverkos v. Northwest Local School District Bd. Of Education*, 2005 Ohio 3489, 2005 Ohio App. LEXIS 3237 (1st Dist. July 8, 2005) (spontaneous telephone call from one board member to another to discuss election politics did not violate the open meetings act); *McIntyre v. Westerville School Dist.*, No. 90AP-1024, 1991 Ohio App. LEXIS 2658 (10th Dist. June 6, 1991); *Maser v. City of Canton*, 62 Ohio App.2d 174, 405 N.E.2d 731 (5th Dist. 1978). *But, cf., State ex rel. Floyd v. Rock Hill Local School Bd. Of Educ.*, No. 1862, 1988 Ohio App. LEXIS 471 (4th Dist. Feb. 10, 1988) (no one-on-one discussions re employment of public employee – must be in open meeting or in executive session).

[74] *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 668 N.E.2d 903 (1996).

[75] *State ex rel. Cincinnati Post v. City of Cincinnati*, 76 Ohio St.3d 540, 668 N.E.2d 903 (1996); *State ex rel. Floyd v. Rock Hill Local School Bd. of Educ.*, No. 1862, 1988 Ohio App. LEXIS 471 (4th Dist. Feb. 10, 1988).

[76] *Haverkos v. Northwest Local School District Bd. Of Education*, 2005 Ohio 3489, 2005 Ohio App. LEXIS 3237 (1st Dist. July 8, 2005) (unsolicited e-mail from one board member to two other board members did not violate the open meetings act).

Of Education, the appellate court in Hamilton County noted that during a 2002 revision of the open meetings law, the legislature did not amend the statute to include "electronic communications" in the definition of a "meeting." According to the court, this omission indicates the legislature's intent not to include e-mails as potential "meetings."[77]

[77] *Haverkos v. Northwest Local School District Bd. Of Education*, 2005 Ohio 3489, 2005 Ohio App. LEXIS 3237 (1st Dist. July 8, 2005) (unsolicited e-mail from one board member to two other board members did not violate the open meetings act).

🗁 *Open Meetings Act: A Public Body's Duties*

If a public body[78] is conducting a "meeting,"[79] it has three duties under the open meetings law: The body must (1) issue appropriate **notice** of a meeting (2) that is **open** to the public. Additionally, the public body must (3) promptly prepare **minutes** of the meeting, which are then made available for public inspection.

►***NOTICE.*** While the meeting must be conducted in an open venue,[80] the public body must first issue appropriate **notice** of the meeting. The requirements for proper notice will vary depending upon the type of meeting a public body is conducting.

- ***Regular Meetings:***
  A "regular meeting" is held at prescheduled intervals,[81] such as "every Tuesday at 7:30 p.m. in the town hall." For regular meetings, a public body must establish **by rule** a reasonable method that allows the public to determine the **time** and **place** of regular meetings.[82]

- ***Special Meetings:***
  A "special meeting" is any meeting other than a regular meeting.[83] Moreover, the term "special" implies that the meeting is being held for a specific purpose or purposes.[84] For special meetings, a public body must establish **by rule** a reasonable method that allows the public to determine the **time, place, and purpose** of a special meeting.[85]

  Purpose Statement: When holding a special meeting, including an emergency meeting (see discussion below), in addition to advising of the time and date of the meeting, the notice statement must also disclose the purpose(s) for which the special meeting is being conducted.

---

[78] *See*, "'Public Body' Defined," page 13.
[79] *See*, "'Meeting' Defined," page 17.
[80] *See*, "Public Body's Duties: Openness," page 25.
[81] 1988 Ohio Atty. Gen. Ops. No. 029; *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990). *See, generally, Moss v. Leifheit*, No. CA-3391, 1989 Ohio App. LEXIS 461 (5th Dist. Jan. 19, 1989) (notice is defective if it fails to specify the public body's meeting place).
[82] Ohio Rev. Code Ann. § 121.22(F). *See also, Wyse v. Rupp*, No. F-94-19, 1995 Ohio App. LEXIS 4008 (6th Dist. Sept. 15, 1995).
[83] *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990); 1988 Ohio Atty. Gen. Ops. No. 029, 1988 Ohio AG LEXIS 29 ("While the term 'special meeting' is not defined in R.C. 121.22, its use in context indicates that reference to all meetings other than 'regular' meetings was intended.").
[84] *Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 at *17-18 (11th Dist. June 30, 1995).
[85] Ohio Rev. Code Ann. § 121.22(F). *See also, Doran v. Northmont Board of Education*, 147 Ohio App. 3d 268, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I") (board violated R.C. 121.22(F) by failing to establish, by rule, method to inform public of time, place, and purpose of special meetings); *Stiller v. Columbiana Exempt Village School Dist. Bd. Of Educ.*, 74 Ohio St.3d 113, 656 N.E.2d 679 (1995).

Where a special meeting is simply a "regular" meeting occurring at a time other than the regularly scheduled time, it is sufficient notice under the law for the stated purpose to be for "general purposes."[86] However, where the special meeting is being held to discuss particular issues, the purpose statement must specifically indicate those issues, and those specific issues are the only ones that can be discussed at that meeting.[87] If, at the special meeting, the public body discusses matters not disclosed in the purpose statement, the meetings violate the Open Meetings Act.[88]

Moreover, if a public body plans to adjourn into executive session during a special meeting, the topic of the executive session must relate directly to some matter included in the notice.[89]

The rule for notification of special meetings must require at least **24 hours** advance notification to all media outlets that have requested such notification, and to people who have specifically requested such notice.[90]

- ***Emergency Meetings:***
  An emergency meeting is a special meeting that is convened because a situation requires immediate official action.[91] For this type of meeting, the public body must **immediately** notify all media outlets that have requested such notification, as well as people who have specifically requested such notice, of the **time, place and purpose** of the emergency meeting.[92] The purpose statement must comport with the specificity requirements discussed above.

►***RULES REQUIREMENT.*** The statute specifically requires public bodies to adopt *rules* establishing methods for notification. Nevertheless, many courts have found that actions taken by a public body are not invalid simply because the body failed to adopt such rules.[93] These

---

[86] *Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 at *18 (11th Dist. June 30, 1995). *See also, Satterfield v. Adams County Ohio Valley School Dist.*, No. 95CA611, 1996 Ohio App. LEXIS 4897 (4th Dist. Nov. 6, 1996) ("personnel" sufficient for notice of special meeting).
[87] *Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 at *18 (11th Dist. June 30, 1995).
[88] *Hoops v. Jerusalem Twp. Bd. of Trustees*, No. L-97-1240, 1998 Ohio App. LEXIS 1496 (6th Dist. Apr. 10, 1998) (business transacted at special meeting exceeded scope of published purpose and thus in violation of. § 121.22(F)).
[89] *See, Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 (11th Dist. June 30, 1995).
[90] Ohio Rev. Code Ann. § 121.22(F); 1988 Ohio Atty. Gen. Ops. No. 029, 1888 Ohio AG LEXIS 29. *See also,* "Who Receives Notice," page 24.
[91] *Cf., Neuvirth v. Bds. of Trustees of Bainbridge Twp.*, 1981 Ohio App. LEXIS 14641 (11th Dist. June 29, 1981) (subject matter of "emergency meeting" was not an emergency just because the Trustees postponed discussion until the last minute).
[92] Ohio Rev. Code Ann. § 121.22(F).
[93] *Doran v. Northmont Bd. Of Educ.*, 147 Ohio App. 3d 268, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I"); *Hoops v. Jerusalem Twp. Bd. Of Trustees*, 1998 Ohio App. LEXIS 1496 (6th Dist. Apr. 10, 1998); *Barber v. Twinsburg Twp.*, 73 Ohio App. 3d 587, 597 N.E.2d 1204 (9th Dist. 1992).

courts reason that the purpose of the law's invalidation section[94] is to invalidate actions taken where insufficient notice of the meeting was provided.[95] Accordingly, where there is no evidence of insufficient notice of a meeting, the technical violation of the rules requirement will likely *not* invalidate all actions taken at that meeting.[96]

- ***Who Receives Notice:*** The open meetings law requires every public body to establish **rules** for notification. The rules must provide that two groups of people will receive notification of meetings: (1) the news media that have requested notification; and (2) any person who has requested reasonable advance notification of all meetings.[97]

  As for the second group, the law requires public bodies to enact a rule establishing a method by which a person may sign up to receive notice of meetings.[98] Some suggested methods include mailing an agenda to subscribers on a list or mailing notices in self-addressed stamped envelopes, etc.[99] The method may also require payment of a reasonable fee, and failure to pay that fee means the person is not entitled to receive the requested notice.[100]

- ***Media Publication of Notice:*** Many public bodies routinely notify their local media of all regular, special, and emergency meetings, whether by rule (as required by law[101]) or by practice. And if the media misprints the meeting information, the public body has *not* violated the notice requirement so long as it transmitted accurate information to the media as required by its rule.[102]

  However, at least one court has concluded that where publication of the notice is at the newspaper's discretion, such notice is *not* "reasonable notice" to the public.[103] Instead, notice must be consistent and "actually reach the public" to satisfy the statute.[104]

---

[94] Ohio Rev. Code Ann. § 121.22(H).
[95] *Doran v. Northmont Bd. Of Educ.*, 147 Ohio App. 3d 268, 271, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I").
[96] *See e.g., Doran v. Northmont Bd. Of Educ.*, 147 Ohio App. 3d 268, 271, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I") ; *Hoops v. Jerusalem Twp. Bd. Of Trustees*, 1998 Ohio App. LEXIS 1496 (6th Dist. Apr. 10, 1998); *Barber v. Twinsburg Twp.*, 73 Ohio App. 3d 587, 597 N.E.2d 1204 (9th Dist. 1992).
[97] Ohio Rev. Code Ann. § 121.22(F).
[98] Ohio Rev. Code Ann. § 121.22(F).
[99] Ohio Rev. Code Ann. § 121.22(F). *See, e.g., Doran v. Northmont Bd. Of Educ.*, 147 Ohio App. 3d 268, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I") (rule allows individuals to mail $5.00 and self-addressed stamped envelopes to receive advance notification of all special meetings).
[100] *McIntyre v. Bd. of County Cmsrs of Ashtabula County*, No. 1269, 1986 Ohio App. LEXIS 8267 (11th Dist. Sept. 12, 1986). *See also, Korchnak v. Civil Serv. Comm'n of Canton*, No. CA-8133, 1991 Ohio App. LEXIS 291 (5th Dist. Jan. 7, 1991) (no standing to challenge notice violation without formal request and payment of fee established by public body).
[101] Ohio Rev. Code Ann. § 121.22 (F). *See also,* "Rules Requirement," page 23.
[102] *Black v. Mecca Twp. Bd. of Trustees*, 91 Ohio App.3d 351, 632 N.E.2d 923 (11th Dist. 1993).
[103] *Doran v. Northmont Bd. Of Educ.*, 147 Ohio App. 3d 268, 272, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I").

►***OPENNESS.*** A public body must conduct its meetings in a venue that is open to the public.[105] Although the Open Meetings Act does not specifically address *where* meetings must be held, some case law suggests that meetings must be held in a public meeting place[106] that is within the geographical jurisdiction of the public body.[107] And a meeting is *not* "open" where the doors to the meeting facility are locked.[108]

Where space in the facility is too limited to accommodate all interested members of the public, closed circuit television may be an acceptable alternative.[109] The meeting place must also be accessible to individuals with disabilities pursuant to federal law, but this requirement has no Open Meetings Act ramifications.[110]

►***MINUTES.*** A public body must keep full and accurate minutes – the minutes must state sufficient facts and information to permit the public to *understand* and *appreciate* the rationale behind the public body's decisions.[111] However, minutes do *not* have to detail discussions held during executive session. Instead, the minutes need only reflect the general subject matter of the executive session.[112]

Additionally, the public body must promptly prepare the minutes, file them, and maintain them.[113] But minutes are merely the *record* of actions; they are *not* actions in and of themselves, and invalid minutes do *not* invalidate the actions recorded in the minutes.[114] So, for example, if a public body fails to approve minutes of a meeting, that failure does *not* necessarily render invalid all action taken during that meeting.[115]

---

[104] *Doran v. Northmont Bd. Of Educ.*, 147 Ohio App. 3d 268, 272, 2002 Ohio 386, 770 N.E.2d 92 (2nd Dist. 2002) ("Doran I").
[105] Ohio Rev. Code Ann. § 121.22(C).
[106] *Crist v. True*, 39 Ohio App.2d 11, 314 N.E.2d 186 (12th Dist. 1973); 1992 Ohio Atty. Gen. Ops. No. 032.
[107] 1944 Ohio Atty. Gen. Ops. No. 7038; 1992 Ohio Atty. Gen. Ops. No. 92-032.
[108] *Specht v. Finnegan*, 149 Ohio App.3d 201, 2002 Ohio 4660 (6th Dist. Sept. 6, 2002).
[109] *Wyse v. Rupp*, No. F-94-19, 1995 Ohio App. LEXIS 4008 (6th Dist. Sept. 15, 1995).
[110] 42 U.S.C. § 12101, American with Disabilities Act of 1990, P.L. §§ 201-02.
[111] *White v. Clinton County Bd. of Cmsrs*, 76 Ohio St.3d 416, 667 N.E.2d 1223 (1996); *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001).
[112] Ohio Rev. Code Ann. § 121.22(C).
[113] Ohio Rev. Code Ann. § 121.22(C). *See, also, White v. Clinton County Bd. of Cmsrs*, 76 Ohio St.3d 416, 667 N.E.2d 1223 (1996); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990); *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001) (audiotapes that are later erased do not meet requirement to maintain).
[114] *Davidson v. Hanging Rock*, 97 Ohio App.3d 723, 647 N.E.2d 527 (4th Dist. 1994).
[115] *Davidson v. Hanging Rock*, 97 Ohio App.3d 723, 647 N.E.2d 527 (4th Dist. 1994).

As indicated, the minutes of a public body's meetings are open for public inspection.[116] However, it is *not* an invasion of privacy when a public body discloses minutes containing information that has a certain stigma attached or may negatively affect the subject of the information.[117] And, in the case of townships, the township fiscal officer is assigned the statutory duty to "keep an accurate record of the proceedings of the board of township trustees at all of its meetings[.]"[118]

[116] Ohio Rev. Code Ann. § 121.22(C).
[117] *Carrelli v. Ginsburg*, 956 F.2d 598 (6th Cir. 1992).
[118] Ohio Rev. Code Ann. § 507.04(A).

►***RIGHT TO ATTEND.*** A person is guaranteed the right to attend and observe a public meeting, *not* the right to be heard at that meeting.[119] A disruptive person waives this right to attend and may be removed from the meeting.[120]

►***RIGHT TO RECORD.*** Audio and video recording may *not* be prohibited[121], but the public body is permitted to establish reasonable rules regulating the use of such 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.[122] However, at least one federal court has held that there is no constitutional right to videotape public meetings.[123]

►***VOTING METHOD.*** 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.[124] The Open Meetings Act does not require a roll call vote, except when adjourning into executive session.[125] The use of secret ballots has only been recognized as permissible for county political party central committees.[126]

---

[119] *Community Concerned Citizens v. Union Twp. Bd. of Zoning Appeals*, No. CA91-01-009, 1991 Ohio App. LEXIS 5718 (12th Dist. Dec. 2, 1991), *aff'd*, 66 Ohio St.3d 452, 613 N.E.2d 580 (1993); *Black v. Mecca Twp. Bd. of Trustees*, 91 Ohio App.3d 351, 632 N.E.2d 923 (11th Dist. 1993); 1992 Ohio Atty. Gen. Ops. No. 032; *Forman v. Blaser*, No. 13-87-12, 1988 Ohio App. LEXIS 3405 (3rd Dist. Aug. 8, 1988).

[120] *Forman v. Blaser*, No. 13-87-12, 1988 Ohio App. LEXIS 3405 (3rd Dist. Aug 8, 1988). *See, also*, *Jones v. Heyman*, 888 F.2d 1328 (11th Cir. 1989) (no violation of 1st and 14th Amendments where disruptive person was removed from a public meeting).

[121] *McVey v. Carthage Twp. Trustees***,** 2005 Ohio App. LEXIS 2690, 2005-Ohio-2869 (4th Dist. June 1, 2005) (trustees violated RC 121.22 by banning videotaping).

[122] *Kline v. Davis*, 2001 Ohio App. LEXIS 5598 (4th Dist. Dec. 11, 2001) (blanket prohibition on recording a public meeting not justified); 1988 Ohio Atty. Gen. Ops. No. 087 (trustees have authority to adopt reasonable rules for use of recording equipment at their meetings.)

[123] *Whiteland Woods v. Twp. of West Whiteland*, 193 F.3d 177 (3rd Cir. 1999) (while a person may have a constitutional right to attend public meetings, there is no right to videotape those meetings.)

[124] *State ex rel. Roberts v. Snyder*, 149 Ohio St. 333, 78 N.E.2d 716 (1948).

[125] Ohio Rev. Code Ann. § 121.22(G).

[126] 1980 Ohio Atty. Gen. Ops. No. 80-083.

🗁 *Exceptions to Openness: Executive Session – General Principles*

An "executive session" is a private conference between members of a public body from which the public is excluded.[127] The public body is permitted to invite anyone it chooses into an executive session,[128] and, conversely, may exclude anyone it so chooses.[129] Because an executive session means that discussions on public business will occur outside the public view, there are limitations on the use of executive sessions.

First, there are limited reasons for which an executive session may be called.[130] Second, there is a specific procedure that must be followed when a public body adjourns into an executive session.[131] Finally, the public body may take no formal action in an executive session.[132]

If a public body is challenged in court for discussions or deliberations held in executive session, the public body has the burden of proof to establish that one of the statutory exceptions permitted the executive session.[133]

---

[127] *Weisel v. Palmyra Township Bd. of Zoning Appeals*, No. 90-P-2193, 1991 Ohio App. LEXIS 3379 (11th Dist. July 19, 1991); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ*., No. 89-CA004624, 1990 Ohio App. LEXIS 2190 (9th Dist. May 23, 1990).

[128] *Chudner v. Cleveland City School Dist.*, No. 68572, 1995 Ohio App. LEXIS 3303 (8th Dist. Aug. 10, 1995); *Weisel v. Palmyra Township Bd. of Zoning Appeals*, No. 90-P-2193, 1991 Ohio App. LEXIS 3379 (11th Dist. July 19, 1991); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ*., No. 89-CA004624, 1990 Ohio App. LEXIS 2190 (9th Dist. May 23,1990).

[129] *Chudner v. Cleveland City School Dist.*, No. 68572, 1995 Ohio App. LEXIS 3303 (8th Dist. Aug. 10, 1995).

[130] Ohio Rev. Code Ann. §121.22(G)(1)-(7).

[131] Ohio Rev. Code Ann. § 121.22(G)(1) and (7) (requiring roll call vote and specificity in motion.) *See also, , State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001); *State ex rel. Fenley v. Kyger*, 72 Ohio St.3d 164, 648 N.E.2d 493 (1995); *The Wheeling Corp. v. Columbus & Ohio River R.R.*, 147 Ohio App.3d 460, 2001 Ohio 8751, 771 N.E.2d 263 (10th Dist. Dec. 20, 2001); *Wright v. Mt. Vernon City Council*, 1997 Ohio App. LEXIS 4931 (5th Dist. Oct. 23, 1997) (A public body must strictly comply with both the substantive and procedural limitations of R.C.§ 121.22(G)); *Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 (11th Dist. June 30, 1995); *Vermillion Teachers' Ass'n. v. Vermillion Local School Dist. Bd. of Educ.*, 98 Ohio App.3d 524, 648 N.E.2d 1384 (6th Dist. 1994); 1988 Ohio Atty. Gen. Ops. No. 029.

[132] Ohio Rev. Code Ann. §121.22(H).

[133] *State ex rel. Bond v. City of Montgomery*, 63 Ohio App.3d 728, 580 N.E.2d 38 (1st Dist. 1989.)

🗁 *Exceptions to Openness: Executive Session – Permissible Reasons*

There are very limited **valid reasons** for a public body to adjourn into executive session:

►***PERSONNEL.*** 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, or [to consider] the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the employee, official, licensee, or regulated individual requests a public hearing.[134] 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.[135] This exception does *not* grant a substantive right to a public hearing – such right must exist elsewhere in Ohio or federal law before a person may demand a public hearing under this exception.[136]

- ***Non-Specific Personnel.*** The courts disagree as to whether this exception may be used when discussing a category of personnel, rather than specific personnel or regulated individuals.[137] These decisions also indicate that it may be inappropriate to use this exception to discuss the creation of a new position.[138] These courts have determined that the "personnel" exception is only appropriately used to discuss matters that directly affect specific personnel or regulated individuals.

►***PROPERTY.*** A public body may adjourn into executive session to consider the purchase of property, whether real or personal property, whether it is tangible or intangible.[139] A public body may also adjourn into executive session to consider the sale of property by competitive bid (real or personal property) *if* disclosure of the information would result in a competitive

---

[134] Ohio Rev. Code Ann. § 121.22(G)(1). *See Brownfield v. Bd. of Educ.*, No. 89 CA 26, 1990 Ohio App. LEXIS 3878 (4th Dist. Aug. 28, 1990) (upon request, teacher was entitled to have deliberations regarding his dismissal in open meetings.)
[135] Ohio Rev. Code Ann. § 121.22(G)(1).
[136] *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624, 1990 Ohio App. LEXIS 2190, at 12-13 (9th Dist. May 23, 1990); *State ex rel. Harris v. Indus. Comm'n of Ohio*, No. 95APE07-891, 1995 Ohio App. LEXIS 5491, at 6 (10th Dist. Dec. 14, 1995).
[137] *Gannett Satellite Info. Network v. Chillicothe City School Dist.*, 41 Ohio App.3d 218, 534 N.E.2d 1239 (4th Dist. 1988); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624, 1990 Ohio App. LEXIS 2190 (9th Dist. May 23, 1990). *But, see, Wright v. Mt. Vernon City Council*, No. 97-CA-7, 1997 Ohio App. LEXIS 4931 (5th Dist. Oct. 23, 1997) (permissible for public body to discuss merit raises for exempt city employees in executive session without referring to individuals in particular positions).
[138] *Gannett Satellite Info. Network v. Chillicothe City School Dist.*, 41 Ohio App.3d 218, 534 N.E.2d 1239 (4th Dist. 1988); *Davidson v. Sheffield-Sheffield Lake Bd. of Educ.*, No. 89-CA004624, 1990 Ohio App. LEXIS 2190 (9th Dist. May 23, 1990).
[139] Ohio Rev. Code Ann. § 121.22(G)(2). *See, also*, 1988 Ohio Atty. Gen. Ops. No. 003.

advantage to the other side.[140] No member of a public body may use this exception as subterfuge for providing covert information to prospective buyers or sellers.[141]

►***COURT ACTION.*** A public body may adjourn into executive session *with the public body's attorney* to discuss *pending* or *imminent* court action.[142] Court action is "pending" if a lawsuit has been commenced; court action is "imminent" if it is on the point of happening or is impending.[143] 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.[144]

►***COLLECTIVE BARGAINING.*** A public body may adjourn into executive session to prepare for, conduct, or review collective bargaining strategy.[145]

►***CONFIDENTIAL MATTERS.*** A public body may adjourn into executive session to discuss matters required to be kept confidential by federal law, federal rules, or state statutes.[146]

- ***Documents Discussed:*** If a document is a "public record" and is not otherwise exempt under one of the exceptions to the Public Records Act,[147] the record *will* be subject to public disclosure not withstanding the appropriateness of confidential discussions about it. For instance, if a public body properly discusses pending litigation in executive session,[148] a

[140] Ohio Rev. Code Ann. § 121.22(G)(2). *See, also*, 1988 Ohio Atty. Gen. Ops. No. 003.
[141] Ohio Rev. Code Ann. § 121.22(G)(2).
[142] Ohio Rev. Code Ann. § 121.22(G)(3).
[143] *State ex rel. Cincinnati Enquirer v. Hamilton County Commissioners*, 2002 Ohio App. LEXIS 1977 (1st Dist Apr. 26, 2002) ("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, 580 N.E.2d 38 (1st Dist. 1989). *But, compare, Greene County Guidance Center, Inc. v. Greene-Clinton Community Mental Health Bd.*, 19 Ohio App.3d 1, 482 N.E.2d 982 (2nd Dist. 1984) (discussion with legal counsel in executive session under 121.22(G)(3) is permitted where litigation is a "reasonable prospect".)
[144] *Awadalla v. Robinson Memorial Hosp.*, No. 91-P-2385, 1992 Ohio App. LEXIS 2838 (11th Dist. June 5, 1992).
[145] Ohio Rev. Code Ann. § 121.22(G)(4).
[146] Ohio Rev. Code Ann. § 121.22(G)(5). *See also State ex rel. Cincinnati Enquirer v. Hamilton County Cmsrs*, 2002 Ohio 2038, 2002 Ohio App. LEXIS 1977 (1st Dist. April 26, 2002) (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 Properties, Inc. v. Bd. of Revision of Franklin County*, Nos. 81-D-509, 81-D-510, 1982 Ohio Tax LEXIS 535 (Ohio Bd. of Tax Appeals Jan. 19, 1982) (common law attorney-client privilege may not be available under Ohio Rev. Code Ann § 121.22 (G)(5) given the presence of Ohio Rev Code Ann. § 121.22(G)(3)). *But, see, Theile v. Harris*, No. C-860103, 1986 Ohio App. LEXIS 7096, at *16 (1st Dist. June 11, 1986) (public officials have right and duty to seek legal advice from their duly constituted legal advisor.)
[147] *See generally*, "Open Government Laws: Public Records," page 39.
[148] Ohio Rev. Code Ann. § 121.22(G)(3).

settlement proposal drafted during that executive session is nevertheless subject to public disclosure.[149]

►***SECURITY MATTERS.*** A public body may adjourn into executive session to discuss details of security arrangements and emergency response protocols where disclosure could be expected to jeopardize the security of the public body or public office.[150]

►***COUNTY HOSPITAL TRADE SECRETS.*** A public body may adjourn into executive session to discuss trade secrets of a county hospital organized under Ohio Rev. Code Chapter 339.[151]

►***VETERANS SERVICE COMMISSIONS.*** 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.[152]

[149] *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Cmsrs*, 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997) (R.C. § 121.22(G)(3) permits private discussions about litigation, but settlement agreement resulting from those discussions is public record.)
[150] Ohio Rev. Code Ann. § 121.22(G)(6).
[151] Ohio Rev. Code Ann. § 121.22(G)(7).
[152] Ohio Rev. Code Ann. § 121.22(J)

🗁 *Exceptions to Openness: Executive Session –Proper Procedure*

As a primary matter, an executive session must always begin and end in an open meeting.[153] Then, there must be a proper motion, a second, and a roll call vote.[154]

►***THE MOTION.*** The open meetings law *itself* indicates that 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."[155]

For instance, if the purpose of the executive session is to discuss one of the matters listed in the personnel exception, the motion must specify one or more of the listed purposes, *i.e.*, "to discuss the dismissal of a public employee."[156] **Without question, it is *not sufficient* to simply state "personnel" as a reason for executive session**.[157] But, the motion does *not* need to specify by name the person who is to be discussed.[158]

►***THE SECOND.*** After the motion, there must be a second on the motion.

