



COUNTY ADVISORY BULLETIN

CAB

Published by: County Commissioners Association of Ohio

209 East State Street • Columbus, Ohio 43215-4309

Phone: 614-221-5627 • Fax: 614-221-6986 • www.ccao.org

Bulletin 2016-09

October, 2016

PUBLIC RECORDS DISPUTE MEDIATION

APPLICABLE LEGISLATION: Sub. SB 321 (131st General Assembly)

REVISED CODE SECTIONS: Amends ORC 149.43, 149.433, 2323.52, 2743.03, 2746.04, and 3333.0412. Enacts ORC Section 2743.75.

LEAD SPONSOR: Senator Keith Faber

SENATE COSPONSORS: Burke, Eklund, Jordan, LaRose, Peterson, Seitz, Obhof, Skindell, Bacon, Balderson, Beagle, Brown, Coley, Gardner, Hackett, Hite, Hottinger, Hughes, Jones, Lehner, Manning, Oelslager, Patton, Sawyer, Schiavoni, Thomas, Uecker, Yuko, Tavares, Williams

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EFFECTIVE DATE: September 28, 2016

BULLETIN SUMMARY

On September 28, 2016, a new public records mediation law became effective which provides members of the public a faster and more affordable way of settling public records disputes with government entities. This new law establishes a process to hear complaints alleging a denial of access to public records within the Ohio Court of Claims in Columbus. Prior to this law taking effect, the only recourse a person who was denied a public records request was to sue the government entity for a mandamus action in court. This option is often expensive and costly for both the requester and government entity.

Another important change as a result of SB 321 is the ability of a government entity that provides free public records on their website to limit the number of digital public records

it will provided to a requester of up to ten per month if these records are available on the website. The requester must certify that they will not forward the requests for commercial purposes.

Additionally, SB 321 would do the following:

1. Updates the issuance of court costs that a court must award to a person who files a mandamus action for a public record dispute should the public entity responsible for the records acted in bad faith. In this situation, the court may also award attorney fees as well.
2. Expands the exemption of releasing infrastructure records under the Public Records Law to private entities' infrastructure records that are being kept by a public entity.
3. Shields certain private, nonprofit institutions of higher education from any claims that come from them disclosing information in response to a public records request. This would also shield these institutions from breach of confidentiality claims.

This County Advisory Bulletin (CAB) will summarize the permanent changes to the public records laws. For a copy of the new act, please go to the following website: <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA131-SB-321>.

BACKGROUND

General Public Records Requirements of Public Offices

Ohio's Public Records Law is primarily established in [ORC Section 149.43](#). The law requires every public office to maintain its records in accordance with statutory requirements or record retention schedules. For counties, record retention schedules are approved by the county records commission. Records cannot be removed, transferred or destroyed unless approved by the county records commission. For more information, please see *CCAO County Commissioners Handbook* [Chapter 128 - Public Records and Records Commissions](#).

It is also important that ORC Section 149.43 defines a "public record" and specifies which public records are exempt from being released. If no express exemption applies, then the law presumes access to the public. The concept of confidentiality of public records is a complex legal issue and, when in doubt, counsel should always be consulted. Generally, confidentiality means that disclosure of information is limited.

The Public Records Law is interpreted to provide broad public access to public records. The law imposes two primary obligations upon public offices, which are public rights:

1. To provide prompt inspection of public records.
2. To provide copies of public records within a reasonable period of time.

The requester need not identify themselves or a purpose for the public record. The public office cannot require a written request. Cost of copying is limited to the copy itself, excluding any labor cost.

What are Public Records?

Under Ohio Law, [ORC Section 149.011 \(G\)](#) defines public records as:

"Records includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section [1306.01](#) of the Revised Code, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the office."

Additionally, Ohio law and court rulings, have further defined a record as any item kept by a public office that meets all of the following:

1. Is stored on a fixed medium (such as paper, electronic – including but not limited to - e-mail and other formats).
2. Is created or received by or sent by a public office.
3. Documents the organization, functions, policies, decisions, procedures, operations or other activities of the office.

This definition of records is broad enough to include most items and documents maintained by public offices. If any one of these three requirements is absent, the item is not a "record" and therefore not a public record. A good source of reference on public records and open meetings is the [Ohio Sunshine Law Manual](#) produced by the Ohio Attorney General's Office and available online.

Public Records Request and Denials

The Public Records Law is interpreted to provide broad public access to public records. Public offices must provide prompt inspection of public records to any person, as well as provide copies of public records within a reasonable period of time. However, many issues may arise when a public records request is made upon a public office.

The person responsible for the public records may face the following issues regarding public record requests: identification, format, medium, response time, copies, mail requests and requests made by incarcerated persons. For more information regarding these issues, please see CCAO County Commissioners Handbook [Chapter 128 - Public Records and Records Commissions](#).

