WHAT IS DIFFERENT ABOUT OHIO PUBLIC SECTOR LAW?

by

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Table of Contents

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I. CIVIL SERVICE LAW

Reasons for Discipline
Guaranteed tenure and discipline

Pursuant to Section 124.34 of the Ohio Revised Code, employees in the classified service of the State of Ohio and its political subdivisions have guaranteed job tenure during good behavior and can only be disciplined for the reasons enumerated in Section 124.34, which are:

- incompetency
- inefficiency
- dishonesty
- drunkenness
- immoral conduct
- insubordination
- discourteous treatment of the public
- neglect of duty
- **violation of any policy or work rule of the officer's or employee's appointing authority**,
- violation of this chapter or the rules of the director of administrative services or the commission,
- any other failure of good behavior,

- any other acts of misfeasance, malfeasance, or nonfeasance in office, or conviction of a felony.

Violations subject to dismissal

Also included as violations subject to dismissal are:

- violation of Section 2907.03 of the Revised Code (sexual battery) by teaching and non-teaching employees; violation of Section 102 (Ethics) of the Revised Code; and failure to file a statement or falsifying a statement under 102.02 of the Revised Code

Specific employee groups

- teachers and employees of school districts are governed by provisions in RC Chapter 3319.

- public officers are governed by RC 3.07. police and Fire personnel are governed by RC 737.12.

Additional reasons for discipline

Employees may also be disciplined for off-duty conduct, sexual harassment, and prohibited political activities.

Pre-Disciplinary Hearing

Hearing guidelines

Pre-disciplinary hearings are intended to give an employee the opportunity:

- to respond to the charges
- for representation
- to question any witnesses against him/her
- to offer any mitigating circumstances surrounding the alleged violation

Pre-disciplinary hearings are informal and do not follow the same guidelines as a court of law.

Notice

The hearing should be conducted 72 hours after the pre-disciplinary notice has been given.

Hearing officer

Generally, a neutral third party serves as a hearing officer and renders a decision at the conclusion of the pre-disciplinary hearing

Decision

The Appointing Authority may accept, reject or modify the hearing officer's recommendation.

Documentation

Disciplinary actions require the completion of a "124.34 Order of Removal, Reduction, Suspension, Involuntary Disability Separation."

Suspension

- Suspensions of 1-3 days are not appealable to the State Personnel Board of Review Suspension of 4 days or more and terminations are appealable

II. OHIO REVISED CODE §149.43: OHIO'S PUBLIC RECORDS ACT

A. What Is A Public Record?

> ***"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 . . ."***

This first element of the definition of a record focuses on the existence of a recording medium; in other words, something that contains information in fixed form. The physical form of an item does not matter so long as it can record information. A paper or electronic document, e-mail, video, map, blueprint, photograph, voicemail message, or any other reproducible storage medium could be a record. This element is fairly broad. With the exception of one's thoughts and unrecorded oral communication, most public office information is stored on a fixed medium of some sort.

A request for unrecorded or not-currently-recorded information (a request for advice, interpretation, referral, or research) made to a public office, rather than a request for a specific existing document, device, or item containing such information, would fail this part of the definition of a "record." A public office has discretion to determine the form in which it will keep its records. Further, a public office has no duty to fulfill requests that do not specifically and particularly describe the records the requester is seeking.

It is usually clear when items are created or received by a public office. However, even if an item is not in the public office's physical possession, it may still be considered a "record" of that office. If records are held or created by another

entity that is performing a public function for a public office, those records may be "under the public office's jurisdiction."

> ***". . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."***

In addition to obvious non-records such as junk mail and electronic "spam," some items found in the possession of a public office do not meet the definition of a record because they do not "document the activities of a public office." It is the message or content, not the medium on which it exists, that makes a document a record of a public office. The Ohio Supreme Court has noted that "disclosure [of non-records] would not help to monitor the conduct of state government."

Some items that have been found not to "document the activities," etc. of public offices include public employee home addresses kept by the employer solely for administrative (i.e. management) convenience, retired municipal government employee home addresses kept by the municipal retirement system, personal calendars and appointment books, juror contact information and other juror questionnaire responses, personal information about children who use public recreational facilities, and non-record items and information contained in employee personnel files.

Similarly, proprietary software needed to access stored records on magnetic tapes or other similar format, which meets the first two parts of the definition, is a means to provide access, not a record, as it does not itself document the activities, etc. of a public office. Personal correspondence that does not document any activity of the office is non-record. Finally, the Attorney General has opined that a piece of physical evidence in the hands of a prosecuting attorney (e.g., a cigarette butt) is not a record of that office.

B. Coverage

1. Ohio's Public Records Act (R.C. §149.43) applies to all state public offices, which includes all state agencies, counties, cities, school districts, and so on.

2. Ohio's Public Records Act also applies to any other organization established under Ohio law for the purpose of exercising any function of government.

3. Private entities may be forced to comply with Ohio's Public Records Act if it:

    a) Prepares records in order to carry out the responsibilities of a public office,

b) The public office is able to monitor the private entity's performance and

c) The public office has access to these records.

C. Requirements of Ohio's Public Records Act

1. Covered employers are required to "promptly" prepare and make available for inspection to any person at all reasonable times during regular business hours.

