



# Dave Yost • Auditor of State

Bulletin 2011-006

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## Auditor of State Bulletin

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**Date Issued:** October 21, 2011

**TO:** To All Public Offices and Independent Public Accountants

**FROM:** Dave Yost, Ohio Auditor of State

**SUBJECT:** Best Practices for Responding to Public Records Requests – Updated

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### I. Public Records

#### A. A Hope, a Goal, a Right

The concept of “public records” and access of the people to those records has a rich history in the United States. The Founding Fathers, under English Common Law, knew well the pitfalls and inequities of a government where the records were the property of only an elite few and access to those records was, at best, guarded. In creating this Nation, the Founding Fathers carved out many new democratic rights for citizens. Key among these rights is the ability to participate in government, and the previously unheard-of-right to inspect government records and observe government deliberations. Transparency, after all, makes a more accountable government. Although now firmly secured for Ohio citizens as a “right” by virtue of the Ohio Public Records Act (the “Act”), all public servants have a legal responsibility to ensure that both the letter and spirit of the Act are upheld.

#### B. What does the Ohio Public Records Act require?<sup>i</sup>

Ohio law requires that a public office make public records available for inspection or copying, depending on the request. The time required for a response depends on the type of request.

- (1) If a request is to inspect public records – response must be prompt.
- (2) If copies are requested – those copies must be provided within a reasonable period of time.

As is often noted, the terms “promptly” and “reasonable period of time” are not defined by a specific period of time. Rather, these terms have been interpreted by courts to mean “without delay” and “with reasonable speed,<sup>ii</sup>” and the ultimate determination of “reasonableness” will differ in each case depending on the particular facts and circumstances of a request.<sup>iii</sup> Additionally, courts have held that a “prompt” or “reasonable period of time” includes the time for a public office to (1) identify the responsive records; (2) locate and retrieve records from place of storage; (3) review, analyze and make necessary redactions (or legal review); (4) prepare the requests; and (5) provide for delivery.

Not all documents and information kept by a public office is subject to disclosure under the Act. In these instances, it may be necessary to withhold records or redact the relevant information from the response. When redacting information from a request, the public office is required to notify the requester of any redaction or make the redaction plainly visible.<sup>iv</sup> Additionally, where the request is denied, in whole or in part, including redactions, the public office must provide the requester with a reason, including the legal authority for the denial/redaction.<sup>v</sup>

### **C. Penalties**

What happens when there has been a violation of the Act? A warning? An administrative investigation? No - neither of these items are provided for in the Act. Instead, the Act gives an “aggrieved party” the right to sue in court for the records. There is no other body that alerts a public office that an allegation of noncompliance exists or that litigation may be forthcoming. Therefore, a public office often becomes aware of an allegation of noncompliance through service of a lawsuit.

Penalties provided for in the Act can also be quite severe, depending on the nature of the noncompliance. The penalties can range from a court order to force compliance (a mandamus action) to the awarding of statutory damages, attorneys fees and court costs. In addition, if records are not properly retained in accordance with an approved record retention schedule, a public office may be fined up to \$1,000 per record. Prior to a recent law change, the amount a public office could be fined was not capped. For instance, one court fined a city approximately \$861,000 for improper destruction of public records.

Members of the Ohio General Assembly capped a public office’s liability for improper destruction of public records in Ohio’s recently-passed operating budget legislation – Am. Sub. House Bill 153 of the 129<sup>th</sup> General Assembly. This new cap limits a public office’s liability to a cumulative total of \$10,000, regardless of the number of violations. It also limits attorney’s fees to an amount not to exceed the total penalty. According to the Ohio Secretary of State’s office, these changes became law on September 29, 2011.

The Ohio Supreme Court also recently clarified who may bring a lawsuit under the Act as an “aggrieved party” for improper destruction of public records.<sup>vi</sup> In the Court’s opinion, Justice McGee Brown writes:

“The requirement of aggrievement indicates that a forfeiture is not available to ‘any person’ who has made a request and discovered that the records were not available due to the public office’s violation of R.C. 149.351; it is available *only* to a person who made a request with the goal being to access the public records. If the goal is to seek a forfeiture, then the requester is not aggrieved. The presumption, however, is that a request for public records is made in order to access the records.” *Emphasis added.*<sup>vii</sup>

So, if a public office is able to establish that the requester does not actually want records being requested and instead only wants the request to be denied, then a court may conclude that the requester was not aggrieved by destruction of public records. The burden of proof, however, is on the public office to demonstrate this intent, and the risk of litigation is still high.