►***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*.[159] The vote may not be by acclamation or by show of hands, and the vote must be recorded in the minutes. [160]

---

[153] Ohio Rev. Code Ann. § 121.22(G).
[154] *Vermillion Teachers' Ass'n. v. Vermillion Local School Dist. Bd. of Educ.*, 98 Ohio App.3d 524, 648 N.E.2d 1384 (6th Dist. 1994); 1988 Ohio Atty. Gen. Ops. No. 029 (detailing proper procedure for executive session).
[155] Ohio Rev. Code Ann. § 121.22(G)(1) and (7).
[156] *Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 (11th Dist. June 30, 1995); 1988 Ohio Atty. Gen. Ops. No. 029; *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (June 13, 2001). *See also,* "Executive Session: Permissible Reasons – Personnel," page 29.
[157] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001) (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. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 (11th Dist. June 30, 1995); 1988 Ohio Atty. Gen. Ops. No. 029.
[158] Ohio Rev. Code Ann. § 121.22(G)(1); *Beisel v. Monroe County Bd. of Educ.*, No. CA-678, 1990 Ohio App. LEXIS 3761 (7th Dist. Aug. 29, 1990).
[159] Ohio Rev. Code Ann. § 121.22(G).
[160] Ohio Rev. Code Ann. § 121.22(G); 1988 Ohio Atty. Gen. Ops. No. 029. *See Shaffer v. Village of West Farmington*, 82 Ohio App.3d 579, 612 N.E.2d 1247 (11th Dist. Sept. 18, 1992) (minutes may not be conclusive evidence as to whether roll call vote was taken.)

►***NO FORMAL ACTION.*** There can be no formal action taken in an executive session.[161] And if a public body does take formal action in an executive session (or otherwise violates the open meetings law), the resulting action is invalid.[162]

►***NO COMMINGLED TOPICS.*** Only matters specifically listed in R.C. § 121.22(G) may be discussed in executive session. Further, even when other matters are intertwined with those permitted matters, the other matters must *not* be discussed in the executive session.[163]

►***DISCLOSING INFORMATION.*** The Open Meetings Act does not prohibit the public body or one of its members from disclosing the information discussed in executive session.[164] However, other provisions of law may prohibit such disclosure, depending on the subject matter.[165]

---

[161] *Pickutowski v. South Central Ohio Educational Service Center Governing Bd.*, 2005 Ohio App. LEXIS 2691, 2005-Ohio-2868 (4th Dist. June 3, 2005) (resolution approved in open session proposing creation of new school district invalid where it resulted from improper deliberations in executive session), *Mansfield City Council v. Richland County Council*, 2003 Ohio App. LEXIS 6654 at *13-14 (5th Dist. Dec. 24, 2003) ("formal action" occurred in executive session when members subsequently issued press release stating decision not to take action on union complaint); *Mathews v. Eastern Local School Dist.*, 2001 Ohio App. LEXIS 1677 (4th App. Dist. Jan. 4, 2001); *State ex rel. Humphrey v. Adkins*, 18 Ohio App.2d 101, 247 N.E.2d 330 (2nd Dist. 1969); *State ex rel. Vindicator Printing Co. v. Hughley*, 2 Ohio Bar Rep. 449 (Mahoning Cty. C.P. 1982); *Drake v. Fairfield County Bd. of Health*, No. 28-CA-90, 1991 Ohio App. LEXIS 301 (5th Dist. Jan. 22, 1991).

[162] Ohio Rev. Code Ann. § 121.22(H). *Mathews v. E. Local School Dist.*, 2001 Ohio 2372, 2001 Ohio App. LEXIS 1677 (4th Dist. Jan. 4, 2001); *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 582 N.E.2d 653 (8th Dist. Oct. 17, 1990). *See also, Staley v. St. Clair Twp. Bd. of Trustees*, No. 87-C-44, 1987 Ohio App. LEXIS 10087 (7th Dist. Dec. 15, 1987). *But, see, Barbeck v. Twinsburg Township Bd. of Trustees*, 73 Ohio App.3d 587, 597 N.E.2d 1204 (9th Dist. 1992). *See also* "Open Meetings Act: Remedies", page 34.

[163] *State ex rel. Vindicator Printing Co. v. Hughley*, 2 Ohio Bar Rep. 449 (Mahoning Cty. C.P. 1982). *But, see, Chudner v. Cleveland City School Dist.*, No. 68572, 1995 Ohio App. LEXIS 3303 (8th Dist. Aug. 10, 1995).

[164] *But, cf.*, Ohio Rev. Code Ann. § 121.22(G)(2) ("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.")

[165] *See, e.g.*, Ohio Rev. Code Ann. § 102.03(B) (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); *Springfield Local School Dist. Bd. of Educ. v. Ohio Ass'n of Public School Employees*, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist. 1995); Informal Opinion of the Ohio Ethics Comm'n issued to Elaine S. Buck (Oct. 10, 1986).

🗁 *Open Meetings Act: Remedies*

In Ohio, there is no government official (state or local) granted the authority to enforce open meetings laws. Instead, if a person believes a public body has violated, or intends to violate, the open meetings law, that person may bring an action in court to enforce the law's provisions.

The court will strictly construe the law in favor of openness.[166] Also, a court may look beyond the express reason stated by the public body for the executive session to find an implied or circumstantial violation of the Open Meetings Act.[167]

►***INJUNCTION.*** The type of court action that must be filed for an alleged violation of the open meetings law is called an **injunction**,[168] which, if granted, will compel the members of the public body to comply with the law.

- ***Who May File:*** "Any person"[169] may file an injunction to enforce the Open Meetings Act. The statute's language is 'plain and unambiguous and provides standing to any individual to bring an action alleging a violation' of the Open Meetings Act.[170] There is no restriction as to who may file an injunction under this law, *i.e.*, the person need *not* demonstrate a personal stake in the outcome.[171]

- ***Where and When to File:*** The statute requires the injunction to be filed in the court of common pleas for the county where the meeting at issue took place.[172] And the action must

---

[166] *Gannett Satellite Info. Network v. Chillicothe City School Dist.*, 41 Ohio App.3d 218, 534 N.E.2d 1239 (4th Dist. 1988).
[167] *Sea Lakes, Inc. v. Lipstreu*, No. 90-P-2254, 1991 Ohio App. LEXIS 4615 (11th Dist. Sept. 30, 1991) (court found 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, 1991 Ohio App. LEXIS 2409 (5th Dist. May 15, 1991) (court found violation where county commission emerged from executive session "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.)
[168] Ohio Rev. Code Ann. § 121.22(I)(1).
[169] Ohio Rev. Code Ann. § 121.22(I)(1).
[170] *McVey v. Carthage Twp. Trustees***,** 2005 Ohio App. LEXIS 2690, 2005-Ohio-2869 (4th Dist. June 1, 2005).
[171] *Doran v. Northmont Bd. Of Educ.*, 153 Ohio App. 3d 499, 2003 Ohio 4084 at P20, 794 N.E.2d 760 (2nd Dist. 2003) ("Doran II"); *State ex rel. Mason v. State Employment Relations Bd.*, No. 98AP-780, 1999 Ohio App. LEXIS 1796 (10th Dist. Apr. 20, 1999); *Thompson v. Joint Twp.*, No. 2-82-8, 1983 Ohio App. LEXIS 11519 (3rd Dist. June 23, 1983); *Foreman v. Blaser*, No. 13-87-12, 1988 Ohio App. LEXIS 3405 (3rd Dist. Aug. 8, 1988). *But, see, Korchnak v. Civil Serv. Comm'n of Canton*, No. CA-8133, 1991 Ohio App. LEXIS 291 (5th Dist. Jan. 7, 1991) (no standing to challenge notice violation without formal request and payment of fee established by public body.)
[172] Ohio Rev. Code Ann. § 121.22(I)(1).

be filed within two years of the violation or alleged violation, or it will be barred from proceeding.[173]

- ***Legal Burdens:*** Upon proof of a violation or threatened violation of the open meetings law, the court *shall* issue an injunction.[174] In fact, once the filing party satisfies this burden of proof, the court will conclusively and irrebuttably presume irreparable harm and prejudice to the filing party,[175] which means that the filing party need not prove these elements to win the injunction, as would be required in a standard injunction action. And once an injunction is issued, members of the public body who commit a "knowing" violation of the injunction may be removed from office.[176]

- ***Curing Violations:*** 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.[177] Indeed, Ohio courts disagree as to whether an invalid action can *ever* be cured by compliant discussions followed by official action taken in an open session.[178] Further, if the action at issue is removal of a public official, which was decided during a meeting allegedly not open to the public, the proper vehicle to challenge that action is a *quo warranto* action.[179]

►***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

---

[173] Ohio Rev. Code Ann. § 121.22(I)(1).
[174] Ohio Rev. Code Ann. § 121.22(I)(1). *See also, Doran v. Northmont Bd. Of Educ.,* 153 Ohio App. 3d 499, 2003 Ohio 4084 at P21, 794 N.E.2d 760 (2nd Dist. 2003) ("Doran II") (injunction is mandatory upon finding violation of statute); *Fayette Volunteer Fire Dept. No. 2, Inc. v. Fayette Twp. Bd. Of Trustees,* 87 Ohio App. 3d 51, 54, 621 N.E.2d 855 (4th Dist. 1993).
[175] Ohio Rev. Code Ann. § 121.22(I)(3). *Ream v. Civil Serv. Comm'n of Canton*, No. CA-8033, 1990 Ohio App. LEXIS 5184 (5th Dist. Nov. 26, 1990).
[176] Ohio Rev. Code Ann. § 121.22(I)(4); *McClarren v. City of Alliance,* No. CA-7201, 1987 Ohio App. LEXIS 9211 (5th Dist. Oct. 13, 1987).
[177] *McVey v. Carthage Twp. Trustees,* 2005 Ohio App. LEXIS 2690, 2005-Ohio-2869 at P9 (4th Dist. June 1, 2005) ("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, 794 N.E.2d 760 (2nd Dist. 2003) ("Doran II"); *Beisel v. Monroe County Bd. of Educ*., No. CA-678, 1990 Ohio App. LEXIS 3761 (7th Dist. Aug. 29, 1990).
[178] Courts finding that violations *cannot* be cured: *Danis Montco Landfill Co. v. Jefferson Township Zoning Comm'n*, 85 Ohio App.3d 494, 620 N.E.2d 140 (2nd Dist. 1993); *with M.F. Mon. Waste Ventures, Inc. v. Bd. of Amanda Twp. Trustees*, No. 1-87-46, 1988 Ohio App. LEXIS 493 (3rd Dist. Feb. 12, 1988); *Gannett Satellite Information Network, Inc. v. Chillicothe City School District Bd. Of Education,* 41 Ohio App.3d 218, 534 N.E.2d 1239 (4th Dist. Apr. 8, 1988). Courts finding violations *can* be cured: *State ex rel. Cincinnati Enquirer v. Hamilton County Cmsrs*, 2002 Ohio App. LEXIS 1977 (1st Dist. Apr. 26, 2002); *Theile v. Harris*, No. C-860103, 1986 Ohio App. LEXIS 7096 (1st Dist. June 11, 1986); *Kuhlman v. Village of Leipsic*, No. 12-94-9, 1995 Ohio App. LEXIS 1269 (3rd Dist. Mar. 27, 1995); *Carpenter v. Bd. of Cmsrs*, No. 1-81-44, 1982 Ohio App. LEXIS 15269 (3rd Dist. Aug. 10, 1982); *Fox v. City of Lakewoo*d, 39 Ohio St.3d 19, 528 N.E.2d 1254 (1988); *Beisel v. Monroe County Bd. of Educ.*, No. CA-678, 1990 Ohio App. LEXIS 3761 (7th Dist. Aug. 29, 1990); *Brownfield v. Bd. of Educ.*, No. 89-CA-26, 1990 Ohio App. LEXIS 3878 (4th Dist. Aug. 28, 1990).
[179] *Randles v. Hill*, 66 Ohio St.3d 32, 607 N.E.2d 458 (1993).

meeting minutes.[180] Mandamus is also the appropriate action to order a public body to give notice of meetings to the person filing the action.[181]

►***MANDATORY FINE.*** If the court issues an injunction, the court *shall* order the public body to pay a civil forfeiture of $500 to the party that filed the action.[182] Further, where the public body has violated the law on repeated occasions, the $500 fine will be awarded for *each violation*.[183]

►***COURT COSTS AND ATTORNEY FEES.*** Depending on which party prevails in an injunction action, the other may be ordered to pay all court costs, as well as the other party's attorney fees.

- ***Awards to the Filing Party:*** If the court issues an injunction (i.e., if the public body loses), the court *shall* order the public body to pay all court costs.[184] In addition, the court *shall also* order the public body to pay the filing party its reasonable attorney fees.[185]

  However, the court is given discretion to reduce the attorney fee award to the filing party, even to the point of no fee award, if the court finds that (1) based on the state of the law when the violation occurred, a well-informed public body could reasonably believe it was not violating the law; and (2) it was reasonable for the public body to believe its actions served public policy.[186]

- ***Awards to the Public Body:*** On the other hand, if the court does *not* issue an injunction, *and* the court deems the action to have been frivolous, the court *shall award* to the public body

[180] *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001); *State ex rel. Fairfield Leader v. Ricketts*, 56 Ohio St.3d 97, 564 N.E.2d 486 (1990).
[181] *State ex rel. Vindicator Printing Co. v. Kirila*, No. 91-T-4550, 1991 Ohio App. LEXIS 6413 (11th Dist. Dec. 31, 1991).
[182] Ohio Rev. Code Ann. § 121.22(I)(2); *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (June 13, 2001); *Cincinnati Enquirer v. City of Cincinnati*, 2001 Ohio App. LEXIS 3738 (1st Dist. Aug. 24, 2001).
[183] *Specht v. Finnegan*, 2002 Ohio 4660, 2002 Ohio App. LEXIS 4742 (6th Dist. Sept. 6, 2002); *Manogg v. Stickle*, 1999 Ohio App. Lexis 1488 (5th Dist. Mar. 15,1999). *But cf., Doran v. Northmont Bd. Of Educ.*, 2003 Ohio 7097, 2003 Ohio App. LEXIS 6422 (2nd Dist. Dec. 24, 2003) ("Doran III") (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.).
[184] Ohio Rev. Code Ann. § 121.22(I)(2)(a).
[185] Ohio Rev. Code Ann. § 121.22(I)(2)(a); *State ex rel. Long v. Cardington Village Council*, 92 Ohio St.3d 54, 748 N.E.2d 58 (2001) (citizen awarded over $17,000 in attorney's fees); *Cincinnati Enquirer v. City of Cincinnati*, 2001 Ohio App. LEXIS 3738 (1st Dist. Aug. 24, 2001).
[186] Ohio Rev. Code Ann. § 121.22(I)(2)(a)(i) and (ii). *Mansfield City Council v. Richland County Council AFL-CIO*, 2003 Ohio App. LEXIS 6654 (5th Dist. Dec. 24, 2003). *But cf., Mathews v. Eastern Local School Dist.*, 2001 Ohio App. LEXIS 1677 (4th Dist. Jan 4, 2001) (where two board members knew not to take formal action during executive session, Board was not entitled to reduction.)

all court costs and reasonable attorney's fees.[187] The court has discretion to determine the amount of the fee award to the public body.[188]

►***INVALIDITY.*** A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.[189] Even in the absence of a formal vote or poll, a formal action may have occurred. A "formal action" occurs by any mechanism by which members make their views known about a matter pending before them.[190]

For instance, where council members *properly* deliberated in executive session whether to take action on a union request, they *improperly* took formal action in the executive session when it was clear at the conclusion of the executive session that council would take no action on the request.[191] Council's authorization of a press release announcing that no action would be taken and the decision it reflects constitute "formal actions," which are invalid and of no effect.[192]

Furthermore, a formal action taken in a meeting for which notice was not properly given may also be invalid.[193] In addition, even if the formal action is adopted in an open meeting, if it results from deliberations that improperly occurred in a meeting not open to the public, the action is still invalid.[194] However, courts have refused to allow public bodies to benefit from their own violations of the Open Meetings Act.[195] For instance, a public body may not attempt

---

[187] Ohio Rev. Code Ann. § 121.22(I)(2)(b); *McIntyre v. Westerville School Dist.*, No. 90AP-1024, 1991 Ohio App. LEXIS 2658 (10th Dist. 1991) (plaintiff engaged in frivolous conduct because her actions subjected the board to a baseless suit and the incurring of needless expense.)

[188] Ohio Rev. Code Ann. § 121.22(I)(2)(b).

[189] Ohio Rev. Code Ann. § 121.22(H); *State ex rel. Holliday v. Marion Twp. Bd. of Trustees*, 2000 Ohio App. LEXIS 4416 (3rd Dist. Sept. 27, 2000).

[190] *Mansfield City Council v. Richland County Council AFL-CIO*, 2003 Ohio App. LEXIS 6654 at *13 (5th Dist. Dec. 24, 2003). *See also*, *Pickutowski v. South Central Ohio Educational Service Center Governing Bd.***,** 2005 Ohio App. LEXIS 2691, 2005-Ohio-2868 (4th Dist. June 3, 2005) (in executive session, board members gave personal opinions and indicated vote on proposal to create new school district and resolution to adopt proposal deemed invalid, though it was adopted in open session).

[191] *Mansfield City Council v. Richland County Council AFL-CIO*, 2003 Ohio App. LEXIS 6654 (5th Dist. Dec. 24, 2003).

[192] *Mansfield City Council v. Richland County Council AFL-CIO*, 2003 Ohio App. LEXIS 6654 at *13-14 (5th Dist. Dec. 24, 2003).

[193] Ohio Rev. Code Ann. § 121.22(H). *See Hoops v. Jerusalem Twp. Bd. of Trustees*, No. L-97-1240, 1998 Ohio App. LEXIS 1496 (6th Dist. Apr. 10, 1998); *Staley v. St. Clair Township Bd. of Trustees*, No. 87-C-44, 1987 Ohio App. LEXIS 10087 (7th Dist. Dec. 15, 1987). *But, see*, *Barbeck v. Twinsburg Township Bd. of Trustees*, 73 Ohio App.3d 587, 597 N.E.2d 1204 (9th Dist. 1992).

[194] Ohio Rev. Code Ann. § 121.22(H); *Mansfield City Council v. Richland County Council AFL-CIO*, 2003 Ohio App. LEXIS 6654 at *13 (5th Dist. Dec. 24, 2003) (council reached conclusion based on comments in executive session and acted according to that conclusion); *State ex rel. Holliday v. Marion Twp. Bd. of Trustees*, 2000 Ohio App. LEXIS 4416 (3rd Dist. Sept. 27, 2000). *See, also*, *State ex rel. Delph v. Barr*, 44 Ohio St.3d 77, 541 N.E.2d 59 (1989).

[195] *Jones v. Brookfield Twp. Trustees*, No. 92-T-4692, 1995 Ohio App. LEXIS 2805 (11th Dist. June 30, 1995); *Roberto v. Brown County General Hosp.*, No. CA87-06-009, 1988 Ohio App. LEXIS 372 (12th Dist. Feb. 8, 1988).

to avoid a contractual obligation by arguing that approval of the contract is invalid due to a violation of the Open Meetings Act.[196]

[196] *Roberto v. Brown County General Hosp.*, No. CA87-06-009, 1988 Ohio App. LEXIS 372 (12th Dist. Feb. 8, 1988).

As with the Open Meetings Act, the Public Records Act is also based on the principles of democracy. Furthering the notion that a government "of the people, by the people, and for the people" can be accomplished only when the people are able to oversee their government's operations, the Ohio Legislature enacted the Public Records Act to guarantee the people broad access to the records of public offices.

Moreover, Ohio's highest court has expressly cautioned public officials that the records in their possession belong *to the people*, not to the government officials holding them.[197] Accordingly, the public records law must be interpreted liberally in favor of disclosure,[198] which means that any doubt about whether to disclose a record should be resolved by its disclosure.

[197] *White v. Clinton Cty. Bd. Of Cmsrs.*, 76 Ohio St. 3d 416, 667 N.E.2d 1223 (1996); *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 171 N.E.2d 508 (1960).
[198] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497, 805 N.E.2d 1116 (2004); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177 (1994).

Even before a member of the public requests to inspect or receive copies of records of the public office, the public office has three duties in order to prepare to receive these requests. The public office must: (1) adopt and post a public records policy, (2) organize and maintain its records in a manner such that they can be made available for inspection or copying, and (3) maintain a copy of the office's current records retention schedules at a location readily available to the public.

►***ADOPT AND POST A PUBLIC RECORDS POLICY.*** A public office is required to create and adopt a public records policy for responding to public records requests.[199] The office may obtain guidance from the Attorney General's model public records policy.[200] Items of note: the policy adopted *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.[201]

In addition, the public records policy must be posted in the public office in a conspicuous location and in all locations where there are branch offices.[202] Note also that the public office's records manager/custodian or employee who otherwise has custody of the records must receive and acknowledge receipt of the policy. The public office is *required* to include the public records policy in its policies and procedures manual, if one exists. Finally, the public office *may* post the public records policy on its internet web site.[203]

►**ORGANIZATION OF RECORDS.** A public office must organize and maintain its records in a manner such that they can be made available for inspection or copying.[204]

►***PROVIDE THE PUBLIC OFFICE'S RECORDS RETENTION SCHEDULES.*** The public office must also maintain a copy of it current records retention schedules at a location readily available to the public.[205]

►***ELECTED OFFICIALS' DUTY TO ATTEND PUBLIC RECORDS TRAINING.*** All elected government officials of both local and statewide offices (except for justices, judges or clerks of the following

[199] Ohio Rev. Code Ann. § 109.43 (E) and 149.43 (E)(1).
[200] Ohio Rev. Code Ann. § 109.43 (E) and §149.43 (E)(1).
[201] Ohio Rev. Code Ann. § 149.43 (E)(1).
[202] Ohio Rev. Code Ann. § 149.43 (E)(2).
[203] Ohio Rev. Code Ann. § 149.43 (E)(2).
[204] Ohio Rev. Code Ann § 149.43(B)(2).
[205] Ohio Rev. Code Ann. § 149.43 (B)(2).

courts: supreme court, court of appeals, court of common pleas, municipal court, or county court) must attend a three-hour public records training program approved by the Attorney General for each term of elective office for which the official was appointed or elected.[206] The certified training must be given by the Ohio Attorney General or another entity with which the Attorney General's office contracts to conduct the training. The intent of this provision is to enhance the official's knowledge of the duty to provide access to public records and to provide guidance in developing and updating their offices' public records policies.[207] The Attorney General's office may not charge a fee to anyone attending the certified training programs it conducts. Contractors of the Attorney General providing certified training may charge a registration fee to attendees, based on the actual and necessary expenses associated with the training, as determined by the Attorney General's office.[208]

An elected official may appoint an appropriate designee to attend the training on his or her behalf. The designee must be a person "in the public office" and 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. [209]

If the elected official or his or her designee successfully completes the training requirements established by the Ohio Attorney General, the elected official will have satisfied the education requirements imposed by statutory law.[210] The Auditor of State, in the course of a regular financial audit, will audit public offices' compliance with both the training and public records policy provisions of the law.[211]

►DUTIES REGARDING INSPECTION AND REQUESTS FOR COPIES.

Once a member of the public has expressed an interest in inspecting or requesting copies, a public office has two basic duties under the public records law: to provide (1) ***prompt inspection*** of public records, and (2**)** ***copies within a reasonable period of time***, if requested.[212] These two duties apply only to items that are "public records" as defined in Ohio law.[213]

[206] Ohio Rev. Code Ann §109.43(E)(1). See also, 109.43(A)(2) for definition of "elected official."
[207] Ohio Rev. Code Ann. § 109.43 (B).
[208] Ohio Rev. Code Ann. § 109.43 (B),(C), and,(D).
[209] Ohio Rev. Code Ann. § 109.43 (A)(1).
[210] Ohio Rev. Code Ann. § 149.43(E)(1) and §109.43(B).
[211] Ohio Rev. Code Ann. § 109.43(G).
[212] Ohio Rev. Code Ann. § 149.43(B). *See also, generally, State ex rel. Consumer News Services, Inc. v. Worthington City Bd. Of Educ.*, 97 Ohio St. 3d 58, 2002 Ohio 5311, 776 N.E.2d 82 (2002) (asking requester to withdraw her public records request is inconsistent with a public office's duties under RC 149.43(B) .)
[213] *See,* "'Public Record' Defined," page 48.

Under current Ohio law, there is no defined period of time (*e.g.*, 10 days) by which a public records request must be completed. Instead, appropriate response times will vary depending on different factors, including, but not limited to: (a) the location and manner in which the records are kept, (b) the breadth of the request, and (c) whether legal evaluation of the responsive records is required before release.[214]

INSPECTION OF PUBLIC RECORDS

►***PROMPT.*** "'Prompt' is not defined within the statute; however its customary meaning is 'without delay and with reasonable speed,' and this meaning depends largely on the facts in each case."[215] This standard does not necessarily require immediate access,[216] and it also contemplates the opportunity for legal review.[217] Also, a public office may need time to examine the responsive records before permitting inspection to ensure that all confidential material has been redacted.[218]

►***BUSINESS HOURS.*** A public office must make its public records available for inspection at all reasonable times during regular business hours.[219] "Regular business hours" means established business hours.[220] Where a public office operates 24-hours-a-day, such as a police department, the office may adopt hours that approximate normal administrative hours during which inspection may be accomplished.[221]

►***COST OF INSPECTION.*** The public records law does not permit a public office to charge the public for inspection of public records.[222]

---

[214] *State ex rel. Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662.
[215] *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 689 N.E.2d 25 (1998), quoting Black's Law Dictionary (6th Ed.1990); *State ex rel. Consumer News Services, Inc. v. Worthington City Bd. Of Educ.*, 97 Ohio St. 3d 58, 2002 Ohio 5311, P51, 776 N.E.2d 82 (2002) (response was not "prompt" where some records were provided on same day as request, while other similar records were delayed for improper reasons.)
[216] *State ex rel. Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, P10 (2006) (unreasonable to expect clerk to respond to request for public records "without a moment's delay").
[217] *State ex rel. Taxpayers Coalition v. City of Lakewood*, 86 Ohio St.3d 385, 715 N.E.2d 179 (1999) (seven days for attorney to review documents is appropriate); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174, 178 (1994).
[218] *State ex rel. Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, P17 (2006) (public records law "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, 640 N.E.2d 174 (1994).
[219] Ohio Rev. Code Ann. § 149.43(B).
[220] *State ex rel. Butler County Bar Ass'n v. Robb*, 62 Ohio App.3d 298, 575 N.E.2d 497 (12th Dist. 1990).
[221] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 640 N.E.2d 174 (1994) (allowing records requests during all hours of the entire police department's operations is unreasonable.)
[222] *State ex rel. Lemke v. Columbiana Pros. Office*, No. 93-C-56, 1996 Ohio App. LEXIS 521 (7th Dist. Feb. 16, 1996).

