

Public Records & Open Meetings: A Guide for Activists



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Introduction

The Buckeye State has had a long history of recognizing the importance of public records. Sixteen years before Ohio even became an official state, the Ordinance of 1787 provided the region with an appointed secretary whose duties included keeping and preserving public records. Since then, the Open Records Law and Open Meetings Law sections of the Ohio Revised Code have governed the classification and accessibility of public records and meetings.

But since the law's inception, both state courts and the legislature have repeatedly attempted to impose their own limits on "Sunshine Laws." Unfortunately, many of those restrictions became precedents still followed today. And now, the government would like to exclude more records from public scrutiny in addition to the 29 already enumerated exemptions. That's why your role as an activist is so crucial to the well-being of our state.

It is up to you to hold our government accountable for its actions. Ohio government can truly be one made by the people and for the people when it is open to the public. This transparency benefits society as a whole. And it lets Ohioans discover why a school board chose to ban a certain book, how a city plans to improve economic development, or whether state prison facilities are treating inmates humanely. As a member of the public, you have a fundamental right to know whether government officials are improving the welfare of the community in which you live. And if you determine that your officials have not used your tax dollars appropriately, you have the right to demonstrate that sentiment at a rally, as a petition, or even in your ballot at the next election. This keeps public servants accountable to you, the constituents that they serve.

You should use this guide to learn about your rights to access the records and meetings of the government. Go a step further and ask for the disclosure of a record that might help your cause. Or even attend a city council meeting. To aid in your advocacy, we've analyzed the language of Ohio Sunshine Laws, outlined important court decisions, and created a handy how-to guide so that you can access public information like a pro. Please take advantage of your right to examine your government's actions and help the ACLU of Ohio promote, protect, and expand government transparency, an essential civil liberty for us all.

Public Records Law

DEFINITIONS

A. Public records (must meet all three criteria):

- 1) Have information stored on a fixed medium (paper, computer, film, etc.); and
- 2) Are created, received, or sent under the jurisdiction of a public office; and
- 3) Document the organization, functions, procedures, policies, operations, decisions, or other activities of the office.

B. Public office:

Any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.

C. Private office as functional equivalent of public office:

A private entity may be found to be a functional equivalent of a public office, and thus subject to the Public Records Act, if there is clear and convincing evidence that it meets these conditions:

- 1) The entity performs a government function.
- 2) The entity has a high level of government funding.
- 3) The government is involved in or regulates the daily activities of the entity.
- 4) The entity was created by the government to avoid the requirements of the Public Records Act.

Courts determine functional equivalency on a case-by-case basis. There is no set number of factors the private entity must meet in order to qualify as a functional equivalent.

D. Quasi-agency:

When a public office contracts with a private entity to perform government work, the resulting records may be public records even if they are solely in the possession of the private entity if all of the following three conditions are met:

- 1) The private entity prepared the records to perform responsibilities normally belonging to the public office.
- 2) The public office is able to monitor the private entity's performance.

3) The public office may access the records itself.

Under these circumstances, the public office is subject to requests for these public records, and the private entity itself may become responsible for public records.

EXCEPTIONS

The following are examples of records that are exempted from public records law:

- Medical and DNA records.
- Trial preparation records.
- Confidential information within law enforcement investigatory records.
- Records of probation/parole proceedings.
- Youth services records.
- Mediation communications and Civil Rights Commission proceedings.
- Residential and familial records of law enforcement.
- Intellectual property records and trade secrets.
- Adoption records.
- Records prohibited from release by state and federal law.
- Security and infrastructure records.

Private information such as social security numbers and driver's license numbers may be redacted (blacked out) within a public record.

For a complete list of all exceptions, see O.R.C. §149.43(A)(1)(a-cc).

MAKING A PUBLIC RECORDS REQUEST

- Any person (citizenship not required) may request public records by contacting an appropriate person within the public office.
- Requests may be made in person, by phone, by letter, or by email.
- No special language or format is necessary.
- Requests should be clear and specific enough for the public office to reasonably identify the desired public records.

