SUNSHINE LAWS TRAINING AGENDA

I. Welcome and Introduction
   A. Credit and proof of attendance

   B. Why are we here: the importance of public records training

II. The Public Records Act: Important Terms and Definitions
   A. What is a “public office” subject to the Public Records Act?
      1. The Public Records Act applies to public offices and “persons responsible for public records”
         • State ex rel. Cincinnati Enquirer v. Krings, 93 Ohio St.3d 654 (2001) (records of
           stadium cost were within jurisdiction of county board and were public records regardless
           of whether they were in the possession of the county or the construction company)
         • State ex rel. Armatas v. Plain Twp. Bd. of Trs., 163 Ohio St.3d 304 (2021) (legal
           invoices of outside law firm public records)
      2. A private entity may be considered the “functional equivalent” of a public office
         • State ex rel. Oriana House v. Montgomery, 2005-Ohio-3377 (10th Dist.), rev’d on other
           grounds, 110 Ohio St.3d 456, 2006-Ohio-4854 (community-based correctional facility
           not functional equivalent of public office)
         • Sheil v. Horton, 2018-Ohio-5240 (8th Dist.) (community college foundation is
           functional equivalent of a public office)
   B. What is a “record”? 
      1. A “public record” exists on a fixed medium
      2. A “public record” is created by, received by, or comes under the jurisdiction of the public office
      3. A “public record” documents the activities of the public office
   C. When does a record “document the activities of the office”? 
      1. The information or content of a record—not the medium the record is stored on—determines whether
         a record is a “public record”
      2. Messages on a personal account or device can be public records if the content or information
         documents the activities of the public office
         • Sinclair Media v. City of Cincinnati, 2019-Ohio-2623 (Ct. of Claims) (text messages
           between city council members about firing city manager public records)
      3. A record does not document the activities of the office if it is purely personal
         • Internatl. Union, United Auto., Aerospace & Agric. Implement Workers v. Voinovich,
           100 Ohio App. 3d 372 (10th Dist. 1995) (governor’s personal calendars do not document
           the activities of the office and not public records)
      4. A record does not document the activities of the office if it is not used
         • State ex rel. Beacon Journal Publishing Co. v. Whitmore, 83 Ohio St.3d 61 (1998)
           (when judge read unsolicited letters but did not rely on them in sentencing, letters did not
           document any activity of the office and not public records)
         • State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Dept., 82 Ohio St.3d 37 (1998)
           (racist emails between public employees not “records” because the messages were not
           used by the public office)
• *State ex rel. Bowman v. Jackson City School Dist.*, 4th Dist. No. 10CA3, 2011-Ohio-2228 (personal emails on public system “records” when relied on for discipline)

5. Employee home addresses generally do not document the activities of the office
   • *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384 (home addresses of public employees generally do not document activities of the office, but may in certain circumstances)

6. Notes and drafts can be public records depending on how they are used
   • *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196 (notes taken during public employee’s pre-disciplinary conference not “records”)
   • *State ex rel. Doe v. Tetrauert*, 2012-Ohio-3879 (12th Dist.) (notes used by public employee to track work hours were personal notes and not a record of the office)

7. Notes and drafts may be considered transient records

D. A public record must be “kept by” a public office
   1. Public records on personal devices or accounts are records “kept by” the public office
      • *Sinclair Media v. City of Cincinnati*, 2019-Ohio-2623 (Ct. of Claims) (texts and emails on personal devices are considered “kept by” the public office)
   2. A record is not “kept by” a public office if disposed of pursuant to records retention schedule

III. The Public Records Act: Making and Responding to a Public Records Request

A. Any person can make a public records request

B. No form or specific language is required to make a public records request

C. The identity and motive of a requester are irrelevant
   1. The identity of a requester is relevant if the requester is a journalist, next of kin, or insurer
   2. The identity of a requester is relevant if the requester is an inmate who is seeking records regarding his or her own criminal case

D. A requester has the right to inspect records or to receive copies of records
   1. Public office can charge the “actual cost” of providing copies of records but nothing for inspection
      • *State ex rel. Ware v. City of Akron*, 164 Ohio St.3d 557, 2021-Ohio-624 (public office can require prepayment of costs, but erred by not providing invoice of costs to requester)
   2. Public office must provide copies of records even if records are available elsewhere
      • *State ex rel. Summers v. Fox*, 163 Ohio St. 3d 217, 2020-Ohio-5585 (public office not excused from providing records when the requester got the records from a third party)

