Communiqué

To: Board members, superintendents, treasurers and OCSBA members
From: Julia Bauer, staff attorney
Re: **Public Records Law changes after House Bill 9**
Date: August 28, 2007

In December, the General Assembly enacted House Bill (HB) 9, which revised Ohio's Public Records Act. The effective date of this law is Sept. 29, 2007. Implementation of this law has generated some questions. Below are answers to some frequently asked questions about HB 9.

What are the policy requirements of HB 9?

Each board of education must adopt a public records policy for responding to public record requests by Sept. 29, 2007 (Revised Code section (RC) 149.43 (E)(1)). Generally, the board of education is responsible for the content of this policy, within the requirements of the law. The law suggests boards look to the attorney general's model policy for guidance in developing their own policy (see below).

HB 9 imposes several limitations on what may be in the policy. The policy may not limit the number of records an office will make available to a single person, limit the number of records it will make available during a fixed period of time or establish a set period of time before it will respond to a request, unless that period of time is less than eight hours. Review your existing public records policy to ensure it does not contain any of these provisions that are now prohibited.

The board must distribute the public records policy to the board's records custodian or person who otherwise has custody of the records of that office. The records custodian must acknowledge receipt of the copy of the public records policy. The board must post a poster describing the policy (or post the actual policy) in a conspicuous location in the main office of the board of education and in the main office in every building. The board must include a copy of the policy in its employee manual or handbook, if the board has one. The board also may post the policy on its Web site, but is not required to do so.

Do we have to adopt the attorney general's model public records policy?

No. The law requires the attorney general to develop a model public records policy "to provide guidance to public offices in developing their own public records policies" (RC 109.43 (E)). While RC 149.43 requires boards of education to adopt a public records policy, they need not adopt the attorney general's model policy. ***The Ohio School Boards Association recommends that the version of the model public records policy available on Aug. 28, 2007*** **should not be adopted** ***by boards of education.*** Contact OSBA policy services for a sample public records policy.

The attorney general's policy goes beyond the requirements of the law and could subject boards of education to monetary penalties. The policy includes a statement that the public entity will not ask that public records requests be made in writing, and will not ask for the identity of the requester or the intended of the use of the records. The law permits the public office to ask for this information, as long as providing it is not a condition of receiving the records. Sometimes boards are required to ask for this information. Additionally, the board need not establish fixed time lines (i.e., routine requests available immediately), and page-length minimums for filling requests (i.e., less than 20 pages available immediately), as set forth in the model policy. The law requires only that all records responsive to the request be promptly prepared and copies made available within a reasonable period of time.

The model policy contains a statement that the public office must acknowledge requests in writing, and promise a time for the satisfaction of a request, neither of which is required by HB 9. In fact, a board that adopts these requirements may be subjecting itself to increased damages in the form of attorneys' fees — which a court must award in a mandamus action if the public body promises to fulfill a request within a certain period of time and then fails to do so. Therefore, adopting a specific time response makes boards liable for attorneys' fees should they fail to meet the promised time line for the request. Finally, the model policy addresses the issue of the use of personal e-mail accounts for public business. The policy declares that e-mails are public records when "their content relates to the business of the office," a standard that does not exist in current law. The policy requires employees to copy their public e-mail address when using a personal account for public business. While the solution proposed likely would protect the public office, the law does not currently require that portion of the policy.

What are the training requirements under HB 9?

All elected officials or their appropriate designees are required to attend public records training approved by the attorney general (RC 149.43 (E). Elected officials include every elected or appointed board of education member. The training must be for three hours every term of office for which the elected official was appointed or elected to the public office (RC 109.43 (B)). This means that every school board member in the state or a person designated by the entire board is required to attend the training.

Who may the board designate to attend this training?