Any person is allowed to make a public records request to a public office. The requester does not need to be an individual - it could be a corporation, government agency or some other body - nor does the requester need to live in Ohio or the United States.¹ The requester can make this request by phone, email, letter or in person. Public offices are

¹ R.C. 1.59(C); 1990 Ohio Attorney General Opinion No. 50

not permitted to require the requester to identify themselves or require the requester to indicate why they are requesting the records. However, it is permitted to ask the requester for this information only after the requester has been notified of all of the following:²

1. Disclosure to the requester that a written request is not mandatory.
2. Disclosure to the requester that the requester may decline to reveal the requester's identity or intended use.
3. Determination by the public office that a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability to identify, locate or deliver the public records sought by the requester.

After notifying the requester of their rights, it is recommended the person responsible for the public records have a discussion with requester about the purpose of the public records request. A dialog with the requester assists the public office in locating and producing the desired records. Hopefully this will lead to the request being fulfilled and not denied. Again, a good source of reference on public records is the [Ohio Sunshine Law Manual](#) produced by the Ohio Attorney General's Office as well as the Ohio Court of Claims [Public Records FAQ](#).

Should a request be denied, in part or in its entirety, the public office must provide the requester with an explanation, with the legal authority, for the request being denied. If the requester made their request in writing, the explanation for the denial must also be in writing.³

Many times a request is denied because it is ambiguous or overly broad. Should a request be denied because it was too broad, the law requires the public office to permit the requester an opportunity to revise their request by informing them of the manner in which records are maintained by the public office.⁴ Through this process, the law promotes cooperation to clarify and narrow requests to help the requester craft a revised records request.

Public offices are encouraged to work with the requester to find a solution to a public records request. The requester is not required to provide a lot of information, but the office should ask regardless. Forming a dialog with the requester is helpful in resolving many public records disputes.

Ideally, the public office should accommodate the requester with as many records as identifiable and reasonable, even when rejecting part of a request. The public office should document its response in the event of subsequent litigation.

Given the potential penalties a county may encounter should a public record request be improperly denied, the county prosecutor should be consulted when any public record request raises concerns.

² R.C. 149.43 (B)(5)

³ R.C. 149.43 (B)(3)

⁴ R.C. 149.43 (B)(2)

SYNOPSIS

Public Record Disputes

Senate President Keith Faber sponsored SB 321 to provide Ohioans with a faster, more affordable method of settling public records disputes. Previously, the only finite method of resolving public records disputes was for the requester to file a mandamus lawsuit against the public office. Mandamus actions can be filed in the court of common pleas, the court of appeals, or the Supreme Court of Ohio. Many times this is an extremely long and expensive process. The requester would need to hire an attorney, and the public office would need to spend its limited public resources to defend itself. Should the public office lose the case, the court may require the office to pay a civil penalty and attorney fees.

More recently, the offices of the Ohio Attorney General and Ohio Auditor of State created internal public records mediation programs to help the disputing parties resolve public records disputes prior to a mandamus lawsuit being filed. These programs were helpful, but had limitations. In particular, either side of the dispute could stop the process by not agreeing to the mediation. The Attorney General's program could only provide mediation dealing with public records disputes with local governments, but not with state government.

The new law now permits a requester who has been denied public records to file a traditional mandamus action or file an "Action in the Ohio Court of Claims" in the form of a formal complaint. The new process sets up required mediation through the Ohio Court of Claims. The requester has to choose one option or the other, but not both.⁵

Action in the Ohio Court of Claims

Besides a court that would hear a mandamus action, the Ohio Court of Claims now becomes the exclusive court in Ohio with jurisdiction to resolve public records disputes. The clerk of the Ohio Court of Claims will designate at least one or more attorneys to serve as special masters to hear public records complaints.⁶

Filing a complaint in the Ohio Court of Claims

A requester who chooses to file a complaint with the Ohio Court of Claims must file the complaint on a form prescribed by the clerk of the Ohio Court of Claims, with:

1. The clerk of the Ohio Court of Claims, or
2. The clerk of courts of the common pleas court of the county in which the public office from which the records are requested is located.

The county clerk of courts will then forward the complaint to the clerk of Ohio Court of Claims within three days, as well as provide a copy of the complaint to the public office from which the records are requested.

⁵ R.C. 149.43 (C)(1)

⁶ R.C. 2743.75(A)

You can access the Ohio Court of Claims' Public Records Access Formal Complaint Form at the following website: <https://ohiocourtofclaims.gov/pdf/forms/public-records-complaint-form.pdf>.

The requester must attach copies of the original records request, if any, and any written correspondence from the public office or person responsible for public records. The requestor also must pay a \$25 filing fee.