2. Upon request by any person, the individual responsible for maintaining public records is required to make copies available at cost within a reasonable period of time after receiving such a request.

3. In order to facilitate broader access to public records, governmental units are required to maintain these records in a manner that can be made available for inspection.

D. Exceptions Under R.C. §149.43

1. R.C. §149.43 states that a "public record" means any record that is kept by any public office, including, but not limited to, state county, city, village, township and school district units. However, thirteen exceptions exist to Ohio's Public Records Act, which include:

a) Medical records;

b) Records pertaining to probation and parole proceedings;

c) Records pertaining to actions under §2151.85 of the Revised Code and to appeals of actions arising under that section; (minor female request for abortion.)

d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under §3705.12 of the Revised Code;

e) Information in a record contained in the putative father registry established by §3107.062 of the Revised Code;

f) Records listed in division (A) of §3107.42 of the Revised Code or specified in division (A) of §3107.52 of the Revised Code, which relates to such adoption records as:

(1) File of releases,

(2) Indices to the file of releases,

(3) Releases and withdrawals of releases in the file of releases, and the information therein, and

(4) Probate Court records of adoption.

g) Trial preparation records;

h) Confidential law enforcement investigatory records;

i) Records containing information that is confidential under §4112.05 of the Revised Code; (privileged communications)

j) DNA records stored in the DNA database pursuant to §109.573 of the Revised Code;

k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of §5120.21 of the Revised Code;

l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to §5139.05 of the Revised Code;

m) Records which may not be released under state or federal law.

E. Other Exceptions

1. Any taxpayer records or

2. Social Security numbers.

F. Private Ohio Employers, Other Than Keepers of Public Records

In the private sector, Ohio law states that the employer owns the employees' personnel files. Therefore, it is up to each employer to decide whether it will allow its employees access to their records.

G. Complying With A Request

1. Whenever a request for public records is obtained, the records should first be researched and the appropriate documents retrieved. If any information in these records falls under one of the exceptions to Ohio's Public Records Act, such as one of the thirteen exceptions of R.C. §149.43, this data should be excluded. The remaining information should then be disclosed to the requester.

2. The request should be in writing.

3. Public employers may charge the individual for the "actual cost" of copying these records. (labor costs excluded.)

4. Public agencies are not required to create any new information or to perform any new analysis of existing information.

5. Any person can also request to simply inspect public records.

H. In What Form Must The Public Record Be Delivered To The Individual?

1. The standard format to deliver documents to the requester is in the form of a paper copy.

2. However, if the public record exists in another format that may either better organize or compress the data, which often occurs when such information is stored on computer disc, and the requester presents a legitimate reason why a paper format is insufficient, then the requester must be given the computerized form.

III. OHIO'S REVISED PUBLIC RECORDS ACT

As of June 27, 2007, all state and local public sector employers are required to have implemented new procedures for responding to public records requests as outlined in House Bill 9 (H.V. 9). HB9, which was sponsored by Ohio Representative Scott Oelslager (R-Canton) and signed into law by Governor Taft in December 2006, changes many aspects of Ohio Public Records Act.

A. Oral Requests and Identity and Intent of Person Making Request

The Public Records Act now contains restrictions on when a public body can request that a public records request be placed in writing. Under the new statute, a public body can ask that a request be placed in writing only if two conditions are met.

1. First, it may do so only after disclosing that a written request is not mandatory, and that the requesting person may decline to reveal his or her identity or the intended use of the information.

2. Second, the public body may ask that the request be placed in writing when a written request or disclosure of the identity or intended use would benefit the requesting person by enhancing the ability of the public office to identify, locate or deliver public records.

Therefore, Ohio's revised Public Records Act allows public officials to ask that a request for public information be made in writing, it may ask for the requester's identity and it may ask about the intended use of the requested information ***only*** if the public official discloses to the requester that compliance with these requests are not required and the public official describes how this information will enhance the public entity's ability to comply with the request. Therefore, requests for public information may be made anonymously and the person making the request cannot be required to disclose his/her intended purpose for the request.

If a public official attempts to require such information before releasing public information, this requirement will be viewed as a denial to supply the information, unless specifically required to inquire as to the intended use of the information or authorized by specific state or federal law to do so.

For example, one important exception to this requirement is contained in Ohio Revised Code 3319.321, the statute that governs student records in Ohio. House Bill 9 clearly states that when a school district receives a request for student directory information, it can require the requesting person to disclose his/her identity and what the person intends to do with the information in order to ascertain whether the information will be used for a profit-making plan or activity.

B. Responding to Public Records Requests

Under Ohio's revised Public Records Act, while public entities are still required to respond "promptly" to any records request, the new law significantly changes the manner in which public officials deal with public records that contain "confidential" information that should ***not*** be released to the public, such as medical information, information protected by attorney-client privilege, etc. Previously, public officials would simply remove any protected information from the records being released. In other words, the public officials could just withhold the information and the person making the public records request never knew these documents were missing from the request. However, Ohio's revised Public Records Act changes this process.

