

# Stay Out of The Matrix

## A user's guide to Ohio's Sunshine Laws

*Gary Daniels, Chief Lobbyist, ACLU of Ohio*

*Dennis Hetzel, President, Ohio Coalition for Open Government*

*and Executive Director, Ohio News Media Association*

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# Topics we'll discuss

1. *Welcome to Sunshine Week!*
2. *The basics of Ohio's open meetings law*
3. *The basics of Ohio's open records law*
4. *Your rights when they say "no"*
5. *An in-depth look at the new public records appeals process*
6. *Resources and how you can get more involved*
7. *As many of your questions as we can*

**PLEASE NOTE:** The Federal Freedom of Information Act and federal records are subjects for another day!

# It's Sunshine Week!

Sunshine Week is a national initiative spearheaded by the American Society of News Editors to educate the public about the importance of open government and the dangers of excessive and unnecessary secrecy. It was established in March 2005 with funding from the John S. and James L. Knight Foundation. *(from Wikipedia)*



# Open government matters

- Essential to democracy
- Not just for 'nosy reporters'
- Everyday citizens, advocacy groups, businesses and many more need access every day
- Problems growing; helped and hurt by digital age



# Open meetings in Ohio

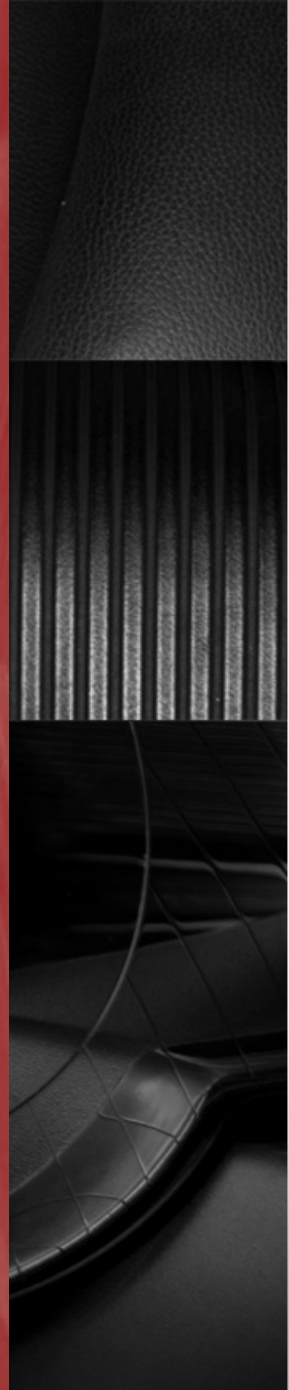
## *Our law has a great preamble (ORC 121.22)*

This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

## *What's a public body?*

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

**PROBLEM:** More and more government business (and dollars) controlled by non-public agencies.



# Open meetings in Ohio

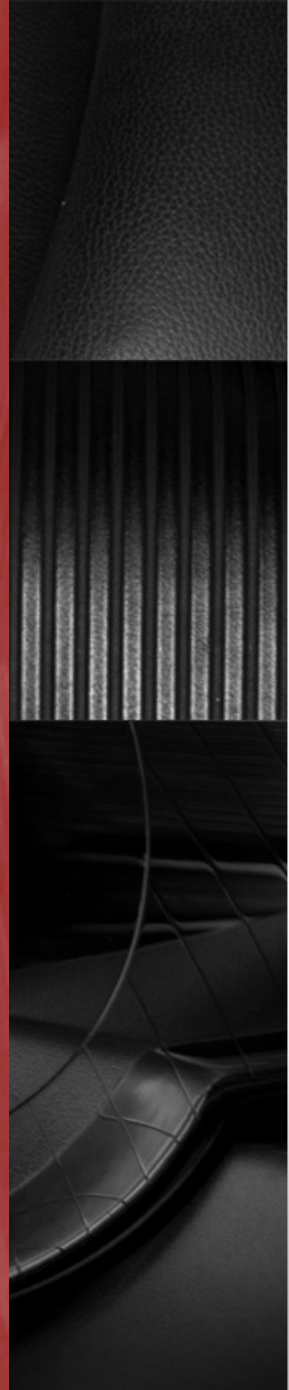
## *What's a public meeting? 3-part test*

a.) A pre-arranged discussion that b.) includes a majority of members and c.) involves discussion of public business. Court decisions have helped shape what this means. Meetings may not need to be in person for some public bodies.

