Ohio Coalition for Open Government

OPEN GOVERNMENT REPORT

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Deeds decision multi-front win for Ohio

By David Marburger, Baker & Hostetler

The victory of Data Trace and Property Insight in the Ohio Supreme Court has far greater impact than vindicating public oversight of local government. In fact, overseeing county recorders' offices may be the least potent of the community benefits in the court's unanimous 24-page ruling.

The purpose of mandating public access to deeds, mortgages, and tax liens on land that are "recorded" in county recorders' offices is not to ensure public oversight of county recorders. The purpose is to give us confidence to buy land. If the deeds and mortgages deposited with the county recorder were not instantly open to the public, we would be afraid to buy land. And banks and other lending institutions would be afraid to accept land as security for loans, such as home mortgages.

Here's why: Suppose that deeds and mortgages deposited with county recorders are not open to the public, or that county recorders don't exist. You'd like to buy the house and lot where Mrs. Peterson lives. She shows you her deed, but deeds don't show what happened to the property after someone took ownership of it. So you must rely on her assurances that no one else has any rights to the property because no other source of information about the land is available.

You pay $200,000 to her, and she delivers her deed to you. You move into the house, but a year later you learn that Mr. Smith, Mrs. Peterson's son, is moving to town from California. He has a deed showing that he owns about half of your lot. It turns out that Mrs. Peterson had conveyed that part of the property to her son 18 years earlier, but he'd never done anything with it because he lived 3,000 miles away.

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Dispatch editorial: Victory for openness

From The Columbus Dispatch

A recent Ohio Supreme Court ruling smacking down Cuyahoga County's attempt to charge extortionate fees for providing public information isn't a victory just for real-estate professionals and wonky journalists who might be interested in copious mortgage data. It is a victory for the public, against a highhanded attempt to effectively disregard public-records law.

Obtaining public information that already exists in electronic form should be simple and routine, and it was in the Cuyahoga County recorder's office until 2010.

That's when Recorder Lillian Greene informed two California real estate-information companies that her office no longer would provide a CD of each day's transactions for $50. Instead, she said she would provide only paper copies of the documents, at the premium price of $2 per page.

Leave aside the gargantuan waste of insisting that people buy reams of paper documents they don't want when an electronic version exists. The cost – each company would have owed $208,000 for two months' worth of data – was tantamount to denying access to the records.

Greene's policy violated both the spirit and the letter of open-records law. There's no reason to insist on paper instead of electronic copies, and the law already states that governmental offices can't charge more for copies than the cost to produce them. They also can't include a charge for public employees' time spent producing the records, as some government offices have tried to do.

In that sense, Cuyahoga County got a break; the court ruling orders it to provide electronic records for $1 per CD, when court records showed the county pays a bit less than that for blank discs. That's still a huge price break compared with $50.

Plaintiffs in the case made similar records requests of all 88 Ohio counties in 2011 and found that 60 provided CDs of daily activity. Some charged $1 per disc; none charged more than $20.

Ohioans interested in keeping track of their government owe a debt of thanks to Data Trace and Property Insight, the companies that sued the recorder's office after trying for months to get the information they requested.

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For continually updated OCOG news, go to www.ohionews.org/category/ocog.

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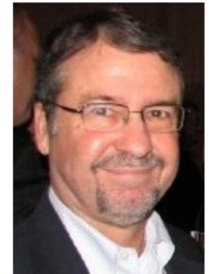
OCOG evolves
Battles change but never end

By Dennis Hetzel, OCOG President


Hetzel

The past six months have been interesting ones for OCOG. It's time for a roundup of what we've been doing and thinking about.

Elsewhere in this newsletter you will read detail about a big win in a Cuyahoga County case in which government officials were trying to charge outrageous amounts of money for compact discs of property records that cost about a buck each to produce.

The Ohio Supreme Court decision was unanimous and strong – pointed even – in its rejection of a position that was absurd and a waste of taxpayer dollars to litigate.

The ripples of this decision go well beyond property records. It means that governmental bodies in Ohio can't interpret the laws to either turn public records into profit centers or discourage access to information because the cost is too high.

OCOG played a role in the case by funding an "amicus" (friend-of-the-court) brief written by Jack Greiner of the Graydon Head law firm in Cincinnati. Dave Marburger of the Baker Law office in Cleveland, who writes many of the items you see in this newsletter, was lead counsel for the plaintiffs.

OCOG resources challenging

The work involved to fund these amicus briefs is important but potentially costly. The reality is that OCOG's resources are pretty slim. We are essentially limited to doing our newsletters twice a year and getting involved in court cases from time to time.

But the challenges to open government continue and get more complex. Consider the Internet just as one example. It makes more government information more readily available to more citizens than ever. That's the good news. However, because it makes so much information so readily available, the drumbeat gets louder to restrict access to information in the name of protecting individual privacy.

This is a complicated issue, and organizations such as OCOG are essential to point out the serious dangers of pushing the privacy pendulum too far.

And there is so much more OCOG could be doing, particularly in the areas of engaging more citizens in the cause and using social media, such as Facebook and Twitter, to not only send our message but also spark conversations about issues, raise awareness and build consensus. Access to government information crosses all political lines and affects everyone.

With that in mind, we are in the early stages of planning what will perhaps be a half-day retreat this fall to discuss OCOG's future directions.

We welcome ideas from all our members and friends, especially if you might be interested in participating. And please encourage people you know to become OCOG members.

Public notices deserve more respect

Public notices – or "legals" as they have been nicknamed for years at newspapers – are the stepchildren of access issues. Newspapers are reticent at times to speak up about the importance of paid notices, because they also have a financial interest in the revenue provided by this advertising.

However, notices serve a critical purpose. Luther Liggett, who represents Ohio's free weekly newspapers, recently put it this way when he and I presented a program to a group of county officials: It is a fundamental, Constitutionally-mandated role of government to inform citizens before acting.

And, he added, there is no point in the information if it is done only at places, such as government websites, that few people see.

