Ohio public records law may require production of public records in readily-editable format

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In a recent case,[1] the Ohio Court of Claims held that a public records requester is entitled to a record in an editable format, such as a Microsoft Word document, when the request specifies that format. The request at issue designated that the records should be produced "in whatever format they are in at the time of [the request]." The public agency kept the record in question as a Word document but, instead, produced an identical copy of the record as a PDF. The Court of Claims determined this to be improper and ordered production of the record in Word format.

This holding may come as a surprise to public records custodians, leading one to think, "Why would I have to hand over a record that can so easily be edited?" But to keen observers of Ohio public records law, it came as no surprise. To better understand how we got to this point, it's best to begin more than two decades ago, in the infancy of computerized public records.

The evolution of requested medium

One of the earliest opportunities for the Ohio Supreme Court to apply the public records law to computerized records came in *Margolius v. Cleveland.*[2] There, the requester sought to obtain certain police records that the City of Cleveland maintained in a database. Specifically, the requester wanted the records in the native, digital format so that she could manipulate the data and make use of its inherent utility. Cleveland, however, asserted that it could comply with the law's requirements by providing the requester with paper print-outs of the database. The Supreme Court disagreed — to an extent. Laying out a new test, it held that a public agency must produce records in digital, rather than paper, form, "if the person requesting the information has presented

a legitimate reason why a paper copy of the records would be insufficient or impracticable."[3] Originally, the Supreme Court envisioned this showing to be a high bar:

> We caution those who would interpret our decision as a wholesale opening of the computer files of our public agencies to any citizen who files a request. Indeed, it should be the rare instance in which a party making such a request would be able to demonstrate a need for the record stored on a magnetic medium in lieu of a paper copy.[4]

Thus, while the *Margolius* court held that the "message, not the medium" is the public record, it nonetheless observed that the medium may have utility and that the public agency cannot *carte blanche* deny access to that utility where the medium "enhances the message."[5]

The *Margolius* "demonstrated need" test remained the law until 1999, when the General Assembly amended R.C. 149.43 to provide:

> The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy.[6]

Thus, a requester now has three choices of medium: that which the record is "kept," on paper, or on any other medium on which the agency can duplicate the record as an "integral part of [its] normal operations." Critically, no longer does the requester bear the *Margolius* burden to show why their desired medium has more utility than paper copies. This has been the state of public records law in Ohio for nearly 20 years.

This is the short answer for why an agency must provide an editable copy of the record if one is requested: if the agency keeps the record in editable format and the requester specifies copies "as kept," the law plainly says that the agency must provide it. But there is also another factor at play with our modern, digitized records: metadata.

Meta...what?

Metadata is not as scarily technological as it sounds and certainly isn't the exclusive realm of IT professionals. Simply, metadata is data that describes other data. For records purposes, the "data" is the information within the record — say, the letters and words that make up a resolution. The file size, the dates the document was created and edited, the author and even the total edit time may be logged by a word processing program as metadata — all of these examples are data which describe the letters and words that make up the original resolution.

Only a few years after deciding *Margolius*, the Supreme Court decided *Beacon Journal Publishing v. Arkon*,[7] in which it (likely unknowingly) laid the framework for eventual metadata analysis. The *Beacon Journal Publishing* court held that Social Security numbers found within payroll files were themselves "records" for purposes of the public records law. Thus, public records include not only the documents themselves but also information found within those documents.

This all leads to the reasonable thought of, "So what? The requester didn't ask for all that metadata. All she asked for was the resolution." And at first glance, it would seem as though the law was clear. In 2012, the first public records case involving metadata was decided. In that case, the Ohio Supreme Court held that a request for "documents" did *not* properly request metadata as well.[8] Rather, the Supreme Court held, a requester must specify that he or she seeks metadata to be entitled to it.[9]

