

# OHIO AUDITOR OF STATE KEITH FABER



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## Auditor of State Bulletin Bulletin 2019-003

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**DATE ISSUED:** November 18, 2019

**TO:** All Political Subdivisions  
All Independent Public Accountants

**FROM:** Keith Faber, Ohio Auditor of State

**SUBJECT:** Ohio Sunshine Laws and New Star Rating System

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Central to the founding principle of self-governance is the ability of the public to participate; to create a partnership among the citizens of a community, some of whom have come forward in elective roles. Transparency in governing makes those who serve more accountable to their fellow citizens and also fosters the exchange of ideas to increase efficiency and effectiveness with public dollars. To that end, Ohio Sunshine Laws ensure all citizens are granted the right to have broad access to government records and meetings.

The Ohio Auditor of State's Office (AOS) works to ensure the Ohio Sunshine Laws are respected and complied with at every level. Each year, the AOS partners with the Ohio Attorney General's Office to distribute *Ohio Sunshine Laws, An Open Government Resource Manual*. This manual provides extensive information regarding the Ohio Public Records Act and Ohio Open Meetings Act and is available at <http://www.ohioauditor.gov/open.html>. Both offices also conduct Certified Public Records Training to educate public officeholders and their staff about their statutory duties. These classes are also open to the public.

Ohio public records and open meeting laws can be confusing, which is why it is critical that public offices routinely consult with their statutory counsel for legal advice on how to: draft public records and record retention policies, implement them, respond to requests and educate their staff on complying with Ohio's Sunshine Laws. The guidance in this Bulletin is meant to assist public offices to ensure staff is complying with the law. If a citizen believes the Public Records or Open Meetings Acts have been violated, it's imperative that staff work with them to help them understand the public records process. This helps to create goodwill between the public office and constituents while avoiding potential litigation that can be costly to taxpayers and the community.

Our office is introducing a new approach to how the AOS and contracted independent public accountants (IPAs) report public offices' compliance with Ohio's Sunshine Laws. This Bulletin supersedes and replaces AOS Bulletin 2011-006. Procedures outlined in this Bulletin should be applied to audit engagements with a fiscal year ending December 31, 2019 and later, and will be updated in the 2020 *Ohio Compliance Supplement*.

The compliance testing results will be incorporated into the new AOS Star Rating System (StaRS), described in this Bulletin. The StaRS will reflect a rating for each public office, i.e. a public entity such as a county, for every audit period ending December 31, 2019 or after, which not only measures compliance with Sunshine Laws, but also encourages public entities to be more open and transparent with the citizens they serve through implementation of identified best practices. The public should be mindful that while testing for StaRS ratings will begin on January 1, 2020, results will not become available until audits are completed later in 2020.

Public offices receiving StaRS ratings with 2 or more stars will be given the opportunity to print a certificate to highlight their accomplishment. This certificate will be made available via the applicable public office's Auditor of State eServices account at the completion of their audit.

### **Sunshine Law Requirements:**

The Sunshine Law incorporates two acts, the Ohio Public Records Act R.C. 149.43 and the Ohio Open Meetings Act R.C. 121.22. As provided in the Acts and R.C. 109.43, during an annual/biennial audit pursuant to R.C. Chapter 117 the AOS will test for compliance with these statutes. A brief description of the Acts follow.<sup>1</sup>

AOS will be testing for statutory compliance with the Ohio Public Records Act and Ohio Open Meetings Act, and reporting those results with more emphasis. The General Assembly has empowered the public to ensure their local governments are acting transparently in carrying out the peoples' business by creating these two self-help statutes. If a citizen believes a public office has violated either Act, they can file an action in the appropriate court.

#### *Ohio Public Records Act - R.C. 149.43*

This Act requires that a public office make public records available for inspection or copying. The time required for a response depends on the type of request.

- 1) If a request is to INSPECT public records, the response must be **prompt**.
- 2) If COPIES are requested, those copies must be provided within a **reasonable period of time**.

As is often noted, the terms "promptly" and "reasonable period of time" are not defined by a specific period of time. Rather, these terms have been interpreted by courts to mean "without delay" and "with reasonable

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<sup>1</sup> For full details of all requirements and exceptions see the Ohio Sunshine Law Manual at: <https://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws>.

speed,<sup>2</sup> and the ultimate determination of "reasonableness" will differ in each case depending on the particular facts and circumstances of a request.<sup>3</sup> Additionally, courts have held that a "prompt" or "reasonable period of time" includes the time for a public office to: (1) identify the responsive records; (2) locate and retrieve records from place of storage; (3) review, analyze and make necessary redactions (or legal review); (4) prepare the requests; and (5) provide for delivery.