►***REASONABLE PERIOD OF TIME.*** This period of time must be judged within the context of the circumstances in each individual case.[223] This standard also contemplates the opportunity for legal review.[224]

►***COST OF COPIES.*** A public office may only charge its **actual cost** in making the copy,[225] unless the cost is otherwise set by statute.[226] For instance, the Ohio Supreme Court has concluded that "when a party to an action requests copies of a court transcript of the proceedings in that action, [the actual cost limitation of the Public Records Act] is superseded by" the statute granting courts the authority to set a court reporter's fee, which fee may be well in excess of "actual cost."[227] However, where a party is seeking only a copy of the audiotape of the proceedings, he is entitled to that copy "at cost."[228]

Employee time may NOT be calculated into the "actual cost" charge.[229] Further, specific statutory authority to charge a set fee for **certified copies** of a public record does not mean the

[223] *State ex rel. Consumer News Servs., Inc. v. Worthington City Bd. of Edn.*, 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 52 (2002) ("access to public records will ultimately be dependent upon the facts and circumstances of each request"); *Also, see, State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 53, 689 N.E.2d 25 (1998).

[224] *State ex rel. Taxpayers Coalition v. City of Lakewood*, 86 Ohio St.3d 385, 715 N.E.2d 179 (1999) (seven days for attorney to review documents is appropriate); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174, 178 (1994).

[225] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 640 N.E.2d 174 (1994). *See, also, State ex rel. Russell v. Thomas*, 85 Ohio St.3d 83, 706 N.E.2d 1251 (1999) ($1.00 per page did not represent actual cost of copies); 2001 Ohio Atty. Gen. Ops. No. 01-012; *State ex rel. Williams v. Stearn*, No. CA-9241, 1993 Ohio App. LEXIS 1624 (5th Dist. Mar. 15, 1993) ("at cost" includes, but is not limited to, the cost to respondent for materials, equipment, and other things necessary for the retrieval and copying of the documents.) *But, see, State ex rel. Karasek v. Haines*, No. 16490, 1998 Ohio App. LEXIS 4135 (2nd Dist. Sept. 4, 1998) (ten cents for copies is "reasonable"); *State ex rel. Strothers v. Murphy*, No. 75399, 1999 Ohio App. LEXIS 831 (8th Dist. Mar. 4, 1999) (parties agreed to five cents per page for copies.)

[226] *E.g.*, Ohio Rev. Code Ann. § 5502.12 (cost Dept. of Public Safety may charge for copies of accident reports is $4.00). *See also, State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 92, 2004-Ohio-4354, *P14, 814 N.E.2d 55, 57 (2004) (it is a "well-settled principle of statutory construction 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.'") (citing *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68 Ohio St.3d 426, 1994-Ohio-340, 627 N.E.2d 993 (1994)).

[227] *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 93, 2004-Ohio-4354, *P18, 814 N.E.2d 55, 58 (2004) ("R.C. 2301.24 is a specific statute that requires a party to an action to pay the designated fee to the court reporter when seeking transcripts or copies of transcripts in the action.")

[228] *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 92, 2004-Ohio-4354, *P17, 814 N.E.2d 55, 58 (2004) (requester "is not asking to have the tape transcribed or to have a transcript of the tape copied for him—he is only requesting a copy of the audiotape. Under these circumstances, he is entitled to the copy at cost.")

[229] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 640 N.E.2d 174 (1994).

same fee may be charged for uncertified copies of the same record.[230] So, if the requester does not request a certified copy, the fee charged must be "at cost."[231]

When records are stored, produced, organized, or compiled in an enhanced or **"value-added"** format, the copying charge is the actual cost of copying the records in the format they exist. A public office cannot include a fee to defray the cost of producing the records in the enhanced format.[232]

►PAYING FOR COPIES.

REFUSAL OR INABILITY TO PAY. In general, a public office has no duty to provide copies of public records free of charge to someone who indicates an inability or unwillingness to pay for them.[233]

ADVANCE PAYMENT. Many Ohio courts have held that it is appropriate under the public records law to require prepayment of the cost of copies.[234] In addition, prepayment of costs associated with mailing copies of public records is also appropriate.[235]

►MAKING THE COPIES.

OUTSIDE CONTRACTORS. In some circumstances, it is permissible for a public office, in response to a request for public records, to have an outside contractor make copies and pass on the actual cost of the service directly to the requester.[236]

THE REQUESTER. The public records law does not require the public office to relinquish custody and control of its records so that requesters may make copies of public records using

---

[230] *State ex rel. Call v. Fragale,* 104 Ohio St.3d 276, 2004-Ohio-6589 (2004) (common pleas court clerk may charge up to $1.00 per page for certified copies per R.C. 2303.20(Z)); *State ex rel. Butler County Bar Ass'n v. Robb,* 66 Ohio App.3d 398, 584 N.E.2d 76 (12th Dist. 1990).

[231] *State ex rel. Butler County Bar Ass'n v. Robb*, 66 Ohio App.3d 398, 584 N.E.2d 76 (12th Dist. 1990).

[232] 2001 Ohio Atty. Gen. Ops. No. 01-012, 2001 Ohio AG LEXIS 12.

[233] *State ex rel. Call v.* Fragale, 104 Ohio St.3d 276, 2004-Ohio-6589, 819 N.E.2d 294 (Dec. 15, 2004); State *ex rel. Dunning v. Cleary,* 2001 Ohio App. LEXIS 79 (8th Dist. Jan. 11, 2001); *State ex rel. Mayrides v. City of Whitehall,* 62 Ohio App.3d 225, 575 N.E.2d 224 (10th Dist. 1990), *aff'd,* 62 Ohio St.3d 203, 580 N.E.2d 1089 (1991); *State ex rel. Edwards v. Cleveland Police Dept.,* 116 Ohio App.3d 168, 687 N.E.2d 315 (8th Dist. 1996) (citing *Mayrides, supra)*; *State ex rel. Lewis v. O'Brien,* No. 96-T-5529, 1996 Ohio App. LEXIS 5944 (11th Dist. Dec. 31, 1996); *State ex rel. Plowman v. Butler County Clerk of Courts,* 103 Ohio App.3d 77, 658 N.E.2d 812 (12th Dist. 1995).

[234] *State ex rel. Plowman v. Butler County Clerk of Courts,* 103 Ohio App.3d 77, 658 N.E.2d 812 (12th Dist. 1995); *State ex rel. Bertolini v. Smith,* No. 87AP-218, 1988 Ohio App. LEXIS 2994 (10th Dist. July 26, 1988); *Fant v. Sykes,* No. 87AP-1034, 1988 Ohio App. LEXIS 678 (10th Dist. Feb. 23, 1988). *See, also, State ex rel. Justice v. Enright,* No. 92AP-424, 1992 Ohio App. LEXIS 4550 (10th Dist. Aug. 27, 1992) (dollar per page copying cost challenged but court merely held that since relator sent only $1.50 in advance, this would not cover 33 pages of copying.)

[235] Ohio Rev. Code Ann. § 149.43(B)(7); *State ex rel. Call v. Fragale,* 104 Ohio St.3d 276, 2004-Ohio-6589, 819 N.E.2d 294 (Dec. 15, 2004). *See also,* "Duty to transmit by method requested," page 46.

[236] *State ex rel. Margolius v. City of Cleveland,* 62 Ohio St.3d 456, 460 n.4, 584 N.E.2d 665 (1992); *State ex rel. Gibbs v. Concord Twp. Trustees,* 152 Ohio App. 3d 387, 2003-Ohio-1586 (11th Dist. March 28, 2003).

their own equipment.[237] However, a public office may not prohibit a requester from duplicating the records using personally owned photographic equipment.[238]

[237] *State ex rel. Bertolini v. Smith*, No. 87AP-218, 1988 Ohio App. LEXIS 2994 at *3 (10th Dist. July 26, 1988).
[238] *Land Title Guarantee & Trust Co. v. Essex*, 52 Ohio App.2d 56, 368 N.E.2d 326 (9th Dist. 1977) (requester permitted to photograph public records during inspection); 2004 Ohio Atty. Gen. Ops. No. 04-011, 2004 Ohio AG LEXIS 18 (county recorder may not prohibit person from using digital camera to duplicate records nor may the recorder assess a copy fee to the requester.)

Under the public records law, in addition to the right to *prompt inspection* and copies in a *reasonable period of time*, a person making a public records request has two additional rights: (1) to receive copies *by mail or by any other means of delivery or transmission* , and (2) to receive copies on *paper*, in the *same medium* in which the records are kept, or in *any other medium specified*, so long as it is available as an integral part of the public office's normal business operations.[239]

COPIES BY METHOD REQUESTED

►***DUTY TO TRANSMIT BY METHOD REQUESTED.*** Upon request, a public office *must* provide copies of public records via the U.S. mail or by any other means of delivery of transmission.[240] The public office may require prepayment of postage or delivery and the cost of mailing supplies, in addition to the cost of copies.[241]

►***LIMITATION FOR COMMERCIAL REQUESTS.*** The public office may adopt policies and procedures for mailing or delivering copies of public records, which may include a limit of ten records per month mailed to any one requester, unless the requester certifies in writing that the use of the records or the information in them is not for commercial purposes.[242]

MEDIUM OF COPIES

►***REQUESTER'S CHOICE.*** The public records law allows a person to choose the medium upon which they would like a record to be duplicated.[243] They can choose to have the record (1) on paper, (2) in the same form as the public office keeps it (*e.g.*, on computer disk), or (3) on any medium upon which the *public office* determines the record can "reasonably be duplicated as an integral part of the normal operations of the public office."[244] Once the person requesting a

[239] Ohio Rev. Code Ann. § 149.43(B)(6). *See, also,* Ohio Rev. Code Ann. § 9.01 (where public office keeps information by machine-readable means, such as microfilm, etc., office must make available the equipment necessary to reproduce information in readable form); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 640 N.E.2d 174 (1994).
[240] Ohio Rev. Code Ann. § 149.43(B)(7).
[241] Ohio Rev. Code Ann. § 149.43(B)(7). *See also* cases listed in footnote 234
[242] Ohio Rev. Code Ann. § 149.43(B)(7).
[243] Ohio Rev. Code Ann. § 149.43(B)(6). *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office,* 105 Ohio St.3d 172, 2005-Ohio-685, 2005 Ohio LEXIS 284 (2005).
[244] Ohio Rev. Code Ann. § 149.43(B)(6).

copy makes a choice, the public office shall provide a copy in accordance with the choice made by the person seeking the copy.[245]

►***STANDING REQUESTS.*** A public office has no duty to provide responsive records that are acquired or created *after* a request for records is complete.[246]

[245] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, 2005 Ohio LEXIS 284 (2005).
[246] *State ex rel. Taxpayers Coalition v. City of Lakewood*, 86 Ohio St.3d 385, 715 N.E.2d 179 (1999) (city had no duty to provide access to attorney fee records that did not exist at time of request.)

Essentially, a "public record" is a **record** kept by a **public office**. Consequently, the office holding the record must first be a "public office."

►***PUBLIC OFFICE.*** By statute, a "public office" is 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."[247]

In determining whether an entity is a "public office" for purposes of the Public Records Act, the Supreme Court has used the functional-equivalency test. "Under this test, the 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."[248] In addition, the Court noted "
"We adopted the functional-equivalency test in *Oriana House* because it 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.[249]

So, assuming the office holding the item is a public office, the item must also be a "record." A **"record"** has three characteristics -- if any of the three is absent, the item is NOT a "record" (and, thus, not a "public record.") In that case, a public office will have no duty to provide inspection or copies of the item.[250]

Under the plain language of the Public Records Act, a "public record" must be "kept" by the public office.[251] Accordingly, where a school board returned superintendent candidates' application materials to the applicants, there were no "public records" responsive to a newspaper's request for copies of such materials.[252] Moreover, the board's failure to keep

[247] Ohio Rev. Code Ann. § 149.011(A).
[248] *State ex rel. Oriana House, Inc. v. Montgomery,* 110 Ohio St.3d 456, 2006 Ohio 4854, 854 N.E.2d 193; see also *State ex rel. Repository v. Nova Behavioral Health, Inc.,* 112 Ohio St. 3d 338 (2006).
[249] *State ex rel. Repository v. Nova Behavioral Health, Inc.,* 112 Ohio St. 3d 338 (2006).

[250] *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188, 610 N.E.2d 997 (1993) (to the extent an item does not document the activities of a public office, it is not a public record and need not be disclosed.)
[251] *See, State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ'n*, 99 Ohio St 3d 6, 2003-Ohio-2260, 788 N.E.2d 629 (2003) (materials related to superintendent search were not "public records" where neither board nor search agency kept such materials.)
[252] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ'n*, 99 Ohio St 3d 6, 2003-Ohio-2260, 788 N.E.2d 629 (2003).

copies of these materials did not violate the newspaper's First Amendment right to gather news.[253]

►***RECORD.*** A "record" is any item that is kept[254] by a public office that: (1) is stored on a fixed medium**,** (2) created, received, or sent under the jurisdiction of a public office *and* (3) documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office.[255] Note that in certain instances, the Ohio Supreme Court has concluded that items in a public office which do not "expose government activity to public scrutiny" and do not "shed any light on any government activity" are not "records."[256]

First, to be a "record," the item must be stored on a fixed medium, something tangible. This characteristic is fairly broad, and but for one's thoughts and unrecorded verbal communication, most everything is stored on a fixed medium of some sort. A public office has discretion to determine the form in which it will keep its records.[257] Accordingly, items such as photographs, negatives, videos, maps, voice mails, e-mails, and computer files might constitute "records."[258]

Second, the item must have been created, received, or sent under the jurisdiction of the public office.[259] Even if the items requested are not in the public office's physical possession, if they were created under the office's jurisdiction, they may still be subject to public disclosure.[260]

Third, the item must document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.[261] In short, it must document something that the

---

[253] *Cincinnati Enquirer v. Cincinnati Bd. Of Educ'n*, 249 F. Supp. 2d 911, 2003 U.S. Dist. LEXIS 2361 (S.D. Ohio 2003) (right to gather news does not include right to access government information.)

[254] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ'n*, 99 Ohio St 3d 6, 2003-Ohio-2260, 788 N.E.2d 629 (2003) (materials related to superintendent search were not "public records" where neither board nor search agency kept such materials.)

[255] Ohio Rev. Code Ann. § 149.011(G).

[256] *State ex rel. Montgomery Cty. Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662 (March 1, 2006) (Social Security numbers in court records.) *See also, State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384 (Sept. 7, 2005) (home addresses of state employees); *State ex rel Beacon Journa Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002) (personal information about jurors); *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 2000-Ohio-345, 725 N.E.2d 1144 (2000) (personal information of children using city pools.)

[257] *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St.3d 163, 546 N.E.2d 203 (1989).

[258] Note, however, that proprietary computer software is not a public record. *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St.3d 163, 546 N.E.2d 203 (1989).

[259] Ohio Rev. Code Ann. § 149.011(G).

[260] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St. 3d 654, 2001-Ohio-1895 (2001) (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.)

[261] Ohio Rev. Code Ann. § 149.011(G).

office does.[262] 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.[263] Instead, the public office must *actually use* the item, otherwise it is not a "record."[264]

►***NECESSARY RECORDS.*** Under Ohio law, 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."[265] This standard appears to grant a public office a considerable degree of discretion in determining the records it will maintain.[266]

►***CREATING 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.[267] 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.[268]

However, if a public office's computer is already programmed to produce the record described by the requester, the record already exists for purposes of the Public Records Act, and the office would have to provide the requested output.[269] In addition, if a public office chooses to create a

---

[262] *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.* (1998), 82 Ohio St.3d 37, 693 N.E.2d 789. (allegedly racist email circulated between public employees are not "records" when they were not used to conduct the business of the public office.)

[263] *See State ex rel. Beacon Journal Publ'g Co. v. Whitmore*, 83 Ohio St.3d 61, 697 N.E.2d 640 (1998).

[264] *See State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 411, 2004-Ohio-1497, *P27, 805 N.E.2d 1116, 1122 (2004) (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, 697 N.E.2d 640 (1998) (judge read unsolicited letters but did not rely on them in sentencing a criminal defendant, 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, 707 N.E.2d 496 (1999) (letters alleging inappropriate behavior of coach not "records" and can be discarded) (citing to *Whitmore, supra*); *State ex rel. Carr v. Caltrider*, 2001 Ohio Misc. LEXIS 41 (Franklin Cty. C.P. 2001); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37, 693 N.E.2d 789 (1998) (allegedly racist e-mail messages circulated between public employees were not "records.")

[265] Ohio Rev. Code Ann. § 149.40.

[266] *See State ex rel. Beacon Journal Publ'g Co. v. Whitmore*, 83 Ohio St.3d 61, 697 N.E.2d 640 (1998); *State ex rel. Sensel v. Leone*, 85 Ohio St.3d 152, 707 N.E.2d 496 (1999). *See also, State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ'n*, 99 Ohio St 3d 6, 2003-Ohio-2260, 788 N.E.2d 629 (2003) (neither school board nor search agency required by law to keep application materials of superintendent applicants.)

[267] *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 707 N.E.2d 496 (1999); *State ex rel. Warren v. Warner*, 84 Ohio St.3d 432, 433, 704 N.E.2d 1228 (1999); *State ex rel Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 695 N.E.2d 256 (1998); *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37, 42, 693 N.E.2d 789, 793 (1998); *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197, 198, 580 N.E.2d 1085, 1086 (1991).

[268] *Fant v. Flaherty*, 62 Ohio St.3d 426, 583 N.E.2d 1313 (1992); *State ex rel. Fant v. Mengel*, 62 Ohio St.3d 197, 580 N.E.2d 1085 (1991); *Pierce v. Dowler*, No. CA93- 08-024, 1993 Ohio App. LEXIS 5224 (12th Dist. Nov. 1, 1993).

[269] *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376, 544 N.E.2d 680 (1989) (overruled on different grounds.)

customized record to respond to a public records request, it may still only charge its actual cost to duplicate the record – it *may not* assess the cost of customization to the requester.[270]

►***DRAFTS.*** The Ohio Supreme Court has held that the written draft of an oral collective bargaining agreement between a city and its union was a "record."[271] According to the Court, the draft documented the city's version of the oral agreement and the city submitted the draft to city council for its approval.[272] In short, so long as the draft document possesses the three characteristics of a "public record," it will be subject to the public records law, even though it is not in final form.

►***NOTES.*** When a public employee's notes are simply personal papers kept for the employee's own convenience, rather than for official record keeping purposes, they are not public records subject to mandatory disclosure.[273] But, a court will also consider whether other members of the office have access to the notes and whether information would be lost by deeming them to be non-public records. [274]

►***PRIVATE ENTITIES.*** When a public office contracts with a private entity for government work, the resulting records may be "public records," even if they are in the possession of the private entity.[275] 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

---

[270] 1999 Ohio Atty. Gen. Ops. No. 99-012, 1999 Ohio AG LEXIS 2.
[271] *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 729 N.E.2d 1182 (2000).
[272] *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St.3d 229, 729 N.E.2d 1182 (2000).
[273]*State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884 (Sept. 29, 2004) (personal notes taken during dismissal hearing are not public records); *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 619 N.E.2d 688 (1993); *State ex rel. Pauer v. Ertel*, 149 Ohio App. 3d 287, 2002 Ohio 4592 (8th Dist. Sept. 5, 2002) (judge's notes, even in court file, are not public records); *State ex rel. Murray v.* Netting, 1998 Ohio App. LEXIS 4719 (5th Dist., Sept. 18, 1998) (handwritten notes evaluating candidates for police chief are not public records); *Int'l. Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Voinovich*, 100 Ohio App.3d 372, 654 N.E.2d 139 (10th Dist. Jan. 19, 1995) (governor's personal calendars and appointment books were not public records); *Vindicator Printing Co. v. Julian*, No. 93-CA-252, 1994 Ohio App. LEXIS 3362 (7th Dist. July 26, 1994) (school board members' notes in preparation for meeting are not records.)
[274] *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884 (Sept. 29, 2004); *State ex rel. Steffen v. Kraft*, 67 Ohio St.3d 439, 619 N.E.2d 688 (1993); *Int'l Union, United Automobile, Aerospace and Agricultural Implement Workers of America v. Voinovich*, 100 Ohio App.3d 372, 654 N.E.2d 139 (10th Dist. Jan. 19, 1995) (Governor has official calendar, so no loss of information if personal calendar is not public record); *Vindicator Printing Co. v. Julian*, No. 93-CA-252, 1994 Ohio App. LEXIS 3362 (7th Dist. July 26, 1994) (board members' individual evaluation forms not public record, and collective evaluation form ensures no loss of information to public.) *But see*, *State ex rel. Murray v. Netting*, 1998 Ohio App. LEXIS 4719 (5th Dist., Sept. 18, 1998) (handwritten notes taken during police chief interview are not public records, even though maintained in agency files); *State ex rel. Pauer v. Ertel*, 149 Ohio Appl 3d 287, 2002-Ohio-4592, 776 N.E.2d 1173) (judge's personal notes not public records, even though inadvertently placed in court file.)
[275] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 758 N.E.2d 1135 (2001); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 76 Ohio St.3d 1224, 669 N.E.2d 1148 (1996); *State ex rel. Plain Dealer Publ'g Co. v. City of Cleveland*, 75 Ohio St.3d 31, 661 N.E.2d 187 (1996); *State ex rel. Medina County Gazette v. Brunswick*, 109 Ohio App.3d 661, 672 N.E.2d 1070 (1996)

office; (2) The public office is able to monitor the private entity's performance; and (3) The public office may access the records itself.[276]

For instance, the cost overrun records related to the construction of a sports stadium were public records even though they were in the physical possession of a private construction company.[277] In fact, even where the public office does not have control over or access to such records, the records may still be deemed to be public.[278] Clearly, a public office cannot avoid its responsibility for public records by transferring custody or even the record making function to a private entity.[279]

[276] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 758 N.E.2d 1135 (2001); *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 550 N.E.2d 464 (1990) (overruled in part by statute, R.C. § 4701.19(B)—audit work papers of private accounting firm are not public records.)
[277] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 758 N.E.2d 1135 (2001).
[278] *See, e.g., State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 678 N.E.2d 557 (1997) (public office did not have the ability to monitor performance or access to records, but records were held to be public records nonetheless.)
[279] *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 758 N.E.2d 1135 (2001); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 76 Ohio St.3d 1224, 669 N.E.2d 1148 (1996); *State ex rel. Plain Dealer Publ'g Co. v. City of Cleveland*, 75 Ohio St.3d 31, 661 N.E.2d 187 (1996); *State ex rel. Medina County Gazette v. Brunswick*, 109 Ohio App.3d 661, 672 N.E.2d 1070 (9th Dist. 1996).

►***THE REQUESTER.*** Any "person" may request public records, including corporations, individuals, and even other governmental agencies.[280] The requester does not have to be an Ohio resident.[281] In the absence of a statute to the contrary, foreign individuals and individuals domiciled in a foreign country are "persons" who are entitled to inspect and copy public records.[282] Further, the person seeking the records may designate someone else to inspect or retrieve copies.[283]

►***INMATE REQUESTER.*** An incarcerated person, like anyone else, may make a request for public records. However, if the requested records concern a criminal investigation, the inmate must follow very strict guidelines.

First, the records must be "public records" (*see* Ohio Rev. Code § 149.011(G)) that are not otherwise exempt from public disclosure.[284] Second, the inmate must have a finding from the sentencing judge stating that the information the inmate seeks is necessary to support a justiciable claim.[285] Courts have regularly dismissed inmates' mandamus actions because this procedure was not followed.[286]

►***PROPER REQUEST.*** A legally proper public records request *specifically and particularly* describes the *records* being sought.[287]

---

[280] *Franklin County Sheriff's Dept. v. State Employment Relations Bd.*, 63 Ohio St.3d 498, 589 N.E.2d 24 (1992).
[281] Ohio Rev. Code Ann. § 1.59; 1990 Ohio Atty. Gen. Ops. No. 90-050, 1990 Ohio AG LEXIS 50.
[282] 2006 Ohio Atty Gen Ops. No. 06-038.
[283] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994); *State v. Larkins*, 2003 Ohio 5928, 2003 Ohio App. LEXIS 5276, (8th Dist. Nov. 6, 2003); *State ex rel. Finnerty v. Custodian of Records, Strongsville Police Dept.*, 96 Ohio App.3d 569, 645 N.E.2d 780 (8th Dist. 1994).
[284] *See*, "Exceptions to Disclosure: General Principles" on page 58.
[285] Ohio Rev. Code Ann. § 149.43(B)(8).
[286] *State ex rel. Sevayega v. Reis*, 88 Ohio St.3d 458, 727 N.E.2d 910 (2000); *Rittner v. Barber*, 2006-Ohio-592, 2006 Ohio App. LEXIS 522 (6th Dist., Feb. 7, 2006); *Breeden v Mitrovich*, 2005-Ohio-5763, 2005 Ohio App LEXIS 5179 (11th Dist., Oct. 28, 2005); *State ex rel. Herboltzheimer v City of Columbus*, 2005-Ohio-5169, 2005 Ohio App. LEXIS 4658 (10th Dist., Sept. 29, 2005); *Bowman v City of Trotwood Police Dept., 2005-Ohio-4734, 2005 Ohio App. LEXIS 4257 (2nd Dist., Sept. 9, 2005); State ex rel. Cohen v. Mazeika*, 2004-Ohio-3340, 2004 Ohio App. LEXIS 2978 (11th Dist., June 25, 2004); *See also, e.g., State ex rel. Hightower v. Russo*, 2003 Ohio App. LEXIS 3316, 2003 Ohio 3679 (8th Dist. July 9, 2003); *State ex rel. Becker v. Ohio State Highway Patrol*, 2003 Ohio App. LEXIS 1383 (10th Dist. Mar. 25, 2003).
[287] *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001) (requester failed in duty to identify records with sufficient clarity); *State ex rel. Whittaker v. Court of Common Pleas*, 2001 Ohio App. LEXIS 680 (8th Dist. Feb. 15, 2001) (request for all documents pertaining to a case is fatally vague and incapable of being acted upon); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (10th Dist. 1989); *State ex rel. Farley v. McIntosh*, No. 16682, 1998 Ohio App. LEXIS 3307 (2nd Dist. July 17, 1998).