For that reason, the Ohio Newspaper Association is actively opposing Senate Bill 234, which would allow all sheriffs' sale notices to only be posted on government websites. Research shows that newspapers remain the public's first choice for notices, and that people believe it is a wise, prudent use of taxpayer dollars to put notices in print.

I can't think of notices more important than sheriff's sales of property. On top of that,

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there is no taxpayer cost for sheriff's sale since the payment comes from the sale proceeds. However, there will be taxpayer costs if sheriffs set up elaborate, secure websites to handle thousands of notices that newspapers now process for them.

OCOG members who would like more information about SB 234 or details about the research I am referencing can contact me.

Legislative activity report

Here is more, but not all, of the legislation we have been monitoring that could have an impact on open government in Ohio. All information on status was current as of March 14:

- HB 118 adds probation officers to a long list of public safety-related workers who can have personal information redacted form public records. The other occupations in the list have a journalistic exception allowing reporters to see these records, but the exception hasn't been applied to probation officers. The bill is pending in the House.

- The state budget – HB 153 – placed restrictions on those who profiteer by getting fines levied against governmental bodies that haven't correctly archived and maintained records. The bill probably went too far. Destroying an "unwelcome" record could become more attractive than keeping it.

- HB 66 created a system to encourage whistleblowers to report possible fraud and abuse of taxpayer dollars to the state auditor. That's a good thing. So was the support of Auditor Dave Yost for creation of a "complaint log" so the public knows what complaints are being made in general terms, preventing complaints from being swept under rugs. Gov. John Kasich signed this bill into law.

- SB 207 and HB 308 would allow tele-conferencing instead of public meetings in which everyone is physically present for generally uneventful but time-consuming proceedings that local officials must have regarding sanitary and drainage ditches. This may provide an opportunity for a healthy discussion on the right ways to allow more public meetings of this type, particularly if it is video conferencing and not audio-only, which has weaknesses that are obvious to anyone who takes part in conference calls.

- SB 226 would restrict access to videos taken by police cruiser cameras of the killing of a public safety officer. It is pending in the Senate.

- HB 386 regulates the casino industry and was improved in the House to allow for more disclosure of information about license applicants. The bill is pending in the Senate.

- SB 271 would allow telephone companies to withdraw landline service from communities with adequate competition. The sponsor, Sen. Frank LaRose, agreed to an amendment that requires public notices before this can be done.

- HB 133 sets requirements for drilling for gas and oil on state-owned lands such as state parks. It became law with no public-notice requirements, and we are hoping that this will be fixed in an upcoming session.

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The law gives you no recourse except to sue Mrs. Peterson for fraud and the return of some of your money. But you can't get the whole lot that you thought you'd purchased because Mr. Smith validly owns half your lot. And Mrs. Peterson's defense: There was no fraud; in her old age, she'd forgotten that she'd given her son part of the property, especially since years had passed and he'd done nothing with it.

Are you going to be comfortable buying someone's land again?

Instant public access to recorded deeds, mortgages, and other rights in land recorded with the county solves that problem. Our laws say that no claimed right in land can be enforced against others unless that claimed right is recorded with the county and immediately open for public inspection. County recorders exist to give the public notice of who claims to have rights in land so that the public won't be afraid to buy land.

What Lexis and West Publishing Company do for the legal world, Property Insight and Data Trace do for the world of buying and selling land.

Using digital images of publicly-available deeds, mortgages, and other recorded instruments, sophisticated software, and tiers of personnel, they maintain and update databases of information about title to land. Banks, title companies and professionals in the title field pay to use Data Trace's and Property Insight's databases to find and evaluate records of title to land, much as lawyers and courts pay Lexis and West Publishing Company to use their databases and search tools to find and evaluate publicly-available appellate court opinions and state and federal statutes.

Data Trace and Property Insight and other companies like them enhance county recorders' missions by making it easier to figure out who claims rights in land and whether the chain of title to land is good.

If those companies had to pay county recorders hundreds of thousands of dollars to obtain copies of deeds, mortgages, and liens, as Cuyahoga County demanded, they would have two choices.

One: get out of the business altogether because it's too costly, thus depriving the community of their useful services.

Two: Pass the county recorders' exorbitant fees onto the banks that use the companies' services. Of course, the banks would pass those costs onto you as "closing costs" when you buy a house. Instead of paying $3,000 in closing costs, you'd pay, say, $60,000.

Preventing all of that is the real victory for the public in the Ohio Supreme Court's decision.

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As the Ohio Newspaper Association and the Reporters Committee for Freedom of the Press pointed out in friend-of-the-court briefs supporting the real-estate companies' complaint, access to public records is critical if members of the public and journalists are to discover and prove abuses by government or businesses.

The high court hasn't been a reliable defender of public access to government records. But this decision is a welcome one.

David Marburger's Open Government Commentary

Ohio Supreme Court opens crack for release of some personally identifying information

By David Marburger

The Ohio Supreme Court has opened a crack in a series of precedents that allowed public offices to withhold names and addresses from public records.

In 2000, the court issued the first of those precedents, ruling that a Boy Scout recruiter had no right to see the names and addresses of boys and their parents who held passes to use Columbus recreation facilities. The court ruled that "standing alone," the names of the boys, their parents, and their addresses "does nothing to document any aspect of the City's Recreation and Parks Department."

That ruling applied Ohio law's definition of "record," which uses the word "document" as a verb. The information must "document" the "organization, functions, policies, decisions, procedures, operations, or other activities" of the public office. If the requested information fails to satisfy that definition, then it isn't a "record" under Ohio law, and so cannot be a "public record" under the Public Records Act.

Two years later, the court ruled that the Akron Beacon Journal had no right to see responses to jury-selection questionnaires in a murder case. To aid lawyers in selecting a jury, the trial court asked potential jurors to complete questionnaires. The trial court then distributed their answers to the lawyers in the case. The Ohio Supreme Court ruled that the information did not qualify as a "record" because it "does little to ensure the accountability of government or shed light on the trial court's performance of its statutory duties." Ironically, in many cases, the jurors would have been asked the same sorts of questions orally in open court, and they would have responded orally in open court for anyone to hear.