IMPORTANT NOTE: OSC ruled in 2016 that a board quorum can't use email to deliberate and decide.

## *What's an executive session?*

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



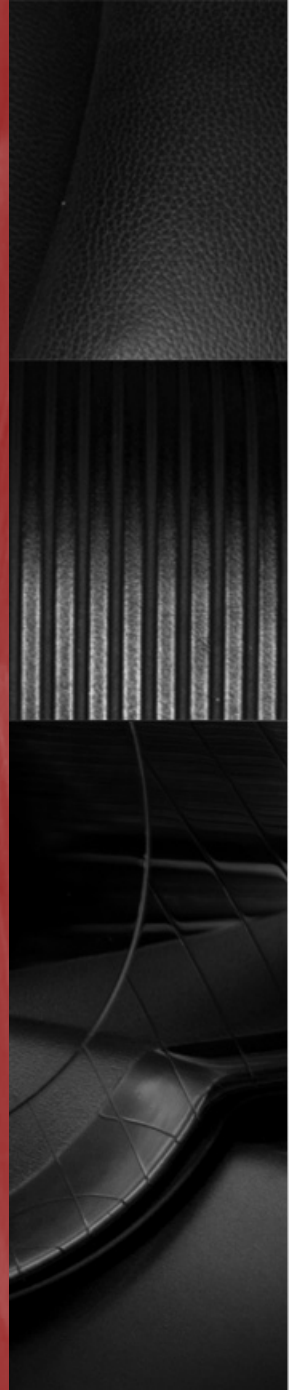
# Open meetings in Ohio

## *How must they handle executive sessions?*

Only can be initiated at an open meeting. Motion stating specific reason under statute must be adopted with roll-call vote. Minutes not required to be kept, but materials handed out may be public record.

## *What are the reasons for executive sessions?*

Common reasons: specific personnel issues; purchase or sale of property; attorney discussions about specific, pending litigation; collective bargaining; hospital trade secrets; security arrangements; matters 'otherwise confidential' under state and federal law. Examples of the catch-all exemption: trade secrets, HIPAA and FERPA-type matters.

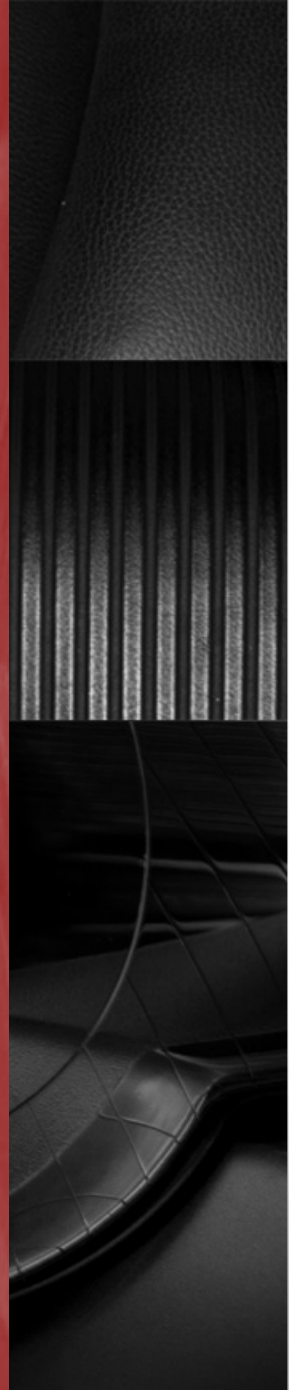




# Open meetings in Ohio

## *What are some of a board's other duties?*

- Ensure meetings are open at a public venue. HOWEVER: No requirement for public comment periods. Comment periods can be restricted for length of time, specificity.
- Have a reasonable method of meeting notification with specific rules on how this will be done.
- Cannot ban audio or video recording but can have reasonable rules to regulate.
- Keep full, accurate minutes. These are public records, including draft minutes.
- Follow procedures for emergency (immediate) or special meetings (24-hour notice required).