Mandamus will be denied where the request broadly asks a public office to search for records containing selected information.[288] For example, a request for "any and all records containing any reference whatsoever" to a particular person, is an inappropriate public records request.[289]

►***OVERBROAD REQUEST.*** The person requesting public records has a duty to craft an appropriate request, which describes with sufficient clarity the records desired,[290] rather than the information sought.[291] For instance, it is inappropriate to request materials exchanged between unspecified people, such as "correspondence either to or from Public Office A to or from any employee, agent, or representative of Company X" because such a request would require the public office to determine all employees, agents, or representatives of Company X.[292]

A public office may be unable to respond to a request where the manner of indexing the records does not permit retrieval of the records in the same manner as requested.[293] Although a records custodian has a duty to organize and maintain records so they are available for inspection or copying,[294] using an indexing system different than, and inconsistent with, a request does not necessarily mean the public office has violated its duty under Ohio Rev. Code § 149.43(B)(2).[295] At least one court has held that the primary concern of a retrieval system is to accommodate the mission of the office, and that to provide reasonable access for citizens is only secondary or perhaps even tertiary.[296]

---

[288] *See State ex rel. Frank R. Recker & Assoc. Co., L.P.A. v. Montgomery*, 79 Ohio St.3d 1502, 684 N.E.2d 8779 (1997); *Capers v. White*, 2002 Ohio App. LEXIS 1962 (8th Dist. Apr. 17, 2002) (requests for information are not enforceable in a public records mandamus); *State ex re. Evans v. City of Parma*, 2003-Ohio-1159, 2003 Ohio App. LEXIS 1097, (8th Dist. Mar. 13, 2003) (request for service calls from geographic area improper request); *State ex rel. Fant v. Tober*, No. 63737, 1993 Ohio App. LEXIS 2591 (8th Dist. Apr. 28, 1993), *aff'd*, 68 Ohio St.3d 117, 623 N.E.2d 1202 (1993); *see, also, State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994).

[289] *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001).

[290] *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001); *Capers v.* White, 2002 Ohio App. LEXIS 1962 (8th Dist. Apr. 17, 2002) (a requester must identify with reasonable clarity the records at issue). *See State ex rel. Carter v. N. Olmstead*, 69 Ohio St.3d 315, 631 N.E.2d 1048 (1994); *State ex rel. Waterman v. City of Akron*, No. 14507, 1992 Ohio App. LEXIS 5417 (9th Dist. Oct. 21, 1992); *State ex rel. Bertolini v. Smith*, No. 87AP-218, 1988 Ohio App. LEXIS 2994 (10th Dist. July 26, 1988); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (10th Dist. 1989).

[291] *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994).

[292] *State ex rel. Oriana House, Inc. v. Betty D. Montgomery*, , 2005-Ohio-3377 (10th Dist. June 30, 2005).

[293] *State ex rel. Oriana House, Inc. v. Betty D. Montgomery*, magistrate's decision at p30 (fact that requester made what it believes to be a specific request does not mandate that public office keep its records in such a way that access to the records was possible), adopted by *State ex rel. Oriana House, Inc. v. Betty D. Montgomery* 2005-Ohio-3377 (10th Dist. June 30, 2005); *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159, 2003 Ohio App. LEXIS 1097 (8th Dist. Mar. 13, 2003).

[294] Ohio Rev. Code Ann. § 149.43(B)(2).

[295] *See State ex rel. Oriana House, Inc. v. Betty D. Montgomery*, magistrate's decision at p30 (fact that requester made what it believes to be a specific request does not mandate that public office keep its records in such a way that access to the records was possible), adopted by *State ex rel. Oriana House, Inc. v. Betty D. Montgomery* 2005-Ohio-3377 (10th Dist. June 30, 2005); *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159, 2003 Ohio App. LEXIS 1097 (8th Dist. Mar. 13, 2003); *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (10th Dist. 1989).

[296] *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (10th Dist. 1989).

For instance, if a person requests copies of all police service calls for a particular geographical area identified by street names, but the computer system cannot identify calls based on street names, the request does not match the method of retrieval.[297] Accordingly, the public records request is not a valid request to which the office has a duty to respond.[298]

Note, however, that if the requester makes either an overly broad request or has difficulty making the request such that the public office cannot reasonably identify the records sought, the public office may deny the request but *is required to provide the requester an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office.*[299]

►***WRITTEN REQUEST.*** Ohio's public records law does not mandate that a request for records be in writing, generally.[300] Accordingly, a public office may not require a person to fill out a form before being entitled to inspect or receive copies of public records. If a person is asked to put the request in writing, the public office *must* first inform the requester that a written request would enhance the public office's ability to identify, locate or deliver the records sought *and* that a writing is not mandatory and that the requestor has the right to decline.[301]

There are limited instances when Ohio law *does* require a written request. If the requester is a **journalist** seeking the residential and familial information of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or emergency medical technician, a signed, written request is mandatory by statute.[302] The request must include the journalist's name and title and the name and address of the journalist's employer, and shall state that disclosure of the information sought would be in the public interest. Similar provisions allowing limited access by journalists to otherwise exempt records appear elsewhere in Ohio law. For instance, journalists may access certain claimant information kept by the Bureau of Workers' Compensation and the Industrial Commission.[303] Journalists may also view--but not copy--specified information about individuals to or for whom a sheriff has issued, suspended or revoked a license to carry a concealed handgun.[304] In both cases, signed, written requests are required.

---

[297] *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159, 2003 Ohio App. LEXIS 1097 (8th Dist. Mar. 13, 2003).
[298] *State ex rel. Evans v. City of Parma*, 2003-Ohio-1159, 2003 Ohio App. LEXIS 1097 (8th Dist. Mar. 13, 2003).
[299] Ohio Rev. Code Ann. §149.43(B)(2).
[300] *Franklin County Sheriff's Dept. v. State Employment Relations Bd.*, 63 Ohio St.3d 498, 504, 589 N.E.2d 24, 29 (1992) (R.C. § 149.43 does not require any specific form for a public records request.) see also Ohio Rev. Code Ann. § 149.43(B)(5).
[301] Ohio Rev. Code Ann. § 149.43(B)(5).
[302] Ohio Rev. Code Ann. § 149.43(B)(9). *See, also,* "Journalist Exception," page 75.
[303] Ohio Rev. Code Ann. §4123.88(D)
[304] Ohio Rev. Code Ann. §2923.129(B)(2)

►***IDENTIFICATION OF REQUESTER.*** A public office may ask the requester's identity *only* if it first discloses to the requester that knowledge of their identity would enhance the public office's ability to deliver the records sought and that it is within the requester's rights to decline to reveal their identity.[305]

►***MOTIVE.*** Ordinarily, any person may obtain public records without having to state the reason.[306] Before a public office inquires about the intended use of the information, the public office *must first* disclose that providing the intended use of the information would enhance the public office's ability to identify, locate or deliver the records. In addition, the public office must disclose to the requester that it would be within their rights not to provide this information to the public office.

The Ohio Supreme Court has repeatedly indicated that a person's motive in accessing public records is irrelevant.[307] Except for limiting the number of requests per month in certain circumstances, it is irrelevant whether the records are going to be used for commercial purposes.[308] For further discussion of commercial requests, see page 46.

However, in at least one case, the Ohio Supreme Court *has* considered the requester's motive in determining whether to make the records available.[309] Furthermore, the public records law now takes into account the requester's motive in determining whether the records must be mailed,[310] or whether certain information is even available to a requester.[311]

---

[305] Ohio Rev. Code Ann. § 149.43(B)(5).

[306] See Ohio Rev. Code Ann. §149.43 ((B)(5), effective September 29, 2007. See also, *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993). *But, cf.*, Ohio Rev. Code Ann. § 149.43(B)(5) (journalist seeking peace officer, firefighter, or EMT personal or residential information must certify disclosure would be in public interest); 1974 Ohio Atty. Gen. Ops. No. 74-097.

[307] *Gilbert v. Summit County*, 2004-Ohio-7108, *P10, 821 N.E.2d 564 (2004) (citing *State ex rel. Fant v. Enright*, 66 Ohio St. 3d 186, 610 N.E.2d 997, syllabus (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'n*, 97 Ohio St. 3d 58, 2002-Ohio-5311, *P45, 776 N.E.2d 82 (2002) (purpose behind request to "inspect and copy public records is irrelevant.").

[308] 1990 Ohio Atty. Gen. Ops. No. 90-050, 1990 Ohio AG LEXIS 50; *see, also, State ex rel. Webster v. Burleman*, 4 Ohio Cir. Dec. 506 (6th Dist. 1894). *But, see,* Ohio Rev. Code Ann. § 149.43(B)(7) (public office may limit copies mailed to requester if purpose is commercial.)

[309] *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (police officer's personal information not available to criminal defendant who might use the information to "nefarious ends").

[310] Ohio Rev. Code Ann. § 149.43(B)(7) (public office may limit copies mailed to requester if purpose is commercial.)

[311] Ohio Rev. Code Ann. § 149.43(B)(9) (journalist seeking personal and familial information of peace officers, firefighters, emergency medical technicians (EMTs), parole officers, prosecuting attorneys, assistant prosecuting attorneys, correctional employees, and youth services employees must certify that disclosure would be in the public interest.); Ohio Rev. Code Ann. §4123.88(D); Ohio Rev. Code Ann. §2923.129(B)(2).

►***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.[312] However, when a request *unreasonably interferes* with the discharge of the public office's duties, the office may not be obligated to comply.[313]

[312] *State ex rel. Beacon Journal Publ'g Co. v. Andrews*, 48 Ohio St.2d 283, 358 N.E.2d 565 (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.")
[313] *Barton v. Shupe*, 37 Ohio St.3d 308, 525 N.E.2d 812 (1988); *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 171 N.E.2d 508 (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, 577 N.E.2d 444 (10th Dist. 1989).

🗁 *Exceptions to Disclosure: General Principles*

In Ohio, we are reminded that the records of a public office belong *to the people*, not to the government officials holding them.[314] Accordingly, the public records law must be *liberally interpreted* in favor of disclosure,[315] and any doubt whether to disclose a record should be resolved by its disclosure.

Further encouraging broad access to public records, exceptions in the law that permit certain types of records to be withheld from disclosure are to be *narrowly construed*.[316] If a record does not clearly fit into one of these exceptions, a public office should disclose the record.

►*MANDATORY & DISCRETIONARY EXEMPTIONS*

A record may be exempt from release under the Public Records Act if a specific provision of either state or federal law prohibits its release, even if the public office would like to disclose it. Such records that are subject to mandatory withholding fall under what is referred to as the "catch-all" exemption.[317]

Other provisions of the Public Records Act explicitly exempt certain kinds of records from the definition of "public records" that must be made available by a public office. This means that the public office does not have to disclose these records in response to a public records request. However, it may, if it chooses to do so, without fear of punishment under the law. Such records are referred to as being "discretionarily exempt."

►***REDACTING.*** "Redaction" is defined as "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"[318] When faced with a record that, in part, contains information that is not subject to public disclosure, the public office should redact the exempt portion of the record (rather than withhold the entire record); the remainder of the record must be disclosed.[319] A public office must redact exempt information in *good faith*, and it may not avoid this responsibility by refusing access to the records, nor may it delegate the duty to a court by

---

[314] *White v. Clinton Cty. Bd. Of Cmsrs.*, 76 Ohio St. 3d 416, 667 N.E.2d 1223 (1996); *Dayton Newspapers, Inc. v. Dayton*, 45 Ohio St. 2d 107, 109, 341 N.E.2d 576 (1976) (quoting *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 171 N.E.2d 508 (1960)).
[315] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177 (1994).
[316] *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 621, 640 N.E.2d 174, 177 (1994).
[317] Ohio Revised Code Ann. §149.43(A)(1)(v)
[318] Ohio Rev. Code Ann. § 149.43(A)(11)
[319] Ohio Rev. Code Ann. §149.43(B)(1).

forcing a mandamus action.[320] However, once the public office has decided whether to release, withhold, or redact particular records, that public office *may* file a declaratory judgment action to determine the correctness of its decision.[321]

►***RESPONSE.*** If a public office has determined that *any* portion of the records responsive to the request are exempt from disclosure, the public office has a duty to notify the requester that all or a portion of the request has been denied. The public office may accomplish this notification by explaining what portion(s) were redacted or by making the redaction "plainly visible" to the requester.[322]

A redaction will be considered to be 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.[323]

►***STATUTORY INTERPRETATION.*** Rules of statutory construction, which a court applies when interpreting a challenged statute, typically follow the maxim of *expressio unius est exclusio alterius* – "the expression of one thing is the exclusion of another."[324] Applying this maxim would mean that if a statute expressly states that particular records of a public office are public, the remaining records would *not* be public. However, Ohio's Supreme Court has clearly stated that just the *opposite* is true: 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 *not* public, *i.e.*, that the other records are exempt from disclosure.[325]

Another "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.'"[326] Accordingly, where a statute permits a court to designate the fee parties to an action must pay to the court reporter for

---

[320] *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990).
[321] *State ex rel. Safety 4th Fireworks, Inc. v. Ohio Dept. of Commerce, Div. of State Fire Marshal*, 2003-Ohio-3477, 2003 Ohio App. LEXIS 3145 (7th Dist. June 26, 2003) (citing *State ex rel. Fisher v. PRC Public Sector, Inc.*, 99 Ohio App. 3d 387, 650 N.E.2d 945 (10th Dist. 1994)).
[322] Ohio Rev. Code Ann. § 149.43(B)(1).
[323] Ohio Rev. Code Ann. § 149.43(B)(1).
[324] Black's Law Dictionary, 6th Ed., page 581 (West Publishing 1990).
[325] *Franklin County Sheriff's Dept. v. State Employment Relations Bd.*, 63 Ohio St.3d 498, 589 N.E.2d 24 (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.)
[326] *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 92, 2004-Ohio-4354, *P14, 814 N.E.2d 55, 57 (2004) (citing *State ex rel. Dublin Securities, Inc. v. Ohio Div. of Securities*, 68 Ohio St.3d 426, 1994-Ohio-340, 627 N.E.2d 993 (1994)).

copies of court transcripts, that fee will apply, even though it may be in excess of the court's "actual cost" to duplicate that record.[327]

►***LEGAL CHALLENGES.*** If challenged in court on its decision to withhold a record or redact information, the public office has the burden of proving in court that the records are exempt from disclosure.[328] The court then will review, *in camera*, the materials that were withheld or redacted.[329]

After an *in camera* inspection, the court may decide whether to describe each document and its applicable exception.[330] Moreover, a court has the discretion to apply an exception, even where the public office has not so requested.[331]

But an *in camera* review is not always necessary — such as where only the status of the record as a "public record" is in dispute, rather than the content of the record, or where the matters are entirely public or entirely confidential.[332] For example, an *in camera* inspection was unnecessary where the Court determined that a record was a confidential law enforcement investigatory record because the "identity of uncharged suspects and confidential witnesses or information sources would necessarily be intertwined with any retained investigatory records."[333]

►***WAIVER.*** If a valid exception applies to a particular record, but the public office discloses it anyway, the office is deemed to have waived that exemption, particularly if the disclosure was

---

[327] *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 93, 2004-Ohio-4354, *P18, 814 N.E.2d 55, 58 (2004) ("R.C. 2301.24 is a specific statute that requires a party to an action to pay the designated fee to the court reporter when seeking transcripts or copies of transcripts in the action.") *See generally*, "Cost of Copies," page 43.

[328] *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988) ("NBC I").

[329] *State ex rel. Seballos v. SERS*, 70 Ohio St.3d 667, 640 N.E.2d 829 (1994);*State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988); *State ex rel. Rash v. City of Canton Police Dep't*, No. CA-9031, 1992 Ohio App. LEXIS 5741 (5th Dist. Nov. 9, 1992); *State ex rel. Besser v. Ohio State Univ.* 89 Ohio St.3d 396, 732 N.E.2d 373 (2000) ("Besser II"); *State ex rel. Strothers v. Rish*, 2003-Ohio-2955, 2003 Ohio App. LEXIS 2674 (8th Dist. June 5, 2003); State *ex rel. Dayton Newspapers v. Dayton Bd. Of Education*, 140 Ohio App.3d 243, 747 N.E.2d 255 (2nd Dist. 2000); *In Re: EM*, 2001 Ohio App. LEXIS 5011 (8th Dist. Nov. 8, 2001) (judge required to conduct in camera review of confidential investigatory records used by witness to refresh memory during testimony, when record is requested by opposing side.)

[330] *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 82 Ohio App.3d 202, 611 N.E.2d 838 (8th Dist. 1992) (court can chose whether to list each document and identify specific exemptions).

[332] *State ex rel. Renfro v. Cuyahoga County Dep't of Human Servs.*, 54 Ohio St.3d 25, 560 N.E.2d 230 (1990); compare *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n*, 44 Ohio St.3d 111, 541 N.E.2d 587 (1989); *State ex rel. Outlet Communications, Inc. v. Lancaster Police Dept.*, 38 Ohio St.3d 324, 528 N.E.2d 175 (1988); with *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 550 N.E.2d 945 (1990); *But, see also, In re Vavrock*, No. 14-93-12, 1993 Ohio App. LEXIS 4999 (3rd Dist. Sept. 29, 1993) (even if contents are not disputed, court *may* conduct *in camera* inspection.)

[333] *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 550 N.E.2d 945 (1990).

to a person whose interests are antagonistic to those of the public office.[334] 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."[335] Under such circumstances, the information has never been disclosed to the public.[336]

[334] *See, e.g., State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163 (2002); *State ex rel. Gannett Satellite Network, Inc. v. Petro*, 80 Ohio St.3d 261, 685 N.E.2d 1223 (1997); *State ex rel. Zuern v. Leis*, 56 Ohio St.3d 20, 564 N.E.2d 81 (1990); *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. Coleman v. City of Norwood*, 1989 Ohio App. LEXIS 3088 (1st Dist. 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*, Case No. 98 CVH-07-5242 (Franklin Cty. C.P. June 1, 2000) (attorney-client privilege waived where staff attorney had reviewed, duplicated, and inadvertently produced documents to defendants during discovery.)

[335] *State ex rel. Musial v. N. Olmstead*, 106 Ohio St.3d 459, 2005-Ohio-5521, *P37, (2005) (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, *P14, 785 N.E.2d 822, 826 (1st Dist. 2003) (statutory confidentiality of documents submitted to municipal port authority not waived when port authority shares documents with county commissioners.)

[336] *State ex rel. Musial v. N. Olmstead*, 106 Ohio St.3d 459, 2005-Ohio-5521, *P37, (2005) (forwarding police investigation records to a city's ethics commission did not disclose these records to the general public); *State ex rel. Cincinnati Enquirer v. Sharp*, 151 Ohio App. 3d 756, 761, 2003-Ohio-1186, *P14, 785 N.E.2d 822, 826 (1st Dist. 2003) (statutory confidentiality of documents submitted to municipal port authority not waived when port authority shares documents with county commissioners.)

🗁 *Exceptions to Disclosure: The Catch-all Exception*

The "catch-all exception" essentially acknowledges the confidential nature of certain types of information or records. This exception states that if any provision of Ohio or federal law prohibits the disclosure of a certain type of information or record, a public office *must not* disclose it in response to a public records request.[337]

A valid "catch-all exception" may be founded in statute.[338] Also, an agency rule designating particular records as confidential that is properly promulgated by a state or federal agency will also constitute a valid "catch-all exception"[339] because such rules have the effect of law.[340] 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.[341]

►***ATTORNEY-CLIENT PRIVILEGE.*** Pursuant to the catch-all exception, attorney-client privileged materials are *not* subject to mandatory disclosure under the public records law.[342] Thus, drafts of proposed bond documents prepared by an attorney are protected by attorney-client privilege, and are not subject to disclosure.[343]

---

[337] Ohio Rev. Code Ann. § 149.43(A)(1)(v).

[338] *See eg, State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087 (Dec. 15, 2004) (information gleaned from a report to children's services is confidential under RC 2151.421); *State ex rel. Strothers v. Rish*, 2003 Ohio 2955, 2003 Ohio App. LEXIS 2674 (8th Dist. June 5, 2003) (R.C. § 3309.22(A) is "catch-all" exception for certain information in State Teachers Retirement System records.)

[339] *State ex rel. Lindsay v. Dwyer* 108 Ohio App.3d 462, 670 N.E.2d 1375 (10th Dist. 1996) (State Teachers Retirement System properly denied access to beneficiary form pursuant to Ohio Administrative Code); 2000 Ohio Atty. Gen. Ops. No. 2000-036, 2000 Ohio AG LEXIS 37 (service member's discharge certificate prohibited from release by Governor's Office of Veterans Affairs, per federal regulation, without service member's written consent.)

[340] *Columbus and Southern Ohio Elec. Co. v. Indus. Comm.*, 64 Ohio St.3d 119, 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, paragraph one of the syllabus (1954).

[341] *State ex rel. Gallon & Takacs Co., L.P.A. v. Conrad*, 123 Ohio App.3d 554, 704 N.E.2d 638 (10th Dist. 1997) (BWC administrative rule prohibiting release of managed care organization applications was unauthorized attempt to create exception to Public Records Act.)

[342] *State ex rel. Nix v. City of Cleveland*, 83 Ohio St.3d 379, 700 N.E.2d 12 (1998); *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 1994 Ohio 261, 643 N.E.2d 126 (1994); *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland*, 63 Ohio St.3d 772, 591 N.E.2d 708 (1992); *Woodman v. City of Lakewood*, 44 Ohio App.3d 118, 541 N.E.2d 1084 (8th Dist. 1988). *See, also, State ex rel. Leslie v. Ohio Housing Finance Agency*, 105 Ohio St. 3d 261, 2005-Ohio-1508, 824 N.E.2d 990 (2005) (the attorney-client privilege applies to state agencies and their in-house counsel even when that counsel is not an Assistant Attorney General); *American Motors Corp. v. Huffstutler*, 61 Ohio St.3d 343, 575 N.E.2d 116 (1991).

[343] *State ex rel. Benesch, Friedlander, Coplan & Aronoff, LLP v. City of Rossford*, 2000 Ohio App. LEXIS 1719 (6th Dist. Apr. 21, 2000).

►***COURT RECORDS.***[344] Pursuant to the catch-all exception, when a court authorizes court records to be sealed pursuant to statutory authority, the records are *not* available for public disclosure.[345] This result is true even though there is a presumptive right of public access to all court records,[346] which right can only be overcome "by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest."[347] Because of this presumption of openness associated with court records, "as a general rule, courts should not order the blanket sealing of records."[348] Instead, a court should evaluate each request for sealing to determine whether the standard of "essential to preserve higher values…" has been satisfied.

►***FEDERAL FOIA.*** The Freedom of Information Act ("FOIA") is a federal law that grants public access to records or information of a federal agency.[349] The FOIA, however, does not apply to state agencies or officers,[350] nor do the exceptions codified in FOIA.[351] As a result, FOIA's various exceptions do NOT constitute "catch-all" exceptions under Ohio's public records law.[352]

For instance, under FOIA, federal agencies can withhold records where disclosure would constitute "an unwarranted invasion of personal privacy."[353] Ohio courts have concluded that the legislature already balanced privacy considerations when it enacted the various exceptions to

---

[344] *See also* "Common Issues: Court Records," page 102.
[345] *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581, __805 N.E.2d 1094 (2004) ("Winkler III") (records sealed by court pursuant to statutory authority are no longer public records.)
[346] *See e.g., State ex rel. Cincinnati Enquirer v. Winkler,* 2002 Ohio App. LEXIS 4857, *6-7 (1st Dist. Sept. 13, 2002) ("Winkler I"), aff'd, 2002-Ohio-7334, 2002 Ohio App. LEXIS 7225 (1st Dist. Dec. 31, 2002) ("Winkler II"), aff'd, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094 (2004) ("Winkler III"); *See, also, State ex rel. Highlander v. Rudduck*, 103 Ohio St.3d 370, 2004-Ohio-4952, 816 N.E.2d 213 (2004) (court records were not sealed under any applicable statute); *State ex rel. WHIO TV-7 and Dayton Daily News v. Davis*, 158 Ohio App. 3d 98, 2004-Ohio-3860, 814 N.E.2d 88 (2nd dist., July 21, 2004).
[347] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, 2002-Ohio-7117, paragraph 2 of the syllabus, 781 N.E.2d 180 (2002) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)) (internal quotations omitted).
[348] *Davis v. Davis*, 2005 Ohio 5719 (1st Dist. Oct. 28, 2005) at *P12 (citing *Dzina v. Dzina*, 2002 Ohio 2753 (8th Dist. May 30, 2002) at *P24, fn 2 ("The First Amendment to the United States Constitution creates a strong presumption in favor of public access to court proceedings and records. *** Except for a few limited circumstances (such as adoption proceedings), these competing concerns do not justify a blanket order sealing the record of an entire proceeding.") (Internal citations omitted.)
[349] 5 U.S.C. § 552.
[350] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 412, 2004-Ohio-1497, *P35, 805 N.E.2d 1116, 1123 (2004); *State ex rel. Findlay Publ'g Company v. Schroeder*, 76 Ohio St.3d 580, 669 N.E.2d 835 (1996).
[351] *State ex rel. Thomas v. Ohio State University*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994); *State ex rel. Toledo Blade Company v. University of Toledo Foundation*, 65 Ohio St.3d 258, 602 N.E.2d 1159 (1992).
[352] *State ex rel. Thomas v. Ohio State University*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994); *State ex rel. Toledo Blade Company v. University of Toledo Foundation*, 65 Ohio St.3d 258, 602 N.E.2d 1159 (1992).
[353] 5 U.S.C. § 552(b)(6).

disclosure, and these courts reject the invitation to apply the FOIA privacy exception to Ohio public records requests.[354]

Thus, just because a certain type of record is exempt under FOIA, that exception, standing alone, probably is *not* sufficient grounds upon which an Ohio public office may withhold the record.