First, if any information is removed from the requested documents, the revised Public Records Act will view this removal of information as a denial of the person's request for information "except if federal or state law authorizes or requires a public office to make the redaction." The public entity must then notify the person making the request that certain information had been removed from these documents being released or the removal must be "plainly visible" by reviewing the documents. If any such information is removed or denied to the person making the request, the public entity must also provide the legal authority it relied upon to remove the information from the documents. The authority to withhold such information would most likely be found in the Public Records Act itself or in Ohio case law interpreting the Act.

Ohio's revised Public Records Act also allows a public entity to deny a person's request for public information if the request is "ambiguous," "overly broad," or if the public official releasing the records cannot reasonably identify what records are being requested. If such if the case, the public official must provide the person who is requesting the information with an opportunity to revise his/her request. The public official must inform the person making the request:

1) The manner in which the records are maintained by the public office and

2) How the public entity's records are accessed in the ordinary course of its business.

The reasoning behind this provision is clear:

We do not want someone denied their access to public records simply because they did not ask for the information in the proper manner or because the person making the request did not have a sophisticated knowledge of how the records are kept.

Ohio's revised Public Records Law also clarifies that a public entity may require the person who is asking for the public records to pay the cost involved in providing those records ***in advance***. The law further states that the public entity is not required to allow the person requesting these records to make their own copies. People making public records requests may still ask to have the records provided to them in a paper format or in any other format which the public entity keeps them.

C. Records Retention Schedules

Under Ohio's Public Records Act, the schedule under which records have been retained by public entities has always been a public record open for release to the public. However, public entities must now provide copies of their current records retention schedule "at a location readily available to the public."

D. Records Commissions

Ohio's revised Public Records Act also addresses a void in current law relating to oversight of records retention and destruction policies. Before House Bill 9, Ohio law established "records commissions" to oversee these policies for most, but not all, governmental bodies. House Bill 9 explicitly includes all political subdivisions in this requirement. Specifically, the General Assembly has created records commissions to include:

- County free public libraries,
- Municipal free public libraries,
- Township free public libraries,
- County library districts,

- Regional library districts,
- Special taxing districts, and
- Local and joint vocational school districts.

These commissions may apply for one-time disposal of obsolete records or records retention and disposition schedules to the Ohio Historical Society for review and require the Society to forward the applications and schedules to the State Auditor for approval or disapproval.

Ohio's revised Public Records Act also changes the composition of county records commissions. Previously, R.C. 149.38(A) required the president of the board of county commissioners to serve as chairperson of the county records commission. Under the new language, any county commissioner may fill this role.

E. Penalties for Wrongful Denial of Public Records Requests

Previously, public entities faced the possibility of paying attorneys fees if the requesting person had to resort to the courts in order to obtain public records. The General Assembly has now added language to the Public Records Act to provide that a public body ***may*** be required to pay court costs and statutory damages in addition to attorney's fees in such cases. In certain cases, the award of attorney's fees will be mandatory, absent certain mitigating circumstances, as determined by the court.

A person who was wrongfully denied a request for public records is entitled to statutory damages ***only*** if the public records request was submitted in writing by hand delivery or certified mail, providing proof of the request. In such a case, if the court determines that a public office wrongfully withheld public records, the requesting person is entitled to statutory damages of $100.00 for each business day during which the public records were wrongfully withheld. The amount of statutory damages is capped at **$1,000.00**, and the time period that is used to determine the amount of statutory damages begins on the day on which the requesting person files an action in court to recover the statutory damages.

The court may reduce the award of statutory damages, or not award statutory damages at all, if the court determines two things.

1. The court must determine that, based on the ordinary application of statutory and case law as it existed at the time of the request, a well-informed public official or records custodian would believe that the withholding of the records was not a failure to comply with an obligation under the Public Records Act.

2. Second, the court must determine that a well-informed public official or records custodian would believe his or her actions served the public policy that underlies the authority asserted for withholding the information.

Ohio's revised Public Records Act also contains similar provisions related to both court costs and attorney's fees. As for court costs, the new law requires that a court award

costs against the public entity when it finds in favor of the person who was wrongfully denied access to public records.

Similarly, the court is required to award attorney's fees against the public office when it determines either of the following:

1. The public office or the person responsible for the public records failed to respond to the public records request in the time allowed under the Public Records Act or

2. The public official or the person responsible for the public records promised to permit the requesting person to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

In other cases, the award of attorney's fees remains discretionary.

The court may reduce the award of attorney's fees or not award attorneys' fees at all by making the same determinations required for the reduction of the award of statutory damages.

F. Training Requirement

In order to ensure that public officials are informed of their obligations under Ohio's Public Records Act, H.B. 9 requires that every elected official, or his or her appropriate designee, receive three (3) hours of training regarding Ohio's Public Records Act during each of their terms of office. This way, at least one employee of each public official knows and understands the law so the people making requests for public information receive the documents they are entitled to obtain.

The new law requires that the Attorney General develop, provide and certify training programs that address the duty of public offices to provide access to their public records to anyone making a request. The Attorney General cannot charge a fee to public officials who attend these sessions conducted by the Attorney General. However, the Attorney General's Office may contract with other entities to conduct the training programs. In such cases, the entity conducting the training programs may charge a reasonable amount for a registration fee, approved by the Attorney General, based on the actual necessary expenses associated with the training program. The law expressly allows public offices to use public funds to pay for the registration fees.