Not all documents and information maintained by a public office are subject to disclosure under the Act. In these instances, it may be necessary to withhold records such as when the document is not a public record, or redact information from the response, such as social security numbers. When redacting information from a request, the public office is required to notify the requester of any redaction or make the redaction plainly visible.<sup>4</sup> Additionally, where the request is denied, in whole or in part, including redactions, the public office must provide the requester with a reason, including the legal authority for the denial/redaction.<sup>5</sup>

Because the Public Records Act is a self-help statute, if a person believes the public office has violated the Act in any way, he or she must initiate a legal action themselves. Neither the AOS nor any other public official can do so on their behalf. More general information can be found in the Ohio Sunshine Manual found at <http://www.ohioauditor.gov/open.html>. For more specific information, both citizens and public offices should consult their legal counsel.

#### Ohio Open Meetings Act – R.C. 121.22

This Act requires that all meetings of any public body be open to the public. The minutes of regular and special meetings are to be promptly recorded and open to the public for inspection. Executive session may be held at a regular or special meeting, but must be entered into and returned from during the public meeting. To enter into executive session requires a roll call vote while ending an executive session only requires a simple voice/majority vote. But in both instances the votes can only be taken during the public portion of the meeting. Matters that can be discussed during executive session are specifically limited by R.C. 121.22(G); actions and decisions must occur during the open meetings. The minutes need to only reflect the general subject matter of discussions in executive sessions.

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<sup>2</sup> *State ex rel. Office of Montgomery Cty. Pub. Defender v. Siroki*, 108 Ohio St.3d 207, 2006-Ohio-662, at ¶16; *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311, at ¶37; *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St.3d 50, 53, 1998-Ohio-444.

<sup>3</sup> *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, at ¶17 ("Given the broad scope of the records requested, the governor's office's decision to review the records before producing them, to determine whether to redact exempt matter, was not unreasonable."); *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, at ¶44 (delay due to "breadth of the requests and the concerns over the employees' constitutional right of privacy" was not unreasonable); *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Educ.*, 97 Ohio St.3d 58, 2002-Ohio-5311; *State ex rel. Striker v. Cline* (5th Dist.), 2010-Ohio-3592 (provision of records within nine business days was a reasonable period of time to respond to a records request.); *State ex rel. Holloman v. Collins* (10th Dist.), 2010-Ohio-3034 (Assessing whether there has been a violation of the public records act, the critical time frame is not the number of days between when respondent received the public records request and when relator filed his action. Rather, the relevant time frame is the number of days it took for respondent to properly respond to the relator's public records request.).

<sup>4</sup> Ohio Rev. Code § 149.43(B)(1).

<sup>5</sup> Ohio Rev. Code § 149.43(B)(3).

Every public body shall establish a reasonable method<sup>6</sup> of notifying the public of the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A special meeting requires twenty-four hour notice to the news media that have requested notification, except in the event of an emergency requiring immediate action, whereby notice shall be immediate.

Because the Open Meetings Act is a self-help statute, if a person believes the public office has violated the Act in any way, he or she must initiate a legal action themselves. Neither the AOS nor any other public official can do so on their behalf. More general information can be found in the Ohio Sunshine Manual found at <http://www.ohioauditor.gov/open.html>. For more specific information, both citizens and public offices should consult their legal counsel.

### **Compliance Testing:**

For those entities, such as counties, that have multiple elected officials or oversight boards, the departments/offices that have adopted their own public record policies should be tested on a rotating basis. Test half of the departments/offices each year, unless there has been a change to the policy, then test in the year of the change. The public office's entity-wide policy should be tested annually. Charter municipalities may have different requirements depending on their charters. Therefore, requirements/testing for charter entities may differ.

### **Requirements / Testing Procedures:**

1. The public office shall create and adopt a policy for responding to public records requests. The public records policy may not: (a) limit the number of public records that the public office will make available to a single person, (b) limit the number of public records that it will make available during a fixed period of time, and (c) establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours. [Ohio Rev. Code § 149.43(E)(2)]

*Obtain the public office's Public Records Policy and scan it to be sure the policy did not limit the number of responses that will be made to a particular person, limit the number of responses during a specified period of time, or establish a fixed period of time before it will respond unless that period is less than eight hours.*

2. Public records are promptly prepared and sent to the requestor, and/or promptly prepared and made available for inspection by the requestor within a reasonable time. [Ohio Rev. Code § 149.43(B)(1)]

*Select a sample of five (or total population if less than five) public records requests from the audit period to ensure the public office was compliant within a "reasonable" time.*

3. If a request is denied, in part or in whole, the public office shall provide the requester with an explanation, including legal authority. [Ohio Rev. Code § 149.43(B)(3)]

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<sup>6</sup> Ohio Rev. Code § 121.22(F); *Katterhenrich v. Fed. Hocking Local School Dist. Bd. of Edn.*, 121 Ohio App.3d 579, 587 (4th Dist. 1997) ("Typically, one would expect regular meetings to be scheduled well in advance ....").