The board may designate anyone to attend the training on its behalf. In the case of a public office with multiple elected officials, like a board of education, the law allows for the office to designate a person to attend on the behalf of the entire office. Because the terms of board members are staggered, the board will need to designate a designee every two years to meet the requirement of attending once per term for each board member. If a new board member is appointed, either the appointee or the board's designee will need to attend the training. It is recommended that boards appoint a different designee each time so that as many people as possible can be trained. RC 109.43(C) permits the attorney general to allow the attendance of other interested persons at any of its public records training or seminars, so boards may be able to send additional personnel to these training sessions, as well.

Will OSBA's public records training sessions count toward this requirement?

It depends on the training. OSBA provides quality training opportunities to its members and school personnel on important legal issues, including public records training. However, RC 109.43 (B) requires the attorney general to "develop, provide and certify training programs and seminars for all elected officials or their appropriate designees." The law allows the attorney general's office to contract the training out and certify seminars of other entities. At this time, ***the attorney general is the only certified entity providing the training***. The attorney general has indicated a willingness to certify other seminars and trainers in the future. When that option is offered, OSBA will apply to have our seminars certified.

OSBA will host the attorney general's certified training sessions at upcoming OSBA seminars; the Management Development Series (MDS) on Oct. 10, 2007, as well as at Capital Conference on Nov. 12, 2007. Both of these training sessions will be led by the attorney general's staff, and will meet the training requirements of the law.

To register for either October MDS session (a morning and afternoon session will be offered), please visit **www.osba-ohio.org/training.htm.** The Capital Conference session will be open to registered Capital Conference attendees only. The attorney general is providing other certified training opportunities. At this time, we know of no other entity that has been certified by the attorney general to provide certified training.

My term expires in December 2007 and I am not running for reelection. Do I or my designee still need to attend the training?

Yes. The new training requirement is effective Sept. 29, 2007. Boards should act this fall to designate a person to attend so that a designee is attending for the terms of persons who are not running for reelection as well as current board members who lose their seats in November.

What happens if I or my designee do not attend?

The training requirements of HB 9 are enforced by the Auditor of State during the annual or biennial audit of a public office (RC 109.43). The Auditor most likely will require a copy of a certificate or other proof of attendance for the training for each elected official. Where boards designate a person to attend, the Auditor will require the board resolution designating the board's designee, in addition to proof of attendance.

If the elected official or designee does not attend the required training, the penalty will be a potential finding by the Auditor that the elected official or designee did not comply with the requirements of the law. This is not a criminal offense, and there are no fines or penalties imposed on the individual officeholder or the board. Keep in mind that the consequences will likely include the publicizing of the elected official's failure to follow the requirements of the law, which will reflect badly on not only the individual, but also the school district as a whole.

Will I be able to get continuing legal education credit for attending a public records training seminar?

RC 109.43 (B) requires the attorney general to have the public records training accredited by the Supreme Court of Ohio for continuing legal education (CLE) credit. The attorney general's office has informed us that attorneys attending its training will be eligible to receive three continuing legal education credits.

What did HB 9 change about how a public office should respond to a public records request?

Public offices have some new duties under the law. The first duty is to produce records ***responsive to the request*** within a reasonable period of time, and if any part of the requested record is exempt from the duty to produce it, provide the rest of the record that is not exempt. If any redactions are made, the public office must disclose that fact or make the redactions plainly visible. A redaction is deemed a denial of the request, except if the redaction is authorized by state or federal law.

Another duty newly described in the law is to organize and maintain the public records "... in a manner that they can be made available for inspection and copying ..." (RC 149.43(B)(2)). If a person seeking to inspect or copy public records makes an ambiguous or overly broad request, or has difficulty making the request, the public office now has a legal duty to inform him or her of the manner in which the records are maintained and accessed in the ordinary course of business and to provide the person an opportunity to revise his or her request. The attorney general's policy, which boards need not follow, goes beyond the requirements of the law in that it states public entities must contact and assist the person with the revision of the request.