Then, in 2005, the Ohio Supreme Court ruled that the Columbus Dispatch had no right to see the home addresses of state employees. Although the Ohio Dept. of Administrative Services had to collect those home addresses to perform its duty of managing the state's human resources, the court ruled that the home addresses of state employees are not "records" and therefore can't be "public records." The court concluded that the department's "policy" of requiring employees to provide their home addresses would be a "record," but the home addresses themselves were not because they didn't document any department policy or procedure.

In the court's latest ruling about names and addresses in public records, the court decided that Cleveland-area lawyer Michael O'Shea had a right to see the home addresses of certain people who lived in government housing, but denied him access to their names. In O'Shea v. Cuyahoga Metropolitan Housing Authority, decided in January, 2012, O'Shea asked to see the responses by residents to questionnaires about exposure to lead in their homes.

When the housing authority learned of potential lead poisoning, it asked the affected residents to answer the questionnaire. The responses listed the residents' names, addresses, telephone numbers, names and birth dates of children, information about the residents' employment, and information about the condition of the home and where the exposure to lead might have occurred.

The court affirmed its precedents in ruling that O'Shea had no right to see the names, telephone numbers, dates of birth, and identities of employers. But the court ruled that O'Shea had a right to see other information, including the home addresses of the residents. The court decided that "the addresses contained in the completed lead-poisoning questionnaires here help the public monitor CMHA's compliance with its statutory duty to provide safe housing."

The lesson for those seeking information in public records that identifies people: Find a way to argue convincingly that the information isn't merely incidental to a public office's duties, but central to overseeing whether the office performed its duties diligently or even at all.

Invoices from outside counsel may not be public record

By David Marburger

When outside lawyers bill their public-sector clients for legal services, the public has no right to see what the lawyers did to deserve the fees that they demand. The Ohio Supreme Court ruled unanimously against a central Ohio mother who sued to see the bills that the Columbus law firm of Bricker and Eckler had sent to the Bloom-Carroll school district where her son is enrolled.

Angela Dawson, of Fairfield County, asked the district to allow her to inspect the law firm's invoices for defending the district in a suit that she brought on behalf of her son claiming that the district had violated his due-process rights.

In ruling for the school district, the Ohio Supreme Court concluded that the attorney-client privilege protects the "narrative portions of attorney-fee statements" that describe "legal services performed by counsel" for the client. The Court reaffirmed several earlier decisions that applied the attorney-client privilege to block the reach of the Public Records Act in opening government records to the public.

In the Dawson case, the court decided that the school district had the right to withhold the law firm's "detailed descriptions of work performed," "statements concerning their communications to each other," and "the issues they researched." The court also upheld the district's refusal to redact the bills to separate privileged from unprivileged information because the unprivileged information was "inextricably intertwined" with the privileged information.

The court approved the school district's release to Dawson of summaries of the law firm's bills showing the attorneys' names who performed services, the fee total, and identifying the general matter involved. The court's opinion said nothing about the attorneys' hourly rates.

Court rules on county web posting

By David Marburger

The Ohio Supreme Court unconvincingly exalted form over substance when it ruled against Michael Patton of Hamilton County, who succeeded in persuading the county to post copies of some of its financial statements on its website.

In March, 2010, Patton asked the county to provide a copy of the county's financial reports prepared for each of several earlier years. He asked the county to provide the copies directly to him or to post them on the county's website.

The state auditor had not yet completed the audits for the requested years because of issues raised by the federal government about accounting procedures used by one of the county's departments. Because of Patton's request, the county asked the state auditor if the county could post on the county's website unaudited draft financial reports for the requested years. The state auditor approved it, but told the county to accompany the postings with an alert that the reports were unaudited and not yet final.

Within six weeks after making his request, Patton had heard nothing from the county, so he sued. Less than two weeks later, the county posted the unaudited financial statements with a disclaimer that the state auditor had approved.

Patton agreed that the website postings had satisfied his request, but demanded that the court award him statutory damages and attorneys' fees under the Public Records Act. Despite over a decade of awarding attorneys' fees to citizens who receive requested copies of public records in the middle of their suits, the Ohio Supreme Court denied Patton's request.

The court reasoned this way: The Public Records Act doesn't require public offices to post any public records on their websites, so Patton didn't vindicate any right under the Act when the county posted the financial reports on its website for the entire public to copy and read. Since Patton didn't vindicate any right under the Act, he wasn't eligible for any award of attorneys' fees and statutory damages that the Act provides for vindicating rights under the Act.

The court's reasoning was flawed. The Public Records Act requires public offices to make copies of public records available upon request. It also requires public offices to comply with a citizen's request to provide those copies on any medium that the office uses or can use, consistent with its normal operations.

Posting public records on a government website is the act of making copies of them available for Patton and anyone else to read and further copy. And, since Patton specified using the county's website as the medium for providing the requested copies, he invoked the Act's provisions that require the county to do just that, and the county complied with it.

Although the court ruled correctly that, as a general matter, Ohio law doesn't compel public offices to post their public records on the internet, that generality should not have mattered here. The Act compels public offices to provide requested copies of public records, and to comply with a requester's choice of media for providing those copies. Complying with Patton's request to post the financial statements on the county's website fits squarely within the Act's mandates, and the court should have ruled for Patton.

About David Marburger

Marburger

David Marburger is a partner in the Cleveland office of Baker Hostetler and an authority on legal issues arising from the content side of communications and around issues of constitutional law. Marburger is a member of the Ohio Coalition for Open Government committee and has represented many clients in Sunshine Law cases. He has also co-authored *Access with Attitude*, a 350-page "advocate's guide to freedom of information in Ohio," published by Ohio University Press.

Citizen ordered to pay attorney fees to court clerk

By David Marburger

Raleigh Striker must feel frustrated. The central Ohioian took on several court clerks in a variety of separate suits to gain access to court records, lost the suits, and the Ohio Supreme Court affirmed an order requiring him to pay over $3,000 in attorneys' fees to one of the clerks.