Attorneys and county treasurers may count this training toward their other continuing education requirements. Ohio Revised Code § 109.43(B), 321.46(B)(3)(c).

This bill also requires the State Auditor's office to audit public offices for compliance with the training requirements of the Public Records Act.

G. Public Records Policy

The new law also requires all public entities to adopt a public records policy to comply with Ohio's revised Public Records Act. Even though the Ohio Attorney General's Office is required to develop and provide to all public offices with a model public records policy in compliance with the Public Records Law, this required training is also intended to provide guidance that can be used by public officials in developing and updating their new Public Records Policy.

Once the policy is adopted, each public official must distribute the policy to each employee who serves as the records custodian, records manager, or otherwise has custody of records of the office. The employees must, in turn, acknowledge receipt of the policy.

Each public office must also create a poster that describes its Public Records Policy. The poster must be displayed in a conspicuous place in the public office and in all locations where the public entity has branch offices. If the public office has a manual or handbook of its general policies and procedures for all employees, it must include a copy of its Public Records Policy in the handbook.

H. Excluded Accountant Records

Ohio's revised Public Records Act restores the current law regarding the provision in the Accountants Law that provides that, generally, statements, records, schedules, working papers, and memoranda made by a public accountant or certified public accountant incident to or in the course of an audit of a public office or private entity are not public records.

I. Excluded Accountant Records

Ohio's revised Public Records Act also addresses sheriff's records relating to either issued, suspended or revoked applications to carry a concealed handgun. Specifically, the new law:

1. Allows a journalist to submit to a sheriff a signed, written request to view the name, county of residence, and date of birth of each person for whom the sheriff has suspended or revoked a license to carry a concealed handgun or a temporary emergency license to carry a concealed handgun. If the journalist submits a request to view the name, county of residence, and date of birth of each person to whom the sheriff has issued a license or replacement license to carry a concealed handgun, renewed a license to carry a concealed handgun, issued a temporary emergency license or replacement temporary emergency license to carry a concealed handgun, or the name, county of residence, and date of birth of each person for whom the sheriff has suspended or revoked a license to carry a concealed handgun or a temporary emergency license to carry a concealed handgun, the sheriff must grant the journalist's request and it …

2. Prohibits a journalist from copying the name, county of residence, or date of birth of each person to and for whom the sheriff has issued, suspended, or revoked a license, as described above.

IV. OHIO SUPREME COURT: New "Functional Equivalency Test" For Determining Private Entities Subject to Ohio's Public Records Act

In State ex rel. Oriana House, Inc. v. Montgomery, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d, Oriana House was a community-based correctional facility ("CBCF") operated by the Summit County Ohio Judicial Corrections Board. The Board was responsible by law for operating the CBCF. In doing so, the Board contracted with Oriana House, a private for-profit entity, to operate the Summit County CBCF.

In January 2003, State Auditor Betty Montgomery announced her intention to conduct a special audit of Oriana House and its transactions with its subsidiaries. Oriana House claimed that Montgomery did not have the right to conduct a special audit of its records, or of its subsidiaries, because they were all for-profit private entities are were therefore not subject to Ohio Revised Code Section 149.43, Ohio's Public Records Law.

The case eventually made its way to the Ohio Supreme Court. The court rendered its decision on October 4, 2006. In reaching its decision, the Ohio Supreme Court announced a new rule for determining whether a private entity is a public institution subject to Ohio public records laws.

The court first concluded that Oriana House was not a public institution for purposes of public records law. In doing so, the court set forth a new "Functional Equivalency Test" using a four-pronged analysis to determine when a private entity is subject to Ohio's Public Record Law. In setting forth the new test, the Court made clear that the functional equivalency analysis begins with a **presumption** that private entities are **not** subject to Ohio's Public Records Law. The court also made clear that the functional equivalency analysis must be applied by the courts in a case-by-case basis specific to the particular facts of any situation involved.

Functional Equivalency Test

The Court held that the Functional Equivalency Test should be applied in situations where a private entity or a hybrid public-private entity is asked to submit records pursuant to Ohio's Public Records Law. The Ohio Supreme Court then announced the adoption of the following four "Functional Equivalency Test" factors that should be used to determine whether a private entity is a public institution subject to Ohio public records laws:

1. Whether the entity performs a governmental function;

2. The level of government funding;

3. The extent of government involvement or regulation; and

4. Whether the entity was created by the government or to avoid the requirements of Ohio's Public Records Law.

The court was careful to note that the functional equivalency analysis should begin with a presumption that private entities are not subject to Ohio's Public Records Law, Ohio Revised Code Section 149.43. Absent a showing by **clear and convincing evidence** that the functional equivalency test is met, records held by a private entity are not subject to Ohio's Public Records Law. However, the Ohio Supreme Court also stated that Ohio's Public Records Law is to be construed liberally and in favor of broad access and disclosure of records.

The Ohio Supreme Court then examined these four factors in relation to this case and concluded that Oriana House was not a public institution or public office and could not be subject to public records law.

