

**Letting the Sun Shine In:
Ohio's Sunshine Laws**

*A presentation for the
Ohio Constitutional Modernization Commission*

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Attorneys General

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**Public Records Policy
R.C. 149.43(E)**

- Public offices must prepare, distribute, and post a public records policy
- The Attorney General's model public records policy is available at:
www.ohioattorneygeneral.gov/sunshine
- The model policy is for guidance, not a substitute for an individualized policy

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Public Records Act Overview

Definitions
Exceptions
Obligations
Liabilities

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Definitions

The "Who?" Public Office

- Government entities
- Functional equivalent
- A person responsible for public records

The "What?" Records

- Information stored on a fixed medium
- Created, received by, or coming under the jurisdiction of a public office
- Documents the activities of the office (organization, policies, decisions, operations, etc.)

Kept By

- Records kept by a public office
- In existence and in possession of public office
- NOT records properly disposed of
- NOT records not yet created

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Types of Records

Emails

Transient Records

Notes

Drafts

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Email

- Handle electronic records just like any other tangible record
- Analyze based on **content**, rather than storage medium
- Ohio Electronic Records Committee:

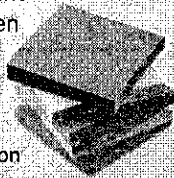


<http://www.ohio.erc.org>

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Transient Records

- Used only to remember information until you transfer it to its permanent home, i.e. a file, database, a written report, etc.
- Very limited administrative use = quick disposal
 - E.g. email changing a meeting location
- Should have a records retention schedule for transient records



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Notes

Notes can be "records," but are usually transient.

Notes are not public records if they are:

- 1) Kept as personal papers, not official records;
 - 2) Kept for the employee's own convenience (for example, to recall events);
- AND
- 3) Other employees did not use or have access to the notes

State ex rel. Cranford v. Cleveland, 2004 Ohio 4884

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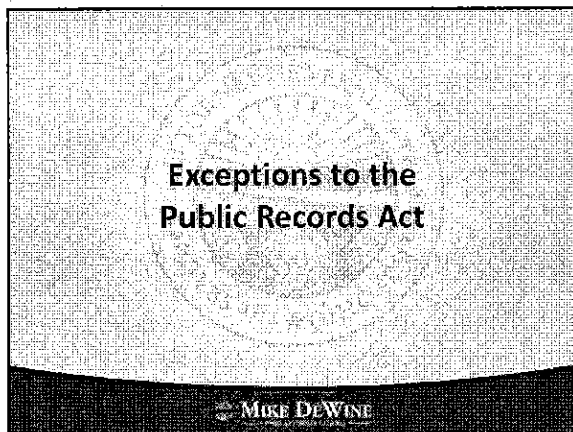
Drafts

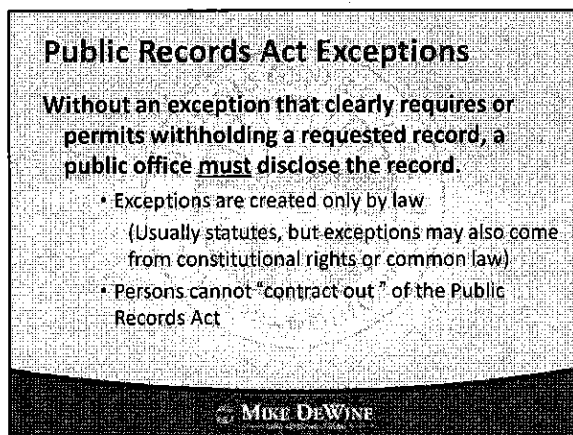
If a draft meets the definition of a record, it is subject to both the Public Records Act and records retention laws.



A public office can address the length of time that drafts must be kept in its record retention schedules.

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Mandatory/Catch-all Exception

- Any state or federal law which **prohibits** the release of specified records – RC 149.43(A)(1)(v)
- If any state statutes, rules, federal statutes or regulations prohibit public disclosure, then a public office **MUST NOT** release that record in response to a Public Records Request

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Discretionary Exception

- Public office **does not have to** disclose the record in response to a request, but **may if it so chooses**
- Thus, if any state or federal laws designate certain records as "not public record" then they **are not** subject to the provisions of the Public Records Act
- Remember:** courts interpret the Public Records Act broadly, in favor of disclosure of records

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Mandatory vs. Discretionary

Mandatory Exceptions	Discretionary Exceptions
- Physician-patient privileged records - Student education records (FERPA) - Criminal history records from LEADS	- Trial preparation records - Infrastructure and security records - Confidential Law Enforcement Investigatory Records (CLEIRs)

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Withholding or Redacting

- **"Redaction"** – Obscuring documents or information per the Public Records Act
 - Redactions **must** be plainly visible, or the office must advise the requester of what redactions have been made – R.C. 149.43(B)(1)
- If a request is denied in part (e.g., redactions), or in whole (entire document), an explanation must be provided, **including legal authority!!!**
R.C. 149.43(B)(3)

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The Public Records Request

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Requester Rights and Obligations

- Any **"person"** can make a public records request
- No **special format or language** required
- A request may be **written or verbal**
- Requester's motive is **not relevant**. The request must be specific and detail the records sought.
- A public office cannot require the requester to put it in **writing** or reveal their **identity**

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Requester Rights and Obligations

- Inspect vs. copies
- Regular business hours
- Copies at "cost"
- Payment in advance (optional)
- Methods of delivery



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Mandatory vs. Optional Negotiation/Clarification

Mandatory: "Overly Broad"

- Request denied as ambiguous, overly broad, or office can't reasonably identify records requested
- Must tell requester how the records are maintained, so that the requester can revise the request

