

New public records law expands duties, penalties

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I recently had the opportunity to train some new board members during a daylong workshop focusing on their new roles and responsibilities. As part of the legal section, we were talking about Ohio's Open Government laws, the Sunshine Law and public records law. When the workshop was over, I was looking through the evaluations and one of the comments was, "I am unclear as to why I need to know so much about public records."

Well, that was a surprise to me. I began to think that after having done this job for a while, perhaps I had started to assume people understand why the information is important. And in fact, I did not explain to the group why the topics were important to them as elected officials of a political subdivision in the state of Ohio.

It isn't as if board members staff the front office, responding to requests and pulling documents, is it? You have staff members who perform that function as part of their duties. In fact, it's not really a board

member's role, if you think about it.

No matter what type of district you represent — local, exempted village, city, joint vocational or educational service center — the board is the entity ultimately responsible for

the management and control of the public schools in your district.

The school district is bound by public records laws and is liable if it

does not comply with them. Therefore, that means that you as a board are responsible for maintaining, retaining and producing public records in response to a request for them. Responsibility in this context means ultimate responsibility, not day-to-day responsibility.

Does this mean you should rip the "... if you want something done right, do it yourself" page from the book of management principles and take over everything? No. For example, even though you might not ever actually prepare the five-year forecast, specifications for a competitive bid or respond to a request for public records by pulling and copying them yourself, your board has ultimate responsibility for all those processes. Therefore, awareness of the parameters of your responsibilities are key to ensuring those responsibilities are met.

So, with a major revision to the public records law that, for the most part, becomes effective in September, why and what should board members know about that law?

Whose records are they?

As you begin to think about understanding the new requirements of the public records law, it might help to remind yourself that as a public office, the board

of education, superintendent, treasurer and other staff do not own the records produced, categorized and maintained by the school district.

The records of your school district belong to the public. However, it is the legal responsibility of the board office to maintain those records for the time

period provided for their retention, and produce them upon request and within a reasonable time.

Substitute (Sub.) House Bill (HB) 9 was passed as part of the final, lame-duck legislative session of the 126th General Assembly. It makes many substantive changes to Ohio's Public Records Law and those provisions become effective on Sept. 29, 2007. This article highlights the

changes to the laws governing public records.

Training for public officials

The new law will require that all elected officials (with the exception of judges and clerks of court) attend, once for each term of office, a three-hour training session on their responsibilities, the purpose of which is to "... enhance the officials' knowledge of the duty to provide access to public records." (Ohio Revised Code Section (RC) 109.43(B)). If the public body includes more than one public official, the body may designate one designee to attend the training.

For boards of education, of course, terms are staggered, so a portion of the board is up for election every two years. The board will need to designate someone, or each official will need to attend the training once every two years. Appointed board members must also attend training.

Board elections will be held in November this year and new terms will begin in January 2008.

There is no transition language in the bill, so it appears that even board



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members whose terms are expiring at the end of December 2007 will need to obtain the public records training.

The Ohio attorney general will develop and provide the training, and also may certify other entities to provide the training.

The auditor of state is now charged with auditing every public office for compliance with the training requirement during the course of its audit, as well as audit for compliance with other aspects of the new law as described below.

Public records policies and posting

The public records law as amended by Sub. HB 9 will require that public offices adopt a public records policy. The Ohio attorney general will develop a model policy that the public office may use or be guided by in the development of its own policy; it is not mandatory that the public office adopt the attorney general's policy. However, the policy may not contain limits on the number of records it will provide to a requester, may not fix the number of hours before which it will respond to a public records request unless it is shorter than eight hours and may not limit the number of records it will provide within a fixed period of time (with the exception of limiting mail requests to 10 per month as provided by existing law and not amended by Sub. HB 9) (RC 149.43(E)(1)).

Boards of education also must create a poster describing the public records policy and display the poster in "... a conspicuous place in the public office and in all locations where the public office has branch offices." (RC 149.43(E)(2)). For public schools, this probably means in each building.