In one case, Striker asked the clerk of the Mansfield Municipal Court to see the records filed in a civil suit that had been pending for about two years. The clerk denied the request, saying that the records were in the custody of the municipal court judge, and "would not be accessible to the public until the case file was returned to the clerk's office." The judge had held the case file in his office for all of the past 11 months.

Then, after Striker left the clerk's office, the judge's case file was returned to the clerk's office that same day, but the clerk didn't alert Striker. Not knowing that the records were back in the clerk's office, Striker sued the clerk the next day in the court of appeals. About three weeks later, the clerk provided copies of the requested records to Striker. The Ohio Supreme Court affirmed the court of appeals' decision declining to award attorneys' fees to Striker.

Later, Striker asked the clerk of the Mansfield Municipal Court to see records filed in another case that had been before that court. The case had been transferred to the local common pleas court. After Striker sued in the court of appeals, the Ohio Supreme Court affirmed the court of appeals' ruling against Striker on the ground that the municipal court no longer possessed the records.

Then, Striker sued the clerk of the Shelby Municipal Court to compel the clerk to release certain court records. A private law firm represented the clerk in defending the case, which Striker filed in the court of appeals. Striker insisted that only the Shelby Law Director had the legal authority to represent the clerk, not the private law firm, but the court of appeals ruled that the private law firm could represent the clerk. Despite that ruling, Striker repeatedly claimed that the private law firm had no authority to defend the clerk.

The court of appeals then required Striker to pay over $3,000 in attorneys' fees incurred by the clerk because Striker had insisted upon "relitigating an issue after first raising it unsuccessfully," which the court concluded was frivolous conduct. The Ohio Supreme Court affirmed.

Ohio Supreme Court rules county risk-sharing authority is not subject to the Public Records Act

By David Marburger

The Ohio Supreme Court has reaffirmed the sheer impossibility of using the Public Records Act to hold people accountable to the public when they provide privatized government services. This time the Court ruled that the Public Records Act doesn't apply to the organization whose only reason to exist is to hold county tax money, invest it, pay claims against the counties, and otherwise manage self-insurance for Ohio's counties.

When a county insures itself, it sets aside money that from which it pays claims against it, such as to settle lawsuits against it. It invests that money to earn dividends or otherwise to grow the pool of money.

A state law allows Ohio's counties to pool their self-insurance money together. State law allows the counties to cooperate in the forming of a nonprofit organization to administer the joint self-insurance pool and to pay claims from it. That organization must be "a separate legal entity" and it cannot serve the purposes of private people. It can serve only "the public purpose" of administering the counties' joint self-insurance pool and paying claims from it. The entity is exempt from all state and local taxes.

State law says that the joint self-insurance pool "is not an insurance company" and "is not subject to the insurance laws of this state." It adds that, if a public official or employee of one of the counties in the pool simultaneously serves as a member of the governing body of a joint self-insurance pool, the official or employee does not have a conflict of interest.

The state law that allows joint self-insurance mandates allowing the public to inspect and copy the contract between the self-insurance entity and the counties. The counties cannot agree to the contract without first publicly disclosing its proposed terms at a public meeting. Each year the entity must make available to the public a report that "includes but is not limited to" an accounting of money paid for claims, legal fees for defending claims, and fees paid to consultants.

In the case before the Ohio Supreme Court, a central Ohio man whose name has appeared often as a litigant in court cases, Greg Bell, sued County Risk Sharing Authority, Inc., the nonprofit organization that most of Ohio's counties cooperated in forming to administer their joint self-insurance pool.

He asked to inspect all of the records showing the joint self-insurance pool's payments of claims that had been made against Madison County, which lies between Columbus and Springfield. He also asked to see the records showing the joint self-insurance pool's allocation of payments received by Madison County into the joint self-insurance pool's financial accounts. And he asked to see minutes of minutes of the meetings of the insurance pool's board of trustees.

The joint self-insurance pool refused, saying that it had no duty to let Bell see those records because the Public Records Act doesn't apply to any of the pool's records. Applying a series of precedents that began in 2006, the Ohio Supreme Court unanimously agreed.

> ***Government agencies privatize their services chiefly for one reason: to free themselves from day-to-day control over those services while remaining ultimately responsible for providing the services.***

In 2006, the court decided that it would not apply the Public Records Act to privatized government services, typically performed by nonprofit corporations contracting with state or local government agencies, except under four criteria.

The first criterion requires the privatized service to be one that government historically has performed. A second requires that funds from a government agency pay for most of the nonprofit organization's operating expenses. A third requires that a governmental entity establish the nonprofit organization. And the fourth is that a government entity must control the "day-to-day operations" of the nonprofit organization.

In Bell's case, the court decided that the nonprofit County Risk Sharing Authority received nearly 90% of its funding from the counties. Indeed, the only other money that it received was dividends and interest earned on that money. But the court decided that the other three criteria barred applying the Public Records Act. Administering a county's self-insurance was not an historical government function, the court decided. The County Risk Sharing Authority was formally created under the laws for creating nonprofit corporations and not set up directly by the counties through an order of the boards of county commissioners. And there was "no evidence that any government entity controls the day-to-day operations" of the County Risk Sharing Authority.

Failing that last criterion has doomed every case since the fall of 2006, when the court ruled against Ohio's Attorney General when it sought to apply the Public Records Act to an entity that operates privatized prisons in Ohio.

In fact, every entity that performs privatized government services will flunk the criterion that requires a government agency to control the entity's day-to-day operations. Government agencies privatize their services chiefly for one reason: to free themselves from day-to-day control over those services while remaining ultimately responsible for providing the services.

The agencies retain control over the ultimate product through contracts, but they avoid the constraints of the civil service laws, collective bargaining agreements, and the direct costs inherent in using their own employees. To gain those perceived economic advantages, they cede day-to-day control of providing the services to the employees and managers of nonprofit organizations, while retaining ultimate control through contracts with those organizations.

So long as the Ohio Supreme Court allows the absence of day-to-day control by government agencies to drive its analysis, privatizing government services will always escape the accountability to the public that the Public Records Act can provide.