E. A public office must provide copies of records in a “reasonable period of time”
   1. “Reasonable period of time” to respond: consideration of the type of record
      • *State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311 (six-day delay in producing requested candidate resumes unreasonable)
      • *Wadd v. Cleveland*, 81 Ohio St.3d 50 (1998) (24-day delay in producing accident reports unreasonable)
   2. “Reasonable period of time” to respond: consideration of circumstances surrounding request
      • *Cincinnati Enquirer v. Pike Cty. Coroner*, 153 Ohio St.3d 63, 2017-Ohio-8988 (two-month delay in producing autopsy reports in murder case was reasonable given the magnitude of the investigation and level of care needed to redact)
3. “Reasonable period” of time to respond: communication with the requester
   • State ex rel. Bristow v. Baxter, 2019-Ohio-1973 (6th Dist.) (two-and-a-half-month delay in responding to request unreasonable when office had no communication with requester)
   • State ex rel. Patituce & Assocs., LLC v. Cleveland, 2017-Ohio-300 (8th Dist.) (three-month delay in responding to request reasonable when, among other factors, office communicated with and provided prompt responses to requester)

4. The burden of responding to a request is not an excuse for delay
5. Tips for responding timely: do not back-burner requests and communicate with requester

IV. The Public Records Act: What is a Proper Request?

A. A proper request asks for existing records
   1. A record might exist if it can be produced or created from information in a database
      • State ex rel. Scanlon v. Deters, 45 Ohio St.3d 376 (1989) (if public office already uses computer program that can perform search and produce compilation or summary requested, output already “exists” as a record for the purposes of Public Records Act)
      • WCPO-TV v. Ohio Dept. of Health, 2021-Ohio-1151 (Ct. of Claims) (Department of Health had to produce death certificate records when it could sort its database to produce the categories of records requested)
   2. A proper request does not ask for information or research
      • State ex rel. Morabito v. Cleveland, 2012-Ohio-6012 (8th Dist.) (requests for “why, how, when, and by whom” a video was destroyed, are improper requests for information)
      • Kovach v. Geauga Cty. Auditor’s Office, 2019-Ohio-5455 (Ct. of Claims) (office properly denied requests seeking explanations or reasons for certain actions, and to admit or deny factual representations)

B. A proper request describes the records sought with “reasonable clarity”
   1. Request must ask for records consistent with how the public office organizes/maintains its records
      • State ex rel. Zidonis v. Columbus State Community College, 133 Ohio St.3d 122, 2012-Ohio-4228 (request for all emails between two employees was overbroad when office did not organize emails by sender and recipient)
      • DeCrane v. City of Cleveland, 2018-Ohio-3476 (Ct. of Claims) (request for “all correspondence” overbroad when office did not organize and maintain its records by correspondence)
   2. A proper request does not ask for a complete duplication of the public office’s records or for an entire category of records
      • State ex rel. Zauderer v. Joseph, 62 Ohio App.3d 752 (10th Dist.1989) (request for all traffic reports with no time or subject matter limitation was overbroad)
      • State ex rel. Strothers v. Keenon, 2016-Ohio-405 (8th Dist.) (request for all of the office’s personnel files was overbroad)
      • State ex rel. Glasgow v. Jones, 119 Ohio St.3d 391, 2008-Ohio-4788 (request for all correspondence, including texts and emails, of state employee over six-months was overbroad)
      • Gupta v. Cleveland, 2018-Ohio-3475 (Ct. of Claims) (request for all “emails and other correspondence” between named individuals over two-years was overbroad)
   3. A request might be ambiguous if the public office does not know what the requester wants or where to look for requested records
• Robinson v. Village of Alexandria, 2018-Ohio-1581 (Ct. of Claims) (request for emails “concerning village business” ambiguous and unenforceable)

4. If a public office denies a request because it’s overbroad or ambiguous, it must inform the requester of how its records are kept and give the requester a chance to revise the request
   • State ex rel. Summers v. Fox, 163 Ohio St. 3d 217, 2020-Ohio-5585 (public office violated the Public Records Act when it raised overbreadth for the first time in litigation, and thus failed to give requester chance to revise request)

5. How an office explains how its records are kept depends on how the office organizes its records

V. Exemptions to the Public Records Act
A. General principles of exemptions
   1. Exemptions are only created by applicable state or federal law, never by contract
      • State ex rel. Gannett Satellite Information Network v. Shirey, 78 Ohio St.3d 400 (1997) (contract provision between city and outside search firm that made resumes and application materials confidential was void as a matter of law)
   2. Exemptions are always narrowly construed
   3. Two categories of exemptions: mandatory and discretionary