Another new requirement is that if a request is denied in whole or in part, the public office must provide an explanation, including legal authority, as to why the request has been denied. If the request was made in writing, the explanation must also be in writing. We recommend you contact your board counsel to develop a response letter.

Public offices may ask for the requester's identity, inquire why copies are sought and ask for the request in writing. However, the public office must first disclose that this is not mandatory. The public office must explain that providing such information in writing would enhance the public offices' ability to identify, locate or deliver the records sought.

The only exception is when a requester asks for student directory information. Boards of education have an obligation under RC 3319.321, Ohio's student confidentiality statute, to ascertain the identity of the requester and the intended use of the directory information, because if the information is intended to be used in a profit-making plan or activity, the request must be denied.

Public offices have a duty to respond to a public records request in the medium on which the requester is seeking the records if the person responsible determines they can be reasonably duplicated in that medium. The public office must transmit the copies sought by mail or any other means of delivery requested if that method is available. The public office may charge for the cost of that delivery and for the supplies used in advance, and may require the requester to pay the cost of the copies in advance.

Did HB 9 change anything relating to records retention and records commissions?

The new law establishes and makes clear that local school districts and joint vocational school districts each will have their own records commission. It describes more clearly the requirements of the records disposal process without changing the basic structure of the law.

A new duty is that the public office must have a copy of its records retention schedule (also called the RC-2) "... at a location that is readily available to the public." (RC 149.43(B)(2)). The attorney general's policy states the records retention policy should be posted prominently. This is not required by HB 9.

The new law requires school district records commissions to submit applications for one-time disposal (RC-1) and schedules of records retention and disposition (RC-2) to the Ohio Historical Society. The historical society will review the records within 60 days, then forward the application or schedule to the auditor of state for review within 60 days (RC 149.41). Routine certificates of records disposal (RC-3) should be submitted to the Ohio Historical Society and districts should wait 15 days until actual disposal of the records.

What are the new penalties for violation of the public records law?

The new law enhances the penalties for failing to comply with a public records request. If a mandamus action is filed against a public body and a court issues a writ ordering the public office to comply, it may, and in some circumstances must, award court costs, reasonable attorneys' fees and statutory damages under the circumstances described below.

The court issuing an order for a public body to comply with the public records law must award court costs if the court determines that the public office or person responsible failed to promptly prepare records or for any other failure to comply with an obligation in RC 149.43(B). This means in practice that the court usually is going to order the public office to pay court costs if the public office is found to have failed to comply with its obligations under the public records law.

The court may order the public office to pay statutory damages, a new penalty authorized under HB 9. Statutory damages are available only when the original request was in writing, and are awarded in the amount of $100 for each business day, beginning on the day the mandamus action is filed, up to a maximum amount of $1,000. The requester prevailing in court is entitled to the award of statutory damages, unless the court finds both that the public official reasonably believed that the case law and statutory law as it existed at the time of the conduct or threatened conduct did not constitute a failure to meet its obligations under the law, and that the conduct served the public policy underlying the public records law. If the court finds these criteria, known as the "well-informed public official standard" are met, the court may reduce or not award statutory damages.

There has been some expansion of the award of attorneys' fees in a mandamus action against a public office in HB 9. The court must award reasonable attorneys' fees if the public office failed to respond affirmatively or negatively in response to a request within a reasonable time, ***or the public office promised to respond within a specific time period and failed to do so***. An award of attorneys' fees may include fees incurred to produce proof of the reasonableness of the fees sought and otherwise litigate the requester's entitlement to an award of attorneys' fees. The court may reduce or not award attorneys' fees where the court makes a determination the same "well-informed public office or public official" standard has been met.

What *else* should we be doing to get ready for Sept. 29, 2007?

The most important thing a school district can do to get ready for Sept. 29, 2007, is to train its staff on both the changes from HB 9 and the public records law. We believe that news organizations and taxpayer groups will be testing public entities to ensure that they are complying with the new law. Call the OSBA legal division with your questions.

The information in the Communiqué *is intended as general information. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.*