*Select a sample of five (or total population if less than five) denied, in whole or in part, public records requests from the audit period, to ensure the public office provided an explanation which includes the legal authority to the requester.*

4. The public office shall notify the requester of any redaction(s) or make them plainly visible and provided an explanation, including legal authority. [Ohio Rev. Code § 149.43(B)(1)]

*Select a sample of five (or total population if less than five) public records requests with redactions from the audit period to ensure the public office was redacting records and making the redactions visible, and provided an explanation which includes the legal authority to the requester.*

5. A public office shall have a copy of its current records retention schedule at a location readily available to the public. [Ohio Rev. Code § 149.43(B)(2)]

*Ascertain whether the public office has a records retention policy, and that it is readily available to the public.*

6. The public office shall distribute the public records policy to the employee who is the records custodian or records manager or employee who otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. [Ohio Rev. Code § 149.43(E)(2)]

*Determine whether written evidence exists that the Public Records Policy was provided to the records custodian/manager.*

7. If the public office has established a manual or handbook of its general policies and procedures, the public office shall include the public records policy in the manual or handbook. [Ohio Rev. Code § 149.43(E)(2)]

*Ascertain whether the public office's public records policy was included in policy manuals.*

8. The public office shall create a poster describing their public records policy and shall post it in a conspicuous place in all public locations of that public office. [Ohio Rev. Code § 149.43(E)(2)]

*Ascertain whether the public office's poster describing the policy is displayed conspicuously in all branches of the public office.*

9. The appropriate records commission shall review the schedules of records retention and disposition, as well as any applications for the one-time disposal of obsolete records. [Ohio Rev. Code §§ 149.38, 149.39, 149.41, 149.411, 149.412, and 149.42]

*If submitted, obtain up to five applications for one-time disposal of obsolete records, and also review the schedules of records retention and dispositions for the audit period. In both instances, confirm approval by the appropriate records commission. (Note: the records retention schedule is not the same policy as the public records policy.)*

10. All elected officials or their designees shall attend public records training approved by the Attorney General. [Ohio Rev. Code § 149.43(E)(1)] Training is required to be three hours for every term of office. [Ohio Rev. Code § 109.43(B)] Community school administrators are required to complete annual training on public records and open meeting laws. [Ohio Rev. Code § 3314.037]

*Determine whether each elected official<sup>7</sup>(or his/her designee) successfully attended a certified three-hour Public Records Training for each term of office. Obtain copies of their certificates of completion and place them in the permanent file for future reference.*

*Determine whether each community governing authority member, or community school administrative staff (designated fiscal officer, chief administrative officer, and all individuals performing supervisory or administrative services) completed annual training on public records and open meetings laws.*

11. Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings, and the time, place and purpose of all special and emergency meetings. [Ohio Rev. Code § 121.22(F)]
- a. A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action.
  - b. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

*Determine whether the public office notified the general public and news media of when and where meetings during the audit period are to be held.*

12. The minutes of a regular or special meeting of any public body shall be promptly prepared, filed and maintained and shall be open to public inspection. [Ohio Rev. Code § 121.22(C)]

*Determine whether the minutes of public meetings during the audit period were:*

- a. Prepared promptly – a file is created following the date of the meeting
- b. Filed – placed with similar documents in an organized manner
- c. Maintained - retained, at a minimum, for the audit period
- d. Open to public inspection – available for public viewing or request.

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<sup>7</sup> Elected official does not include judges. See Ohio Rev. Code § 109.43(A)(2).

13. An executive session requires a majority of a quorum by roll call vote at a regular or special meeting for the sole purpose of the consideration of only the following matters: [Ohio Rev. Code § 121.22(G)]
- a. Specified employment matter of public employee/official (excluding elected officials);
  - b. Purchase of property for public purpose or sale/disposition of property;
  - c. Conferences with an attorney for the public body concerning disputes that are the subject of pending or imminent court action;
  - d. Preparing for, conducting or reviewing negotiations or bargaining sessions;
  - e. Matters required to be kept confidential by federal law or regulations or state statutes;
  - f. Specialized details of security arrangements and emergency response protocols;
  - g. Consideration of trade secrets for hospitals;
  - h. Confidential information related to marketing plans, business strategy, trade secrets, or personal financial statements of an applicant for economic development assistance.