# Open meetings in Ohio

*What are options if you think they broke the law?*

- 1. PERSUASION.** Arm yourself with specific reasons why. Check excellent resources such as the Ohio Attorney General's Sunshine Law manual. Or, the ACLU of Ohio's manual. (Both easy to find via Google.) Both OCOG and ACLU may be able to help. Contact them or speak out.
- 2. LITIGATION.** Pursue an injunction in the county court of common pleas to compel the public body to comply with the law. Must be filed within two years. Hiring an attorney is highly advised.

# Open meetings in Ohio

## *What can happen if they break the law?*

1. Their action may be declared invalid. They could be subject to lawsuits. Often, though, courts allow do-overs and corrections.
2. If the court issues an injunction, the body will be ordered to pay \$500 to the filing party as well as court costs and reasonable attorney fees. However, courts have broad authority to reduce attorney fees to zero, especially if they successfully argue they had a reasonable belief it was OK. *NOTE: They also can counter-claim that the litigation was frivolous and demand that you pay their costs.*

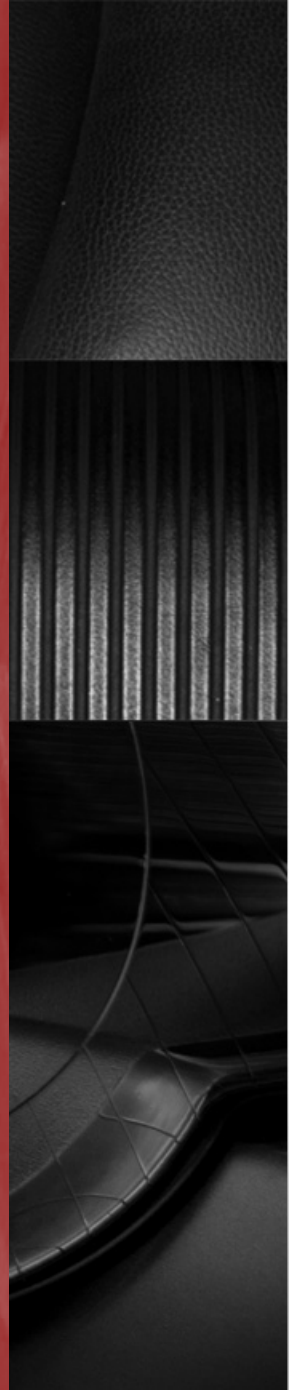
# Open records in Ohio

## *What's a public record? (ORC 149.43)*

Public records are presumed open unless there's an exemption. It can't be open if it isn't a public record! A public record has three parts: 1.) information stored on a 'fixed medium'; 2.) created, received or sent under jurisdiction of a public office; 3.) documents the organization, functions, procedures, policies, operations, decisions or other activities of the office.

## *What's a public office?*

Any state agency, public institution, political subdivision or other organized entity established by the laws of Ohio to exercise the functions of government.





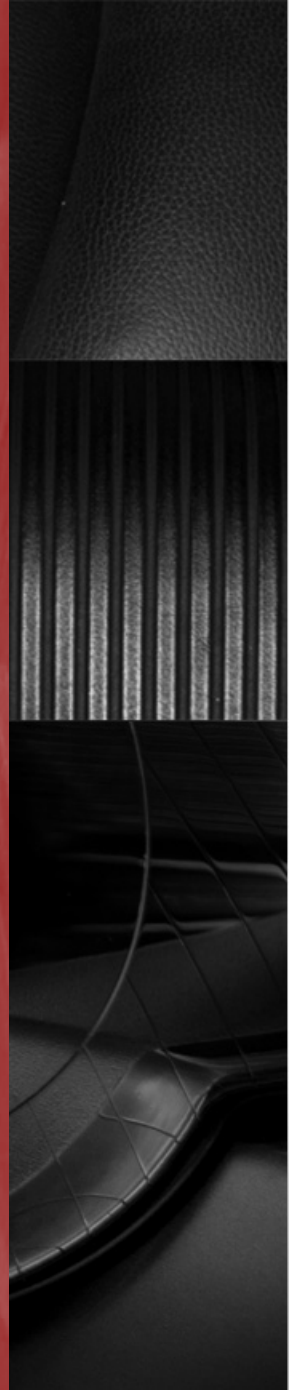
# Open records in Ohio

*What about public-private entities and other groups that get taxpayer dollars?*

It's a growing concern as more tax dollars leave government for schools, prisons, JobsOhio, tourism bureaus, etc. Must be considered case-by-case.