Discretionary

- May ask for request in writing, provide identity, or intended use of records, if:
- Benefits requester by enhancing ability to identify, locate or deliver the records, AND
- Discloses that requester may choose not to

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Liabilities for Violating the Public Records Act

- Mandamus Action by "person aggrieved"
 - A legal action in common pleas, appellate court, or the Ohio Supreme Court to enforce the Act.
- Civil Damages (if violation caused actual lost use of records)
- Attorney's fees and court costs

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Records Retention and Management

Obligations

Schedules

Liabilities

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Obligations of Public Offices for Records Retention

Shall make only necessary records R.C. 149.40	Organize and maintain public records for inspection or copying R.C. 149.43(B)(2)
May not dispose of records except by law or per retention schedules R.C. 149.351	Records records retention schedule readily available R.C. 149.43(B)(2)

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Liabilities for Violating Records Retention Laws – R.C. 149.351

An “aggrieved person” may file either or both of the following, in common pleas court:

- A civil action for injunctive relief to compel compliance with this section, and/or
- A civil action to recover a forfeiture of \$1,000 for each violation,

• Forfeiture for multiple violations capped at \$10,000 (attorney fees are also capped at \$10,000)

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Records Retention Information

For more information, please contact your records commission, and/or:

State Archives
614-297-2553
localrecs@ohiohistory.org

DAS General Schedules:
<http://apps.das.ohio.gov/rims/General/General.asp>



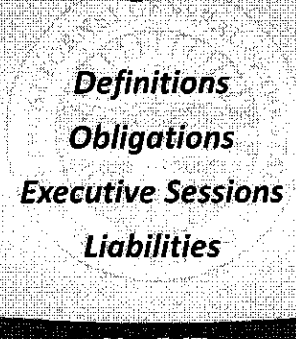
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The Ohio Open Meetings Act



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Open Meetings Act Overview



Definitions
Obligations
Executive Sessions
Liabilities

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Who is Subject to the Open Meetings Act and When?



Public Body:

Any decision-making body of the state, its political subdivisions and school districts (including committees & sub-committees)

Meeting: (1) **P**rearranged gathering of
(2) **a majority** of members of public body
(3) conducting or discussing **public business**

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Looking Deeper: What is a Meeting?

Discussion/Deliberation vs. Information Gathering:

- Discussion & deliberation involve weighing reasons for/against a course of action & **must be conducted openly**
- In some appellate districts, gatherings solely to receive factual information may not be "meetings"

... BUT TENTH DISTRICT HAS NOT ADOPTED THIS REASONING, SO CONSULT LEGAL COUNSEL FIRST!

Work sessions:

- **Prearranged work sessions, retreats, etc. where public business is discussed by majority of members of public body are "meetings" that must be noticed and open to public**

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Obligations

Give appropriate NOTICE

➡ R.C. 121.22(F)

Take action & deliberate on public business in OPEN session

R.C. 121.22(C)

Take & file MINUTES

➡ R.C. 121.22(C)

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Obligation 1: Notice

Types of Meetings & Notice Required

Regular Meetings	➔	Held at prescheduled intervals Notice = time and place
Special Meeting	➔	Any meeting other than regular meeting Notice = at least 24 hours in advance = time, place, & purpose unless Emergency = immediate notice to news media that have requested

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Obligation 2: Openness

Take Action & Deliberate in Public

Where must public meetings be held?

- Public forum within area that public body serves

Does public have right to speak at public meetings?

- Not required by the OMA, but may otherwise be permitted or required

Can members of public record the proceedings?

- Yes, if it does not disrupt meeting

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Obligation 3: Minutes

"The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to the public."
- O.R.C. 121.22(C)

- Do not have to be verbatim transcript of proceedings but must be full and accurate and enable public to understand rationale behind public body's decisions
- No requirement to take minutes of executive sessions

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Executive Sessions

Proper Procedures:

- Meetings must always begin & end in open session
- Executive session must be preceded by specific motion
- Motion must specifically state permissible topic(s) that will be discussed
- Vote on motion must be by roll call of members

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Executive Sessions

Permissible topics for consideration:

- 1) Personnel (must state specific type of personnel matter to be discussed, but not identity of person)
- 2) Certain property sale or purchase issues
- 3) Court action (only with the body's attorney)
- 4) Collective bargaining preparation & sessions
- 5) Matters required to be kept confidential by codified law
- 6) Security arrangements
- 7) Certain public hospitals' trade secrets

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Executive Sessions

Present in Executive Sessions:

Who may members include?

- anyone who is invited to stay

Who may the members exclude?

- any other members of the public

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Restrictions On Executive Session

- There can be **no decision-making**
- **No voting**, including "straw polls"
- Non-permitted matters may **not** be discussed, even if intertwined with permitted matters



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Executive Sessions - Records

- Executive sessions provide private space for discussion, but do not make any materials confidential, including documents handed out during session
- Analyze public records issues separately, as though taking place outside of executive session
- No minutes need to be taken of executive session discussions . . . and should not be!

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Miscellaneous Topics: Virtual Participation

- A member "shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting." *R.C. 121.22(C)*
- Virtual participation (teleconferencing) is only permitted when **specifically authorized by law**

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Penalties for Violating OMA



Fines
Injunction
Court Costs
Attorney Fees
Action Invalidated
Removal from Office

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Questions & Answers

Sunshine Laws Web Page:
www.ohioattorneygeneral.gov/Sunshine

Sunshine Laws Manual Online:
www.ohioattorneygeneral.gov/YellowBook

For Additional Information . . .
Ohio Attorney General Mike DeWine

Public Records Unit Phone:
614-466-2872

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