B. Mandatory exemption examples: FERPA and LEADS
   • State ex rel. ESPN v. Ohio State Univ., 132 Ohio St.3d 212, 2012-Ohio-2690 (FERPA applies to prohibit release of otherwise public records)
   • Ingraham v. Ribari, 80 Ohio App. 3d 29 (9th Dist. 1992) (LEADS confidentiality provision applies to preclude release of LEADS computer information)

C. Discretionary exemption examples
   1. Confidential Law Enforcement Investigatory Records (“CLEIRs”)
      • State ex rel. Mahajan v. State Med. Bd., 127 Ohio St. 3d 497, 2010-Ohio-5995 (CLEIRs applied to certain records compiled by medical board in investigation of physician)
   2. CLEIRs: specific confidential investigatory techniques or procedures
      • State ex rel. Summers v. Fox, 163 Ohio St. 3d 217, 2020-Ohio-5585 (law enforcement interviews of assault victims not exempt under CLEIRs as specific investigatory techniques or procedures)
   3. CLEIRs: investigatory work product
      • State ex rel. Cincinnati Enquirer v. Ohio Dept. of Public Safety, 148 Ohio St. 3d 433, 2016-Ohio-7987 (only 90 seconds of dash cam footage constituted “investigatory work product” under CLEIRs)
   4. CLEIRs: investigatory work product exemption expires when law enforcement matter concludes
   5. CLEIRs: investigatory work product exemption does not apply to 9-1-1 calls or initial incident reports
      • State ex rel. Cincinnati Enquirer v. Hamilton Cty., 75 Ohio St.3d 374 (1996) (content of 9-1-1 call is always public, even if it would disclose information otherwise protected under CLEIRs, such as the identity of an uncharged suspect, or would reveal SSNs)
   6. Infrastructure and security records
      • McDougald v. Greene, 162 Ohio St. 3d 250, 2020-Ohio-4268 (security records exemption exempted prison shift-assignment rosters)
      • State ex rel. Rogers v. Dept. of Rehab. & Correction, 155 Ohio St.3d 545, 2018-Ohio-5111 (security camera footage of use-of-force incident not an infrastructure or security record)
      • Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office, 163 Ohio St. 3d 337, 2020-Ohio-5371 (video from exterior courthouse security camera that captured the shooting of a judge not a security record)
D. No exemption for certain categories of records: job application materials, juvenile records, and based on a right to privacy

E. Discretionary exemptions can be waived

F. More than one exemption may apply

G. Exempted records or information may be withheld or redacted
   1. Non-record information may be redacted or withheld
   2. Public office must make redactions plainly visible and provide the legal basis
   3. Use lists or “cheat sheets” to help with common exemptions
   4. Always redact/withhold in good faith and talk to your attorney when in doubt

VI. Litigation and potential liabilities for violating the Public Records Act
   A. Litigation option one: mandamus lawsuit
      1. Asks court to order the public office to comply with the Public Records Act
      2. Statutory damages may be awarded to a requester
      3. Attorney fees may be awarded to a requester

   B. Litigation option two: complaint in the Court of Claims, fast-track procedure specific to public records

   C. Follow best practices to avoid litigation: document all requests your office receives, be prepared, stay up-to-date on public records law

VII. Records Management
   A. Public offices are required to adopt a public records policy

   B. Records management practices
      1. Public offices are required to organize and maintain records to be made available for inspection and copying
      2. Contents of records retention schedules: (1) title, (2) description, (3) retention period, (4) retention format, (5) disposal
      3. Factors determining record retention period: (1) historical value, (2) administrative value, (3) legal value, (4) fiscal value
      4. Records retention schedule approval process
      5. A public office can only dispose of records pursuant to an approved retention schedule
      6. Managing electronic records: retain records based on the content of the record, not the type of device or the format of the record
      7. Managing electronic records: issues specific to texts, emails, and personal accounts
      8. Avoid using personal devices and accounts for work
      9. Update records retention schedules to keep up with new technology
     10. Include electronic records in your public records policy
     11. Managing transient records
     12. Transient records retention schedule

   C. Litigation and potential liabilities for improper disposal of public records
      • *State ex rel. Crenshaw v. King*, 2021-Ohio-4433 (8th Dist.) (requester who failed to first make public records request could not bring writ of mandamus action; rather, requester
should have brought a civil action in common pleas court under R.C. 149.351 for the destruction of records)

D. Records management resources

VIII. The Open Meetings Act

A. The Open Meetings Act applies to the “meetings” of “public bodies”

B. What is a “public body”?
   • State ex rel. Massie v. Lake Cty. Bd. of Commrs., 2021-Ohio-786 (11th Dist.) (visitors bureau not found to be public body)
   • Cincinnati Enquirer v. Cincinnati, 145 Ohio App.3d 335, 339 (1st Dist. 2001) (urban design review board found to be public body)