►***CONSTITUTIONAL RIGHT TO PRIVACY.*** The Ohio Supreme Court has acknowledged that constitutional privacy rights constitute "state or federal law" that prohibit disclosure of certain records or information.[355] However, a person's interest in maintaining the confidentiality of private information does not always rise to a constitutional dimension.[356] For a person to establish a constitutional right to privacy in non-disclosure of personal information, the court must find that there is a high potential for fraud or victimization in releasing the information,[357] or that releasing the information will create a substantial risk of serious bodily harm or death.[358]

[354] *State ex rel. Toledo Blade Company v. University of Toledo Foundation*, 65 Ohio St.3d 258, 602 N.E.2d 1159 (1992).
[355] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St. 3d 605, 1994-Ohio-6, 640 N.E.2d 164 (1994) (city employees social security numbers); *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (personal information of police officers contained in personnel files); *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000) (personal information of children maintained in city's database.)
[356] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) ("Kallstrom I").
[357] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St. 3d 605, 612, 1994-Ohio-6, 640 N.E.2d 164 (1994) ("high potential for fraud and victimization caused by the unchecked release of city employee SSNs");. *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 372, 725 N.E.2d 1144 (2000) ("Because of the inherent vulnerability of children, release of personal information of this nature creates an unacceptable risk that a child could be victimized); *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 282, 707 N.E.2d 931 (1999) ("Police officers' files that contain the names of the officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, medical information, and the like should not be available to a defendant who might use the information to achieve nefarious ends.")
[358] *Kallstrom v. City of Columbus*, 136 F.3d 1055, 1062 (6th Cir. 1998) ("Kallstrom I") (personal information of police officers); *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (personal information of police officers.)

🗁 *Exceptions to Disclosure: The Catch-all Exception -- HIPAA*[359]

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 is the "Privacy Rule," which is a collection of federal regulations seeking to maintain the confidentiality of individually identifiable health information.[360] For some public offices, the Privacy Rule will alter the manner in which they respond to public records requests.[361] The most commonly asked questions are addressed in the following discussion.

►***HIPAA DEFINITIONS.*** The Privacy Rule protects all "individually identifiable health information," which is called "**protected health information,**" or "**PHI**."[362] PHI is information that could reasonably lead to the identification of an individual, either by itself or in combination with other reasonably available information.[363] The HIPAA regulations, including the Privacy Rule, apply only to "**covered entities**," of which there are only three: (1) healthcare providers; (2) a health plan; or (3) a healthcare clearinghouse.[364]

Generally, a "**healthcare provider**" is any entity providing mental or health services *and* electronically transmitting individually identifiable health information for any financial or administrative purpose subject to HIPAA.[365] A "**health plan**" is an individual or group plan that provides, or pays the cost of, medical care, such as an HMO.[366] A "**healthcare clearinghouse**" is any entity that processes health information from one format into another for particular purposes, such as a billing service.[367] Legal counsel should be consulted if there is uncertainty about whether or not a particular public office is a "covered entity" for purposes of HIPAA.

►***PHI IN PERSONNEL FILES.*** The HIPAA Privacy Rule does not affect release of PHI contained in employment records that are held by a covered entity in its sole role as an employer.[368] So, when handling a public records request, a covered entity need *not* redact PHI

---

[359] Special thanks to the author of this section: Socrates H. Tuch, Esq., Asst. Counsel/Privacy Officer, Office of the General Counsel, Ohio Dept. of Health.
[360] 45 C.F.R. Parts 160 and 164.
[361] *But cf.*, Texas Attorney General Open Records Decision No. 681, http://www.oag.state.tx.us (Texas attorney general concluded that HIPAA has no impact on disclosure pursuant to that state's open records law).
[362] 45 C.F.R. 160.103.
[363] 45 C.F.R. 160.103.
[364] 45 C.F.R. 160.103.
[365] 45 C.F.R. 160.103.
[366] 45 C.F.R. 160.103.
[367] 45 C.F.R. 160.103.
[368] 45 C.F.R. 160.103.

from the personnel file or obtain the employee's authorization before releasing the records. However, other state and/or federal catch-all exceptions may still apply.[369]

►***LAW ENFORCEMENT INVESTIGATIONS.*** Basically, where the PHI is necessary to further a legitimate law enforcement purpose, a covered entity *may* release PHI to law enforcement officials without the patient's prior authorization.[370]

Specifically, the situations in which such release is permissible are as follows: (1) where state or federal law requires the release, including a valid court order, warrant, or subpoena; (2) to identify or locate a suspect, fugitive, material witness, or missing person; (3) when a crime victim is unable to consent, the PHI is needed to determine whether a crime has been committed *and* the PHI will not be used against the victim, the investigation will be materially and adversely affected by waiting for the victim to consent, and the covered entity determines, in its professional judgment, that release will serve the victim's best interests; (4) when a crime is suspected in a person's death; (5) where the PHI constitutes evidence of a crime that occurred on the covered entity's premises; (6) in an emergency if necessary to alert law enforcement to the commission of a crime, the location of the crime or the victims, and the identity, description, or location of the alleged perpetrator.[371]

►***PHI IN DISPATCH CALLS.*** A covered entity, such as an EMS organization, *may* disclose PHI where disclosure is necessary to prevent or lessen a serious and imminent threat to the safety and health of an individual or the public *and* disclosure is made to persons reasonably able to prevent or lessen the threat, including the target of the threat if appropriate.[372] So, for instance, police and EMS calls that disclose a patient's medical condition in order to dispatch appropriate medical or emergency assistance do not violate HIPAA's Privacy Rule.[373]

Additionally, a covered entity is permitted to use or disclose PHI for its own treatment, payment, and health care operations, as well as for the treatment activities of a health care provider.[374] But a covered entity must restrict the scope of the disclosure to the minimum necessary to accomplish the intended purpose.[375]

---

[369] *See,* "Exceptions to Disclosure: The Catch-all Exception," page 62.
[370] 45 C.F.R. 164.512(f).
[371] 45 C.F.R. 164.512(f).
[372] 45 C.F.R. 164.512(j).
[373] 45 C.F.R. 164.512(j).
[374] 45 C.F.R. 164.506; but see 45 C.F.R. 164.508(a)(2) and (3) (uses and disclosures of psychotherapy notes and PHI for marketing purposes may require prior authorization from the subject of the PHI).
[375] 45 C.F.R. 164.502(b)

►***RELEASING PHI TO THE MEDIA.*** As a matter of routine, a covered entity *may* release "**directory information**" about a patient without running afoul of HIPAA's Privacy Rule.[376] Basically, when the requester asks for the individual by name, a covered entity may disclose the patient's name, the patient's location in the facility, and a description of the patient's general condition so long as it does not communicate specific medical information.[377] However, the individual must be given the opportunity to restrict or opt out of such directory disclosures prior to the disclosure or use.[378]

But, in an emergency situation, when the patient is unable to object or it is not practicable to offer the opportunity to object, *if* the covered entity determines that disclosure is in the patient's best interest, it may disclose directory information.[379] Any such disclosure must be consistent with the patient's known preferences, and the patient must be given the opportunity to opt out of the disclosure as soon as practicable.[380]

[376] 45 C.F.R. 164.510(a)(1)
[377] 45 C.F.R. 164.510(a)(1)
[378] 45 C.F.R. 164.510(a)(2)
[379] 45 C.F.R. 164.510(a)(3); *see* 45 C.F.R. 164.510(a)(1)
[380] 45 C.F.R. 164.510(a)(3); *see* 45 C.F.R. 164.510(a)(1)

🗁 *Exceptions to Disclosure: The Catch-all Exception – Copyright Law*[381]

Public offices are frequently faced with the quandary of whether or not to release copyrighted materials in response to a public records request. For instance, in response to a public records request, must a county building department duplicate copyrighted blueprints, that were submitted for approval as required by law? Or, does the federal copyright law constitute a "catch-all" exception that prohibits the public office from disclosing the copyrighted material?

As discussed earlier, the "catch-all" exception recognizes other provisions of state or federal law that prohibit disclosure of certain information or records.[382] However, in a 1993 opinion, the Ohio Attorney General concluded that copyright law does not *prohibit* disclosure of protected materials, and so it does not constitute a "catch-all" exception.[383] Later, the Ohio Supreme Court concluded that the federal copyright law does not constitute an exception from mandatory disclosure where the requester's intended use is not commercial.[384]

►***Copyright Definitions.*** Federal copyright law is designed to protect "original works of authorship,"[385] which may exist in one of several specified categories. Specifically, works of authorship include the following categories of materials: literary works; musical works (including any accompanying words); dramatic works (including any accompanying music); pantomimes and choreographic works; pictorial, graphic, and sculptural works; motion pictures and other audiovisual works; sound recordings; and architectural works.[386]

►***Protections Granted.*** From the moment of creation, the author of an original work possesses exclusive rights to publish, copy, and distribute the work.[387] The federal copyright law does not, however, provide to the author the right to keep the work confidential.[388] Indeed, copyrighted works are not protected from *inspection* by the public, so it is seemingly inappropriate to characterize copyrighted works in the possession of a public office as records "the release of which is prohibited by…federal law."[389]

---

[381] Sections 107 and 109(a), Title 17, U.S. Code.
[382] *See*, "Exceptions to Disclosure: The Catch-all Exception," page 95.
[383] 1993 Ohio Atty. Gen. Ops. No. 93-010.
[384] *State ex rel. Rea v. Ohio Dept. of Educ'n*, 81 Ohio St. 3d 527, 601-02, 1998 Ohio 334, 692 N.E.2d 596 (1998) ("Relators have no intention of copying these materials for commercial resale purposes.")
[385] 17 U.S.C. § 102(a).
[386] 17 U.S.C. § 102(a)(1)-(8).
[387] *Harper & Row,Inc. v. Nation Enterprises,*. 471 U.S. 539, 546-47 (1985) ("Under the Copyright Act, these rights -- to publish, copy, and distribute the author's work -- vest in the author of an original work from the time of its creation.").
[388] 1993 Ohio Atty. Gen. Ops. No. 93-010.
[389] 1993 Ohio Atty. Gen. Ops. No. 93-010.

Moreover, the policy underlying the copyright law is "to encourage the broad dissemination of copyrighted works, albeit in a manner which protects the economic interest of the author."[390] Because the copyright law does not prohibit disclosure of protected materials, nor does it grant copyrighted works confidentiality, such works are not "records the release of which is prohibited by state or federal law," as required by the catch-all exception.[391] Accordingly, at least according to present Ohio law, the catch-all exception will not give a public office an excuse to withhold a public record that is copyrighted.

►***"Fair Use" of Copyrighted Works.*** Copyright law does permit "fair use" of a copyrighted work, which use does *not* infringe on the author's exclusive rights.[392] Under the fair use exception, reproduction or copying of a protected work does not infringe the copyright "where the material will be used for purposes such as criticism, research, comment, and for other educational or non-profit purposes that are not commercial in nature."[393] As the doctrine of fair use is "an equitable rule of reason,"[394] the issue, essentially, is whether the public interest in the free flow of information outweighs the copyright holder's interest in exclusive control over the protected work.[395]

In determining whether the intended use of the protected work is "fair use," a court must consider these factors, 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 effect of the intended use upon the market for or value of the protected work.[396] The fourth factor, whether the use will negatively impact the market for the work, is generally considered to be "the single most important element of fair use."[397]

The Ohio Supreme Court has addressed the relationship between public records disclosure of a copyrighted work only once, and in that case concluded that the state department of education must disclose portions of previously-administered state proficiency tests to a high school student. [398] Without detailed analysis, the Court concluded that the intended use was "fair use"

---

[390] 1993 Ohio Atty. Gen. Ops. No. 93-010.
[391] 1993 Ohio Atty. Gen. Ops. No. 93-010.
[392] 17 U.S.C. § 107.
[393] *State ex rel. Rea v. Ohio Dept. of Educ'n*, 81 Ohio St. 3d 517, 602, 1998 Ohio LEXIS 1195 (1998) (federal copyright law does not constitute an exception to disclosure of proficiency exams previously administered to public school students).
[394] *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 560, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985).
[395] *Lamb v. Starks*, 949 F. Supp. 753, 757 (N.D. Cal. 1996) (quoting *Hustler Magazine, Inc. v. Moral Majority, Inc.*, 796 F.2d 1148, 1151 (9th Cir. 1986)).
[396] 17 U.S.C. § 107 (1)-(4).
[397] *Harper & Row, Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 566, 85 L. Ed. 2d 588, 105 S. Ct. 2218 (1985).
[398] *State ex rel. Rea v. Ohio Dept. of Educ'n*, 81 Ohio St. 3d 527, 1998 Ohio LEXIS 1195 (1998).

because the requester had "no intention of copying these materials for commercial resale purpose."[399]

[399] *State ex rel. Rea v. Ohio Dept. of Educ'n*, 81 Ohio St. 3d 527, 602, 1998 Ohio LEXIS 1195 (1998). *Compare Ass'n of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2nd Cir. 1991) (remanded to determine whether state statute requiring testing agency to file copyrighted exams for public disclosure constitutes "fair use" where (1) use served important public interests, but exam was (2) unpublished, creative work, (3) the amount and substantiality of disclosure required is 100%, and (4) whether disclosure would seriously impair the value of exam was in dispute).

🗁 *Exceptions to Disclosure: Medical Records*

Records that pertain to a patient's medical history, diagnosis, prognosis, or **medical condition** *and* that were generated and maintained in the process of **medical treatment** are not subject to disclosure under the Public Records Act.[400] The record must have both of these characteristics to be exempt from public disclosure under this exception.[401]

Additionally, a public office must be aware of other provisions of law that may impact release of medically related information, such as the federal HIPAA (Health Insurance Portability and Accountability Act).[402] Such laws may constitute "catch-all exceptions,"[403] which mandate non-disclosure. For a discussion of the most frequently asked HIPAA questions, please see "Exceptions to Disclosure: The Catch-all Exception – HIPAA", page 65, above.

►***BIRTH AND DEATH RECORDS, HOSPITAL RECORDS.*** Birth records and death records are not "medical records"[404] for purposes of the Public Records Act. Similarly, the fact of admission to or discharge from a hospital is not a "medical record."[405] Moreover, a public office is permitted to disclose this information notwithstanding the federal HIPAA (Health Insurance Portability and Accountability Act of 1996.)[406]

►***PSYCHOLOGICAL REPORTS.*** The report of a medical professional, including a mental health professional, is *not* a "medical record" where such a report was generated for **employment or litigation purposes** rather than in the process of medical treatment.[407] However, other statutes,

---

[400] Ohio Rev. Code Ann. §§ 149.43(A)(1)(a) and (A)(3); *Bartley v. Little*, 2000 Ohio App. LEXIS 6238 (5th Dist. Dec. 28, 2000).

[401] Ohio Rev. Code Ann. § 149.43(A)(3); *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 684 N.E.2d 1239 (1997); 1999 Ohio Atty. Gen. Ops. No. 99-006. *But cf., State ex rel. Cincinnati Enquirer v. Adcock*, 2004-Ohio-7130, 2004 Ohio App. LEXIS 6772 (1st Dist., Dec. 30, 2004) citing *State ex rel, McCleary v. Roberts*, 88 Ohio St.3d 365, 2000-Ohio-345, 725 N.E.3d 1144 (children's medical information not a public record).

[402] 45 C.F.R. Parts 160 and 164. *See also,* "The Catch-all Exception: HIPAA," page 65.

[403] *See,* "Exceptions to Disclosure: The Catch-all Exception," page 62.

[404] Ohio Rev. Code Ann. § 149.43(A)(1)(a) and (A)(3).

[405] Ohio Rev. Code Ann. § 149.43(A)(1)(a) and (A)(3).

[406] 45 C.F.R. Parts 160 and 164. *See also,* "The Catch-all Exception: HIPAA," Re: Disclosure to Media, page 67.

[407] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 144-45, 647 N.E.2d 1374, 1379 (1995) (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, 752 N.E.2d 318 (4th Dist. Mar. 21, 2001) (psychiatric reports compiled solely to assist court with competency to stand trial determination are not medical records); *State ex rel. DeRemer v. Waller*, No. 1997CA00055, 1997 Ohio App. LEXIS 1909 (5th Dist. Mar. 17, 1997). *See, also, State ex rel. Richard v. Cleveland Metro. Health Ctr.*, 84 Ohio App.3d 142, 616 N.E.2d 549 (8th Dist. 1992); *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 82 Ohio App.3d 202, 214, 611 N.E.2d 838, 845-46 (8th Dist. 1992); *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990). *But, see, Sheely v. Norris,* Nos. 92-P-0027, 92-P-0028, 1993 Ohio App. LEXIS 5205 (11th Dist. Oct. 7, 1993) (emergency room records in custody of prosecutor are not public records.)

such as the federal Americans with Disabilities Act,[408] the federal Family and Medical Leave Act,[409] or the federal HIPAA (Health Insurance Portability and Accountability Act)[410] may otherwise prohibit release of this information.[411]

►***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.[412] Although the organization *may not* redact patients' names, addresses, and other non-medical personal information relying on the medical records exception,[413] it may be required to redact that information under HIPAA.[414]

[408] *See* 42 U.S.C. §§ 12101 *et seq.* (1990).
[409] *See* 29 U.S.C. §§ 2601 *et seq.* (1993).
[410] 45 C.F.R. Parts 160 and 164.
[411] *See*, "Exceptions to Disclosure: The Catch-all Exception – HIPAA," page 65.
[412] 1999 Ohio Atty. Gen. Ops. No. 99-006.
[413] 1999 Ohio Atty. Gen. Ops. No. 99-006.
[414] *See*, "Exceptions to Disclosure: The Catch-all Exception – HIPAA," page 65.

🗁 *Exceptions to Disclosure:*

Trial Preparation Records

Records containing information that was **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, are not subject to mandatory disclosure under the Public Records Act.[415] Such records are "trial preparation records" and a public office may withhold them from disclosure until all actions, trials, and proceedings in the case have concluded.[416]

►***PROSECUTORS' FILES.*** Attorney trial notes and legal research are "trial preparation records," which may be withheld from disclosure.[417] 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.[418] However, unquestionably non-exempt materials do not transform into "trial preparation records" simply by virtue of being held in a prosecutor's file.[419]

Before 1994, courts often found factual reports and witness statements to be subject to disclosure because they did not meet the definition of trial preparation records.[420] Now, it

---

[415] Ohio Rev. Code Ann. § 149.43(A)(4). *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 648 N.E.2d 808 (1995); *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 57 Ohio St.3d 77, 566 N.E.2d 146 (1991) ("NBC II"); *State ex rel. Coleman v. City of Cincinnati*, 57 Ohio St.3d 83, 566 N.E.2d 151 (1991); *State ex rel. Renfro v. Cuyahoga County Dep't of Human Servs.*, 54 Ohio St.3d 25, 560 N.E.2d 230 (1990); *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786 (1988) ("NBC I"); *Barton v. Shupe*, 37 Ohio St.3d 308, 525 N.E.2d 812 (1988).

[416] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 432, 639 N.E.2d 83, 92 (1994).

[417] *State ex rel. Nix v. City of Cleveland*, 83 Ohio St.3d 379, 700 N.E.2d 12 (1998).

[418] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 432, 639 N.E.2d 83, 92 (1994); *State ex rel. Towler v. O'Brian*, 2005-Ohio-363, 2005 Ohio App. LEXIS 342 (10th Dist., Feb. 3, 2005).

[419] *State ex rel. WLWT-TV-5 v. Leis*, 77 Ohio St.3d 357, 673 N.E.2d 1365 (1996). *See also, State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 760 N.E.2d 421 (2002) (criminal defendant's entitled to immediate release of initial incident reports.)

[420] *See, e.g., State ex rel. Morales v. City of Cleveland*, 67 Ohio St.3d 573, 621 N.E.2d 403 (1993); *Sheeley v. Norris* Nos. 92-P-0027, 92-P-0028, 1993 Ohio App. LEXIS 5205 (11th Dist. Oct. 7, 1993); *State ex rel. Coleman v. City of Cincinnati*, 57 Ohio St.3d 83, 566 N.E.2d 151 (1991); *State ex rel. Zuern v. Leis*, 56 Ohio St.3d 20, 564 N.E.2d 81 (1990) (check-list offense report forms, witness and detective statements describing the offense, and photographs of the crime scene are not trial preparation records); *Pinkava v. Corrigan*, 64 Ohio App.3d 499, 581 N.E.2d 1181 (8th Dist. 1990) (victim's statement reporting offense to police is public record); *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 82 Ohio App.3d 202, 611 N.E.2d 838 (8th Dist. 1992); *State ex rel. Jells v. City of Cleveland*, No. 62678, 1992 WL 369893 (8th Dist. Dec. 3, 1993), *aff'd*, 67 Ohio St.3d 436, 619 N.E.2d 686 (1993) (witness statements obtained during course of investigations were not trial preparation records.) Under *Steckman*, basically any information in the prosecutor's file constitutes trial preparation.

appears that only **routine offense and incident reports** are subject to release while the case is active.[421]

►***SETTLEMENT AGREEMENTS AND OTHER CONTRACTS.*** Where a governmental entity is party to a settlement agreement, the trial preparation records exception will not permit the record to be withheld.[422] But the parties are entitled to redact any information within the **attorney-client privilege**.[423] Additionally, a provision that the agreement shall be kept confidential is void and unenforceable because a contractual provision will not supersede Ohio public records law.[424]

🗁 *Exceptions to Disclosure: Residential and Familial Information*

The "**residential and familial information**" of peace officers,[425] firefighters,[426]emergency medical technicians[427] (EMTs), parole officers, prosecuting attorneys, assistant prosecuting attorneys, correctional employees, and youth services employees is expressly exempt from mandatory disclosure under the Public Records Act.[428] Under this exception, "residential and familial information "means any information that discloses any of the following about individuals in those employment categories:

- Residential street address, except that of a prosecuting attorney (the state and political subdivision are still public record)
- Information compiled by an employee assistance program (see also, Ohio Rev. Code § 3701.041)

---

[421] *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 760 N.E.2d 421 (2002) (criminal defendant's limitation to discovery only 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, 639 N.E.2d 83 (1994). *See also,* "Law Enforcement Investigations," page 77.
[422] *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002 Ohio 7041, 781 N.E.2d 163 (2002); *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 582 N.E.2d 653 (8th Dist. 1990), cited with approval in *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Cmsrs.*, 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997); *State ex rel. Sun Newspapers v. City of Westlake Bd. of Educ.*, 76 Ohio App.3d 170, 601 N.E.2d 173 (8th Dist. 1991) cited with approval in *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Cmsrs.*, 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997).
[423] *State ex rel. Sun Newspapers v. City of Westlake Bd. of Educ.*, 76 Ohio App.3d 170, 601 N.E.2d 173 (8th Dist. 1991); *but, see, Covington v. Backner*, Case No. 98CVH-07-5242 (Franklin Cty. C.P. June 1, 2000) (attorney-client privilege was waived when staff attorney had reviewed, duplicated, and inadvertently produced documents to defendants during discovery request). *See also,* "The Catch-all Exception: Attorney-Client Privilege," page 62.
[424] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003 Ohio 5599, 797 N.E.2d 964 (2003); *State ex rel. Findley Publ'g Co. v. Hancock County Bd. of Commissioners*, 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997). *See generally,* "Contractual Confidentiality," page 97.
[425] Ohio Rev. Code Ann. § 109.71and § 149.43(A)(7).
[426] Ohio Rev. Code Ann. § 149.43(A)(7).
[427] Ohio Rev. Code Ann. § 149.43(A)(7) and § 4765.01.
[428] Ohio Rev. Code Ann. § 149.43(A)(7).

- Social Security number
- Residential telephone number
- Bank account number
- Debit/charge/credit card numbers
- Emergency telephone number
- Medical information
- Beneficiaries' names
- Voluntary payroll deductions
- Name, residential address, employer name and address, social security number, residential telephone number, bank account number, debit/charge/credit card numbers, or emergency telephone number of the spouse, former spouse, or children.

Also expressly exempt from the definition of "public record" is a photograph of a peace officer who works undercover or plain clothes assignments.[429] In addition, 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.[430]

►***JOURNALIST EXCEPTION.*** A journalist *may* obtain the residential street address for a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or an EMT, as well as the name and address of the employer of that person's spouse, former spouse, or children, if that employer is a public office.[431] To obtain this information, however, the journalist *must* submit a **written request**,[432] which includes the journalist's name and title, the employer's name and address, and a statement that release of the information is in the public interest.[433]

Recently, the Ohio Supreme Court concluded that, in general, the **home addresses** of **state employees** are not "records," that are required to be disclosed under Ohio's Public Records Act.

---

[429] Ohio Rev. Code Ann. § 149.43(A)(7)(g). *See, also, State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (information is also protected by constitutional right to privacy and "good sense" because peace officers' personnel records should not be available to a defendant who might use the information to achieve "nefarious ends.") (adopting reasoning of *Kallstrom v. Columbus*, 136 F.3d 1055 (6th Cir. 1998) ("Kallstrom I")). *See, also*, 1999 Ohio Atty. Gen. Ops. No. 99-006 (two-part test to determine when personal information is protected from disclosure); *Smith v. City of Dayton*, 68 F. Supp.2d 911 (S.D. Ohio 1999) (release of police officer's home address, unlisted phone number, brother's name, address, and phone number to newspaper without notice violated officer's substantive and procedural due process rights); *Kallstrom v. City of Columbus*, 165 F. Supp.2d 686 (S.D. Ohio 2001) ("Kallstrom II").

[430] Ohio Rev. Code Ann. §2151.142

[431] Ohio Rev. Code Ann. § 149.43(B)(9); *But, see, State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (good sense dictates personal information should not be released to person who might use it to achieve "nefarious ends"); *Kallstrom v. Columbus*, 136 F.3d 1055 (6th Cir. 1998) ("Kallstrom I") (personal information of law enforcement officers held to be protected under constitutional right to privacy where release would cause substantial risk of serious bodily injury or death and release does not serve compelling interest).

[432] *See generally*, "The Request for Records: Written Request," page 55.

[433] Ohio Rev. Code Ann. § 149.43(B)(9).

However, the Court stressed that its decision was to be read narrowly, noting that it would "…reject as unpersuasive the arguments of governmental bodies in future cases attempting to place great weight on this case as precedent in unrelated contexts."[434]

[434] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384 (2005).