For a sample records request, see page 18.

RIGHTS AND RESPONSIBILITIES OF A REQUESTER

If you submit a public records request, you:

- Are not required to state your name or the motive behind your request (unless required by a specific statute), nor must you provide a signature to see the records.
- May inspect the records in person or obtain the records on a medium of your choice (e.g. paper, compact disc).
- May request the records be sent to you via mail.
- Are entitled to prompt inspection of the records at a reasonable time during regular business hours; whether the appointment is "prompt" is determined on a case-by-case basis.
- May designate another person to inspect the records for you.
- Must make the request with reasonable clarity and specificity.
- Must pay the actual costs of obtaining the records (e.g. printed pages, disc) but not the cost for the office's time or effort in fulfilling the request.

For the exact text of the Sunshine Laws, visit these websites:

- ▶ Public Records Act:
<http://codes.ohio.gov/orc/149.43>
- ▶ Open Meetings Act:
<http://codes.ohio.gov/orc/121.22>

RIGHTS AND RESPONSIBILITIES OF A PUBLIC OFFICE

In handling records requests, a public office:

- Must maintain records in a manner that can be made available for inspection and copying during regular business hours at no cost.
- Must make available a copy of the records retention schedule.
- Must respond to requests with reasonable speed and without delay, but it is not required to respond immediately.
- Is not obligated to create new records in response to a request or format records in a way most convenient to the requester.
- May require payment for copies of records in advance.
- May limit the number of records requested that the office will physically deliver to ten per month unless the requester certifies in writing the requested record is not for commercial purposes.
- May physically deliver records by United States mail or another delivery service.
- May not destroy, mutilate, or otherwise dispose of records except as provided by law or under the rules of the records

- commissions.
- May not deny a request because it will interrupt office business, unless it unreasonably interferes (e.g. request is so broad that retrieving it would prevent the office from functioning).
 - Must provide an explanation if a request is denied in part (redactions) or in whole (entire documents) and cite the legal authority for doing so.
 - Must explain to the requester why a request cannot be filled if it is overly broad or vague and then attempt to remedy the situation by giving the requester the opportunity to revise his/her initial request.
 - Must ensure that all elected public officials are trained in public records law.

WHAT TO DO IF YOUR REQUEST IS DENIED

If you feel that your request was wrongfully denied, you have the right to:

1. File a complaint with the clerk of the court of claims or the clerk of the court of common pleas of the county where the public office from which the records are requested is located;

OR

2. File a mandamus action in the court of common pleas of the county in which you were denied or the court of appeals for that appellate district or the Ohio Supreme Court.

1. Complaint and Mediation Process:

- Pay a \$25 filing fee to file a complaint with the clerk of the court of claims or court of common pleas.
- After receiving the filing fee, copies of the original records request, and any communications from the public office regarding the public records request, the clerk will assign a "special master" (lawyer who has practiced in Ohio for at least four years and is in good standing) and a case number.
- The complaint will be referred to mediation services unless, "in the interest of justice," the special master determines a report and recommendation can be made without mediation or that it should become a mandamus action.

- If mediation is terminated or the case is not referred to mediation, the public office has ten days to respond to the complaint.
- Based on the complaint and response, the special master will submit a report and recommendation.
- Either party may object to the report and recommendation by filing a written response with the clerk. If neither party objects within seven business days after receiving a copy of the report and recommendation, the court will adopt the report and recommendation and issue a final order.
- If a party objects, the objection may be taken into consideration in the final order.
- If the complainant prevails, she is entitled to receive copies of the public records required to be disclosed in in the court order, as well as, recover the \$25 filing fee and any other costs associated with the action, except attorney's fees.
- A final order may be appealed to the court of appeals. If the court of appeals determines that an appeal by the public office was intended to delay compliance with an order to release public records, the court of appeals may also award reasonable attorney's fees.

2. Mandamus Action

A mandamus action is a lawsuit that asks the court to compel the public office to release records. This lawsuit must be filed within ten years of the original denied request.