New public records ‘trolling’ law goes after problem already fixed by Ohio Supreme Court

By David Marburger

About three months before Ohio’s General Assembly amended Ohio law to stop people from “trolling” for easy money under the state’s records-destruction statute, the Ohio Supreme Court had already found a way to stop it under the existing law.

For years, Ohio’s records-destruction law allowed an “aggrieved” citizen to win $1,000 for each violation of the law: when state or local government agencies destroyed a record that the government should have kept under the agency’s schedule for keeping and destroying its records. The law made the government liable even if it destroyed records accidentally or even if something outside the government’s control destroyed them.

During 2010, two Stark County men canvassed local governments across the state looking for old reel-to-reel audio tapes of 911 calls or police dispatchers that local agencies had taped over or destroyed even though the agency hadn’t adopted a schedule that authorized the destruction. Then, each man sued that agency under Ohio’s records-destruction law, demanding tens of thousands and hundreds of thousands of dollars.

One of the Stark County men, Edwin Davila, won a judgment last summer of $1.4 million against the city of Bucyrus, but the court of appeals overturned the judgment on technical grounds. Davila used to be a lawyer, but he surrendered his license to practice law over a decade ago when disciplinary proceedings were pending against him.

Last September, the General Assembly amended the law to create an avenue for a government agency to show that someone’s request for records that had been destroyed was phony. That is, a court could refuse to award any money if the agency proved that the requester actually wanted requested records to be missing so that the requester could collect a windfall of money and had only pretended to want to read the destroyed records.

But earlier last summer, the Ohio Supreme Court construed the original law to have that same effect. Timothy Rhodes, a colleague of Ed Davila’s, had asked the city of New Philadelphia for reel-to-reel tapes of police dispatch calls covering the years 1975 through 1995. He’d asked for the same kinds of tapes from Tuscarawas County, five different cities, and a village. When the city of Medina made some of the requested tapes available to him, he made no effort to listen to them or to get copies.

New Philadelphia had re-used its reel-to-reel tapes every 30 days, but hadn’t taken the legal steps that Ohio law required to do that. Rhodes sued the city, but the jury entered a verdict in favor of the city, apparently deciding that Rhodes wasn’t really “aggrieved” because he didn’t really want to hear the tapes; he wanted them to be missing.

Rhodes appealed and the court of appeals reversed. The court of appeals decided that Rhodes was “aggrieved” because, if a public office destroyed a record that it was supposed to keep, anyone who asks to see it is “aggrieved” regardless of why they asked to see it.

Rhodes demanded $4.9 million, arguing that about 4,900 taped calls had been erased, but the court of appeals rejected that. Deciding that the reel-to-reel tape was the destroyed record, not the individual calls that it recorded, the court decided that the city had erased the tape 84 times over seven years. At $1,000 per erasure, Rhodes could win $84,000.

Still, the court of appeals sent the case back to the trial court for a new jury trial on how many records the city had destroyed, and therefore how much money the city should pay to Rhodes.

The city appealed to the Ohio Supreme Court arguing that the Rhodes wasn’t entitled to any money because he wasn’t “aggrieved.” The city argued that the evidence before the jury showed that, by erasing over the tapes, the city had made Rhodes a happy citizen. What Rhodes really wanted, the city argued, was the right to sue for money; he did not really want the requested tapes. And since erasing over the tapes gave Rhodes the apparent right to sue for money, he got exactly what he really wanted.

Rhodes’ lawyer, Craig Conley of Canton, did not deny that his client actually wanted the money instead of the tapes. At oral argument, he admitted to the Ohio Supreme Court that he would have objected if the trial court had instructed the jury that they could rule for Rhodes only if he really wanted to hear the requested tapes.

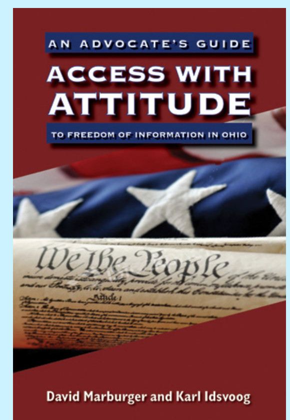
When Justice Terrence O’Donnell asked Conley whether Rhodes had asked for tapes knowing that they’d been destroyed, Conley responded “so what” if that were true.

The result: The high court ruled unanimously against Rhodes, ruling that he wasn’t really “aggrieved” because he didn’t really want the old tape recordings. What he wanted instead was the right to sue to win a financial windfall. He got what he wanted – the right to sue – so he wasn’t “aggrieved.”

The court’s ruling made changing the law unnecessary, but the General Assembly led by Republican Bill Seitz of Cincinnati changed the law anyway and with overkill. As amended, the law limits dramatically a citizen’s ability to win even a fraction of the fees that he had to pay his attorney if he proves that a state or local agency unlawfully destroyed public records. The likely result: probably no one will be able to find an attorney to sue to enforce the law.

OCOG members receive discount for David Marburger’s reference book

Ohio University Press is offering members of OCOG discounted copies of *Access with Attitude*, a valuable new reference book about freedom of information in Ohio.



Access with Attitude: An Advocate’s Guide to Freedom of Information in Ohio is a straightforward, practical guide written by David Marburger and Karl Idsvoog that will help journalists take advantage of our state’s public records.

The retail price for the paperback book is $29.95, but Ohio University Press is offering OCOG members a 30% discount on orders between one to four copies. To get the discount, use discount code M1121 when ordering on the Ohio University Press website, www.ohioswallow.com.

For a 40% discount on orders of five or more books, contact Ohio University Press’s business manager Kristi Goldsberry at either (740) 593-1156 or goldsbek@ohio.edu.

Unless indicated, all articles excerpted from state and national news sources. For links to the complete articles, go to www.ohionews.org/category/ocog.

OHIO ROUNDUP

New law will help workers report fraud

From OCOG

On February 2 Governor Kasich signed into law House Bill 66, which will encourage reports of potential fraud and abuse by government officials.

House Bill 66 also provides new protections from retaliation for whistleblower-type complaints. In addition, the Ohio Newspaper Association was successful in adding an amendment that will create a "police blotter" type list of complaints when they are received in the office of the state auditor. While the log will not be specific, journalists and the public will be able to get the nature of the complaint, the department to which it was directed, its status and when it was received.