However, the *Parks* case presents an interesting application of the law surrounding metadata. In that case, though the request was for "the minutes" of a meeting in their kept format, the court held that the requester had made a proper request for metadata where email exchange between the requester and agency indicated that the requester was interested in the document

creation dates.[10] That is, while the original request did not specifically indicate that it sought "metadata," the requester's expressed interest in creation dates was enough for the court to read a request for metadata into the public records request.[11] Thus, in addition to not producing the records in the format requested, when the agency provided a PDF copy — an entirely new file with its own metadata — the agency actually did not provide the record requested — the minutes' metadata — at all.[12]

Recommendations

At this stage, you're likely asking, "Okay. So what do I need to do to avoid these situations?" If an agency is concerned about potentially providing copies of its records in editable format, one option would to implement a system in which "final" versions of records are maintained in a non-editable format, such as a PDF, and where "draft" editable versions of the record are disposed of upon finalization. Care must be taken, however, or the agency may end up illegally destroying public records, because the draft version of the record is still itself a public record.

The Ohio Supreme Court has observed that a public office may properly dispose of "transient" records once those records "are no longer of administrative value," if doing so is expressly provided in the agency's retention policy.[13] Courts have held that handwritten notes no longer have administrative value once the notes are incorporated into a final record.[14] Like handwritten notes, draft versions of a record likely have no administrative value once the final version is created for preservation.

There are two big caveats, however. First, the agency's retention policy must expressly provide for this disposition. If it does not, deletion of the draft document may be an unlawful destruction of a public record. Second, the draft version to be destroyed must be identical to the final version. Courts have held that handwritten notes that differ from the final document prepared from them are themselves separate records.[15] Thus, destruction of a draft version containing additional information that was "cut" from the final version may also be unlawful.

What's more, the above efforts may all be for naught. Recall that the requester has three media options under the law — paper, as kept and "any other format which "reasonably can be duplicated as an integral part of the normal operations of the public office." Thus, if the agency's PDF software can readily convert the PDF to a Word document, the agency arguably must provide a Word document if the requester specifies that medium.

The larger takeaway, perhaps, is that public agencies need to be comfortable with producing their records in an editable format. A requester motivated to tamper with the record is unlikely to be fazed by a production in PDF format. In this age of technology, a requester is a quick to perform a web search and is two clicks away from free PDF conversion software. In that sense, all documents produced by public agencies are in "readily-editable" format and producing a record as a PDF over, say, a Word or Excel file is hardly a roadblock.

Ultimately, the agency will always have the original record. Should any discrepancy arise, the agency will always have the definitive proof of what the authentic record says. In that sense, perhaps, the solution is to readily produce the public record instead of withholding it. In the event they're needed, other copies of the unaltered record may help to confirm the original. What is certain is that as technology develops so will the law to ensure the public keeps its access to scrutinize state and local government records.

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[1] *Parks v. Webb*, 2018-Ohio-1578.

[2] *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992).

[3] *Id.* at 460.

[4] *Id.* at 461.

[5] *Id.*

[6] R.C. 149.43(B)(2) (1999).

[7] *State ex rel. Beacon Journal Publishing Co. v. Akron*, 70 Ohio St.3d 605, 606, 640 N.E.2d 164 (1994)

[8] *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St. 3d 139, 2012-Ohio4246, 976 N.E.2d 877, ¶ 19.

[9] *Id.*

[10] *Parks v. Webb*, 2018-Ohio-1578, ¶ 13.

[11] *Id.*

[12] *Id.*

[13] *State ex rel. Glasgow v. Jones*, 2008-Ohio-4788, ¶ 24 n.1, 119 Ohio St. 3d 391, 396, 894 N.E.2d 686, 691

[14] *E.g.*, *Hunter v. Ohio Bureau of Workers' Comp.*, 10th Dist. No. 13AP-457, 2014-Ohio-5660, ¶ 36; *Hurt v. Liberty Twp.*, Ct. Cl. No. 2016-00856-PQ, 2017-Ohio-825, ¶ 19.

[15] *E.g.*, *State ex rel. Verhovec v. Marietta*, 4th Dist. Washington No. 12CA32, 2013-Ohio-5415, ¶ 30, appeal not accepted, 138 Ohio St.3d 1470, 2014-Ohio-1674, 6 N.E.3d 1206.

Authors