*Review the minutes from the audit period and determine if executive sessions were only held at regular or special meetings.*

*Review the minutes of meetings held during the audit period and the purpose for going into an executive session (when applicable). Confirm the purpose correlates with one of the matters listed in a-h above.*

*Determine whether formal governing board actions from the audit period were adopted in open meetings.*

### **Sunshine Law Star Rating System (StaRS):**

If the public office implements best practices beyond what is required by law, our office will recognize that achievement. The StaRS level each public office has achieved will be posted on the Auditor of State's website.

### **StaRS Overview:**

A public office **MUST** be compliant with all the legal requirements listed above to become eligible for consideration for a StaRS Award. To achieve a higher level reflected in the StaRS levels chart below, a public office should adopt the best practices from the list of suggested best practices provided by the AOS (which follows the StaRS chart) to enhance transparency consistent with the spirit of the Sunshine Laws. These procedures and practices ***are not required by law*** but are suggested to help public offices meet and fully address the requirements of the law. Each public office's StaRS level will be based on compliance and the number of best practices implemented.

<b>StaRS Levels:</b>	
	<b>Open and Transparent Government</b> - Meets all Sunshine Law requirements.
	<b>Achievement in Open and Transparent Government</b> - Implemented 1-2 best practices.
	<b>Outstanding Achievement in Open and Transparent Government</b> - Implemented 3-4 best practices.
	<b>Highest Achievement in Open and Transparent Government</b> - Implemented 5 or more best practices.
<b>Non-Compliant</b>	Non-Compliant - Sunshine Law requirements are not fully achieved.

**StaRS Best Practices:**

To achieve additional success toward a more open and transparent government operation, the AOS suggests the following be implemented; these suggestions are not required by Ohio’s Sunshine Laws.

In order to meet each best practice identified below, the public office must address a majority of the elements of that best practice.

1. The public office employs a method to track public records requests. The public office uses a log or similar tracking method. The tracking method should include a majority of these elements. Additionally, a sample log is included in Appendix A of this bulletin.
  - a. Date in-person, verbal, written or email request received (date stamp written requests)
  - b. Name of Requester (only if voluntarily provided; requests can be under a pseudonym or made anonymously)
  - c. Type of records requested
  - d. Date requests were fulfilled
  - e. Name of person fulfilling request

*Determine whether the public office tracks public records requests and what method is used. Select a sample of five (or total population if less than five) and review the tracking method for evidence of the elements listed above.*

2. To assist the public in making a request for records the public office has standard request forms that are available to requestors to use if they wish, as well as for the staff to use when a request is made via phone (Example: Appendix A). The informational fields can include:
  - a. The date of the request in order to be tracked.
  - b. A description of the records requested (agendas, minutes, resolutions, budgets, etc.).

- c. The format the requestor would like the records produced in (paper, electronic, etc.).
- d. The method the requestor would like to receive the requested records (in person, via e-mail, standard mail, electronic media, etc.).
- e. If the public office has a website, is the form available in order to submit a request on the website, or to download and submit by email, mail, fax or in person.

*Determine whether the public office makes available a standard request form for public records requests by mail, in person, or on the phone, and confirm the request form includes a majority of the elements listed above.*

3. The public office provides an acknowledgement to the requestor when a public records request is received, consistent with the manner in which the request was made.
  - a. The acknowledgement by phone, email or mail provides a “tracking” number (date of request for example) the requestor can reference.
  - b. The acknowledgement is recorded in the public records log by date and method that request was submitted to the office.
  - c. The acknowledgement should be made in a reasonable period of time to assure requestor their request has been received and is being processed.

*Determine whether and how the public office acknowledges public records requests with a tracking number for requestor. Select a sample of five (or total population if less than five) and confirm that acknowledgements are made/issued within a reasonable period of time.*

4. To assist the public in making a request for records, the public office has publicized (website, public records poster, etc.) the name or office title of the records custodian and his/her contact information. Further, the public office’s staff has been trained on how to route public records requests to the record custodian, who also has been trained on fulfilling the public records requests, including guidelines for negotiating ambiguous or large requests.

*Review the Public Records Policy to verify the policy identifies the employee or office title of the public records custodian and the contact’s telephone number, email and mailing address. Obtain evidence of training received by the public office’s staff and public records custodian such as a Certificate of Public Records Training.*

5. As tested in #10 of the requirements, all elected officials or their designees shall attend public records training. The applicable required Certified Public Records Training for all elected officials or their designees was completed within the first year of taking office. In addition, community school administrators are required to complete annual training on public records and open meeting laws. The applicable required Certified Public Records Training and the annual training for community school administrators was completed within the first four months of employment.