First, the court found that Oriana House performed a historically governmental function by operating a correctional facility. Second, as to the level of government funding, the court noted that receiving government funds does not automatically convert a private entity into a public office. In the case of Oriana House specifically, the court found that the level of government funding was significant. Therefore, the court concluded that the first two prongs of the functional equivalency test had been met.

However, the court found that the second two prongs were not met. The court found no evidence that any governmental entity controlled the day-to-day operations of Oriana House thus the extent of government involvement was minimal. Similarly, the court found no evidence that Oriana House was created specifically to avoid the requirements of the public records act.

The Ohio Supreme Court concluded that only two of the four prongs were met and proceeded to weigh these factors. Noting that Ohio Revised Code Section 149.43 requires liberal construction in favor of broad access to public records, the Court nonetheless concluded that there was not clear and convincing evidence that Oriana House was a public institution. Therefore, after considering and weighing all four factors, the court found that Oriana House was **not** a public institution:

THEN…2 MONTHS LATER…

On December 28, 2006, the Ohio Supreme Court decided a similar case in State ex rel. Repository v. Nova Behavioral Health, Inc., 112 Ohio St.3d 338, 2006-Ohio-6713. In this case, Nova was a private, nonprofit Ohio corporation whose purpose was to "improve the quality of life of the citizens of our communities by providing exemplary behavioral health care to members of these communities." According to its own projections in September 2004, Nova would receive $8.89 million in revenue for mental-health services, 92 percent or $8.17 million of which would be compensation by contract from the Stark County Community Mental Health Board ("CMHB"). Nova did not, however, receive any direct public funding, financing, or subsidies. It maintained its own facilities, established the terms and conditions of employment for its staff, and

maintained its own retirement plan. Nova's employees were not covered under the Ohio Public Employees Retirement System.

In late summer or early fall of 2004, Nova became aware of allegations by female patients that Dennis Bliss, an employee and mental-health counselor for Nova, was sexually harassing patients. Sometime prior to April 8, 2005, Nova suspended Bliss without pay pending an investigation into the matter by the Stark County CMHB. At a special board meeting on April 7, 2005, the executive director of the Stark County CMHB stated that there was indeed evidence to support the claim that "professional boundaries were crossed with women who came forward to complain."

On April 8, 2005, a staff writer for the Repository, a daily newspaper in Stark County, requested that Nova provide access to Bliss's personnel file. Nova rejected the request, stating that "the only way we release any personnel files is with a release from the employee." On April 20, 2005, the Repository reiterated its request for Bliss's personnel file. On April 22, 2005, Nova denied the request, stating, "[W]e do not feel that Nova Behavioral Health, Inc., a private, nonprofit, contract agency, is subject to Ohio Revised Code Section 149.43 in that it is not a 'public agency.'"

On May 5, 2005, the Repository filed this lawsuit to compel Nova to allow the Repository to inspect and copy all nonexempt portions of Bliss's personnel file under O.R.C 149. 43, Ohio's Public Records Act.

(Incidentally, in June 2005, after the Repository filed this lawsuit, the Stark County CMHB informed Nova that it would no longer be paid for non-Medicare services. Based on this tremendous loss of revenue, Nova's board of trustees voted to cease all operations and close effective August 5, 2005.)

The Ohio Supreme Court reasoned that the primary issue in this case was whether Nova, a private, nonprofit corporation providing community mental-health services under contract with the Stark County CMHB, was a public office for purposes of the Public Records Act.

'Public record' means records kept by any public office * * *." R.C. 149.43(A)(1). " 'Public office' includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A). The Repository does not assert that Nova, while operational, was a state agency, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government. Instead, the Repository contends that Nova was a "public institution" under R.C. 149.011(A) and thus a public office subject to R.C. 149.43.

Public Institutions and the Functional Equivalency Test

When this lawsuit was originally filed on March 29, 2006, the court was using different tests to determine whether a particular entity is a public institution for purposes of Ohio's Public Records Act. The court has since modified the test for determining a private entity's status as a public institution under R.C. 149.011(A). In State ex rel. Oriana House, Inc. v. Montgomery, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193, at the syllabus, the court held:

"1. Private entities are not subject to the Public Records Act absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.

"2. In determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public Records Act, R.C. 149.43, a court shall apply the "Functional-Equivalency Test." Under this test, the court must such factors as:

1. Whether the entity performs a governmental function;

2. The level of government funding;

3. The extent of government involvement or regulation; and

4. Whether the entity was created by the government or to avoid the requirements of Ohio's Public Records Act.

The court adopted the Functional-Equivalency Test in Oriana House because it is best suited to the overriding purpose of the Public Records Act, which is "to allow public scrutiny of public offices," but not all entities that receive public funds are covered by Ohio's Public Records Act. By homing in on the "functional realities" of a particular contractual arrangement, the f Functional-Equivalency Test provides greater protection against unintended public disclosures while affording a more suitable framework for determining the extent to which an entity has actually assumed the role of a governmental body.