## **II. Best Practices for Compliance with the Act**

Access to public records is a right that underlies the fundamental principles of democracy. A citizen's right to know how government operates is a right that needs to be protected and preserved.

Ohio public records laws are sometimes confusing, and responding to a request can be burdensome on an already burdened public office. Noncompliance with the laws, however, will be costly to taxpayers.

The Auditor of State's recommendations for best practices are not intended to add to the responsibilities of your office or to place additional burdens on you or your staff. Rather, we hope our recommendations will help a public office streamline its response process and insulate itself from liability in the event of litigation.

In reviewing the requirements of the Act, discussing the practical problems of compliance with local government officials, and also examining the multitude of new public records litigation, it has become clear that additional documentation, organization and early detection would prove beneficial to both the public office and a potential records requester.

### **A. Public Records Log**

In seeking to achieve these goals, we recommend that each public office keep a log of all public records requests not fulfilled at the time they are made. Ideally, this log would include the following components:

- Date of request;
- Name of person or entity making the request (if provided);
- Type of records requested;
- Date of release;
- Legal authority for any redactions/withholdings; and
- Name of person fulfilling the request.

The attachment to this bulletin provides a sample of a public records log similar to one utilized in the Auditor of State's Office and other Ohio public offices. A log, however, may be in any form, *e.g.* a log book, a spreadsheet, or files maintained together.

It is important to note that the maintenance of such a log is not a legal requirement. Rather, it is a recommended best practice that is designed to help public entities ensure compliance with the Act.

The goal of this recommendation is not to create additional work for the public office. Instead, it is the Auditor's hope that, by maintaining all information in a central location, the response process will be streamlined, and the risk of litigation and, ultimately, liability lessened.

### **B. Copies of Public Records Requests**

Another recommended best practice is to make copies of responses to public records requests that include redactions so you know what you have provided. These copies should be kept in accordance with your records retention schedule.

### **C. Other Best Practices**

Other best practices recommended include the following:

- Training employees on how to handle public records requests;
- Assigning a central point of contact for your office or each division/section;
- If a request is in writing, date stamp when you receive the request;
- Notifying legal counsel when a request is received and redactions may be required;
- Acknowledging receipt of a request that requires legal review and possible redactions, include guidance on when you anticipate responding;
- Documenting when you respond to a request; and
- Addressing how long you will maintain copies of public records requests in your records retention schedule.

## **III. Putting the Recommendations for Best Practices to Work**

### **A. What Does this Mean for a Public Office?**

Many public offices record public records requests in some form. Additionally, many public offices have a record of what was released, the date it was released, and what, if any, redactions were made. The Auditor's recommendations for best practice simply suggest keeping all of that information in one central location.

Whether the entity's public records requests are filled by one employee or fielded by multiple staff members, the Auditor's recommendations for best practices will help ensure compliance and accuracy. Relevant employees will be able to identify duplicate or similar requests and be more efficient in the filling, redaction and response.

Finally, the Auditor's recommendations will help a public office protect itself from liability in the event of litigation. The recommended public records log would serve to demonstrate the specifics of compliance in each instance.

### **B. Examples**

*Q. I am a county auditor fulfilling a request for a copy of a map. I am providing a copy at the time the request is made and I am not making any redactions? Am I required to log this request and keep a copy?*

- In this case, a copy of the map was immediately provided to the requestor so the Auditor's recommendation for maintaining a log would not apply. In addition, there were no required redactions so the Auditor's recommendation for keeping copies of the response would not apply.

*Q. I am a county recorder – am I required to log all requests for copies of title records maintained by my office? My office makes these records available for inspection and copying in a public area of my office. Therefore, I fulfill these requests at the time they are requested.*

- Same as above – in this case, these records are made readily available to the public. In addition, copies are immediately provided to the requestor so the Auditor's recommendation for maintaining a log would not apply.

*Q. I am a school district treasurer for a very large school district – does the Auditor’s recommended best practices require that my school hire an additional employee to handle all public records requests and maintain the log?*

- No. Each public office handles its responsibilities under the Act a little bit differently. Some entities do employ a separate public records officer to coordinate and respond to all public records requests. Other entities have several employees, often one in each department/division, that respond to public records requests. Typically, these employees are not employed solely to respond to public records requests. Rather, this is one of several duties that the employee may have. The decision of how to utilize staff and resources is, ultimately, a management decision to be made by each entity. Utilization of the public records log will work in any environment.
- In this case, the school may want to assign a point of contact in each building to handle public records requests.