The ONA argued that without some type of public records complaint log, it would be all-too easy for complaints to be ignored or swept under rugs for political reasons.

The mechanisms created by this bill will enable journalists to check the log periodically, which could be a rich source of both stories and story ideas and affirm the watchdog role of the media.

The bill was sponsored by Rep. Ross McGregor, R-Springfield, while State Auditor Dave Yost worked with McGregor to add the "police blotter" amendment.

Revised sunshine 'bible' now available

From The Columbus Dispatch

The so-called "Yellow Book," the Bible of Ohio Sunshine laws, has received its annual retooling to ring out Sunshine Week.

Download a copy today (from http://www.ohioattorneygeneral.gov/YellowBook). It's the informed citizen's guide to government transparency, spelling out in detail the public's rights to attend meetings and access records.

Controlling Board approves JobsOhio contracts, but public may never know if they're successful

From OCOG

In January the state Controlling Board approved JobsOhio contracts covering spending of over $100 million for econonomic development. However, Ohioans may or may not ever know if they are getting a good deal from this spending because there is no requirement that JobsOhio ever disclose details of unsuccessful initiatives. JobsOhio also has broader exemptions from typical open meetings and open records requirements.

In the original legislation creating JobsOhio, the Ohio Newspaper Association was successful in getting added a public notice requirement for meetings and standards for archiving of records. However, an attempt to apply broader open meeting and open records requirements was defeated.

Ohio auditor slams responses to public-records requests

From The Columbus Dispatch

Ohio Auditor Dave Yost figures that if his office can't quickly obtain public records, "Joe Average Citizen isn't going to fare very well."

Yost proclaimed (March 12) that the "public-records law in Ohio is alive but not well" as he released a study of cities' responses to his office's request on Oct. 17 for copies of their annual payrolls.

Forty percent of Ohio's 247 cities failed to provide records within the requested seven to 10 days, a figure that the auditor declared unacceptable. Within a month, 77 percent of cities had turned over their payrolls.

Funeral directors board violated open-meetings law

From The Columbus Dispatch

A Franklin County judge has ordered a state board to pay nearly $26,000 in attorney fees and court costs for violating Ohio's open-meetings law.

Common Pleas Judge Mark Serrott ruled (in January) that the Ohio Board of Embalmers and Funeral Directors broke the law by meeting in private in August to discuss a Columbus funeral home's license application.

At the time of the ruling, the judge imposed a $500 civil fine against the board and scheduled a hearing to determine attorney fees for the funeral home.

Fairborn Sweet Corn Festival violated religious free speech, court rules

From The Dayton Daily News

A federal appeals court in Cincinnati ruled Monday that two Christians had their free speech rights violated and should have been allowed to display signs and distribute leaflets promoting their religious beliefs at the Fairborn Sweet Corn Festival in 2009.

The U.S. 6th Circuit Court of Appeals three-judge panel ruled unanimously that a festival policy against solicitation from individuals who were not working at a booth was too extensive, unconstitutional and violated the First Amendment. The panel reversed an earlier decision by U.S. District Judge Thomas M. Rose from the Southern District of Ohio.

(The Feb. 13) decision upheld the preliminary injunction plaintiffs Tracy Bays and Kerrigan Skelly – who are described in the lawsuit as evangelical Christians from Kentucky – sought to be allowed to carry signs and speak about religion at the festival. The case has been sent back to Rose to decide the merits of the festival's solicitation policy.

Islamic group: Unseal files in lawsuit

From The Vindicator

The Islamic Society of Greater Youngstown has asked a federal judge to unseal documents and audiotapes submitted as evidence in a lawsuit by an assistant city prosecutor who alleged his boss and the city discriminated against him based on his Muslim faith.

The sealing order was agreed upon by the parties in the lawsuit by Bassil Ally, who is of Middle Eastern descent, against the city and its prosecutor, Jay Macejko. The suit was settled without a trial last fall.

New whistleblower site solicits leaks for Ohio, other states in Appalachia region

From OCOG

Honest Appalachia, a new whistleblower website focusing on Ohio and other states in the Appalachia region, is now soliciting leaks. As reported by the Associated Press, Honest Appalachia co-founder Jim Tobias and his partners decided to focus on these states "because of its relatively rural area, believing there was less media scrutiny in the region and that a resource like Honest Appalachia would be particularly valuable."

Whistleblowers first download software from the website and can then upload documents anonymously. The Honest Appalachia website is https://docs.honestappalachia.org. The site is funded by both private donations and the Sunlight Foundation.

Marietta mayor waffled on releasing names of job applicants

From The Marietta Times

After twice denying a public records request in December, Marietta Mayor Joe Matthews agreed (in early January) to release the names of applicants who submitted resumes for six city jobs that he appointed on Jan. 1.

(Matthews later said) he may no longer provide the information because he was tired of being asked about it.

The list of applicants was requested by The Marietta Times but Matthews at first declined to release the names, citing concerns that some of those who applied could lose their present positions if the names were printed in the newspaper.

The mayor re-stated that concern following a city council committee meeting (on Jan. 3) but said he would provide the list by (Jan. 9), following a conversation about the issue with the state auditor's office.

Ohio not part of federal database on EMS runs

From The Columbus Dispatch

Ohio is considered a leader in emergency medical services, but it's one of the few states that don't send run reports to a national database.

That means EMS agencies here can't compare themselves to others across the country to improve patient care and how emergency medical workers are trained.

A 1992 law that created the Ohio trauma registry prohibits state officials from sending the information to the federally funded National EMS Information System.

ESPN: Ohio State using playbook of misdirection

From The Columbus Dispatch

A lawyer for ESPN accuses Ohio State University of attempting an end-run around the truth.

Jack Greiner, a Cincinnati lawyer representing the sports broadcasting giant in a public-rights fight with Ohio State before the Ohio Supreme Court, recently spanked the public university in a reply brief to Ohio State's legal justification for withholding records pertaining to the Buckeyes football scandal.