If successful, a court may award court costs and reasonable attorney's fees, but not punitive damages. Be aware, that a court may determine the mandamus action is frivolous, and if so, the court may award the public office all court costs, expenses, and reasonable attorney's fees. Courts may also determine an alternative means to a mandamus action should have been used and reduce the amount of fees awarded.

In cases where a public official removes, destroys, mutilates, damages, transfers public records, or threatens to do so, O.R.C. 149.351(B)(2) allows for recovery of up to \$10,000 and reasonable attorney's fees.

Keep in mind that recent court decisions may make it more difficult for requestors to obtain attorney's fees, and frequent records requests could lead to fines.

The State Attorney General provides a useful and thorough guide to Sunshine Laws:

▶ <http://www.ohioattorneygeneral.gov/YellowBook>

Open Meetings Law

DEFINITIONS

A. Public body:

A decision-making body of any state political entity, subdivision, or school district that may include regularly constituted committees and subcommittees.

b. Meeting (must meet all three criteria):

- 1) Is a prearranged discussion (does not have to be in person); AND
- 2) Includes a majority of the members of a public body; AND
- 3) Involves the discussion of public business.

C. Executive session:

A conference that takes place between members of a public body but from which the public is excluded.

DUTIES

Government bodies must:

- Ensure meetings are open to the public. This does not give the public the right to speak at a meeting. If public comment is allowed, it can be restricted for length of time and required to be on topic.
- Establish a reasonable method for notifying the public in advance of meeting dates and times.
- Keep full and accurate minutes of meetings. Minutes are public records that must be made available for inspection.

EXECUTIVE SESSION PROCEDURE

Executive sessions may only be held during an open meeting, and they must begin and end during the meeting. An executive session can only be called when there is a motion (with the specific, permissible topic of the motion stated), a second, and a roll call vote with a majority of the quorum voting in favor. While there is no requirement to keep the minutes of executive sessions, materials from the sessions (e.g. handouts) are public records.

APPROVED EXECUTIVE SESSION MEETING TOPICS

Only these topics may be discussed during an executive session:

- Considerations of appointment, discipline, promotion, and compensation for a public official or investigations or charges against a public official.
- Purchase or sale of property.
- Discussion with the public body's attorneys regarding pending litigation.
- Collective bargaining matters.
- Hospital trade secrets.
- Veterans Service Commission applications.
- Confidential matters under state and federal law.
- Security arrangements and emergency response protocols.

WHAT TO DO IF A MEETING IS IMPROPERLY HELD

Any person can ask for an injunction in the county court of common pleas. An injunction compels the public body to refrain from prohibited behavior, to conduct meetings in accordance with the law, and/or to correct past damage. The injunction must be filed within two years of the violation. In addition, any action taken or legislation enacted by a public body in violation of this section is void. Seek out an attorney if you choose to pursue an injunction.

Important Ohio Supreme Court Decisions

(2006—Present)

The following cases are in reverse chronological order, starting from the most recent.

EMAILS AS OPEN MEETINGS

White v. King, 2016-Ohio-2770

A private citizen filed a lawsuit against the members of the Olentangy Local School District board stating the board members' email discussion about public business was an open meeting. The Ohio Supreme Court held the **Open Meetings Act applies to any prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, over the telephone, by video conference, or electronically by email, text, tweet, or other form of communication.**

PUBLIC OFFICES IN PRIVATE ENTITIES

State ex rel. Schiffbauer v. Banaszak, 142 Ohio St.3d 535, 2015-Ohio-1854, 33 N.E.3d 52

In 2014, a student run media website requested criminal reports of persons who had been referred to Westerville's Mayor's Court from Otterbein University police department. Otterbein University's police department refused to release the records stating that the police department was a private entity because it was a department in a private university. **Although Otterbein University is a private entity, the Ohio Supreme Court determined that Otterbein University's police department is a public office and subject to the Public Records Act.**