Courts have adopted a confusing test that weighs four factors to determine “public office” status: 1.) Private entity performs a government function; 2.) Extent of government oversight; 3.) Level of government funding; 4.) Whether created to avoid purposes of public records act.

If an entity functions as a public office, you can seek related records, but expect resistance in many cases.

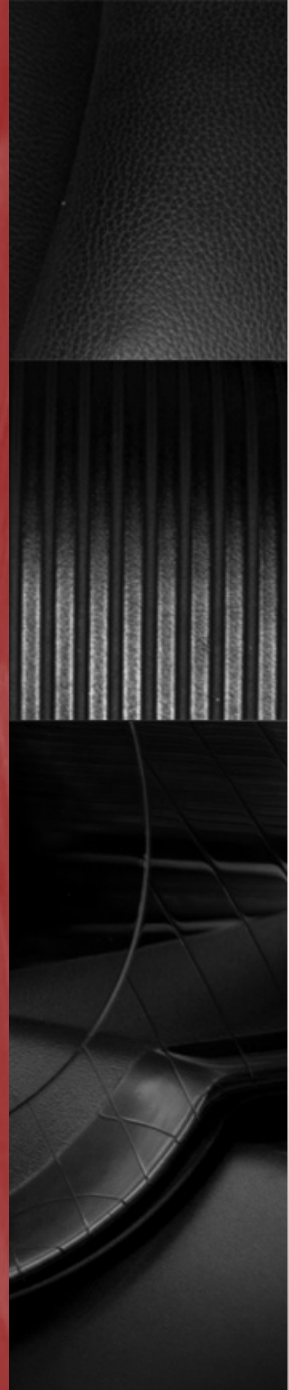


# Open records in Ohio

## *What are some of the exemptions?*

More than 30 listed in 149.43 and many scattered elsewhere through the law. NOTE: Court records are generally open but governed in large part by Ohio Supreme Court rules. Common exemptions:

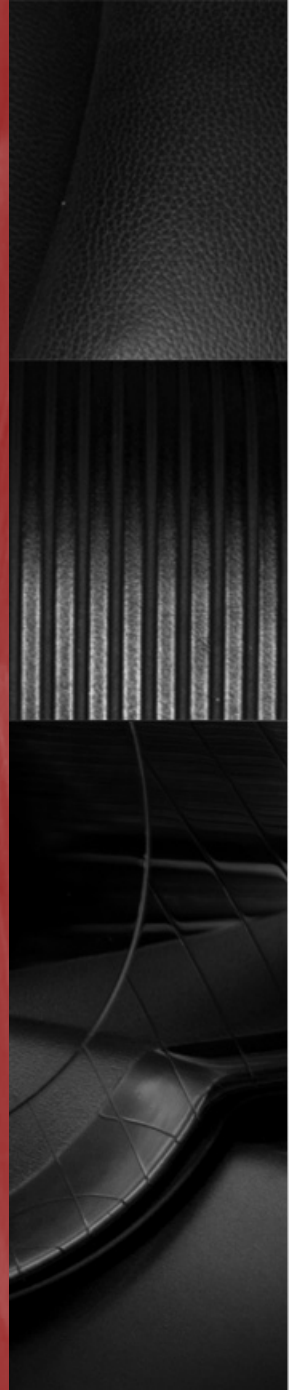
- Medical and adoption records
- Trial preparation records
- Confidential police investigation records
- Records of probation/parole proceedings
- Mediation and Civil Rights proceedings
- Intellectual property and trade secrets
- Security and infrastructure records
- Identifying info such as SS numbers
- The catch-all: Records prohibited by release by other state and federal laws



# Open records in Ohio

## *How do I request? What are my rights and requirements?*

- Anyone, not just an Ohio citizen, can request.
- Can request in person, phone, letter or mail.
- You do not have to identify yourself. They may ask if you want to do so to facilitate sending it or helping you.
- In almost all cases, you do not have to state a reason.
- You have the right to inspect in person at a reasonable time during business hours. Or, you can obtain the record in the medium you request.
- You pay actual costs of obtaining, such as copying. You cannot be charged for staff time or search fees.
- Requests should be clear and specific, especially regarding date range and topic. Asking for “all the emails between A and B for the last five years” will be rejected.
- Check out the ACLU’s sample request letter.