Ohio State contends it did not violate the Ohio Public Records Act by withholding records it contends are shielded by the Family Educational and Privacy Rights Act that prohibits the release of student "educational records."

"OSU can offer this court all of the misdirection in its playbook, but it cannot avoid the inconvenient truth that it violated the Public Records Act in its response to ESPN's requests," Greiner wrote. Records concerning NCAA violations and resulting investigations are not student records, he maintains.

Former Lorain County Sheriff's captain identifies reporter as source of tip

From The Plain Dealer

A former sheriff's captain has provided a sworn statement that identifies former Plain Dealer reporter Mark Puente as the anonymous source that Lorain police cited to search the home of a man suspected of distributing letters critical of the police department and its chief.

Richard Resendez said he met in 2008 with Puente at a restaurant in Westlake, where the newspaper reporter named former Lorain police officer Joseph Montelon as the letter writer — information that police used to obtain a search warrant for Montelon's house in Lake County.

Montelon was not arrested and has never been charged with a crime. He later filed a federal lawsuit against Lorain Police Chief Cel Rivera, Detective Andrew Mathewson and the city of Lorain, accusing them of an unconstitutional search and seizure, and a violation of his freedom of speech. Montelon has not said publicly whether he was the letter writer.

Ohio State keeps public safety meeting private

From The Lantern

The public safety committee that President E. Gordon Gee formed to help address a recent string of armed robberies in the campus area met for the first time (on November 22). The public was denied access to the closed-door meeting.

After the door to Bricker Hall Conference Room 105 shut at 4:12 p.m. Tuesday, officials from several different offices discussed several safety issues.

After emerging at 5:54 p.m., all committee members present declined to comment on the meeting.

University spokeswoman Shelly Hoffman said none of the members of the committee were going to talk about the meeting.

When asked why none of the committee members would be commenting on the meeting, Hoffman said, "there's nothing to say."

Unless indicated, all articles excerpted from state and national news sources. For links to the complete articles, go to www.ohionews.org/category/ocog.

OHIO ROUNDUP

Ohio governments earn high praise for websites

From The Akron Beacon-Journal

A nonprofit group is giving high marks to government websites in Ohio for providing information to the public, including an A-plus for the city of Akron.

Sunshine Review, an organization in Alexandria, Va., analyzed the state website and sites for Ohio's five largest counties, five largest cities and 10 school districts. Ohio's overall score was a B, one of the highest grades the group has handed out so far.

"Sunshine Review has conducted transparency tests in 16 states so far, and Ohio ranks in the top three for disclosing information to the public via their government websites," group President Michael Barnhart said in a prepared statement.

The group grades websites based on content available, such as budgets, meetings, lobbying, financial audits, contracts, academic performance, public records and taxes.

AG: State Board of Education cannot vote by secret ballot

From Gongwer News Service

Attorney General Mike DeWine has issued a formal opinion concluding the State Board of Education may not vote by secret ballot during a public meeting.

The board had voted twice at the beginning of the year to elect a board president and vice president, the first of which was done without revealing how each member voted.

Board President Debe Terhar, who was elected to her post during the second vote this year, said (October 19) the vote for the board's leadership has traditionally been done by secret ballot. The board, however, changed its policy following an initial letter from the AG in the spring.

Ohio's public meetings law does not explicitly address the use of secret ballots but the law itself instructs liberal interpretation of its mandates in favor of openness, the AG said in his opinion.

Judge: Forest Hills committee violated law

From The Cincinnati Enquirer

A Forest Hills schools committee violated Ohio law, a judge has ruled, by deliberating and voting in secret to recommend what building changes the school board should consider.

Hamilton County Common Pleas Judge Dennis Helmick agreed (October 7) with The Forest Hills Journal after it sued the school district and its facilities committee. Helmick said the committee – which was to consider and recommend the proposed consolidation of two high schools and construction or discontinuation of other buildings – violated Ohio's Open Meetings Act with its secret deliberations and vote on issues that potentially involve spending millions in public money.

The judge permanently prohibited that committee – or any committee created after this by the school board – from violating that law.

The Forest Hills Local School District provides an education for about 7,800 students in Anderson Township and Newtown.

Enquirer, judges agree to dismiss public records suit

From Gongwer News Service

A public records case before the Ohio Supreme Court involving a newspaper's request for information from the Cincinnati Police Department has been dismissed at the request of the involved parties.

The Cincinnati Enquirer had requested documents related to a shootout that took place in September 2010 between the Cincinnati Police Department and a motorcycle gang. The request was denied by CPD, resulting in a complaint being filed by the paper in Ohio's First District Court of Appeals to seek release of the records.

In March 2011, the newspaper sought deposition of Thomas Streicher, then CPD chief. Prior to the deposition of Streicher, CPD filed a motion for protective order to seal the deposition, as the chief was concerned revealing certain information could endanger individuals and their families.

First District Court of Appeals initially did not apply a rule allowing release of the records but upon application of the rule the newspaper gained access to the records it sought albeit with redactions, Enquirer attorney John Greiner said in an interview.

First District Court of Appeals judges Patrick Dinkelacker and Sylvia Hendon filed a motion to dismiss (in October 2011) with an application for dismissal of the case coming from The Enquirer a few days later.

"We might disagree about what they redacted or not but we felt that we had accomplished what we needed to accomplish," Greiner said.

Smaller communities more likely to allow public speaking than larger cities

From The Akron Beacon-Journal

If you want to speak before city council, you can in Stow, Green, Kent and Medina.

But, if you live in Akron or another big Ohio city, you may be out of luck.

A Beacon Journal survey found that smaller communities are more likely to give residents the chance to talk during their meetings than the state's largest cities.

Of 19 communities and agencies in the Akron-Canton area, Akron is the only one that doesn't have a public speaking time during its regular meetings. Cleveland, Cincinnati and Toledo also don't have comment periods, while Canton, Columbus, Dayton and Youngstown do. These bigger cities also more often grapple with sticky subjects that could draw a crowd.