CHALLENGE TO EXECUTIVE PRIVILEGE

State ex rel. Plunderbund Media, LLC v. Born, 141 Ohio St.3d 422, 2014-Ohio-3679, 25 N.E.3d 988

In 2013, the **Ohio Democratic Party requested access to Governor John Kasich's weekly schedule, but the Governor's Office denied the request** on the grounds that the itinerary was kept confidential because Kasich has received numerous death threats. In response, Plunderbund Media, LLC brought a mandamus action against the state to compel the release of the records from the Ohio Department of Public Safety of said death threats. **The Ohio Supreme Court held that the records of threats made against the governor are security records, and as such, Plunderbund has no legal right to access the records.**

AVAILABILITY OF METADATA

State ex rel. McCaffrey v. Mahoning County Prosecutor's Office, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877

A criminal defense attorney brought a public records mandamus action against the Mahoning County Prosecutor. **The Ohio Supreme Court held that if a requester does not specifically request copies of the metadata** (data about the data, e.g. document changes or explanations of the specific structure or presentation of the information), **he is not entitled to it** for the documents requested. Additionally, **personal calendars of public officials that deal with work-related activities are subject to public records requests.**

APPLICATION OF FUNCTIONAL EQUIVALENCY TEST

State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Comm'rs, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553

A nonprofit organization brought an action for a writ of mandamus to compel the release of records of the new Transition Executive Committee ("TEC"), which worked with the Cuyahoga County government. **The Ohio Supreme Court applied the functional equivalency test** and held that TEC was not the functional equivalent of a public office. While the body was composed of public officials, the Court held that it was a private body not funded by the government. Additionally, the Court maintained that while the organization made recommendations to a government entity, it

could not force the government to act, and so it was not required to perform any specific function by the government. Therefore, **the Court ruled that the ACLU of Ohio was not entitled to TEC's records.**

BAD FAITH MANDAMUS ACTION

State ex rel. Bardwell v. Cuyahoga County Bd. of Comm'rs, 127 Ohio St. 3d 202, 2010-Ohio-5073, 937 N.E.2d 1274

A private citizen appealed a lower court's decision that not only denied his mandamus action but also imposed \$1,050 Civil Rule 11 sanctions against him. Rule 11 sanctions are intended to punish individuals who intentionally file lawsuits neither grounded in fact nor legal argument, thus constituting "bad faith." While the Ohio Supreme Court admitted that the citizen might have had merit in asserting that there was no indication that he had acted in bad faith, it ultimately ruled that the Court of Appeals had not abused its discretion in imposing the sanctions. Therefore, **the Ohio Supreme Court affirmed the lower court's ruling to impose Rule 11 sanctions against Bardwell for filing the complaint in bad faith.**

EMAILS AND TEXT MESSAGES

State ex rel. Glasgow v. Jones, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686

A private citizen filed a mandamus action seeking all emails, text messages, and other correspondence sent to or from a state representative from both her public and private computer. The Ohio Supreme Court held that the requests were overbroad.

The Court did not address whether email messages from private accounts can be public records, since the state representative conceded they were. Additionally, because the request for text messages was denied because they did not document work matters, **the Supreme Court has yet to determine whether text messages generally can be public records.**

ADOPTION OF FUNCTIONAL EQUIVALENCY TEST

State ex rel. Oriana House, Inc. v. Montgomery, 110 Ohio St.3d 456, 2006- Ohio-4854, 854 N.E.2d 193

The state auditor conducted a special audit and sought the records

of Oriana House, a private entity that controlled the daily operations of the public Summit County Community-Based Correctional Facility. **The Ohio Supreme Court formally adopted the functional equivalency test** and held that Oriana House did not qualify as a public office. While it met two of the factors of the test (performing a government function and primarily being funded by public money), it did not meet the other two factors (having its daily functions controlled by the government and being established by the government). Thus, the state auditor could not show by clear and convincing evidence that Oriana House was the functional equivalent of a public office and was therefore not entitled to its records.