🗁 *Exceptions to Disclosure: Law Enforcement Investigations*

Arguably, the most complicated exception in the Public Records Act is the exception for **confidential law enforcement investigatory records** (the "CLEIRs" exception.) Oftentimes, this exception is mistaken as one that applies only to police investigations. In reality, the CLEIRs exception may apply to a variety of investigations, including those examining alleged violations of criminal law, civil law, and/or administrative law.[435]

►***DEFINITION.*** Under the CLEIRs exception, a public office may withhold any records (1) that pertain to a law enforcement matter[436] of a criminal,[437] quasi-criminal, civil, or administrative[438] nature *and* (2) that, if released, would create a high probability of disclosing any of the following types of information:

- Identity of an **uncharged suspect**[439]
- Identity of a **confidential source**[440]
- Investigatory **techniques or procedures**[441]
- Investigatory **work product**[442] or
- Information that would endanger the life or **physical safety** of law enforcement personnel, a crime victim, a witness, or a confidential information source[443]

►***THE TEST.*** In determining whether a record constitutes a confidential law enforcement investigatory record, the courts use a two-step test.[444] The record must both (1) pertain to a

---

[435] Ohio Rev. Code Ann. § 149.43(A)(2).
[436] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 684 N.E.2d 1239 (1997) (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); *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St.3d 578, 697 N.E.2d 210 (1998) (investigation of alleged sexual assault conducted internally as personnel matter is not law enforcement matter.)
[437] *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 648 N.E.2d 808 (1995).
[438] *State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 648 N.E.2d 808 (1995); *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 57 Ohio St.3d 77, 566 N.E.2d 146 (1991) ("NBC II") (overruled on other grounds); *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 550 N.E.2d 945 (1990); *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St.3d 79, 83, 526 N.E.2d 786, 790 (1988) ("NBC I"); *Franklin County Sheriff's Dept. v. State Employment Relations Bd.*, 63 Ohio St.3d 498, 589 N.E.2d 24 (1992) (affirmed in part reversed in part and remanded to trial court). This does not include polygraph test results obtained to make hiring decisions. *State ex rel. Lorain Journal v. City of Lorain*, 87 Ohio App.3d 112, 621 N.E.2d 894 (9th Dist. 1993).
[439] Ohio Rev. Code Ann. § 149.43(A)(2)(a).
[440] Ohio Rev. Code Ann. § 149.43(A)(2)(b).
[441] Ohio Rev. Code Ann. § 149.43(A)(2)(c).
[442] Ohio Rev. Code Ann. § 149.43(A)(2)(c).
[443] Ohio Rev. Code Ann. § 149.43(A)(2)(d).

criminal, quasi-criminal, civil or administrative law enforcement matter, and (2) create a high probability of disclosing at least one of the five types of information highlighted above.[445]

►***STEP ONE: A LAW ENFORCEMENT MATTER.*** For the CLEIRs exception to apply, the record at issue must first pertain to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature.[446] In order to do so, the following three questions must be answered affirmatively. If any one of them is answered in the negative, the record cannot be withheld in reliance on the CLEIRs exception.

The three questions:

1. Was the investigation initiated upon **specific suspicion** of wrongdoing?[447]
2. Does the alleged conduct **violate law**?[448] and
3. Does the public office have the **authority** to investigate or enforce the law allegedly violated?[449]

➢ ***SPECIFIC SUSPICION.*** The investigation must have been initiated upon a "specific suspicion" of misconduct or wrongdoing.[450] In determining whether there is a "specific suspicion," it is irrelevant that the investigation is "routine," so longs as the alleged conduct violates the law.

➢ ***VIOLATION OF LAW.*** The alleged conduct must violate law, but it need not necessarily be a violation of criminal law.[451] So long as the conduct is prohibited by statute or

---

[444] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St.3d 54, 56, 741 N.E.2d 511, 513-14 (2001); *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 52, 552 N.E.2d 635, 636-37 (1990).

[445] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 647 N.E.2d 1374 (1995); *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990).

[446] *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 647 N.E.2d 1374 (1995); *State ex rel. Beacon Journal Publ'g v. Maurer*, 91 Ohio St.3d 54 (2001) (initial incident report of police shooting are not part of the criminal investigation subject to the confidential law enforcement investigatory records exception.)

[447] *See, e.g., State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 660 N.E.2d 1211 (1996).

[448] *See, e.g., State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 660 N.E.2d 1211 (1996).

[449] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 684 N.E.2d 1239 (1997) (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); *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St.3d 578, 697 N.E.2d 210 (1998) (investigation of alleged sexual assault conducted internally as personnel matter is not law enforcement matter.)

[450] *State ex rel. Ohio Patrolmen's Benevolent Assn. v. City of Mentor*, 89 Ohio St.3d 440, 2000 Ohio 214, 732 N.E.2d 969 (2000); *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 660 N.E.2d 1211(1996) (quoting, *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990)).

[451] Ohio Rev. Code Ann. § 149.43(A)(2). *See, e.g., State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 660 N.E.2d 1211 (1996); *State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 550 N.E.2d 945 (1990).

administrative rule,[452] whether the punishment is criminal, civil, or administrative in nature is irrelevant.[453] It is not sufficient, however, for the conduct to be strictly a violation of office policies or procedures, which are not "laws."[454]

- ***AUTHORITY.*** The public office that holds the record must have some authority to investigate or enforce the law that has allegedly been violated.[455] If it does not, the record it holds does not pertain to a law enforcement matter, which means it fails the first part of the two-part test, and the CLEIRs exception is inapplicable.[456]

Routine offense or **incident reports**[457] are subject to immediate release upon request.[458] The Ohio Supreme Court has concluded that such routine records do not satisfy Step One for the CLEIRs exception.[459] Additionally, none of the information explained in Step Two, below, can be redacted from an initial incident report.[460]

911 tapes are also subject to immediate release upon request, even if in the possession of the prosecutor, and the tapes may not be redacted for any reason.[461] However, disclosure of information obtained from the database that serves the public safety answering point of a 911 system is prohibited by statute.[462]

---

[452] *See, e.g., State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); *State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 550 N.E.2d 945 (1990).
[453] Ohio Rev. Code Ann. § 149.43(A)(2).
[454] *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*, 82 Ohio St.3d 578, 1998 Ohio 411, 697 N.E.2d 210 (1998) (R.C. 149.43(A)(2) refers, and not to employment or personnel matters ancillary to law enforcement matters); *Toledo Police Patrolman's Assn. Local 10 v. city of Toledo*, 2000 Ohio App. LEXIS 875 (6th Dist. Mar. 10, 2000).
[455] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997).
[456] *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997).
[457] *See generally*, "Police Offense and Incident Reports," page 92.
[458] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, paragraph five of the syllabus, 639 N.E.2d 83 (1994).
[459] *State ex rel. Beacon Journal Publ'g Co. v. Mauer*, 91 Ohio St.3d 54, 741 N.E.2d 511 (2001) (Cook, J., dissenting). *See also, State ex rel. Rasul-Bey v.* Onunwor, 94 Ohio St.3d 119, 760 N.E.2d 421 (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, 639 N.E.2d 83 (1994); *State ex rel. Kim v. Wachenschwanz*, 93 Ohio St.3d 586, 767 N.E.2d 367 (2001) (log sheets, time sheets, and police reports comparable to routine incident reports.)
[460] *State ex rel. Beacon Journal Publ'g Co. v. Mauer*, 91 Ohio St.3d 54, 741 N.E.2d 511 (2001). *But see, State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St. 3d 399, 2004-Ohio-6557, 819 N.E.2d 1087 (2004) ("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.")
[461] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64 (2005); *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 378, 662 N.E.2d 334, 337 (1996).
[462] Ohio Rev. Code Ann. §§ 4931.49(F) and 4931.99(E).

►***STEP TWO: HIGH PROBABILITY.*** After satisfying Step One (above), for the CLEIRs exception to apply, disclosure of the record must also create a high probability of revealing at least one of the following five types of information [463]

➢ ***UNCHARGED SUSPECT.*** A person who has not been arrested or indicted for the offense to which the record pertains is an "uncharged suspect."[464] Where disclosure of a record would identify an uncharged suspect,[465] the office may redact any information that would serve to identify that suspect before releasing the file.[466] Where the file is **inextricably intertwined** with the suspect's identity such that redacting will fail to protect the identity, the entire file may be withheld.[467] And the passage of time is not relevant, so, information identifying an uncharged suspect may be redacted regardless of how much time has passed.[468]

If an uncharged suspect's identity has been **released by law enforcement** and published in news reports, the permissibility of redacting identifying information from the public record has been questioned.[469] It is clear, however, that just because the suspect has been accurately identified in **media coverage**, information identifying the uncharged suspect may still be redacted from the public record.[470]

➢ ***CONFIDENTIAL SOURCE.*** Where a witness or other source has been **reasonably promised** confidentiality, the public office may redact identifying information from the

---

[463] *State ex rel. Multimedia v. Snowden*, 72 Ohio St. 3d 141 (1995).
[464] *State ex rel. Moreland v. City of Dayton*, 67 Ohio St.3d 129, 616 N.E.2d 234 (1993). *See, also, State ex rel. Polovischak v. Mayfield*, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); *State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St.3d 28, 546 N.E.2d 939 (1989); *State ex rel. Outlet Communications, Inc. v. Lancaster Police Dept.*, 38 Ohio St.3d 324, 528 N.E.2d 175 (1988).
[465] *State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340, 667 N.E.2d 974 (1996); *State ex rel. Master v. City of Cleveland*, 75 Ohio St.3d 23, 661 N.E.2d 180 (1996); *State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St.3d 28, 546 N.E.2d 939 (1989); *State ex rel. Outlet Communications, Inc. v. Lancaster Police Dept.*, 38 Ohio St.3d 324, 528 N.E.2d 175 (1988); *State ex rel. Plain Dealer Publ'g Co. v. Lesak*, 9 Ohio St.3d 1, 457 N.E.2d 821(1984); *State ex rel. Musial v. City of North Olmsted*, 2005-Ohio-95, 2005 Ohio App. LEXIS 76 (8th Dist., Jan. 7, 2005).
[466] *But, see, State ex rel. Beacon Journal Publ'g Co. v. Mauer*, 91 Ohio St.3d 54, 741 N.E.2d 511 (2001) (name of uncharged suspect cannot be redacted from initial incident report form.)
[467] *See, State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340, 667 N.E.2d 974 (1996). *See also, State ex rel. McGee v. Ohio State Bd. of Psychology*, 49 Ohio St.3d 59, 60, 550 N.E.2d 945, 947 (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.)
[468] *State ex rel. Moreland v. City of Dayton*, 67 Ohio St.3d 129, 616 N.E.2d 234 (1993); *State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St.3d 28, 546 N.E.2d 939 (1989); *State ex rel. Musial v.City of North Olmsted*, 2005-Ohio-95, 2005 Ohio App. LEXIS 76 (8th Dist., Jan. 7, 2005).
[469] *See State ex rel. Dispatch Printing Co. v. Solove* (*In re T.R.*), 52 Ohio St.3d 6, 556 N.E.2d 439 (1990) (to base the determination of whether a court's "gag order" is valid upon whether the parties' names had been "highly publicized" would effectively let the news media determine which hearings should be open.)
[470] *See State ex rel. WLWT-TV-5 v. Leis*, 77 Ohio St.3d. 357, 673 N.E.2d 1365 (1997); *State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340, 667 N.E.2d 974 (1996); *State ex rel. Ohio Patrolmen's Benevolent Assn., et al. v. City of Mentor*, 89 Ohio St.3d 440, 447, 732 N.E.2d 969, 975 (2000).

public record before release.[471] For confidentiality to be "reasonably promised," it must have been based on an **individualized determination** that the promise was necessary to further the purpose of the investigation.[472] **Automatic promises** of confidentiality, whether made pursuant to a policy statement or routine administrative procedure, are not "reasonable" promises of confidentiality.[473]

Only the **identity** of the confidential source may be redacted; the information provided by that source may still have to be released. But, where the identity is inextricably intertwined with the investigatory file, the public office may withhold the entire file.[474]

Where possible, it is advisable, although *not required*,[475] to have some writing that states the specific reasons the investigator concluded the promise was necessary in that case, including that the information could not be obtained without such a promise.

- ***PHYSICAL SAFETY.*** Information that, if released, would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source may be redacted before public release of a record.[476] Bare allegations or assumed conclusions that a person's physical safety is threatened are not sufficient reasons to redact information. Rather, the danger must be **self-evident**.[477]

- ***TECHNIQUES OR PROCEDURES.*** Information that, if released, would disclose specific confidential investigatory techniques or procedures may be redacted before public release of

[471] *State ex rel. Yant v. Conrad*, 74 Ohio St.3d 681, 660 N.E.2d 1211 (1996); *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990).
[472] *See State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990).
[473] *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990).
[474] *State ex rel. Master v. City of Cleveland*, 76 Ohio St.3d 340, 667 N.E.2d 974 (1996).
[475] *State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 156-57, 616 N.E.2d 886, 887 (1993) (promise of confidentiality or threat to physical safety need not be within "four corners" of document to be exempt); *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990).
[476] *State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 616 N.E.2d 886 (1993) (document need not specify within the four corners the promise of confidentiality or threat to physical safety); *State ex rel. Johnson v. City of Cleveland*, 65 Ohio St.3d 331, 333-34, 603 N.E.2d 1011, 1013-14 (1992), overruled on different grounds by *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994); *State ex rel. Beckman v. Kovacic*, No. 63889 (8th Dist. Feb. 5, 1993); *State ex rel. Jells v. City of Cleveland*, No. 62678, 1992 WL 369893 (8th Dist. Dec. 3, 1992), *aff'd*, 67 Ohio St.3d 436, 619 N.E.2d 686 (1993); *State ex rel. Carpenter v. Chief of Police*, No. 62482, 1992 WL 252330 (8th Dist. Sept. 17, 1992), aff'd, 66 Ohio St.3d 58, 608 N.E.2d 1080 (1993); *State ex rel. Lippitt v. Kovacic*, 70 Ohio App.3d 525, 591 N.E.2d 422 (8th Dist. 1991); *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 82 Ohio App.3d 202, 611 N.E.2d 838 (8th Dist. 1992).
[477] *See, e.g., State ex rel. Johnson v. City of Cleveland*, 65 Ohio St.3d 331, 333-34, 603 N.E.2d 1011, 1013-14 (1992), overruled on different grounds by *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). *See, also, State ex rel. Martin v. City of Cleveland*, 67 Ohio St.3d 155, 156-57, 616 N.E.2d 886, 887 (1993) (promise of confidentiality or threat to physical safety need not be within "four corners" of document to be exempt.)

a record.[478] Clearly, routine investigative techniques may not be redacted under this exception.[479] Rather, sophisticated investigatory techniques or procedures, as well as their results, may be redacted pursuant to this exception.[480]

➢ ***WORK PRODUCT.*** If a law enforcement investigation is not yet "over," information that would, if released, disclose specific investigatory work product of an investigation may be redacted before public release of the file.[481] Providing a criminal defendant discovery materials as required by law does *not* waive any otherwise applicable exceptions to public disclosure, including the exception for work product.[482]

The Old Standard: Before 1994, when the Ohio Supreme Court issued its decision in *State ex rel. Steckman v. Jackson*, only materials that would reveal an investigator's "deliberative and subjective analysis" of a case constituted "work product" that could be withheld from public disclosure.[483] However, the Court felt that the old standard left the exception virtually meaningless.[484] Accordingly, the Court clarified the meaning of "work product" in *Steckman*, at least as it applies to pending criminal investigations.[485]

The Current Standard: In *Steckman*, the Court established a more encompassing definition of "work product." Under current law, materials, such as an investigator's notes, working papers, memoranda, or similar materials, that were prepared in anticipation of litigation, are exempt from public disclosure.[486]

However, the work product is exempt only until the case is "**over**," *i.e.*, when all actions, trials, and proceedings in the case have concluded, the work product becomes available for

[478] Ohio Rev. Code Ann. § 149.43(A)(2)(c); *State ex rel. Walker v. Balraj*, 2000 Ohio App. LEXIS 3620 (8th Dist. Aug. 2, 2000).
[479] *State ex rel. Beacon Journal v. Univ. of Akron*, 64 Ohio St.2d 392, 397, 415 N.E.2d 310, 314 (1980).
[480] *See State ex rel. Dayton Newspapers, Inc. v. Rauch*, 12 Ohio St.3d 100, 465 N.E.2d 458 (1984) (autopsy report exempt from disclosure as specific investigatory technique or work product); *State ex rel. Lawhorn v. White*, No. 63290, 1994 Ohio App. LEXIS 892 (8th Dist. Mar. 7, 1994); *State ex rel. Williams v. City of Cleveland*, No. 57769, 1991 Ohio App. LEXIS 303 (8th Dist. Jan. 24, 1991); *State ex rel. Jester v. City of Cleveland*, No. 56438, 1991 Ohio App. LEXIS 149 (8th Dist. Jan. 17, 1991); *State ex rel. Apanovitch v. City of Cleveland*, No. 58867, 1991 Ohio App. LEXIS 663 (8th Dist. Feb. 6, 1991). The three preceding cases were affirmed in *State ex rel. Williams v. City of Cleveland*, 64 Ohio St.3d 544 (1992) (autopsy photographs are exempt). *See, also, State ex rel. Robertson v. Haines*, No. 12843, 1992 Ohio App. LEXIS 5584 (2nd Dist. Nov. 3, 1992); *Martinelli v. Cuyahoga County Coroner's Office*, 52 Ohio St.3d 702, 556 N.E.2d 526 (1990), appeal dismissed.
[481] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).
[482] *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 673 N.E.2d 1360 (1997).
[483] *See, e.g., State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 38 Ohio St.3d 79, 526 N.E.2d 786(1988) ("NBC I").
[484] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).
[485] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).
[486] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).

public disclosure.[487] This standard includes appeals and post-conviction relief.[488] Therefore, so long as an opportunity still exists either for appeal or post-conviction relief, the work product remains exempt from disclosure.[489] And where the criminal defendant who is the subject of the records agrees not to pursue appeal or post-conviction relief, even though the time to do so has not expired, the case *is* "over" and the work product becomes available for public disclosure.[490]

Moreover, formal proceedings in the case (whether an administrative proceeding or civil or criminal litigation) must be **pending or highly probable**, even where the case is not technically "over."[491] Otherwise, the work product must be released.[492] But even where there is no suspect in a criminal investigation, so long as it is clear that a crime has been committed, this "highly probable" standard is deemed satisfied.[493]

---

[487] *State ex rel. Cleveland Police Patrolmen's Ass'n v. City of Cleveland*, 84 Ohio St.3d 310 (1999); *State ex rel. WLWT v. Leis*, 77 Ohio St.3d 357, 673 N.E.2d 1365 (1996); *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994); *Toledo Police Patrolman's Assn. v. City of Toledo*, 2000 Ohio App. LEXIS 875 (6th Dist. Mar. 10, 2000).

[488] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 432, 639 N.E.2d 83, 93 (1994); *Perry v. Onunwor*, 2000 Ohio App. LEXIS 5893 (8th Dist. Dec. 7, 2000); *State ex rel. Scuba v. Simmons*, 2001 Ohio App. LEXIS 1838 (11th Dist. Apr. 20, 2001).

[489] *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St.3d 357, 1997 Ohio 273, 673 N.E. 2d 1365 (1997), quoting, *Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994) paragraph four of the syllabus. *Also, see, State ex rel. Beacon Journal Publ'g co. v. Bodiker*, 134 Ohio App.3d 415, 731 N.E.2d 245 (10th Dist. July 8, 1999) ("The purpose of the trial preparation exemption ordinarily is not furthered by continuing the exempted status of the record after all proceedings have ended.")

[490] *State ex rel. Cleveland Police Patrolmen's Ass'n v. City of Cleveland*, 84 Ohio St.3d 310, 703 N.E.2d 796 (1999) (when defendant signed affidavit agreeing not to pursue appeal or post-conviction relief, trial preparation and work product exceptions inapplicable.)

[491] *See State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 648 N.E.2d 808 (1995); *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). *See also, State ex rel. Polovischak v. Mayfield, 50 Ohio St.3d 51, 552 N.E.2d 635 (1990); State ex rel. Thompson Newspapers, Inc. v. Martin, 47 Ohio St.3d 28, 546 N.E.2d 939 (1989).*

[492] *See State ex rel. Police Officers for Equal Rights v. Lashutka*, 72 Ohio St.3d 185, 648 N.E.2d 808 (1995); *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).

[493] *State ex rel. Leonard v. White*, 75 Ohio St.3d 516, 664 N.E.2d 527 (1996).

🗁 *Exceptions to Disclosure: 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." [494]

►***INFRASTRUCTURE RECORD.*** 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.[495] Simple floor plans or records showing the spatial relationship of components of the public office are NOT infrastructure records. [496]

►***SECURITY RECORD.*** 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."[497]

The law also states that infrastructure or security records *may* be disclosed for purposes of construction, renovation, or remodeling of a public office without waiving the exempt status of that record.[498]

[494] Ohio Rev. Code Ann. § 149.433.
[495] Ohio Rev. Code Ann. § 149.433(A)(2).
[496] Ohio Rev. Code Ann. § 149.433(A)(2).
[497] Ohio Rev. Code Ann. § 149.433(A)(3)(a)and (b).
[498] Ohio Rev. Code Ann. § 149.433(C). *See,* page 60, above, for a discussion of "waiver."

🗁 *Exceptions to Disclosure: Other Records*

In addition to records that are mandatorily exempt from disclosure under the catch-all exception,[499] the Public Records Act also lists specific types of records that a public office may be permitted or required to withhold:

- ***Probation and Parole Records.***[500] Certain probation records, even when used by a court in its official duties, are confidential and are not subject to public disclosure.[501] Similarly, records reviewed by the Parole Board in preparation for hearings, and records containing the Board's findings are not subject to public disclosure.[502] But, Adult Parole Authority interoffice communications concerning parolees or probationers *may not* be subject to this exception, and *may* be subject to public disclosure.[503]

  Notwithstanding these confidentiality statutes, some otherwise confidential records of the Adult Parole Authority are available to approved media organizations, government officials, victims, the inmate who is the subject of the record, the designated attorney for the victim or inmate, or the public.[504] Access to these records requires a **written request**.[505]

- ***Abortion: Records of Parental Notification Bypass.*** Where a minor is seeking court permission to bypass parental notification for an abortion, records associated with the action are not subject to public disclosure.[506] Indeed, the complaint and all other records pertaining to this type of action *shall* be kept confidential,[507] and *cannot* be publicly released.[508]

---

[499] *See*, "Exceptions to Disclosure: The Catch-all Exception", page 62.
[500] Ohio Rev. Code Ann. § 149.43(A)(1)(b).
[501] Ohio Rev. Code Ann. § 2951.03(D) and § 2953.08(F)(1); *State of Ohio v. Patrick*, 2001 Ohio App. LEXIS 2554 (6th Dist. June 8, 2001) (appellate court's use of a pre-sentence investigation report does not cause that report to become a public record); *State ex rel. Whittaker v. Court of Common Pleas*, 2001 Ohio App. LEXIS 680 (8th Dist. Feb. 15, 2001).
[502] *State ex rel. Lipschutz v. Shoemaker*, 49 Ohio St.3d 88, 551 N.E.2d 160 (1990). *See, also, State ex rel. Gaines v. Adult Parole Auth.*, 5 Ohio St.3d 104, 449 N.E.2d 762 (1983); *State ex rel. Johnston v. Shoemaker*, No. 82AP-991, 1983 Ohio App. LEXIS 15613 (10th Dist. Aug. 11, 1983); *Jarrell v. Denton*, No. 838, 1981 Ohio App. LEXIS 13408 (4th Dist. June 17, 1981).
[503] *State ex rel. Community Corrections Ass'n v. Ohio Dept. of Rehabilitation & Corrections*, 84 Ohio App.3d 821, 619 N.E.2d 20 (10th Dist. 1992).
[504] Ohio Admin. Code § 5120:1-1-36 (for example, if certain requirements are satisfied, member of public may receive parole board decision sheets and warrants and detainers.)
[505] Ohio Admin. Code § 5120:1-1-36.
[506] Ohio Rev. Code Ann. § 149.43(A)(1)(c).
[507] Ohio Rev. Code Ann. § 2151.85(F).
[508] Ohio Rev. Code Ann. § 2151.85(F); Ohio Rev. Code Ann. § 2505.073(B); *Ohio v. Akron Ctr. for Reprod. Health*, 497 U.S. 502 (1990). *See, also, Bellotti v. Baird*, 443 U.S. 622 (1979).

However, if the minor *appeals* denial of her request, the public may obtain *limited* information, including the docket number, the judge's name, the decision, and if appropriate, a redacted opinion.[509]

- ***Adoption Records.*** Records pertaining to adoption proceedings, including the Ohio Department of Health's adoption file, are not public records.[510] Indeed, publicly releasing adoption records is prohibited by law.[511]

- ***Putative Father Registry Records.***[512] This registry is designed to notify men if their children, or alleged children, become the subject of an adoption petition.[513] The information in this database is not available for public disclosure, whether it is held by the Ohio Department of Job and Family Services, the division of child support, or by a child support enforcement agency.[514]

- ***Civil Rights Commission Records.*** Certain records relating to investigations by the Ohio Civil Rights Commission are not available for public disclosure.[515]

- ***DNA Database Records.*** The Ohio Bureau of Criminal Identification and Investigation (BCI) stores DNA records in a database.[516] These records are not subject to public disclosure.[517]

- ***Rehabilitation and Correction/Youth Services Records.*** Certain records of the Ohio Department of Rehabilitation and Corrections, as well as certain records of the Ohio Department of Youth Services, are not subject to public disclosure.[518]

- ***Intellectual Property Records.*** Excluding financial or administrative records, records of faculty or staff of a state college or university created while conducting or as a result of study or research that have not been otherwise publicly disclosed are not subject to public

---

[509] *State ex rel. Cincinnati Post v. Court of Appeals*, 65 Ohio St.3d 378, 604 N.E.2d 153 (1992).
[510] Ohio Rev. Code Ann. § 149.43(A)(1)(d) and (f).
[511] Ohio Rev. Code Ann. §§ 3107.17, 3107.42 and 3107.52; *State ex rel. Wolff v. Donnelly*, 24 Ohio St.3d 1, 492 N.E.2d 810 (1986).
[512] Ohio Rev. Code Ann. § 149.43(A)(1)(e).
[513] Ohio Rev. Code Ann. § 3107.062.
[514] Ohio Rev. Code Ann. § 149.43(A)(1)(e).
[515] Ohio Rev. Code Ann. § 149.43(A)(1)(i) and § 4112.05.
[516] Ohio Rev. Code Ann. § 109.573.
[517] Ohio Rev. Code Ann. § 149.43(A)(1)(j). (See penalties for disclosing such information: Ohio Rev. Code Ann. §109.99(B) Whoever violates division (G)(1) of section 109.573 [109.57.3] of the Revised Code is guilty of unlawful disclosure of DNA database information, a misdemeanor of the first degree.")