All filing fees that are collected by a county clerk of courts of the common pleas court are to be deposit into the county general revenue fund.⁷ All filing fees collected by the clerk of the Ohio Court of Claims are to be kept by the Ohio Court of Claims to implement this new program. The new law also requires the clerk of the Ohio Court of Claims to prepare a report that details all the fees collected during the preceding calendar year by this program.⁸

Once the complaint is filed, the clerk must serve a copy of the complaint to the public office or person responsible for the public records. The clerk of the Ohio Court of Claims must then assign a case number for the action and a special master to examine the complaint. The special master may recommend dismissal of the complaint, or the Ohio Court of Claims, on its own motion, may dismiss the complaint at any time. The requester also may voluntarily dismiss the complaint.⁹

Special Master and Mediation Process

Unless the Special Master finds that the matter is too urgent, the Special Master will refer the case to mandatory mediation. In rare cases, the special master or the Ohio Court of Claims could determine that the complaint involves an issue of substantial public interest. In such a matter, the court will dismiss the complaint without prejudice and direct the requester to file a mandamus action.¹⁰ However, the main intent of the new law is to settle public records disputes through the mediation process.

The mediation services are setup through the Ohio Court of Claims. The mediation may be conducted by teleconference or any other electronic means available. If an agreement is reached by the parties through mediation, the court must dismiss the complaint. Should no agreement be reached, the special master then must notify the court that the mediation process has ended and the case was not resolved.¹¹

After the mediation has ended, the public office must file within ten business days either an answer or a motion to dismiss the complaint with the clerk of the Ohio Court of Claims. The public office must also transmit copies of the pleadings to the requester. No further motions or pleadings will be accepted unless the special master directs in writing that a further motion or pleading be filed.¹² The special master is then required to submit a report and recommendation to the Ohio Court of Claims.

⁷ R.C. 2743.75(I)(1)

⁸ R.C. 2743.75(I)(2)

⁹ R.C. 2743.75(D)

¹⁰ R.C. 2743.75(C)(2)

¹¹ R.C. 2743.75(E)(1)

¹² R.C. 2743.75(E)(2)

Special Master's Report and Recommendation

Prior to the special master's report and recommendation being submitted to the Ohio Court of Claims, all the following apply:¹³

1. The special master cannot permit any discovery.
2. The parties may attach supporting affidavits to their respective pleadings.
3. The special master may require either or both of the parties to submit additional information or documentation supported by affidavits.

Not later than seven business days after receiving the public office's response, or motion to dismiss the complaint, the special master must submit to the Ohio Court of Claims a report and recommendation based on the ordinary application of statutory and case law as they existed at the time of the filing of the complaint. If needed, the special master may extend the seven-day period by an additional seven business days.¹⁴

Once the special master's report is submitted, the clerk of the Ohio Court of Claims must send copies of the report to each party by certified mail, return receipt requested, not later than three business days. Each party may object to the report, but must file a written objection with the clerk within seven business days after receiving the report. Each objection filed must specify and state all reasons for the objection. Whoever objects must also send an additional copy of their written objection to the other party by certified mail, return receipt requested. The other party then has seven business days to file a response with court.¹⁵

The court then within seven business days after the response to the objection is filed, must issue a final order to determine if access to public records were denied. The final order that the court adopts may modify or reject the special master's report and recommendation. If neither party timely objects, the Ohio Court of Claims must also issue a final order. Each party has an opportunity to appeal the court's final order within seven business days to the court of appeals where the public office is located.¹⁶

Determination of Denial of Access to Public Records

If after the mediation process, the Ohio Court of Claims determines that the public office or person responsible for the public records denied the requester access, and if no appeal from the court's final order is taken, both of the following apply:¹⁷

1. The public office must permit the requester to inspect or receive copies of the public records.
2. The requester is entitled to recover from the public office or the person responsible the \$25 filing fee, and any other costs that the requester incurred, but

¹³ R.C. 2743.75(E)(3)

¹⁴ R.C. 2743.75(F)(1)

¹⁵ R.C. 2743.75(F)(2)

¹⁶ R.C. 2743.75(F)(2)

¹⁷ R.C. 2743.75(F)(3)

the requester is not entitled to recover attorney's fees, unless certain circumstances regarding an appeal apply.

Appeal from a Final Order

Each party has the ability to appeal a final order issued by the Ohio Court of Claims, similar to how each party can also appeal a complaint that was dismissed by the Ohio Court of Claims. The appeal must be heard in the court of appeals of the appellate district where the public record dispute took place. In order to appeal a final order of the Ohio Court of Claims that adopts the special master's report, a timely objection to the report has to be filed.