ESTABLISHMENT OF EXECUTIVE PRIVILEGE

State ex rel. Dann v. Taft, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472

The Ohio Supreme Court decided that the governor has a qualified executive privilege that generally protects communications to or from the governor when the communications are for the purpose of making gubernatorial policy and decisions. If the person requesting the information can show a specific need for the protected records and that the need for information is more important than keeping the decision confidential, then the information can be made public.

The Activist's How-To Guide

WHAT TO DO BEFORE WRITING YOUR REQUEST

- 1) Determine the recipient of your public records request:
 - Think of which government agency has the information you are requesting.
 - Look up the phone number and ask for the name of the person who handles the public records requests.
 - If you send a request to a director of a government agency, be sure to carbon copy administrative staff to ensure receipt of your records request.
- 2) How to get the information that you want:
 - Have a clear goal for what you want to do with the information. A clear goal means that you are more likely to have a targeted records request that only includes information you need. You do not want to be buried in unnecessary documents because your request was too broad.
 - You do not have to disclose to the public office why you want the records.
 - Be specific, but not overly so.
 - Ask for smaller amounts of information at a time. You can always make another request at a later date.
- 3) Make your request in writing so that both parties can be sure of what information is being requested. You are entitled to make a records request by phone or in person, but having it in writing may help avoid problems later.
- 4) Send the request by mail, fax, or email.
 - Feel free to call the office and ask which manner would be easiest to process, but don't feel obligated to do this.
 - You may send your request by certified mail, a method that will alert you when the public office receives your request.
- 5) Be courteous to the office from which you are requesting information:
 - Write down the names of the people with whom you interact. You can directly contact these people for updates.
 - Establishing a healthy professional relationship with public records officers is important. These individuals can be allies in helping you obtain the information you desire.

- Be reasonable about the time frame and amount of work your request will require. Setting reasonable expectations can aid in quickly and thoroughly processing your request.
- 6) Be proactive!
- Within one week of sending your request, confirm that the public office has received it.
 - Within two weeks, confirm that the public office is processing your request. Ask if you will be charged and what the fee may be. If desired, ask for a date by which you should receive a response.
- 7) If you didn't receive a response or your request was denied, you have a couple of options.
- Be aware that courts have not yet determined a reasonable time limit for a records request in terms of number of days. The Office of the Attorney General offers a mediation program where a professional mediator will act as the moderator between the public office and the requester. Either party can request the mediation. For more information, visit:
<http://www.ohioattorneygeneral.gov/About-AG/Service-Divisions/Constitutional-Offices/Public-Records-Mediation-Program>.
 - If you are confident that the information you are requesting is indeed a public record and either the public office has denied your request with explanation or it has ignored multiple inquiries for an update, then you have the option to file a complaint with clerk of the court of claims or file a writ of mandamus. If you choose to pursue a mandamus action, it must be filed within 10 years of the cause of action.

WHAT TO INCLUDE IN YOUR REQUEST

The following public records request has been annotated to demonstrate why each piece of the letter is important to include. See page 20 for a sample letter.

March 1, 2013

Include the date so you are certain of when you sent the request.

Sheriff John Smith
Maple County Sheriff's Office
100 Maple Street
Maple, Ohio 12345

RE: Public Records Request

It is not necessary in Ohio to cite this law, but it does not hurt to show the public office that you are well aware of your rights.

Dear Sheriff Smith:

Pursuant to Ohio's open record laws, Revised Code § 149.43(B), the following is a formal request for public records in the possession of the Maple County Sheriff's Office. We hereby request copies of the following:

- The jail roster or other document showing the names, length of stay, and/or charges facing persons in Maple County Jail between January 1, 2012 and February 1, 2012.

Specific information and specific time frame

For purposes of this request, "records" means any and all writings, documents, correspondence, papers, text files, computer files, emails, annals, archives, records, journals, logs, notes, and/or minutes.

Remember that a number of different types of items can be classified as "records."

Please send the requested records to American Civil Liberties Union of Ohio, c/o Jane Doe, Research Assistant, Max Wohl Civil Liberties Center, 4506 Chester Avenue, Cleveland, Ohio 44103, within fourteen days of the receipt of this letter.