*Determine whether each elected official<sup>8</sup>(or his/her designee) successfully attended the required Public Records Training within one year of taking office.*

*Determine whether each community governing authority member, or community school administrative staff (designated fiscal officer, chief administrative officer, and all individuals performing supervisory or administrative services) completed annual training on public records and open meetings laws within four months of hire.*

6. The public office has an online presence and it provides details regarding upcoming events and the operations of the office. Some examples may include:

- a. Agendas of meetings in advance.
- b. Public records policy.
- c. Records retention policy.
- d. Meeting schedule of the public office and any of its committees.
- e. Minutes of all meetings of the public office and any of its committees.

*Confirm on the public office web-page that items are available. For the minutes available for public meetings held during the audit period, confirm the corresponding agendas were published in advance of meetings.*

7. The public office has an online presence that provides access to official documents that may be routinely requested by the public or media. Some examples may include, but are not limited to:

- a. Annual Budget
- b. Annual Report
- c. Compensation for Public Officials
- d. Most recent Audit Report
- e. Contact information and hours of various departments

*Confirm on the public office website that items including but not limited to the listed are available.*

Questions about this bulletin may be directed to the Auditor of State's Center for Audit Excellence Division at [contactus@ohioauditor.gov](mailto:contactus@ohioauditor.gov) or at (800) 282-0370.



Keith Faber  
Auditor of State

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<sup>8</sup> Elected official does not include judges. See Ohio Rev. Code § 109.43(A)(2).

## Questions and Answers

Q1: How do I register for online Sunshine Laws training?

A1: Use the following link to register for online training: <https://sunshinelaw.ohioattorneygeneral.gov/>

Q2: Do I need to participate in the StaRS initiative?

A2: All applicable public offices are required to be compliant with public records laws; however, the best practices model, that will recognize achievements in open government beyond what the law requires, is optional.

Q3: I am a county prosecutor, will my StaRS rating be for only my office or the entire county?

A3: The StaRS rating will be for each public entity (i.e. city, county, etc.). Ratings will not be provided for individual elected officials' offices; however, testing of those individual elected officials' offices will impact the overall StaRS rating for the public entity.

Q4: Will I be penalized for not having an online presence?

A4: An online presence is a suggested best practice; however, it is not statutorily required; therefore, your entity will not receive an audit comment related to an online presence.

Q5: I am a county auditor fulfilling a request for a copy of a map. I am providing a copy at the time the request is made and I am not making any redactions? Am I required to log this request and keep a copy?

A5: In this case, the current public record policy for the specific office as well as the nature of the work the office conducts, would be a factor in determining the need to log and copy the request. As maintaining maps is within the day to day functions of the office, the immediate fulfillment of the request would likely not require this instance to be maintained in the log. In addition, there were no required redactions so the Auditor's recommendation for keeping copies of the response would not apply.

Q6: I am a school district treasurer for a very large school district – does the Auditor's recommended best practices require that my school hire an additional employee to handle all public records requests and maintain the log?

A6: No. Each public office handles its responsibilities under the Act a little bit differently. Some entities do employ a separate public records officer to coordinate and respond to all public records requests. Other entities have several employees, often one in each department/division, that respond to public records requests. Typically, these employees are not employed solely to respond to public records requests. Rather, this is one of several duties that the employee may have. The decision of how to utilize staff and resources is, ultimately, a management decision to be made by each entity. Utilization of the public records log will

work in any environment. In this case, the school may want to assign a point of contact in each building to handle public records requests.

Q7: I run a city building department. Do I need to log requests for applications for a permit and information submitted as part of that application? Do I need to log when I issue a permit?

A7: No. Requests for applications and issuances of permits are outside of the scope of logging recommendations. Public offices, however, may want to log requests for copies of permits if copies are not immediately provided to the requestor. As a best practice, the logging of this request does increase transparency initiatives.

APPENDIX A: Sample Public Records Log

**(Name of Agency/Department/Division) Public Records Request:**

**Date of request:** \_\_\_\_\_

**Name (optional):** \_\_\_\_\_

**Address (required for mail):** \_\_\_\_\_

**City:** \_\_\_\_\_ **State:** \_\_\_\_\_ **Zip Code:** \_\_\_\_\_

**Phone (optional):** \_\_\_\_\_ **Email (optional):** \_\_\_\_\_

**Description of records:**