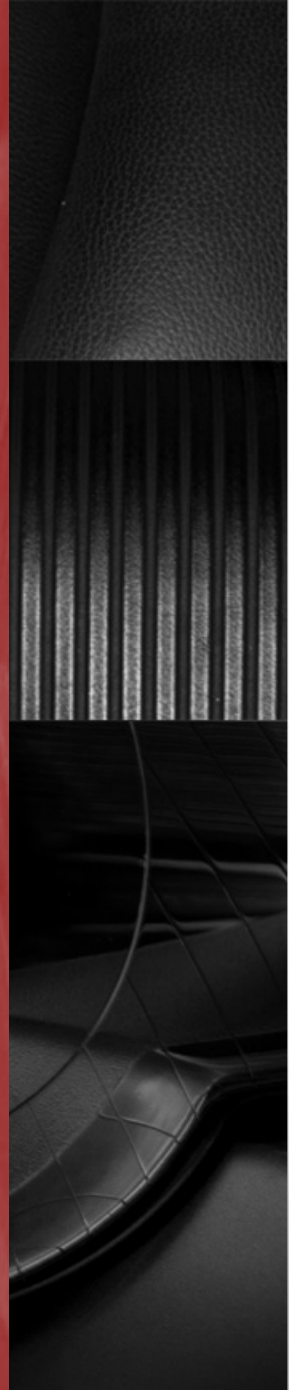




# Open records in Ohio

## *What are the office's rights & responsibilities?*

- Maintain records in a suitable manner to be available for inspection at regular hours at no cost.
- Provide copy of its retention schedule if asked.
- Respond promptly in a reasonable time. Situational. Not a fixed time frame or “immediate.”
- Require some payment in advance.
- Limit number to 10 records unless you specify it's not for commercial purposes.
- Must provide an explanation for denials in part (redactions) or whole and cite the legal authority.
- Try to help requestors whose requests are too vague, ambiguous or overly broad.
- Must ensure all elected officials have received training in open records law.



# Open records in Ohio

*What do I do if they say 'no'?*

## **FIRST STEPS:**

Pin them down on the specifics of the denial.

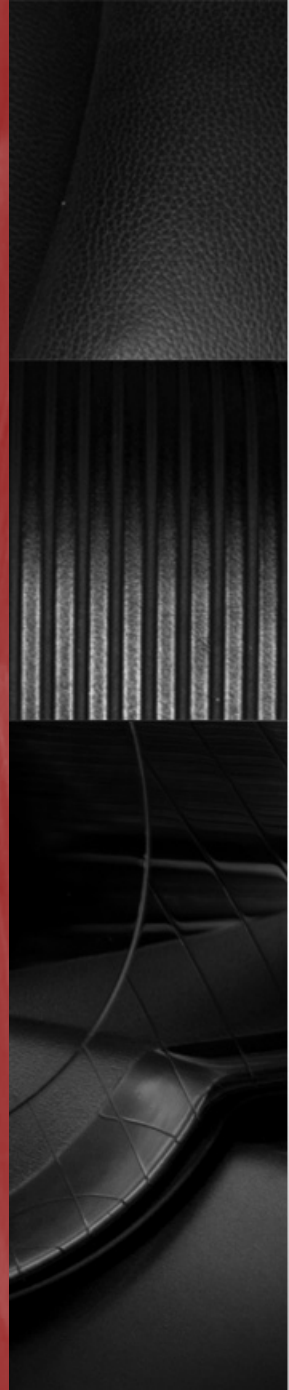
Appeal directly to the legal counsel, the board president, school superintendent, etc.

Find out if the record might be in the possession of a different office or governmental body.

Find ways to re-state or narrow your request.

Seek help from resources such as OCOG, the ACLU,

The local news media may do a story.