Application of the Functional Equivalency Test to Nova

PRONG #1: Governmental Function

Pursuant to its contract with the Stark County CMHB, Nova was obligated to provide mental-health services to residents of Stark County and others who qualified for coverage under the community mental-health plan for Stark County. By virtue of this contract, Nova was a community mental-health agency as defined in R.C. 5122.01(H), but it was not necessarily a public office for purposes of the Public Records Act. Ohio law expressly provides for the participation of both "public and private community mental health agencies ** * in the board's community mental health plan."

In Oriana House, the court found that a private entity operating a community-based correctional facility under contract with a judicial corrections board "is performing a historically governmental function" because "[t]he administration of prisons has traditionally been a uniquely governmental function."

Applying this test to this case, a private entity that provides community mental-health services under contract with a public sector board is not performing a historically governmental function, because "providing mental health services has not been a power which has traditionally been exclusively reserved to the state."

Nor are we presented with the situation in which a public agency transfers one of its own functions to a private entity.

The court agreed with the Repository, however, that to provide care for mental illnesses inadequately covered by commercial insurance is uniquely a government function. Thus, Nova was performing a governmental function to the extent that it contracted to provide mental-health services to Stark County residents **regardless of their ability to pay.** However, this fact alone is not enough to satisfy this first prong of the test.

PRONG #2: Level of Government Funding

Approximately 92 percent of Nova's revenue from mental-health services came from its contract with the Stark County CMHB. Even if Nova's revenue from alcohol- and drug-addiction services is factored into the calculation, Nova still received 87 percent of its total revenues from the Stark County CMHB. In turn, the Stark County CMHB received virtually all of its revenues from public sources.

The level of government funding is therefore significant, especially considering that Nova ceased its operations because of the loss of most of its revenues from the contract with the Stark County CMHB.

PRONG #3: Extent of Government Involvement or Regulation

There is no evidence that the Stark County CMHB or any other governmental body controlled the day-to-day operations of Nova. The statutory monitoring requirements, as well as the various contractual terms that the Repository cites as examples of "the high degree of control the Board has over Respondent," do not constitute day-to-day government supervision. These requirements and stipulations constitute only the control necessary to ensure that government funds are properly used and to protect the government's interest in the development of an effective community-based mental-health system.

Nova was therefore a self-directed, independent, private corporation.

PRONG #4: Creation of Entity

Nova was created as a private, nonprofit corporation. While its incorporators may well have envisioned and even depended on procuring a government contract with a public

mental health board, Nova was not established by a governmental entity or pursuant to any special legislation. No law required Nova's creation; no statute required it to be funded or remain in existence. Nor is there any indication in the record that Nova was created or used by the government to avoid the requirements of Ohio's Public Records Act.

Weighing All Four Factors

Considering the totality of the foregoing factors, we hold that Nova is not a public institution and thus not a public office subject to the Public Records Act for the following reasons:

1. Nova performed a uniquely governmental function only to a limited extent,

2. The provision of mental-health services generally is not a historically or uniquely governmental function,

3. Nova's operations were independent of government and

4. The Stark County CMHB did not make decisions for or control or direct the day-to-day operations of Nova.

The Public Records Act was not designed to allow public scrutiny of "all entities that receive funds that at one time were controlled by the government." Providing public access to Nova's records does not serve the policy of governmental openness that underlies the Public Records Act.

Additionally, the Repository now raises the alternate claim that even if Nova was not a public office, it was "**the person responsible for the public record**" under R.C. 149.43(C) and therefore subject to Ohio's Public Records Act. The Repository, however, waived this claim because it failed to raise this claim in its complaint or amend its complaint to include it. Therefore, the court did not need to address the merits of this alternate claim.

Still, the court analyzed the case of State ex rel. Toledo Blade Co. v. Ohio Bur. of Workers' Comp., 106 Ohio St.3d 113, 2005-Ohio-6549, 832 N.E.2d 711. In the Toledo Blade case, the Capital Coin Fund companies and their inventory were essentially owned by the Bureau of Workers' Compensation, and the requested records pertained to purchase and sale transactions involving what were essentially the bureau's coins. The Capital Coin Fund companies' records, to the extent they documented transactions concerning the bureau's coins, were therefore prepared in order to carry out the bureau's responsibility. To this extent, the companies were persons responsible for **the bureau's records.** In the present cause, however, no such relationship exists between the Stark County CMHB and Nova. Therefore, the Ohio Supreme Court held that Nova was not the functional equivalent of a public office or a person responsible for public records Nova, therefore, is not subject to the Public Records Act.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

If you do business with any public entity, you should compare your organization against the new "Functional Equivalency Test" and these two Ohio Supreme Court cases to determine if you fall under the auspices of Ohio's Public Records Law. If so, any person or entity off the street would have access to certain records you maintain.

V. OHIO'S OPEN MEETINGS LAW (SUNSHINE LAW)

A. Employer Requirements

Ohio's "Sunshine Law," or the "Open Meetings Act," (O.R.C. 121.22) is intended to require public bodies to take official action and to conduct deliberations upon official business in open meetings. There are limited situations, however, where a public body may adjourn into executive session to discuss matters privately.

Under the Open Meetings Act, public bodies are required to fulfill the following responsibilities:

1. Openness. All official actions must be open to the public.

2. Notice. The public must be informed of the time and place of regular meetings. For special meetings, the public must be informed at least 24 hours in advance of the time, place and purpose of the special meeting.