Boards of education must distribute the policy to the employee who is the records custodian or manager, or who otherwise has custody of the records of that office, and obtain an acknowledgment that the employee received it. Boards of education must also ensure the public records policy is copied in the manual or handbook for employees of its general policies and procedures, if the board has such a manual or handbook.

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 and cleans up the description of the requirements of the records disposal process without changing the basic structure of the law too much.

The school district 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)).

While preparing to comply with the new law, this is an excellent time to review the records retention schedule of your school district, do a records audit and have your records commission meet and send applications for one-time disposal of obsolete records that you may have stored well beyond the usual time for retention according to the schedule.

Why clean house now? Because even if the time period for retention has expired, if you as a school district retain the records, they must be produced in response to a request for the records. With additional penalties and the time and cost to the district and its staff to comb through records your school district may lawfully dispose of in accordance with the procedures outlined in the law, it is wise that your records commission has its approval process for the disposal of records well in hand and under way.

New duties and new penalties

Public offices have some new duties under the law and penalties that go

along with a failure of the public office to meet any of the existing or 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 provide the person an opportunity to revise his or her request.

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 in writing, the explanation must also be in writing.

School staff may ask for the requester's identity, inquire why copies are sought and ask for the request in writing, but the public office must first disclose that it is not mandatory that this information be given by the

What is redaction?

The dictionary definition of "redact" is "to edit." When the term is used concerning a public records request, it means "obscuring or deleting any information that is exempt" from public inspection. For example, if a list of district employees is part of a public records request, the Social Security numbers of those employees, which are not public records, should be blacked out or deleted to prevent the public from having that information. However, such redaction must be plainly visible or the public office must notify the requester there has been a redaction.

requester. The staff member can explain that such information would enhance his or her ability to identify, locate or deliver the records sought.

The only exception to this would be in the area of requests 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.

School districts 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 district must transmit the copies sought by mail or any other means of delivery. It may charge in advance for the cost of that delivery and the supplies used, as well as the cost of the copies.

Penalties for failure to comply with public records law

The new law increases the penalties for failing to comply with a public records request. If a mandamus action is filed against a school district and a court issues a writ ordering the district to comply, it may award court costs, reasonable attorney's fees and statutory damages, under the circumstances described below.

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

The court may order the district to pay statutory damages, a new penalty authorized under Sub. HB 9. The stated purpose of this penalty is to compensate the requester for "lost use" of the requested information. Statutory damages are available only when the original request was in writing, and are awarded in the amount of \$100 for each business day, up to a maximum amount of \$1,000, beginning on the day the mandamus action is filed.

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 found that both those circumstances exist, the court may reduce or not award statutory damages.

There has been some revision and expansion of the award of attorney's fees in a mandamus action against a public office in Sub. HB 9. The court must award reasonable attorney's 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 attorney's 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 attorney's fees.

The court may reduce or not award attorney's fees where the court makes a determination of both the same factors as described above in the award of statutory damages; that is, the "well-informed public office or public official" standard.

The stakes are now higher, so training is key

The obligation of all public offices to safeguard and produce records for the public upon request has always been important. Failures to do so after March 29, 2007, the effective date of the bill, make the stakes higher and potential costs greater for your school district.

OSBA recommends that your board of education adopt a "top-down" management philosophy with regard to public records; that is, train at the top and then ensure that your staff is adequately trained and prepared to respond to public records requests. Your board might decide to treat every person who requests public records as a reporter ... because they might well be. □

"According to law" is designed to provide authoritative general information, sometimes with commentary. It should not be relied upon as legal advice. If legal advice is required, the services of an attorney should be obtained.

Top 10 list of things to do

10. Update and review your records retention schedule and commission meetings.
9. Post records retention policy in main office and keep copy available.
8. Develop a public records policy or update existing policy.
7. Post policy in main office and each building.
6. Give policy to appropriate employees – get acknowledged receipt in writing and keep it.
5. Include policy in employee manual or handbook.
4. Contact school attorney about providing form response explanation if records denied.
3. Develop payment in advance, cost of copies guidelines for district.
2. Arrange who will attend public records training or appoint designee.
1. TRAIN YOUR STAFF on the new requirements.