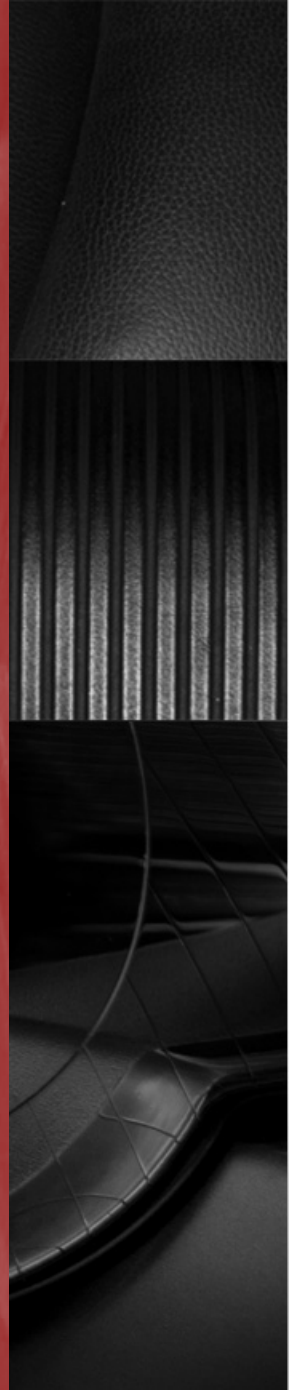
# Open records in Ohio

*What do I do if they say 'no'?*

## **LITIGATION:**

OPTION A: File a “mandamus action” in the court of common pleas in which you were denied or go straight to either the Ohio Supreme Court or the court appellate district for your area. These are actions to compel the government to release the records. They must be filed within 10 years of the denial. You need a lawyer if you possibly can afford one.

OPTION B: Use the easier, faster, cheaper Ohio Court of Claims process now operating. File directly on the Court of Claims website or go to your county courthouse.





# Open records in Ohio

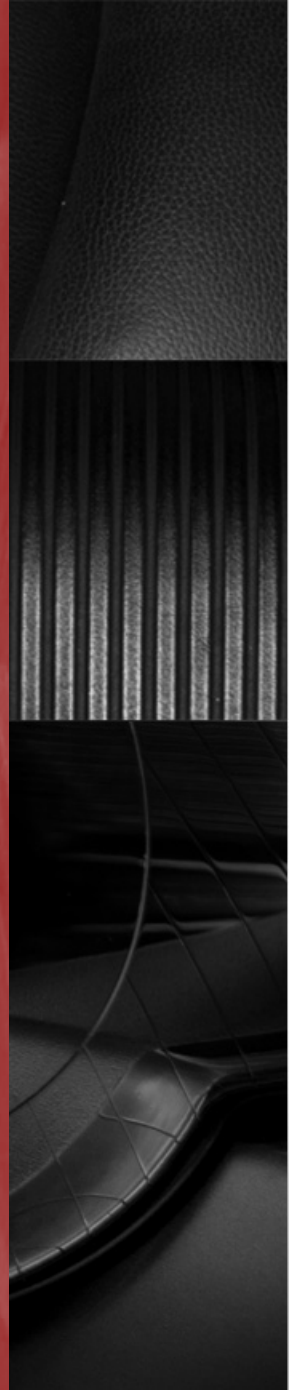
## *What are penalties for violations in a mandamus?*

If you prevail, the court generally can award court costs and reasonable legal fees, but not punitive damages. Legal fee awards are rare and are harder to get if you use the new Court of Claims process.

The court also could determine your conduct was frivolous and require you to pay fees and costs.

Statutory damages are fixed at \$100 for each business day of failure to comply up to a maximum of \$1,000.

Public officials who remove, destroy or mutilate records face fines up to \$10,000.



# The new appeals process

## *Why did ONMA and others support?*

The playing field wasn't level. Ohio had no statutory process with teeth to allow a citizen to appeal a denial without having to hire a lawyer and go to court. Either side can still appeal findings.

## *How did it happen?*

The majority of states have some type of statutory process. Then-Senate President Keith Faber sponsored a bill in late spring that Gov. Kasich signed into law. It took effect in September. Early feedback is that it is working well. We encourage you to try it and provide feedback on the process.