3. Minutes. Full and accurate minutes must be promptly filed and maintained. Minutes will generally only reflect the activity which occurred in the open meeting, not in executive session.

B. Executive Session

An **Executive Session** occurs when members of a public body exclude members of the public from a portion of a public meeting and they may he held only to discuss the following limited matters:

1. **Personnel.** The Board may adjourn into executive session to consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or [to consider] the investigation of charges or complaints against an employee, official, licensee, or regulated individual. O.R.C. 121.22(G)(1)

2. **Property.** The Board may adjourn into executive session to consider the purchase of property or to consider the sale of property by competitive bid, if disclosure of the information would result in a competitive advantage to the other side.

3. **Court Action.** The Board may adjourn into executive session with the public body's attorney to discuss pending or imminent court action.

4. **Collective Bargaining.** The Board may adjourn into executive session to prepare for, conduct, or review collective bargaining strategy.

5. **Confidential Matters**. Matters which are held confidential by federal law, federal rules, or state statutes.

6. **Security Arrangements.** Where disclosure might reveal information that could be used to commit, or avoid prosecution for, a violation of the law.

There may be no decision-making (actual voting) in executive session.

A Motion must be made to enter into executive session stating the specific purpose. The Motion must be seconded and a roll call vote must be taken.

VI. PUBLIC EMPLOYMENT RISK REDUCTION ACT

A. Employer's Responsibilities

The **Public Employment Risk Reduction Act (PERRA)** provides for the establishment of safety and health standards for public sector employers in Ohio. (O.R.C. Section 4167)

Employers are required to provide employment and a place of employment free from recognized hazards (referred to as the "General Duty" clause).

This is significant for Public Managers because Public Managers:

- Are responsible for maintenance of safety and health records.
- May process safety and health complaints
- May act as caretaker of Material Safety Data Sheets (MSDS).
- May assist or walk-through with OSHA inspectors.
- May process Workers' Compensation claims.
- Are responsible for tracking injuries to look for patterns and assess training needs.

- Must ensure that contractors are complying with safety and health standards.

According to O.R.C. 4167.04, an employer's responsibilities also include the following:

- Furnish a place of employment free from recognized hazards that are causing or likely to cause death or serious physical harm to the employees (This is commonly referred to as OSHA's ***General Duty Clause.)***

- Compliance with Ohio's employment risk reduction standards, rules, and orders adopted pursuant to this chapter (The risk reduction standards can be found in O.R.C. 4167.07.)

Note: No public employer is required to take any action under this chapter that would cause an undue hardship upon the public employer, unless the action is required to prevent imminent danger of death or serious harm to the public employee.

B. Employee's Duties

According to O.R. C. 4167.05, employees must comply with Ohio's employment risk reduction standards, rules, and orders, as well as comply with safety rules the public employer establishes.

C. Employee Refusal

There is a provision under Ohio law that allows employees to refuse, in good faith, to work under dangerous conditions without the threat of discrimination or retaliation.

VII. OHIO SUPREME COURT LIMITS PERSONAL LIABILITY FOR PUBLIC SECTOR SUPERVISORS

In Hauser v. City of Dayton Police Dept., et al., No. 2013-0291 and 2013-0493, Slip Opinion 2014-Ohio-3636 (Aug. 28, 2014), Anita Hauser sued the Dayton Police Department and her supervisor, Major E. Mitchell Davis, for age and gender discrimination. The claims against the supervisor were made under Ohio state law. The city requested summary judgment (pretrial dismissal of the case), in part based on the argument that Davis was entitled to immunity as a supervisor.

Hauser argued that immunity didn't apply to Davis because the state employment discrimination statute expressly authorizes suit against individual supervisors and an exception to immunity exists whenever a statute expressly authorizes claims against an individual.

The trial court denied the request for dismissal as it related to Davis' claim of immunity.

The 2nd District Court of Appeals then affirmed the denial of immunity in a 2-1 decision. The issue of immunity was appealed to the Ohio Supreme Court.

The Ohio Supreme Court ***reversed*** the 2nd District's decision, holding that the state-law provisions authorizing lawsuits for discrimination against individual managers (R.C. 4112.01 (A)(2) and 4112.02(A)) do not impose civil liability on ***public-sector supervisory employees*** but instead impose vicarious liability on the public employer.

At issue was the language in the statute defining "employer" to include "the state, any political subdivision of the state, any person employing four or more persons within the state, **and any person acting directly or indirectly in the interest of an employer"** (emphasis added).

The court looked to historical interpretations of that statutory language under federal law rather than reading the statutory language literally.

The court clarified that public-sector supervisors still face liability under R.C. 4112.02(J) for ***aiding and abetting in discrimination or directly or indirectly committing any act constituting an unlawful discriminatory practice***. As further support for its holding, the court noted that the Ohio Legislature expressly authorized claims against individuals for their actions under this section of the law, so lawmakers knew how to authorize individual liability if they intended to do so.

The court noted that its decision is seemingly in conflict with its 1999 decision in Genaro v. Cent. Transport, Inc., in which it held that a supervisor or manager may be jointly and severally liable with his employer for his discriminatory conduct.