Don't be afraid to give the public office a reasonable deadline for a response.

We look forward to receiving copies of these documents via United States mail, and we understand that we are responsible for the copying and mail costs. Nonetheless, please contact us prior to complying with this public records request to inform us of the anticipated costs.

Important so that you are not surprised by a huge bill.

If there are any questions related to this request, please contact me, Jane Doe, via email at jane.doe@acluohio.org or via telephone at 123.456.7890.

Include your contact information in case the office needs to contact you. If your request is overly broad, the duty of the public office is to work with you to narrow the request.

Thank you in advance for your assistance.

Be courteous!

Sincerely,

Leave four blank lines between the closing and your typed name so you can add your signature here in pen.

Jane Doe

cc: Name1 _____
Name2
Name3

If you send your request to multiple people, it is customary to list the "carbon copies" of the recipients.

SAMPLE RECORDS REQUEST LETTER

March 1, 2013

Mr. John Smith
Ohio Department of Education
25 South Front Street
Columbus, Ohio 43215

RE: Request to Inspect Records

Dear Mr. Smith,

Pursuant to Ohio's open records law, Revised Code § 149.43(B), the following is a formal request to inspect public records in the possession of the Ohio Department of Education. I hereby request to inspect copies of the following:

- The minutes from the Maple County School Board meeting, which took place on February 1, 2013.

Please make those records available by Monday, April 1, 2013.

For the purposes of this request, "records" means any and all writings, documents, correspondence, papers, text files, computer files, emails, annals, archives, records, journals, logs, notes, and/or minutes.

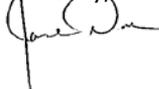
Unless you advise me to come at a different time or on a different date, I will be at your office to inspect the records at 10:00 a.m. on Monday, April 1, 2013.

If you deny any part of this request, please provide your reason in writing along with the legal authority that supports your assessment.

If there are any questions related to this request, please contact me, Jane Doe, via email at jane.doe@acluohio.org or telephone at 123.456.7890.

Thank you in advance for your assistance.

Sincerely,



Jane Doe

USEFUL RESOURCES

Ohio Sunshine Laws apply only to the records and meetings of state and local bodies. Other laws, such as the Freedom of Information Act, regulate federal records.

For the exact text of the Sunshine Laws, the State of Ohio provides an online version of its Revised Code.

- ▶ Public Records Act: <http://codes.ohio.gov/orc/149.43>
- ▶ Open Meetings Act: <http://codes.ohio.gov/orc/121.22>

The Ohio Attorney General's office provides a useful and thorough guide to Sunshine Laws:

- ▶ <http://www.ohioattorneygeneral.gov/YellowBook>
- ▶ Additionally, the office holds several in person and online training sessions on Sunshine Laws throughout the year all over Ohio.
- ▶ Training is open to elected officials and the public.
- ▶ Visit the website to find and register for a training session: <http://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws/Sunshine-Law-Training>

Ohio Coalition for Open Government

- ▶ <http://ohioopengov.com/>
- ▶ Requires a paid membership
- ▶ Includes a hotline to Baker and Hostetler law office for public records request assistance

The US Department of Justice provides an online guide to the Freedom of Information Act:

- ▶ <http://www.usdoj.gov/oip/index.html>

Please note: The material provided here is for basic informational purposes only. It is not meant to be, nor should it be taken as, legal advice. You should not rely on this information instead of seeking the advice of an attorney. The legal issues surrounding civil rights and civil liberties are complex, and a person's rights may vary from case to case depending on subtle details. Only a lawyer who has taken the time to become fully aware of the facts in a given case can provide you with sound legal advice.

If you feel your rights have been violated, contact an attorney at once. The law imposes time limits on most actions to vindicate your rights, so it is important to act quickly. If you do not know how to reach an attorney, call the lawyer referral service of your local bar association. They will be able to direct you to a lawyer experienced in the type of law involved in your case.



ACLU of Ohio Foundation
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