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# *Technology Issues Under Ohio's Public Records Act*

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# Public Records in Ohio

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“The rule in Ohio is that public records are the people’s records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same.”

*Patterson v. Ayers*, 171 Ohio St. 369 (1960)

# The Ohio Public Records Act

- Enacted in 1963 following *Patterson v. Ayers*
- RC 149.43
- Not all documents are “public records”:
  - RC 149.43(A)(1): “Public record” means **records** kept by any public office.
  - RC 149.01(G): “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.**

# When Technology Exceeds the Law

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- How does the law accommodate technology?
- OAG Opinion 1933-167:

**“It is a well settled principle that the law becomes applicable to new inventions as new inventions come into use, without the same being especially included.**

The principle was applied in an opinion of this office, reported in Opinions of the Attorney General, 1913, Volume 1, page 137, where a peddler’s license law, in terms applicable only to using a one-horse vehicle, two-horse vehicle, a boat, watercraft or a railroad car was deemed applicable to a peddler who used a motor truck.”

# Records Law and Technology

- RC 9.01:

When any ... office... is .... required by law to ... preserve, maintain or file any record ... deems it necessary or advisable ... to do so by means of any **photostatic, ... perforated tape, magnetic tape, other magnetic means, electronic data processing, machine readable means, or graphic or video display, or any combination of those processes, means, or displays**, which correctly and accurately copies ... the original ... document, such use of any of those processes, means, or displays for any such purpose is hereby authorized. ...

When so ... copied ..., such ... means ... **have the same effect at law as the original record or of a record made by any other legally authorized means[.]**

# General Requirements of the Act

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- Responsive public records must be made available within reasonable period of time
- Requester can specify medium
  - On paper
  - Same as record is kept
  - Any on which it can be reasonably duplicated
- Copies must be provided “at cost”

# Exception: Intellectual Property

- “Intellectual Property Records” are Exempt

“Intellectual property record” means a record, other than a financial or administrative record, **that is produced or collected by or for faculty or staff of a state institution of higher learning** in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

# Exception: Trade Secrets

- No general exemption for trade secrets
- RC 149.43(A)(1)(v) exempts records if release is prohibited by state law
  - Ohio Uniform Trade Secrets Act: *State ex rel. Besser v. Ohio St. Univ.*, 87 Ohio St. 3d 535 (2000)
  - RC 102.03(B):

No ... public official or employee shall disclose ..., without appropriate authorization, any information ... that has been clearly designated ... as confidential when that confidential designation is warranted because of ... the circumstances under which the information was received and preserving its confidentiality is necessary to the proper conduct of government business.

# E-Mail, Text and Instant Messages

- E-mail can be a public record if it documents the organization, policies, procedures, operations or other activities of a public office.

*State ex rel. Toledo Blade co. v. Seneca Cty. Bd. Of Comm'rs,*  
120 Ohio St. 3d 372 (2008)

- Status depends on **content** of message
- Ohio Attorney General: e-mail, **text messages** and **instant messages** are the same as records in other formats

# Electronic Records/Databases

- Public office not required to search database to compile or produce new records.
  - If existing program can search and produce compilation or summary as requested, record deemed to already exist.
  - If reprogramming required, record does not exist.
- *State ex rel. Margolius v. Cleveland*
  - Compilation of information gathered from public records can constitute a new public record
  - Fact and manner of compilation creates added value

# Electronic Records/Databases

- *State ex rel. Margolius v. Cleveland:*
  - “We caution those who would interpret our decision as a wholesale opening of the computer files of our public agencies to any citizen who files a request.”
  - “There is no requirement on the part of public agencies to create records that are not already in their possession, or to store records in a particular medium in order to provide greater public access to the records.”
  - “Finally, we wish to clarify that computer tapes qua computer tapes are not public records. To the contrary, a public record is simply a record kept in the course of business of a public institution. ... R.C. 149.43 requires the message, not the medium, to be disclosed. It is only when the method of expression enhances the message that we require agencies to disclose more than just a literal representation on paper.”

# Draft Documents

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- Draft documents are generally considered public records under the Act
  - Cases contemplate sharing drafts with others
  - OAG Manual: Unfinished draft held by one individual may constitute personal notes that do not yet document the activities of an office.
  - What about drafts automatically saved by word processing programs?
  - What about backup copies?

# Computer Software

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- No statutory exception for computer software
- *State ex rel. Recodat, v. Buchanan*: Proprietary software does not constitute a public record.
- Vendor contracts usually require confidentiality
  - Software can be trade secret under RC 1333.61
  - But, contract cannot nullify access to public records.
- Source code also subject to copyright
  - No express exception for copyright
  - May be exempt under federal copyright law

# Conflicts With Other Statutes

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- *State ex rel. Data Trace v. Cuyahoga Cty. Recorder*
  - Statute requires payment of \$2 per page for “photocopying” recorded documents
  - Requesters seek electronic copies of recorded documents on CD-ROMs under Public Records Act
  - Is producing copies on CD-ROMs “photocopying” that is subject to statutory fee, or are recorded documents public records that must be provided at cost?

# Enforcement and Penalties

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- Act provides for mandamus action to compel production of public records
  - Statutory damages - \$1,000
  - Costs and Attorneys' Fees
- Potential exposure depends on both:
  - Whether well-informed official reasonably would believe that (i) non-production does not constitute a failure to comply, and (ii) non-production serves public policy



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