*Q. I run a city building department. Do I need to log requests for applications for a permit and information submitted as part of that application? Do I need to log when I issue a permit?*

- No. Requests for applications and issuances of permits are outside of the scope of logging recommendations.
- Public offices, however, may want to log requests for copies of permits if copies are not immediately provided to the requestor.

*Q. What if I decide not to implement the Auditor’s recommended best practices? Will the public office I represent be cited for noncompliance in an audit report?*

- No. The Auditor’s recommendations for best practice are not a legal requirement. Rather, they are suggestions to help a public office comply with the Act and limit risk. If a public office, however, lacks controls for compliance with public records requests; this may be noted in an audit report or management letter.

### **C. Court Records**

Ohio courts are subject to the Rules of Superintendence for the Courts of Ohio, adopted by the Supreme Court of Ohio. The Rules of Superintendence establish rights and duties regarding court case documents and certain administrative documents, starting with the statement that “[c]ourt records are presumed open to public access.” Sup. R. 45(A). While similar to the Act, the Rules of Superintendence contain additional or different provisions for these records. As such, this bulletin does not apply to courts. The Rules of Superintendence are available at the link below.

<http://www.sconet.state.oh.us/LegalResources/Rules/superintendence/Superintendence.pdf>.

## **IV. Putting it All Together**

### **A. Open Government or Public Records Hotline—888.877.7760**

In seeking additional ways to aid local governments in compliance, the Auditor has established an Open Government or Public Records Hotline. This hotline is a separate telephone number that links directly to the Auditor’s Open Government Unit. The hotline is available to receive complaints from any person that feels he/she has been aggrieved under the Act.

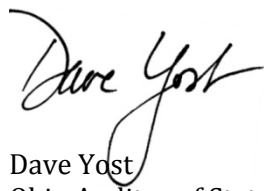
After receiving a complaint, the Auditor will notify the relevant public office that a complaint has been filed. In addition, staff in the Auditor’s Open Government Unit may forward the complaint to audit staff for review during an entity’s next regular audit. At that point, staff in our Open Government Unit’s involvement is complete. Once notified, the public office has the ability to

address the complaint. The goal of the hotline is to provide the public office with notice and the opportunity to correct any noncompliance before the onset of litigation. While we are not able to provide legal advice, we will also direct public officials to available resources to answer any questions they may have about compliance with the Act.

## **B. Audits**

During the 2012 annual financial or bi-annual financial audit, the Auditor's staff, in a sample of public offices, will analyze a public office's process and procedures to determine if the office has controls to ensure compliance with the Act. Using a log is an example of one of these controls. This inquiry and any additional analysis will aid the Auditor's staff in analyzing any risks facing the public entity and in making recommendations to improve controls in an effort to reduce risks.

We hope these recommendations for best practices will help public offices navigate the requirements of the Act, minimize risk, and, ultimately, provide for more efficiency. Should you have any questions about these best practices, please do not hesitate to contact us at 800-282-0370.



Dave Yost  
Ohio Auditor of State

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<sup>i</sup> This is a general overview of Act and its requirements. For a more complete look at Ohio Public Records Law, including the rights, duties and protections provided, please consult the Ohio Sunshine Manual located at [http://www.auditor.state.oh.us/services/opengov/resources/2011-3-15\\_SunshineLawsManual\\_CO.pdf](http://www.auditor.state.oh.us/services/opengov/resources/2011-3-15_SunshineLawsManual_CO.pdf)

<sup>ii</sup> *State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, at ¶16; *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, at ¶37; see also, *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50,53, 1998-Ohio-444.

<sup>iii</sup> *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2010-Ohio-1901 ("Given the broad scope of the records requested, the governor's office's decision to review the records before producing them, to determine whether to redact exempt matter, was not unreasonable."); *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, at ¶44 (delay due to "breadth of the requests and the concerns over the employees' constitutional right of privacy" was not unreasonable); *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311; *State ex rel. Stricker v. Cline* (5th Dist.), 2010-Ohio-3592 (provision of records within nine business days was a reasonable period of time to respond to a records request.); *State ex rel. Holloman v. Collins* (10th Dist.), 2010-Ohio-3034 (Assessing whether there has been a violation of the public records act, the critical time frame is not the number of days between when respondent received the public records request and when relator filed his action. Rather, the relevant time frame is the number of days it took for respondent to properly respond to the relator's public records request.).

<sup>iv</sup> R.C. 149.43(B)(1).

<sup>v</sup> R.C. 149.43(B)(3).

<sup>vi</sup> See *Rhodes v. New Philadelphia*, Slip Opinion No. 2011-Ohio-3279 (2011).

<sup>vii</sup> *Id.*