[518] Ohio Rev. Code Ann. § 149.43(A)(1)(k) and (l), § 5120.21 and § 5139.05.

disclosure.[519] It does not matter whether the study or research was sponsored by the college or university alone, or in conjunction with another governmental body or private entity.[520]

- ***Donor Profile Records.*** Virtually all records about donors or potential donors to a public institution of higher education are exempt from public disclosure.[521] The only records that are publicly available are the names and reported addresses of *actual* donors, and the date, amount, and conditions of the donation.[522]

- ***Department of Job and Family Services Records.*** Records maintained by the Ohio Department of Job and Family Services for use in locating child support obligors.[523]

- ***County Hospitals' Trade Secrets***. Trade secrets belonging to a county hospital may be withheld from public disclosure.[524]

- ***Recreational Activities of Minors.*** Some public offices maintain personal information about minors in connection with recreational activities, such as a police athletic league, or a city recreation department. Ohio law now protects that personal information from public disclosure at the discretion of the public office.[525]

- ***Child Fatality Review Board.*** Certain records, statements and all work products of a child fatality review board are confidential[526] and are not public records.[527]

- ***Public Children Services Agency.*** Certain records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney are not subject to public disclosure.[528]

- ***Nursing Home Administrator.*** Test materials, examinations or evaluation tools used in an examination to license a nursing home administrator are not subject to public disclosure.[529]

---

[519] Ohio Rev. Code Ann. § 149.43(A)(5); *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 732 N.E.2d 373 (2000) ("Besser II").
[520] Ohio Rev. Code Ann. § 149.43(A)(5).
[521] Ohio Rev. Code Ann. § 149.43(A)(1)(n) and (A)(6).
[522] Ohio Rev. Code Ann. § 149.43(A)(6).
[523] Ohio Rev. Code Ann. § 149.43(A)(1)(o)
[524] Ohio Rev. Code Ann. § 149.43(A)(1)(q). *See, also,* Ohio Rev. Code Ann. § 1333.61(D).
[525] Ohio Rev. Code Ann. § 149.43(A)(1)(r) and (A)(8). *See, also, State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 725 N.E.2d 1144 (2000).
[526] Ohio Rev. Code Ann. § 307.629; *but, see,* Ohio Rev. Code Ann. § 307.626 (annual report to Ohio Dept. of Health is a public record.)
[527] Ohio Rev. Code Ann. § 149.43(A)(1)(s).
[528] Ohio Rev. Code Ann. § 5153.171 and § 149.43(A)(1)(t).
[529] Ohio Rev. Code Ann. §§ 149.43(A)(1)(u) and § 4751.04.

►***FOR DENIED ACCESS.*** The Public Records Act is a "self-help" statute, in that 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. The sole remedy available to a person who believes they have been wrongfully denied access to public records is litigation, specifically, a petition for a writ of mandamus.[530] Upon filing a mandamus action, the person filing is called the "relator." **Mandamus** is a court action that asks a court to order a public office to comply with the Public Records Act.

Additionally, a relator in a mandamus action need *not* prove a lack of adequate remedy at law to prevail,[531] which makes a mandamus for public records easier for the relator to prove than other mandamus actions.

➢ ***The Parties.***

The person who files the mandamus is called the "**relator**," while the entity that is holding the records is called the "**respondent**." To be entitled to mandamus, the relator will first have to show that they made an appropriate request for public records before filing the mandamus action.[532] The complaint must specifically state the records that are being sought.[533]

Mandamus does not have to be brought against the person ultimately responsible for the records; it needs only to name "a person responsible."[534] "When statutes impose a duty on a particular official to oversee records, that official is the 'person responsible' under the Public Records Act."[535] If an official responsible for records denies a public records request, no administrative appeal to the officer's supervisor is necessary before filing a mandamus action in court.[536]

---

[530] *State ex rel. McGowan v. Cuyahoga Metro. Housing Authority*, 78 Ohio St.3d 518, 678 N.E.2d 1388 (1997); *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).
[531] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994); *State ex rel. McGowan v. Cuyahoga Metro. Housing Authority*, 78 Ohio St.3d 518, 678 N.E.2d 1388 (1997).
[532] *State ex rel. Bush*, No. 01-T-0042, 2001 Ohio App. LEXIS 4511 (11th Dist. Oct. 5, 2001) (mandamus inappropriate where relator failed to first make request upon public office before filing action.)
[533] *State ex rel. Citizens for Environmental Justice v. Campbell*, 93 Ohio St.3d 585, 757 N.E.2d 366 (2001); *State ex rel. Rivers v. Miller*, No. 93AP-945, 1993 Ohio App. LEXIS 6051 (10th Dist. Dec. 16, 1993).
[534] *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170, 174, 527 N.E.2d 1230 (1988).
[535] *State ex rel. Mothers Against Drunk Drivers*, 20 Ohio St. 3d 30, 485 N.E.2d 706, paragraph two of the syllabus (1985). *See also, State ex rel. Highlander v. Rudduck*, 103 Ohio St. 3d 370, 2004-Ohio-4952, 816 N.E.2d 213 (2004) (at time of request, clerk of courts had custody of records sought and judge had control over them, so both were proper respondents in mandamus action.)
[536] *State ex rel. Multimedia, Inc. v. Whalen*, 48 Ohio St.3d 41, 549 N.E.2d 167 (1990).

➢ ***Where to File.***

A public records mandamus is unique because it permits **forum shopping** — that is, it allows the relator to "shop" for the most beneficial forum because they can file the action in the court where they feel they are most likely to prevail.

A relator may file a public records mandamus in any one of three courts: the local court of common pleas, the appellate court for that district, or the Ohio Supreme Court.[537] However, if a relator files in the Ohio Supreme Court, the case may be assigned to mediation through the Court.[538]

➢ ***Attorney's Fees, Court Costs & Damages***

While the option of litigation may seem intimidating to a private individual, especially from a cost perspective, if a public office loses a mandamus action, it will be ordered to pay the individual's court costs, and may also be required to pay reasonable attorney's fees,[539] and statutory damages.[540] Reasonable attorney fees will be awarded by the court, subject to reduction, when the public office failed to respond affirmatively or negatively to the public records request within the time allowed under the law, or when the public office promised to provide records for inspection or copying within a specified period of time but failed to do so.[541] However, the court may reduce an award of attorney's fees or not award them at all if it determines that the public office reasonably believed that it was not failing to comply with the law, and that its action served a public policy.[542]

Court costs and reasonable attorney's fees awarded in public records mandamus actions are considered remedial rather than punitive.[543] If the court orders the public office to pay attorney's fees, the relator may only recover those fees directly associated with the mandamus action,[544] and only insofar as the requests had merit.[545] Reasonable attorney's fees include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees.[546]

---

[537] Ohio Rev. Code Ann. § 149.43(C).
[538] S. Ct. Prac. R. XIV (public records mandamus actions may be ordered to attempt mediation.)
[539] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 2005-Ohio-685, 824 N.E.2d 64 (Feb. 24, 2005); *State ex rel. Cincinnati Enquirer v. Krings*, 93 Ohio St.3d 654, 758 N.E.2d 1135 (2001); *State ex rel. Kim v. Wachenschwanz*, 93 Ohio St.3d 586, 757 N.E.2d 367 (2001); *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 661 N.E.2d 1049 (1996).
[540] Ohio Rev. Code Ann. §149.43(C)(1)
[541] Ohio Rev. Code Ann. §149.43(C)(2)(b).
[542] Ohio Rev. Code Ann. §149.43(C)(2)(c).
[543] Ohio Rev. Code Ann. §149.43(C)(2)(c).
[544] *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, 661 N.E.2d 1049 (1996).
[545] *State ex rel. Cranford v. Cleveland,* 103 Ohio St.3d 196, 2004-Ohio-4884 (Sept 29, 2004) (relator denied attorney's fees due to "meritless request"); *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001).
[546] Ohio Rev. Code Ohio Rev. Code Ann. §149.43(C)(2)(c).

➢ ***Pro Se Litigants.***

The opportunity to collect attorney fees does *not* apply when the relator appears before the court *pro se*, or without an attorney. The Public Records Act authorizes only "attorney fees," not compensation to *pro se* litigants,[547] even where the *pro se* litigant is an attorney.[548]

Statutory Damages.

Under a provision added to the Public Records Act in 2007, a person who transmits a valid written request for public records by hand delivery or certified mail is entitled to receive statutory damages if a court finds that the public office failed to comply with its obligations under the Act.[549] The award of statutory damages is not considered a penalty under the law; rather, it is intended to compensate the requestor for injury arising from lost use of the requested information. Statutory damages are fixed at $100 per business day, up to a maximum of $1000.[550]

►***FOR DESTRUCTION OR TRANSFER.*** Separately, if a person believes that a public office has destroyed, removed, or transferred public records outside of its statutorily-approved retention schedule, that person has three options:[551] A person may file (1) an injunction action to stop the offending behavior plus a request for attorney fees; (2) a civil action for forfeiture of $1,000 plus a request for attorney fees;[552] or (3) both.[553] A person has only **one year** from the date of discovery of the violation to file these actions.[554]

The Ohio Supreme Court has defined the term "per violation" with regard to the $1,000 civil forfeiture fine.[555] In a dispute with the city over overtime compensation, two former city employees sought the civil forfeiture fine for the city's alleged improper destruction of overtime records maintained in two separate employee files and a tally book. The city argued that it was

---

[547] *State ex rel. Thomas v. Ohio State University*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994); *Fant v. Bd. Of Trustees, Regional Transit Authority*, 50 Ohio St.3d 72, 552 N.E.2d 639 (1990), *cert. denied*, 498 U.S. 967, 111 S.Ct. 429, 112 L.Ed.2d 413 (1990); *State ex rel. Fant v. Mengel*, No. 90AP-531, 1990 Ohio App. LEXIS 3091 (10th Dist. July 26, 1990); compare *State ex rel. Mayrides v. City of Whitehall*, 62 Ohio App.3d 225, 575 N.E.2d 224 (10th Dist. 1990), *aff'd*, 62 Ohio St.3d 203, 580 N.E.2d 1089 (1991). *See, also, State ex rel. McGowan v. Cuyahoga Metro. Housing Authority*, 78 Ohio St.3d 518, 678 N.E.2d 1388 (1997).

[548] *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 643 N.E.2d 126 (1994).

[549] Ohio Rev. Code Ann. §149.43(C)(1).

[550] Ohio Rev. Code Ann. §149.43(C)(1)

[551] Ohio Rev. Code Ann. § 149.351(B)

[552] Ohio Rev. Code Ann. § 149.351(B); *State ex rel. Sensel v. Leone*, 85 Ohio St.3d 152, 707 N.E.2d 496 (1999).

[553] Ohio Rev. Code Ann. § 149.351(B).

[554] *Hughes v. City of North Olmsted*, No. 70705, 1997 Ohio App. LEXIS 224, *7 (8th Dist. Jan. 23, 1997) (statute of limitations for improper destruction of records is one year); Ohio Rev. Code Ann. § 2305.11(A).

[555] *Kish v. City of Akron*, 109 Ohio St. 3d 162 (2006).

only subject to fines for destroying those three "records." The employees, on the other hand, argued that destruction of each document within those files (a total of 860 separate "records") constituted individual violations, so they were entitled to recover $1,000 for each record destroyed (*i.e.,* $860,000).

The Court found that each individual document within the files, as well as the files within which those documents were compiled, were records. The employees who had filed the action for improper destruction of the records were ultimately awarded $860,000.

►***RESUMES.*** Resumes submitted for public employment are *unquestionably* available for public disclosure.[556] The fact that a public office has promised confidentiality to the applicants is irrelevant, and the public is still entitled to review the resumes.[557]

However, it should be noted that the Ohio Supreme Court denied a writ to a newspaper that requested copies of resumes of superintendent candidates.[558] The Court would not order the school board to provide copies of the resumes because the board had not maintained copies of them. The Court reasoned that records must be "kept" by a public office before they constitute "public records."[559] Since the board had not kept the resumes, they were not public records.[560] Moreover, the Court declared that the board had no duty to keep the resumes.[561]

►***POLICE OFFENSE AND INCIDENT REPORTS.*** In 2001, the Ohio Supreme Court issued an opinion that had far-reaching impact on the daily operations of law enforcement agencies in Ohio.[562] The Court first reminded law enforcement that their initial incident reports are public records subject to immediate disclosure upon request.[563]

---

[556] *State ex rel. Consumer News Services, Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002 Ohio 5311, 776 N.E.2d 82 (2002) (unrefuted that resumes of applicants for a school treasurer position are public record); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 678 N.E.2d 557 (1997) (resumes of safety director applicants collected by a private consultant are public records subject to disclosure); *State ex rel. Plain Dealer Publ'g Co. v. City of Cleveland*, 75 Ohio St.3d 31, 661 N.E.2d 187 (1996) (resumes of police chief applicants collected by a private executive search firm are public records); *State ex rel. Dayton Newspapers v. Dayton Bd. Of Education*, 140 Ohio App.3d 243, 747 N.E.2d 255 (2nd Dist. 2000) (resumes for superintendent not trade secret). *But, see, State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 99 Ohio St.3d 6, 2003 Ohio 2260, 788 N.E.2d 629 (2003) (school board had no duty to keep resumes of candidates for superintendent and therefore, those resumes are not public records.)

[557] *State ex rel. Consumer News Services, Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002 Ohio 5311, 776 N.E.2d 82 (2002); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 678 N.E.2d 557 (1997). *Cf. State ex rel. Cincinnati Enquirer v. Cincinnati Bd. of Educ.*, 99 Ohio St.3d 6, 2003 Ohio 2260, 788 N.E.2d 629 (2003) (board notified applicants for superintendent that any materials left with the board or search agency would be public record.)

[558] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ.*, 99 Ohio St.3d 6, 2003 Ohio 2260, 788 N.E.2d 629 (2003) (board members examined application materials during executive session, but applicants did not leave board with originals or copies.)

[559] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ.*, 99 Ohio St.3d 6, 2003 Ohio 2260, P12, 788 N.E.2d 629 (2003).

[560] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ.*, 99 Ohio St.3d 6, 2003 Ohio 2260, P12, 788 N.E.2d 629 (2003).

[561] *State ex rel. Cincinnati Enquirer v. Cincinnati Bd. Of Educ.*, 99 Ohio St.3d 6, 2003 Ohio 2260, P12, 788 N.E.2d 629 (2003).

[562] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St. 3d 54, 741 N.E.2d 511 (2001).

[563] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St. 3d 54, 741 N.E.2d 511 (2001) (citing *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83, paragraph five of the syllabus (1994)).

The Court concluded that, because an initial incident report merely *initiates* an investigation, rather than being part of the investigation, the initial incident report is not a confidential law enforcement investigatory record.[564] As a result of this conclusion, the Court held that public offices could not redact certain information from initial incident reports, including the identity of an uncharged suspect.[565]

After the Court's decision in *Maurer*, some argued the Court had "adopted a per se rule that all police offense and incident reports are subject to disclosure notwithstanding the applicability of any exemption."[566] But, in a subsequent case, the Court expressly rejected that argument and clarified its decision in *Maurer*.[567] The Court explained that "although police offense and incident reports are generally subject to disclosure, documents containing information that is exempt under state or federal law may be redacted."[568]

►***PERSONAL PRIVACY.***

➢ *Private Citizens.*

Historically, the Ohio Supreme Court has rejected invitations to balance an individual's common law right to privacy against the public's "right to know."[569] Ohio courts have ruled that the legislature has already balanced these competing interests when it created the various exceptions to the Public Records Act.[570] For example, a deceased person's family cannot prevent access to public records containing the victim's personal information by arguing privacy

---

[564] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St. 3d 54, 741 N.E.2d 511 (2001). *See generally,* "Law Enforcement Investigations," page 77.

[565] *State ex rel. Beacon Journal Publ'g Co. v. Maurer*, 91 Ohio St. 3d 54, 741 N.E.2d 511 (2001).

[566] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St. 3d 399, 2004-Ohio-6557, *P55, 819 N.E.2d 1087 (2004).

[567] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St. 3d 399, 2004-Ohio-6557, 819 N.E.2d 1087 (2004).

[568] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St. 3d 399, 2004-Ohio-6557, *P55, 819 N.E.2d 1087 (2004) (information obtained in connection with allegations of child abuse or neglect may be redacted from police files, including the incident report, pursuant to a valid catch-all exception in ORC 2151.421(H)). *See generally,* "The Catch-all Exception," page 62.

[569] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 411, 2004-Ohio-1497, *P31, 805 N.E.2d 1116, 1123 (2004) (judge may not withhold public records pursuant to "judicially created" privacy exception.)

[570] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 412, 2004-Ohio-1497, *P36, 805 N.E.2d 1116, 1124 (2004); *State ex rel. Multimedia, Inc. v. Whalen*, 48 Ohio St.3d 41, 549 N.E.2d 167 (1990). *But, see*, *State ex rel. Beacon Journal Publ'g Co. v. Radel*, 57 Ohio St.3d 102, 556 N.E.2d 661 (1991) (there may be a "due process" interest in confidential records of a public office about individuals); *State ex rel. Jones v. Myers*, 61 Ohio Misc.2d 617, 581 N.E.2d 629 (1991) (payroll records relating to withholdings, vacation, sick leave, retirement service, garnishments, and court ordered support payments are public records but deductions for deferred compensation, investments, and Christmas clubs are protected by individual's right of privacy in personal financial matters); *State ex rel. Toledo Blade v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 602 N.E.2d 1159 (1992) (proper role of legislature to balance competing private and public rights); *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) (police officers have fundamental constitutional interest in preventing release of personal information contained in personnel files where such disclosure creates substantial risk of serious bodily harm or death.)

interests,[571] and a judge may not redact the settlement amount from a probate court record because he deems the family's interest in confidentiality of the information outweighs the public's interest in accessing that information.[572]

Notably, Ohio's legislature has on occasion followed the Ohio's Supreme Court's lead by codifying exceptions to mandatory disclosure for certain types of personal information. R.C. §149.43(A)(1)(r), for instance, which creates a discretionary exemption for "information pertaining to the recreational activities of a person under the age of 18," followed the Court's decision that personal information of **children** kept in a city database for the purpose of issuing photo IDs for a public pool was not a "record." The Court had held that the specific information requested did nothing to document any aspect of the city department that held the information.

Additionally, in the case of **police officers**, the Court has spoken on the personal privacy issue.[573] In a case involving police officer files containing personal information, the Court held that the constitutional right to privacy and **"good sense"** exempted that information from release to a criminal defendant who may use the information to achieve "nefarious ends."[574] The legislature codified this "good sense rule" by creating an exemption for the home addresses of peace officers during the pendency of a criminal case in which the officer is a witness or arresting officer.

Although the Court repudiates any attempt to withhold or redact public records using a privacy exception,[575] the Court recognizes constitutional privacy rights as "state or federal law" that prohibit disclosure of certain records.[576] In other words, the Court recognizes constitutional privacy rights as a catch-all exception.[577]

---

[571] *State ex rel. Findlay Publ'g Co. v. Schroeder*, 76 Ohio St.3d 580, 669 N.E.2d 835 (1996). *See also, State ex rel. Vindicator Printing Co. v. Watkins*, No. 91-T-4555, 1991 Ohio App. LEXIS 6414 (8th Dist. Dec. 31, 1991), *aff'd*, 66 Ohio St.3d 129, 609 N.E.2d 551 (1993); *State ex rel. Jefferys v. Watkins*, 92 Ohio App.3d 809, 637 N.E.2d 245 (11th Dist. 1993).

[572] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 413, 2004-Ohio-1497, *P39, 805 N.E.2d 1116, 1124 (2004) (judge erred in relying on "judicially created" privacy exception for redaction.)

[573] *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (adopting reasoning of *Kallstrom*); *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) ("Kallstrom I") (police officers have fundamental constitutional interest in preventing release of personal information contained in personnel files where such disclosure creates substantial risk of serious bodily harm.)

[574] *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999). *See, also*, 1999 Ohio Atty. Gen. Ops. No. 99-006 (two-part test to determine when personal information is protected from disclosure); *Smith v. City of Dayton*, 68 F. Supp.2d 911 (S.D. Ohio 1999) (release of police officer's home address, unlisted phone number, brother's name, address, and phone number to newspaper without notice violated officer's substantive and procedural due process rights). *But, see, Conley v. Correctional Reception Center*, 141 Ohio App.3d 412, 2001-Ohio-2365, 751 N.E.2d 528 (4th Dist., 2001) ("good sense" rule not applicable when inmate requests correction officers' past work schedules.)

[575] *State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 412, 2004-Ohio-1497, *P36, 805 N.E.2d 1116, 1124 (2004).

[576] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St. 3d 605, 1994-Ohio-6, 640 N.E.2d 164 (1994) (city employees social security numbers); *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 707 N.E.2d 931 (1999) (police officers personal information in personnel files); *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000) (personal information of children maintained in city's database.) *See also*, 2004 Ohio Atty. Gen. Ops. No. 04-045, 2004

➢ ***Public Employees.***

The Ohio Supreme Court has concluded that, in general, the **home addresses** of **state employees** are not "records" and, accordingly, state agencies are not required under Ohio's public records law to disclose those addresses in payroll records or W-2 files.[578] Nevertheless, the Court also noted that the home address of a public employee *may* constitute a "record" where, for example, that employee works from home.[579]

Ohio law also protects certain the personal information of certain public employees, including peace officers, parole officers, prosecuting attorneys, assistant prosecuting attorneys, correctional employees, youth services employees, firefighters, and EMTs. For instance, an Ohio statute permits the residential and familial information of peace officers, parole officers, prosecuting attorneys, assistant prosecuting attorneys, correctional employees, youth services employees, firefighters, and EMTs to be withheld from public disclosure.[580] Also, the home address of a peace officer (as defined in Ohio Rev. Code § 2935.01) may not be disclosed where the officer is the arresting officer or a witness in a pending criminal case.[581]

►***PERSONNEL FILES.*** The personal privacy issue arises most commonly when a request is made to inspect or copy personnel files of public employees. But, absent an expressly applicable exception[582] or unless the employee can demonstrate high potential for victimization[583] or a substantial risk of serious bodily harm or death[584] in releasing the information, nearly all of the records in a personnel file are public record.[585] But, to the extent items contained in the file are

---

Ohio AG LEXIS 47 (personal financial information held in court files). *But see, State ex rel. WBNS-TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 413, 2004-Ohio-1497, *P41, 805 N.E.2d 1116, 1125 (2004) (no high potential for victimization in release of settlement amount to give rise to constitutional privacy right.)

[577] *See generally*, "Constitutional Right to Privacy," page 64.

[578] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384 (2005).

[579] *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384, *P39 (2005).

[580] Ohio Rev. Code Ann. § 149.43(A)(1)(p) and § 149.43(A)(7).

[581] Ohio Rev. Code Ann. § 2921.24.

[582] *E.g.*, residential and familial information of peace officers (Ohio Rev. Code Ann. § 149.43(A)(1)(p) and § 149.43(A)(7)); children services agency employees' home addresses (Ohio Rev. Code Ann. § 2151.142).

[583] *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St. 3d 605, 1994-Ohio-6, 640 N.E.2d 164 (1994) (city employees' social security numbers.)

[584] *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998) ("Kallstrom I") (personal information of police officers).

[585] *State v. Yates*, 66 Ohio St.2d 245, 421 N.E.2d 855 (1981) ("There is no statutory or common law right of an employee to privacy concerning his employer's earning records, and there is no reason for the employee to expect such privacy"); *State v. Bundy*, 20 Ohio St.3d 51, 485 N.E.2d 1039 (1985); *State ex rel. Petty v. Wurst*, 49 Ohio App.3d 59, 550 N.E.2d 215 (12th Dist. 1989); 1990 Ohio Atty. Gen. Ops. No. 90-050.

not required for the proper functioning of the office; the item may not be subject to mandatory disclosure.[586]

►***SOCIAL SECURITY NUMBERS.*** SSNs should be redacted before disclosure of public records, even court records.[587] 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.[588]

So, 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.[589] In short, a SSN can only be disclosed if an individual has been given prior notice that their SSN will be publicly available.

However, where a SSN is recorded on a public record to which no expectation of privacy attaches, the SSN will have to be released, too. For instance, the Ohio Supreme Court has ruled that **911 tapes** must be made immediately available for public disclosure.[590] And, even if the

---

[586] *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993) (personnel file item that is not a "public record" and is personal information," as defined by *R.C. § 1347.01(E)*, does not have to be disclosed pursuant to a public records request); *Habe v. South Euclid Civil Serv. Comm'n*, No. 61786, 1993 Ohio App. LEXIS 583 (8th Dist. Feb. 4, 1993) (if a personnel file item is not a "public record" a determination must be made, on an ad hoc basis, if its release would constitute an invasion of personal privacy as prohibited by R.C. Chapter 1347.)

[587] *State ex rel. Office of Montgomery Cty Public Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, 2006 Ohio LEXIS 520 (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 at P25 ("Judge Rudduck should promptly make any appropriate redactions, e.g., Social Security numbers, before releasing the [court] records"); *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 70 Ohio St. 3d 605, 1994-Ohio-6, 640 N.E.2d 164 (1994) (city employees have constitutional right to privacy in social security numbers.) *See also, State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 154, 2002-Ohio-7117, *P25, 781 N.E.2d 180, 190 (2002) (personal information of jurors used only to verify identification, not to determine competency to serve on jury, such as social security numbers, telephone numbers, driver's license numbers, may be redacted); *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53, 689 N.E.2d 25 (1998) ("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, 623 N.E.2d 51 (1993) (on remand, Court of Appeals may redact confidential information, *i.e.* Social Security numbers); 2004 Ohio Atty. Gen. Ops. No. 04-045, 2004 Ohio AG LEXIS 47 (court files may be redacted to conceal social security numbers and other information the release of which would violate constitutional right to privacy.)