However, the court declined to overrule Genaro because that case dealt with private-sector supervisors and the broader question of liability under R.C. 4112 generally — not R.C. 4112.02(A) specifically or public-sector immunity.

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Although the court didn't expressly overrule its 1999 decision imposing joint and several liability on private-sector supervisors and managers, its decision in Hauser signals a possible willingness to revisit the ruling in Genaro. However, even if it does overrule Genaro in the near future, the court noted that a basis for individual supervisory liability exists under a different statutory provision if a supervisor is accused of aiding and abetting in discrimination or directly or indirectly committing any act that constitutes an unlawful discriminatory practice.

VIII. PUBLIC SECTOR EMPLOYEES MAY PURSUE SEXUAL ORIENTATION CLAIMS

In Hutchinson v. Cuyahoga County Board of County Commissioners, Case No. 1:08-CV-2966 (N.D. Ohio, 2011). Shari Hutchinson, a gay woman, began working as a support officer for the Cuyahoga County Support Enforcement Agency (CSEA) in October 2002, although she briefly left her job with the county in 2003. After unsuccessfully applying for an administrative assistant position and a support officer position with CSEA in 2004, she was hired back as a senior account clerk in June 2004.

Hutchinson claims that in April 2005, despite her successful performance as an account clerk, the county board of commissioners and CSEA didn't select her for a business administrator position and instead hired a straight female with less education and financial experience. The next month,

she was moved back to the support officer position she held in October 2002. She unsuccessfully applied in May 2006 and October 2006 for promotions that went to less-qualified heterosexual candidates.

Hutchinson alleges that when she was appointed to a temporary program officer supervisor position in August 2007, the board of commissioners and CSEA purposely delayed her appointment for four weeks because of her sexual orientation. She claims that no straight candidate's temporary appointment was similarly delayed. She also claims that two weeks after she began the job, the board of commissioners and CSEA abolished her four-month temporary position, demoting her back to a support officer job.

Hutchison alleges that in December 2007, June 2008, and January 2009, the board of commissioners and CSEA kept various positions vacant to avoid having to appoint her. Moreover, she says that in March 2008, one of the commissioners refused to recommend her for a temporary program officer position, telling other CSEA management officers that she was **"bizarro"** because of her sexual orientation. The temporary position was given to a less-qualified heterosexual female candidate. Hutchinson also alleges that she was placed in the least-influential and lowest-paid administrative officer position available.

Based on those allegations, Hutchinson says the county impermissibly deprived her of equal employment opportunities and retaliated against her based on her sexual orientation in violation of **42 U.S.C. § 1983**. The county asked the court to dismiss her claims before trial, arguing that she made several discrete claims of discrimination that are barred by the two-year statute of limitations and that sexual orientation discrimination is not an actionable equal protection violation in the public employment context.

The Sixth Circuit has held that the statute of limitations for § 1983 claims in Ohio is two years. That two-year period begins to run "when the [employee] knows or has reason to know of the injury which is the basis of his action." Kuhnle Bros., Inc. v. County of Geauga, 103 F.2d 516 (6th Cir., 1997). Although a category of the continuing violations doctrine extends the limitations period when there's a long- standing demonstrable policy of discrimination, Hutchinson didn't allege any facts that, if proved, would support a finding that the county had a long-standing demonstrable policy of sexual orientation discrimination. The court therefore dismissed the claims based on discriminatory acts that occurred before December 19, 2006, because they were time-barred.

Next, the court concluded that an employee who alleges sexual orientation discrimination under § 1983 isn't inherently precluded from establishing **an equal protection claim against her employer**. According to the court, although Title VII of the Civil Rights Act of 1964 doesn't include sexual orientation as a statutorily protected class, that doesn't automatically remove all constitutional protection when an employee claims equal protection violations based on her membership in that class. Because Hutchinson's complaint states that the county didn't hire or promote her to a number of positions for which she was qualified because of her sexual orientation and the county didn't treat heterosexual job candidates similarly, **her equal protection claims are viable under § 1983.**

WHAT DOES THIS MEAN TO HUMAN RESOURCES?

Although Title VII doesn't include sexual orientation as a statutorily protected class, you should be aware that employees who claim equal protection violations based on their membership in that class are still entitled to constitutional protection. An employee's sexual orientation doesn't give public sector employees you the legal right to discriminate in any way.

Notice: Legal Advice Disclaimer

The purpose of these materials is not to act as legal advice but is intended to provide human resource professionals and their managers with a general overview of some of the more important employment and labor laws affecting their departments. The facts of each instance vary to the point that such a brief overview could not possibly be used in place of the advice of legal counsel.

Also, every situation tends to be factually different depending on the circumstances involved, which requires a specific application of the law.

Additionally, employment and labor laws are in a constant state of change by way of either court decisions or the legislature.

Therefore, whenever such issues arise, the advice of an attorney should be sought.

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Scott has been named one of Business First's 20 People To Know In HR, CEO Magazine's 2008 Human Resources "Superstar," a Nationally Certified Emotional Intelligence Instructor and a SHRM National Diversity Conference Presenter in 2003, 2006, 2007, 2008 and 2012.

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