In cases which the Ohio Court of Claims modified the special master's report, either party can appeal to the court of appeals, but the appeal must be limited to the issue that was modified. Appeals initiated from the mediation process must be given precedence over other pending matters as to ensure a prompt decision.¹⁸

Court of Appeals May Award Attorney's Fees

Should the court of appeals determine that the public office filed the appeal with the intent to either delay compliance with the final order for no reasonable cause, or to harass the requester, the court of appeals may award reasonable attorney's fees to the requester. These attorney's fees are similar to the updated fees awarded to a requester who filed a mandamus lawsuit instead of the mediation process.¹⁹

All of the following apply to any award of reasonable attorney's fees:²⁰

1. The fees must be construed as remedial and not punitive.
2. The fees awarded cannot exceed the total of the reasonable attorney's fees incurred before the public record was made available to the requester.
3. Reasonable attorney's fees must include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees.

For a mandamus lawsuit appeal, the court may reduce the fees awarded if it determines that the records dispute should have been pursued in the Ohio Court of Claims to more effectively and efficiently resolve the dispute.

The new law also prohibits a court from awarding attorney's fees to the requester if the court determines both of the following:²¹

1. That a well-informed public office reasonably would believe that the conduct or threatened conduct of the public office did not constitute a failure to comply with the Public Records Law. This determination must be based on the ordinary

¹⁸ R.C. 2743.75(G)(1)

¹⁹ R.C. 149.43 (C)

²⁰ R.C. 149.43 (C)(4)

²¹ R.C. 149.43 (C)(3)(c)

application of statutory and case law as it existed at the time of the conduct or threatened conduct of the public office that allegedly constitutes a failure to comply the Public Records Law and that was the basis of the mandamus action.

2. That a well-informed public office would believe that the conduct or threatened conduct of the public office would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

Previously, the law permitted the court to award attorney's fees in its discretion.

Should the court not issue a writ of mandamus for a public records dispute, and the court determines mandamus lawsuit was frivolous, the court may award to the public office all court costs, expenses, and reasonable attorney's fees, as determined by the court.²²

Given the potential penalties a county may encounter should a public record request be improperly denied, the county prosecutor should always be consulted prior to denying any public records.

Public Records Accessible on Website

Previously under the Public Records Act, a public office can limit the number of records requested by a person that the office has to mail to the requester to ten per month, unless the requester certifies to the office that they do not intend to use or forward the requested records, or the information contained in them, for commercial purposes.²³

Commercial purposes are to be narrowly interpreted and do not include:

1. Reporting or gathering news.
2. Reporting or gathering information to assist citizen oversight.
3. Understanding of the operation or activities of government.
4. Nonprofit educational research.

The new law creates a similar section dealing with public records that are maintained on a public office's website. The records are provided free of charge, accessible and searchable on the public website. A public office can limit the number of records requested by a person that the office has to deliver digitally to the requester to ten per month, unless the records requested are not provided on the website. As with mailed records, the requester must certify to the office that they do not intend to use or forward the requested records, or the information contained in them, for commercial purposes.

Protection of Infrastructure Records

The new law now allows certain private infrastructure records that are kept by a public office to be exempt from release or disclosure under the Public Records Law. The previous definition of an infrastructure record was only for a public office's or chartered

²² R.C. 149.43 (C)(5)

²³ R.C. 149.43 (B)(7)(c)(i)

nonpublic school's critical systems or in a building. The law specifies that an infrastructure record also includes a risk assessment of infrastructure performed by a state or local law enforcement agency at the request of a property owner or manager. These records are exempt for 25 years after its creation, if it is retained by the public office for that length of time.²⁴

The exemption applies if the record is accompanied by a written statement similar to the following:

"This information is voluntarily submitted to a public office in expectation of protection from disclosure as provided. . . [under Public Records Law]."

An infrastructure record means any record that discloses the configuration of critical systems, including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building.²⁵

Private, Nonprofit Institutions of Higher Education Liability Protection

The new law clarifies that private, nonprofit institutions of higher education who are certified by the Chancellor of Higher Education are provided with liability protection when they respond to public record requests. Specifically, they are exempt from any claims that result from disclosure of information as part of a public records request, including breach of confidentiality claims.²⁶ However, they are still liable for claims that result from the failure to disclose public records as required by law.²⁷

ACKNOWLEDGEMENTS

This County Advisory Bulletin (CAB) was prepared by CCAO. We would like to thank Dennis Hetzel, Executive Director of the Ohio Newspaper Association, and Luther Liggett from the law firm Graff & McGovern, LPA that provided constructive comments which improved this bulletin.

Questions or comments should be directed to Brian Mead, Policy Analyst, at bmead@ccao.org who was primarily responsible for the preparation of this CAB. A special thanks and appreciation go to CCAO Executive Director Suzanne Dulaney, Managing Director of Policy Cheryl Subler and Managing Director of Research Brad Cole for their support, comments and supervision on this CAB.

²⁴ R.C. 149.433(A) and (B)(2)

²⁵ R.C. 149.433(A)

²⁶ R.C. 3333.0412 (B)

²⁷ R.C. 3333.0412 (B)