[588] *State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 70 Ohio St.3d 605, 640 N.E.2d 164 (1994) (city employees had expectation of privacy in SSNs such that they must be redacted before release of public records to newspaper.) *Compare, State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 662 N.E.2d 334 (1996) (Social Security numbers contained in 911 tapes are public records subject to disclosure); *but, see*, Ohio Rev. Code Ann. §§ 4931.49(E) and 4931.99(E) (information from database that serves public safety answering point of 911 system may not be disclosed); 1996 Ohio Atty. Gen. Ops. No. 96-034 (county recorder under no duty to obliterate Social Security number before making document available for public inspection where recorder was presented with document and was asked to file it.)

[589] Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896 (codified at 5 U.S.C.A. § 552a (West 2000)).

[590] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64 (2005); *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 377, 662 N.E.2d 334 (1996).

tapes contain SSNs, they cannot be redacted.[591] The court explained that there is no expectation of privacy when a person makes a 911 call; instead, there is an expectation that the information will be recorded and disclosed to the public.[592] Likewise, there is no expectation of privacy in **official documents** containing SSNs.[593]

►***ELECTRONIC RECORDS.*** Information kept on computer disks or tapes, audio tape, video tape, microfilm, microfiche, or just about any other fixed media imaginable is *potentially* subject to disclosure under the Public Records Act [594] if it meets the definition of a "record." This includes email messages.[595]

►***CONTRACTUAL CONFIDENTIALITY.*** Parties to a public contract, including settlement agreements[596] and collective bargaining agreements, cannot nullify the Public Records Act's guarantee of public access to public records.[597] Nor can an employee handbook confidentiality provision alter the status of public records.[598] In other words, a contract cannot nullify or restrict the public's access to public records.[599] Absent a statutory exception, a "public entity cannot enter into enforceable promises of confidentiality with respect to public records."[600]

But, see, Ohio Rev. Code Ann. §§ 4931.49(E) and 4931.99(E) (information from database that serves public safety answering point of 911system may not be disclosed.)

[591] *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 377, 662 N.E.2d 334 (1996).

[592] *State ex rel. Dispatch Printing Co. v. Morrow County Prosecutor's Office*, 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64 (2005); *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St.3d 374, 377, 662 N.E.2d 334 (1996).

[593] 1996 Ohio Atty. Gen. Ops. No. 96-034, 1996 Ohio AG LEXIS 30 (federal Privacy Act does not require county recorder to redact social security numbers from copies of official records.)

[594] *State ex rel. Harmon v. Bender*, 25 Ohio St.3d 15, 494 N.E.2d 1135 (1986); *Lorain County Title Co. v. Essex*, 53 Ohio App.2d 274, 373 N.E.2d 1261 (9th Dist. 1976).

[595] *But, cf., State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St.3d 37, 693 N.E.2d 789 (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.)

[596] *See generally*, "Settlement Agreements and Other Contracts," page 74.

[597] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003 Ohio 5599, 797 N.E.2d 964 (2003) ("Any provision in a collective bargaining agreement that establishes a schedule for the destruction of public records 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, 734 N.E.2d 797 (2000); *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Cmsrs.*, 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997); *Toledo Police Patrolman's Ass'n v. City of Toledo*, 94 Ohio App.3d 734, 641 N.E.2d 799 (6th Dist. 1994); *State ex rel. Kinsley v. Berea Bd. of Educ.*, 64 Ohio App.3d 659, 582 N.E.2d 653 (8th Dist. 1990); *Bowman v. Parma Bd. Of Educ.*, 44 Ohio App.3d 169, 542 N.E.2d 663 (8th Dist. 1988); *State ex rel. Dwyer v. City of Middletown*, 52 Ohio App.3d 87, 557 N.E.2d 788 (12th Dist. 1988); *State ex rel. Toledo Blade Co. v. Telb*, 50 Ohio Misc.2d 1, 552 N.E.2d 243 (1990); *State ex rel. Sun Newspapers v. City of Westlake Bd. of Educ.*, 76 Ohio App.3d 170, 601 N.E.2d 173 (8th Dist. 1991).

[598] *State ex rel. Russell v. Thomas*, 85 Ohio St.3d 83, 706 N.E.2d 1251 (1999).

[599] *See State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 678 N.E.2d 557 (1997).

[600] *State ex rel. Findlay Publ'g Co. v. Hancock County Bd. of Cmsrs.*, 80 Ohio St.3d 134, 684 N.E.2d 1222 (1997); *State ex rel. Allright Parking of Cleveland, Inc. v. City of Cleveland*, 63 Ohio St.3d 772, 591 N.E.2d 708 (1992) (reversed and remanded on grounds that court failed to examine records *in camera* to determine existence of trade secrets); *State ex rel. Nat'l Broadcasting Co., Inc. v. City of Cleveland*, 82 Ohio App.3d 202, 611 N.E.2d 838 (8th Dist. 1992).

►***MUNICIPAL INCOME TAX RETURNS.*** The issue of whether municipal **income tax returns** and **W-2 federal tax forms** are public records comes up frequently. Any information gained as a result of returns, investigations, hearings or verifications is confidential and no person shall disclose the information except (1) in accordance with a judicial order; (2) in the performance of that person's official duties, or; (3) as a part of the official business of the municipal corporation.[601]

Copies of W-2 federal tax forms, prepared and maintained by a township **as an employer**, are public records[602] (remember to redact the Social Security Number.[603]) However, if a W-2 is filed as part of a municipal income tax return, it is confidential.[604]

Finally, release of municipal income tax information to the Auditor of State is permissible for purposes of facilitating an audit.[605]

►***PROPER DESTRUCTION OF RECORDS.*** Records of a public office may only be destroyed in compliance with a properly approved records retention schedule.[606] As for the retention of electronic records, the Ohio Supreme Court has stated that where a retention schedule is clear that the destruction timetable applies to all copies of the record, regardless of its storage format, then all forms (hard or electronic) may be destroyed according to that timetable.[607] However, if, for example, a retention schedule permits a hard copy of a record to be destroyed once it is converted into an electronic storage format, but the schedule does not provide any instruction as to how long the electronic record must be stored, "then it is clear that the intent…was for the record in the new format to survive destruction of the old."[608] If the retention schedule does not address the particular type of record in question, the record should be maintained until the schedule is properly amended to address that category of records.[609] Indeed, improper destruction of a record is a violation of Ohio Rev. Code §149.351. Also, if a public record is maintained beyond its properly approved destruction date, it keeps its public record status until it is destroyed.[610]

---

[601] Ohio Rev. Code Ann. 718.13. *Also, see, City of Cincinnati v. Grogan,*141 Ohio App.3d 733 (1st Dist, March 16, 2001) (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.)
[602] 1992 Ohio Atty. Gen. Ops. No. 92-013.
[603] *See*, "Social Security Numbers," page 96.
[604] 1992 Ohio Atty. Gen. Ops. No. 92-013.
[605] 1992 Ohio Atty. Gen. Ops. No. 92-010.
[606] Ohio Rev. Code Ann. § 149.351 and § 121.211.
[607] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599 ("Keller I") (2003).
[608] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599 ("Keller I") (2003).
[609] *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 734 N.E.2d 797 (2000).
[610] *Keller v. City of Columbus*, 100 Ohio St.3d 192, 2003 Ohio 5599, 797 N.E.2d 964 (2003); *State ex rel. Dispatch Printing Co. v. City of Columbus*, 90 Ohio St.3d 39, 734 N.E. 2d 797 (2000) (Police department violated §149.43 when records were

►***CRIMINAL DISCOVERY.*** In pending criminal proceedings, criminal defendants are entitled only to the materials that are available to them under criminal discovery rules.[611] However, this limitation does *not* extend to police initial incident reports, which must be made available immediately, even to the defendant.[612]

Before 1994, many criminal defendants were circumventing the discovery process by using the Public Records Act to obtain more records than they would otherwise be entitled to receive.[613] But the Ohio Supreme Court ended that tactic in the landmark public records case of *State ex rel. Steckman v. Jackson*. In *Steckman*, the Court explained that allowing criminal defendants to use the Public Records Act in that manner, among other things, "unleveled" the playing field because prosecutors had no similar right to obtain additional discovery outside the criminal rules.[614] However, where the records requested by a criminal defendant are not related to the case, this limitation does not apply.[615]

Note that, when the prosecutor discloses materials to the defendant pursuant to the rules of criminal discovery, that disclosure does not mean those records *automatically* become available for public disclosure.[616] In other words, the prosecutor does not waive applicable public records exemptions, such as trial preparation records or confidential law enforcement records,[617] simply by complying with discovery rules.[618] Such requests must be analyzed in the same manner as any other public records request.

►***CIVIL DISCOVERY.*** Unlike in the criminal arena, the Ohio Supreme Court has concluded that in pending civil proceedings, the parties are *not* confined only to the materials available under

---

destroyed in contravention of City's retention schedule); *Hunter v. Carr*, 2000 Ohio App. LEXIS 683 (5th Dist. Feb. 22, 2000) (mayor violates §149.351 when she destroys community hospital board minutes in her possession.)

[611] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994); *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001); *State ex rel. Wilberger v. Highland Hills Police Dept.*, No. 79160, 2001 WL 280124 (8th Dist. Mar. 22, 2001); *State ex rel. Scuba v. Simmons*, No. 00 M 000384, 2001 Ohio App. LEXIS 1838 (11th Dist. Apr. 20, 2001); *State v. Woodard*, No. 71912, 1998 Ohio App. LEXIS 205 (8th Dist. Jan. 22, 1998) (petitioner in post conviction relief not entitled to discovery beyond scope of Crim. R. 16) (citing *Steckman, supra*), appeal dismissed *sua sponte* 81 Ohio St.3d 1522, 692 N.E.2d 1024 (1998).

[612] *State ex rel. Rasul-Bey v. Onunwor*, 94 Ohio St.3d 119, 760 N.E.2d 421 (2002) (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 App. LEXIS 1443 (7th Dist. Mar. 19, 2001).

[613] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994).

[614] *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 425, 639 N.E.2d 83 (1994).

[615] *State ex rel. Keller v. Cox*, 85 Ohio St.3d 279, 282, 707 N.E.2d 931, 934 (1999) (where records sought have no relation to crime or case, *Steckman* is not applicable).

[616] *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 673 N.E.2d 1360 (1997).

[617] *See*, "Exceptions to Disclosure: Trial Preparation Records," page 73, and "Law Enforcement Investigations," page 77.

[618] *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St.3d 350, 673 N.E.2d 1360 (1997).

the civil rules of discovery.[619] In other words, a civil litigant is now permitted to use the Public Records Act as a means to circumvent the restrictions associated with the rules of civil procedure.[620] As to the use of these public records as evidence in litigation, the Ohio Rules of Evidence govern.[621]

In considering the role of the Public Records Act in civil litigation, three of the seven justices warned that materials obtained outside the boundaries of civil discovery rules may be excluded by the trial court. In Justice Stratton's concurring opinion, which was joined by the Chief Justice and a visiting justice, Justice Stratton reminded that "trial courts have discretion to admit or exclude evidence."[622] She stated more directly, "[T]rial courts have discretion to impose sanctions for discovery violations, one of which could be exclusion of that evidence."[623] In conclusion, Justice Stratton remarked 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."[624]

►***JUVENILE RECORDS.*** Although it is a common misconception, there is no Ohio law that categorically excludes *all* juvenile records from public records disclosure.[625] While juvenile records maintained by the **juvenile court** typically are *not* available for public inspection and copying,[626] juvenile records maintained by **law enforcement** agencies, in general, are treated no differently than adult records, including records identifying a juvenile suspect, victim, or witness.[627] Said differently, law enforcement agencies are not typically permitted by law to redact information about juveniles from their records *based simply on the juvenile's age*.

---

[619] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564 (2004).
[620] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, *P14, 821N.E.2d 564 (2004) (Lundberg Stratton, J., concurring).
[621] Ohio R. Evid. 803(8) and Ohio R. Evid. 1005. *State of Ohio v. Scurti*, 153 Ohio App.3d 183, 2003 Ohio 3286, 792 N.E.2d 224 (7th Dist. June 19, 2003); *Department of Liquor Control v. B.P.O.E. Lodge 0107*, 62 Ohio St.3d 1452, 579 N.E.2d 1391 (1991). *See also, Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, *P12, 821 N.E.2d 564 (2004) (Lundberg Stratton, J., concurring.)
[622] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, *P13, 821N.E.2d 564 (2004) (Lundberg Stratton, J., concurring).
[623] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, *P13, 821 N.E.2d 564 (2004) (Lundberg Stratton, J., concurring).
[624] *Gilbert v. Summit County*, 104 Ohio St.3d 660, 2004-Ohio-7108, *P14, 821 N.E.2d 564 (2004) (Lundberg Stratton, J., concurring).

[625] *See, generally*, 1990 Ohio Atty. Gen. Ops. No. 90-101.
[626] 1990 Ohio Atty. Gen. Ops. No. 90-101. *See, also*, Juv. Rule of Civ. Proc. 37(B). *But, cf., State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St.3d 19, 652 N.E.2d 179 (1995) (release of transcript of juvenile contempt proceeding required when proceedings were open to the public.)
[627] *See, generally*, 1990 Ohio Atty. Gen. Ops. No. 90-101. *But, cf., State ex rel. Carpenter v. Chief of Police*, No. 62482, 1992 Ohio App. LEXIS 5055 (8th Dist. Sept. 17, 1992) ("other records" may include juvenile's statement or an investigator's report if they would identify the juvenile.)

Further, most information held by local law enforcement offices may be shared with other law enforcement agencies and local schools.[628]

When analyzing a public records request for juvenile records, a law enforcement agency must evaluate the applicability of the confidential law enforcement investigatory records exception.[629] In other words, law enforcement agencies should treat the suspect, victim, witness, or source as it would an adult in the same role, *i.e.*, redact a suspect's identity only if the suspect is "uncharged."[630]

Additionally, the office must assess whether any state or federal "catch-all" exceptions apply to require redaction of some or all information. For instance, one important state law exception applies after a juvenile has been **fingerprinted and photographed** on the basis of an arrest or custody.[631] Once that happens, the fingerprints, photographs, and "other records" relating to the arrest or custody must not be disclosed.[632]

Another important state law exception pertains to information related to alleged **child abuse or neglect**. The Ohio Supreme Court has held that the state law protecting the confidentiality of a child abuse report and the information contained therein applies to the records of law enforcement.[633]

Other examples of state law exceptions to public disclosure include records of **social, mental and physical examinations** conducted pursuant to a juvenile court order,[634] records held by the Department of Youth Services pertaining to juveniles in its custody,[635] reports regarding allegations of child abuse,[636] sealed or expunged juvenile records,[637] juvenile probation records,[638] and certain records of children's services agencies.[639]

---

[628] 1987 Ohio Atty. Gen. Ops. No. 87-010. *See, also,* 1990 Ohio Atty. Gen. Ops. No. 90-099 (local board of education may request and receive information regarding student drug or alcohol use from the public records of law enforcement agencies.)
[629] *See,* "Exceptions to Disclosure: Law Enforcement Investigations," page 77.
[630] *See,* Confidential Law Enforcement Investigatory Records (the "CLEIRs" exception), page 77.
[631] Ohio Rev. Code Ann. § 2151.313.
[632] Ohio Rev. Code Ann. § 2151.313. *See State ex rel. Carpenter v. Chief of Police,* No. 62482, 1992 Ohio App. LEXIS 5055 (8th Dist Sept. 17, 1992) ("other records" may include the juvenile's statement or an investigator's report if they would identify the juvenile.)
[633] *State ex rel. Beacon Journal Publ'g Co. v. Akron,* 104 Ohio St. 3d 399, 2004-Ohio-6557, 819 N.E.2d 1087 (2004) (information obtained in connection with allegations of child abuse or neglect may be redacted from police files, including the incident report, pursuant to a valid catch-all exception in ORC 2151.421(H)).
[634] Juv. Rule of Civ. Proc. 32(B).
[635] Ohio Rev. Code Ann. § 5139.05(D).
[636] Ohio Rev. Code Ann. § 2151.421(H)(1); *State ex rel. Beacon Journal Publ'g Co. v. Akron,* 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087 (2004).
[637] Ohio Rev. Code Ann. § 2151.358. *See also,* "The Catch-all Exception: Court Records," page 63 and "Common Issues: Court Records," page 102.
[638] Ohio Rev. Code Ann. § 2151.14.

Some common federal law "catch-all" exceptions prohibit disclosure of records associated with federal juvenile delinquency proceedings, except for use by authorized persons and law enforcement agencies,[640] and 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 was prosecuted as an adult.[641]

►***STUDENT DISCIPLINARY RECORDS.*** A student's disciplinary records *must not* be disclosed in response to a public records request.[642] A federal appellate court determined that student disciplinary records are "**education records**" as defined in the Family Education Rights and Privacy Act (FERPA).[643] The court concluded that releasing such records and the personally identifiable information contained therein would violate FERPA, which prohibits institutions from releasing a student's "education records" without the written consent of the student or their parents.[644]

Ohio also has a state version of FERPA,[645] which is even more restrictive. Under Ohio law, no person shall release or permit access to *any* personally identifiable information (except directory information) about a student attending a public school, college or university without proper written consent.[646] Accordingly, education officials and employees must be diligent in determining whether to release any record that may identify their students.

►***COURT RECORDS.***

- ***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.[647] Both the United States and the Ohio constitutions create a *qualified right*[648] of public access to court proceedings that have historically been open to the public

---

[639] Ohio Rev. Code Ann. § 5153.17.
[640] 18 U.S.C. §§ 5038(a), 5038(c) 5038(e), Federal Juvenile Delinquency Act (18 U.S.C. §§ 5031-5042).
[641] *See* 18 U.S.C. § 5038(d).
[642] *United States v. Miami Univ.*, Case No. 00-3518 (6th Cir. June 27, 2002). *See, also, United States v. Miami Univ.*, 91 F. Supp.2d 1132 (S.D. Ohio 2000).
[643] *United States v. Miami Univ.*, Case No. 00-3518 (6th Cir. June 27, 2002). *See, also, United States v. Miami Univ.*, 91 F. Supp.2d 1132 (S.D. Ohio 2000).
[644] 20 U.S.C. § 1232g(b)(1).
[645] Ohio Rev. Code § 3319.321.
[646] Ohio Rev. Code § 3319.321(B).
[647] *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, P19, 781 N.E.2d 180 (2002); *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 383, 2004-Ohio-1581, *P8, 805 N.E.2d 1094, 1097 (2004) ("Winkler III") (citations omitted). *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Ct. of Common Pleas*, 73 Ohio St.3d 19, 22, 652 N.E.2d 179 (1995)).
[648] *State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 384, 2004-Ohio-1581, *P9, 805 N.E.2d 1094, 1097 (2004) ("Winkler III") ("The right, however, is not absolute.")

and in which the public's access plays a significantly positive role.[649] This qualified right includes access to the live proceedings, as well as to the records of the proceedings.[650]

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."[651] 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."[652] But, the constitutional right of public access is not absolute,[653] and courts have traditionally exercised "supervisory power over their own records and files."[654]

- ***Statutory Right of Access:*** In addition to this constitutional right to access, the public is additionally entitled to access court records under the Public Records Act.[655] As a result, absent a specific statutory exception, all documents or recorded proceedings of a court are public records subject to disclosure under the Public Records Act.[656] In fact, even otherwise exempt materials, such as a deposition transcript or other discovery devices, when filed with a court, become public records.[657]

---

[649] *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Ct. of Common Pleas*, 73 Ohio St.3d 19, 20, 652 N.E.2d 179 (1995) (citing *In re. T.R.*, 52 Ohio St.3d 6, 556 N.E.2d 439, paragraph two of the syllabus (1990) (*Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 106 S.Ct. 2735, 92 L.Ed. 2d 1 (1986) ("Press-Enterprise II"), followed.)

[650] *State ex rel. Cincinnati Enquirer v. Winkler*,101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E. 2d 1094 (2004) ("Winkler III"); *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Ct. of Common Pleas*, 73 Ohio St.3d 19, 21, 652 N.E.2d 179 (1995) (citations omitted).

[651] *State ex rel. Cincinnati Enquirer v. Winkler*, 2002 Ohio App. LEXIS 4857, *7 (1st Dist. 2002) ("Winkler I") (citing *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga Cty. Ct. of Common Pleas*, 73 Ohio St.3d 19, 21, 652 N.E.2d 179 (1995)), aff'd, 2002-Ohio-7334, 2002 Ohio App. LEXIS 7225 (1st Dist. Dec. 31, 2002) ("Winkler II"), aff'd, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094 (2004) ("Winkler III").

[652] *State ex rel. Cincinnati Enquirer v. Winkler*,101 Ohio St. 3d 382, 384, 2004-Ohio-1581, *P9, 805 N.E. 2d 1094, 1097 (2004) ("Winkler III").

[653] *State ex rel. Cincinnati Enquirer v. Winkler*,101 Ohio St. 3d 382, 384, 2004-Ohio-1581, *P9, 805 N.E. 2d 1094, 1097 (2004) ("Winkler III").

[654] *State ex rel. Cincinnati Enquirer v. Winkler*, 2002 Ohio App. LEXIS 4857, *9 (1st Dist. 2002) ("Winkler I"), aff'd, 2002-Ohio-7334, 2002 Ohio App. LEXIS 7225 (1st Dist. Dec. 31, 2002) ("Winkler II"), aff'd, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094 (2004) ("Winkler III"). *See also*, "The Catch-all Exception: Court Records," page 63.

[655] *See generally, State ex rel. Cincinnati Enquirer v. Winkler*,101 Ohio St. 3d 382, 383, 2004-Ohio-1581, *P5, 805 N.E. 2d 1094, 1096 (2004) ("Winkler III") ("it is apparent that court records fall within the broad definition of a 'public record.'")

[656] *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St.3d 30, 33, 485 N.E.2d 706, 710 (1985); *State ex rel. Cincinnati Enquirer v. Dinkelacker*, No. C-010153, 2001 Ohio App. LEXIS 3312 (1st Dist. July 27, 2001). *But cf., State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002 Ohio 7117, 781 N.E.2d 180 (2002) (juror names, addresses, and questionnaire responses are not public records); *State ex rel. Cincinnati Enquirer v. Winkler*,101 Ohio St. 3d 382, 383, 2004-Ohio-1581, *P6, 805 N.E. 2d 1094, 1096 (2004) ("Winkler III") (properly sealed court records cease to be public records.)

[657] *State ex rel. Cincinnati Enquirer v. Dinkelacker*, No. C-010153, 2001 Ohio App. LEXIS 3312 (1st Dist. July 27, 2001).

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 this public access exists.[658] Under such circumstances, the court may impose a **protective order** prohibiting release of the records.[659]

Similarly, where court records have been properly expunged or **sealed**, they are not available for public disclosure.[660] Even absent statutory authority, trial courts, "in unusual and exceptional circumstances," have the inherent authority to seal court records.[661] 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.[662]

- ***Constitutional Access and Statutory Access Compared:*** The Ohio Supreme Court has distinguished between (1) public records access and (2) constitutional access to jurors' personal information – specifically, jurors' names and home addresses, as well as their responses on written questionnaires.[663] While such information is not a "public record,"[664] it may, nevertheless, be subject to public disclosure based on *constitutional* principles.[665]

  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.[666] However, there is a constitutional presumption that this information will be publicly accessible in

---

[658] *State ex rel. Vindicator Printing Co. v. Watkins*, 66 Ohio St.3d 129, 609 N.E.2d 551 (1993) (prohibiting disclosure of pretrial court records prejudicing rights of criminal defendant); *Adams v. Metallica*, No. C-00513, 2001 Ohio App. LEXIS 2434 (1st Dist. June 1, 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, 816 N.E. 2d 213 (2004) (pending appeal from court order unsealing divorce records does not preclude writ of mandamus claim.)

[659] *State ex rel. Cincinnati Enquirer v. Dinkelacker,* No. C-010153, 2001 Ohio App. LEXIS 3312 (1st Dist. July 27, 2001) (trial judge required to determine whether release of records would jeopardize defendant's right to a fair trial.)

[660] *State ex rel. Cincinnati Enquirer v. Winkler,*101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E. 2d 1094 (2004) ("Winkler III") (affirming trial court's sealing order per R.C. 2953.52). *See also,* "Catch-all Exception: Court Records," page 63.

[661] *Pepper Pike v. Doe,* 66 Ohio St. 2d 274, 421 N.E.2d 1303 (1981). *But cf., State ex rel. Highlander v. Rudduck,* 103 Ohio St. 3d 370, 2004-Ohio-4952, _____816 N.E. 2d 213 (2004) (divorce records not properly sealed when order results from "unwritten and informal court policy").

[662] *Pepper Pike v. Doe,* 66 Ohio St. 2d 274, 421 N.E.2d 1303, paragraph two of the syllabus (1981).

[663] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002).

[664] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, paragraph one of the syllabus, 2002-Ohio-7117, 781 N.E.2d 180 (2002) (juror names, addresses, and questionnaire responses are not "public records" because the information does not shed light on court's operations.)

[665] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, paragraph two of the syllabus, 2002-Ohio-7117, 781 N.E.2d 180 (2002) (1st amendment qualified right of access extends to juror names, addresses, and questionnaire responses.)

[666] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, 2002-Ohio-7117, P11, 781 N.E.2d 180 (2002) (citing *State ex rel. McCleary v. Roberts,* 88 Ohio St.3d 365, 2000-Ohio-345, 725 N.E.2d 1144 (2000)). *See also, State ex rel. Montgomery Cty. Public Defender v. Siroki,* 108 Ohio St.3d 207, 2006-Ohio-662 (2006) (social security numbers in court records do not "shed light on any government activity.")

criminal proceedings.[667] 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."[668]

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.[669] 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."[670]

[667] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, 2002-Ohio-7117, P19, 781 N.E.2d 180 (2002).
[668] *State ex rel. Beacon Journal Publ'g Co. v. Bond,* 98 Ohio St.3d 146, 2002-Ohio-7117, paragraph 2 of the syllabus, 781 N.E.2d 180 (2002) (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510, 104 S.Ct. 819, 78 L.Ed.2d 629 (1984)) (internal quotations omitted.) *See also*, 2004 Ohio Atty. Gen. Ops. No. 04-045, 2004 Ohio AG LEXIS 47 (restricting public access to information in criminal case file may be accomplished only where concealment "is essential to preserve higher values and is narrowly tailored to serve an overriding interest.")
[669] *State ex rel. Montgomery Cty. Public Defender v. Siroki,* 108 Ohio St.3d 207, 2006-Ohio-662 (2006). *See also,* "Public Records Act: Common Issues, Social Security Numbers," page 96.
[670] *State ex rel. Montgomery Cty. Public Defender v. Siroki,* 108 Ohio St.3d 207, 2006-Ohio-662 at P21 (2006).