C. What is a “meeting”?  
   1. When is a meeting “prearranged”?  
      • White v. King, 147 Ohio St.3d 74, 2016-Ohio-2770 (Open Meetings Act does not require face-to-face interaction to constitute a “prearranged” meeting)
      • State ex rel. Post v. City of Cincinnati, 76 Ohio St. 3d 540 (1996) (serial meetings, each with less than a majority of members of the public body, was a “prearranged” meeting)
   2. What is discussion and deliberation of official business?
   3. A “meeting” can occur in a series of meetings, each with less than a majority of members present
      • State ex rel. Post v. City of Cincinnati, 76 Ohio St. 3d 540 (1996) (back to back meetings discussing the same issues of public business constitute a “meeting” for purposes of the Open Meetings Act)
   4. A “meeting” can occur over a series of emails
      • White v. King, 147 Ohio St.3d 74, 2016-Ohio-2770 (discussion of public business in a series of emails violated Open Meetings Act)
   5. A “meeting” can still be a meeting even if it’s called something else

D. “Meeting” obligations: (1) notice, (2) openness, and (3) minutes

E. Notice
   1. The specific type of notice required depends on the type of meeting
   2. Three types of meetings: regular meetings, special meetings, and emergency meetings
   3. Notice to public of planned discussion of particular topic

F. Openness
   1. Forum requirements
   2. Deliberation and decision-making requirements
   3. No secret ballots or whispering of public business
      • State ex rel. Bratenahl v. Village of Bratenahl, 157 Ohio St.3d 309, 2019-Ohio-3233 (the Open Meetings Act prohibits voting by secret ballot)
      • White v. King, 147 Ohio St.3d 74, 2016-Ohio-2770 (discussion of public business by private electronic means, such as a series of emails, can violate the Open Meetings Act)
   4. Consent agendas
      • State ex rel. Ames v. Portage Cty. Bd. of Commrs., 165 Ohio St. 3d 292, 2021-Ohio-2374 (consent agendas may not be used to constructively close a meeting)
5. The Open Meetings Act does not provide for virtual/electronic meetings and participation, unless specifically authorized by law
6. Recording and speaking at open meetings

G. Minutes
1. Content of minutes must allow the public to understand the rationale behind a decision
   • State ex rel. Ames v. Portage Cty. Bd. of Commrs., 165 Ohio St. 3d 292, 2021-Ohio-2374 (a public body violates the OMA when its minutes are greatly inaccurate)
2. Meeting minutes (including drafts and recordings) are public record
   • State ex rel. Ames v. Portage Cty. Bd. of Commrs., 165 Ohio St. 3d 292, 2021-Ohio-2374 (the Open Meetings Act requires preparation of meeting minutes, the Public Records Act requires the production of meeting minutes, and mandamus is the appropriate remedy to force the preparation and production of meeting minutes)

H. Executive session
1. Proper procedure to convene into executive session: motion on the record, second, roll call vote
2. Executive session must occur after meeting opens and before meeting closes
3. Nine permissible executive session topics
   • State ex rel. Ames v. Portage Cty. Bd. of Commrs., 2019-Ohio-3730 (11th Dist.) (reading the entire executive session statute not specific enough to go into executive session)
4. Executive session topic: personnel matters
   • State ex rel. Dunlap v. Violet Twp. Bd. of Trs., 2013-Ohio-2295 (5th Dist.) (citing “personnel matters” was insufficiently specific to go into executive session)
   • Maddox v. Bd. of Dirs. Children Servs. Bd., 2014-Ohio-2312 (2d Dist.) (“dismissal or discipline of a public employee” sufficiently specific to go into executive session)
5. Executive session topic: pending or imminent court action
   • State ex rel. Dunlap v. Violet Twp. Bd. of Trustees, 2013-Ohio-2295 (5th Dist.) (finding minutes stating that executive session was convened for “legal issues” do not comply with Open Meetings Act)
   • Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce, 185 Ohio App.3d 707, 2009-Ohio-6993 (10th Dist.) (finding three board members and executive director who were attorneys were not acting as legal counsel for the board when they discussed legal matters in executive session)
6. Who can be present in executive session?
7. Do not vote or make any decisions in executive session
8. Discussion and documents in executive session are not necessarily confidential
9. Ethical obligations governing the disclosure of executive session discussion or information

I. Anyone can enforce the Open Meetings Act

J. Litigation and potential liabilities for violating the Open Meetings Act

IX. Helpful Resources
A. Ohio Sunshine Laws Manual
B. Trainings offered through the Attorney General’s Office
C. Attorney General’s Office website
D. Attorney General’s Office Public Records Unit