# How the new process works

- *Pay \$25 filing fee for the complaint.*
- *Include copies of the original request and any communications related to the request.*
- *Court of Claims will assign a 'special master' and a case number to your request.*
- *Complaint likely will be referred first to mediation unless master determines he can make a report and recommendation without this, or if this should be a mandamus action.*



# How the new process works

- *Public office has 10 days to respond to the complaint if no mediation.*
- *Based on complaint and responses, master will submit report & recommendation.*
- *Either party may object by filing written response. If neither objects within 7 business days, Court of Claims will accept the report and issue a final, binding order.*

# How the new process works

- *Objections can be taken into account in final order.*
- *If complainant prevails, public records must be provided and \$25 filing fee and other costs are recovered, except for attorney fees.*
- *Final orders may be appealed to the court of appeals for that jurisdiction.*
- *Note: Attorney fees likely will be more difficult to obtain under this process, but that's not a huge factor since it's so hard anyway.*

# <https://ohiocourtofclaims.gov/>



Court of Claims

Contact Us »



Claims vs the State | Public Records | Crime Victims Compensation | Legal Community | Press/Media | Online Services | General Info | Resources

Public Records FAQ

Public Records Forms

Public Records Fees & Costs

Public Records Case Management Process

Public Records Case Timeline

Public Records Resources

Public Records Glossary

**How Do I...**

How Do I... ▾

## Public Records Claims



This section of the website is an informative guide for individuals seeking to obtain public records from the government. It includes:

- [Frequently-asked questions](#) (FAQs) that addresses many common questions a citizen might have about how to obtain a public record and what to do if his or her request is denied
- Information about what to expect once you've filed your case in the Ohio Court of Claims
- [Forms](#), [fee information](#), and a [timeline](#) for processing a public records case

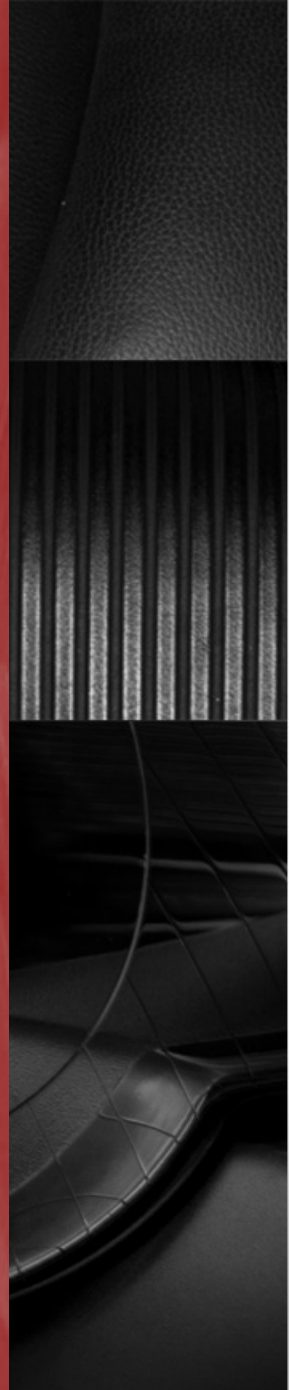
If you have additional questions, email [intake@ohiocourtofclaims.gov](mailto:intake@ohiocourtofclaims.gov). Keep in mind that Court employees are forbidden by law from giving legal advice.

# Be involved!

Pay attention to the legislature and courts

A case study: Police body cameras

- Impactful court decisions; more to come
- Major public-policy issues: Privacy v. transparency
- Legislature getting ready to “do something”
- ONMA’s lobbying points:
  1. *Presumption of openness*
  2. *Uniform standards for all departments*
  3. *Redaction, not denial*
  4. *Reasonable new exemptions*
  5. *Citizen petition rights*
  6. *Archiving standards*





# Questions and discussion

## Thanks for participating!

### *CONTACT INFO*

Gary Daniels, ACLU of Ohio

614-586-1959; [gdaniels@acluohio.org](mailto:gdaniels@acluohio.org)

[www.acluohio.org](http://www.acluohio.org)

Dennis Hetzel, Ohio Coalition for Open Government

614-486-6677; [dhetzel@ohionews.org](mailto:dhetzel@ohionews.org)

[www.ohioopengov.com](http://www.ohioopengov.com)