Open Government Editorials

Preserve public's access to information on sheriff's sales

From The Vindicator

At a time when, unfortunately, the number of foreclosures and sheriff's sales are increasing, there are at least a few senators in the Ohio General Assembly who want to make the process of a sheriff's sale less transparent.

State Sen. Bill Coley, a Butler County Republican, is sponsor of Senate Bill 234, which would allow the public notice of a sheriff's sale to be displayed on a government website, rather than in a newspaper of general circulation in the county where the sale would take place.

We'll acknowledge that as a newspaper we have an obvious dog in this fight. But it is folly to pretend that a greater number of Ohioans would be served by posting a foreclosure sale on a government website rather than have it published in a newspaper.

It should also be obvious that it is not in the best interests of Ohioans to embark on a journey that would eventually replace independent sources of public notices –such as newspapers – with government-run websites.

Obviously the ways in which people use the Internet is evolving, and growing, and most newspapers – this one included – have been adapting to that reality. But an independent press is vital to a democracy, and providing public notices of what the government is doing through general-circulation vehicles is a part of maintaining that independence.

By law, Ohio newspapers already make public notice advertising available to government entities at the lowest rates charged by those papers. That apparently isn't good enough for Sen. Coley, who candidly states that he doesn't read public notices in his hometown paper. Perhaps members of the General Assembly, who have greater access to laptop computers and handheld devises than the average Ohioan, are more Internet savvy than many or even most of their constituents.

But research sponsored by the Ohio Newspaper Association as recently as last May shows that Ohio citizens want and expect public notices to be in newspapers.

As far as the notice of sheriff's sales goes, obviously these are of interest to a broader public than just those who would bid on a particular property. People want to know if a house on their street, or two houses three streets over are going on the block before a sign pops up in the front yard or cars carrying bidders start parking on the street.

And, from a marketing standpoint, the more notice people have of a sale, the more likely it is that more people will show up to bid. And more bidders are good for everyone.

S.B. 234 is a bill that should die because it has no purpose other than to limit the ways in which people can be informed about a matter in which they have an interest. There is no reason why sheriff's sales can't be added to a government website if the local government has one. There is even less reason, though, to replace general circulation of such public notices with the limited circulation available to fewer people on a government-run site.

In the dark: Public officials should know and understand Ohio's public-meetings law

From The Columbus Dispatch

A public board and its public attorney should have known better than to debate a public matter behind closed doors, a breech that costs the state money and public trust.

On Feb. 16, Franklin County Common Pleas Judge Mark Serrott smacked the Ohio Board of Embalmers and Funeral Directors with nearly $26,000 in legal fees and court costs for violating Ohio's open-meetings law. This reimburses the Triplett Chapel of Peace, which also won a $500 civil penalty in the case.

The board had debated behind closed doors, then emerged to vote – without comment – to deny Triplett's application to reopen a Columbus funeral home that, under prior ownership, had cremated the wrong body.

The board's secret session is more baffling because the assistant Ohio attorney general who was present should have advised the board that a secret session would be illegal. Questioned before the executive session, she told a Dispatch reporter, erroneously, that state law allows the board to deliberate in private. Her office acknowledged that she could have done a better job, but said she was caught up in a chaotic situation.

Serrott's reproach isn't lost on Ohio Attorney General Mike DeWine, who said he immediately began using the ruling as a training tool to better assure open government.

"We can use this as an example," DeWine said. "We are trying to get our assistants to be much more aggressive; that has not been the culture in this office."

That is the only heartening outcome of a disappointing episode. The funeral board's assistant director said it barely collects enough license fees to cover operations. So barring a successful appeal, it will have to ask the state controlling board to cover the court-ordered costs by tapping a license-fee fund that pools dollars from a variety of state professional-governance boards. That's a poor use of tight dollars.

Those who sit on the state board are expected to know state open-meetings and open-records laws. The rules aren't overly complicated: Boards can meet privately to discuss lawsuits or pending litigation, real-estate transactions or personnel matters. Otherwise, discussions should take place in open session.

The executive session was a disservice to the public, as well as to new funeral-home owner Thor Triplett, who wanted to reopen the Marlan J. Gary Funeral Home, which had its license suspended after the 2010 cremation error.

The funeral board did prevail over Triplett in one part of his complaint: He could not operate under the Gary name. The state requires funeral homes to include the name of the licensed funeral director. That's so the patrons know exactly with whom they are dealing. The board demands transparency for those it governs, but failed to hold itself to the same high standard.

Open Government Editorials

Records told shocking tale that PUCO hid

By Benjamin J. Marrison,
The Columbus Dispatch

The value of public records is sometimes difficult to convey. Here is a case that makes it crystal clear:

For many months, the Public Utilities Commission of Ohio and American Electric Power fought us over releasing records in AEP's rate case. Through sources and relentless persistence by business reporter Dan Gearino and this newspaper, the agency released documents showing that the proposal would place an inordinate burden on small-business owners.

Using internal memos from the PUCO staff and other public documents, we published a story on Dec. 4 predicting astronomical rate hikes of 30 percent to 40 percent for small businesses.

That day, a quiet campaign was launched to discredit Gearino and the newsroom. Such campaigns are not unusual, because some subjects of such stories don't like what we publish and seek to undermine the messenger who delivers an unpleasant truth.

On Dec. 10, the Dispatch editorial page published a letter from Joe Hamrock, AEP Ohio's president and chief operating officer. He said: "The article misrepresented the overall impact of the agreement for small commercial customers.... When considered in total, the impact is much lower than readers were led to believe, with overall changes in the range of 5 percent of their total electricity cost, compared with current rates."

We were confident with the facts; otherwise, we would not have published the stories. And when electricity bills hit mailboxes, the reporting was proved correct.

Gearino and education reporter Charlie Boss reported that school districts were considering layoffs to pay their electricity bills, and local governments were scrambling to balance their books. Small businesses said they would have to consider expanding in other states because central Ohio is no longer competitive.

Amid the loud and numerous complaints, the PUCO decided to revisit the plan it approved. Of course, it is planning to do so in private – again.

In announcing its review, the commission suggested that AEP wasn't clear in stating the effects of its proposal, although we'd reported that the PUCO's own internal emails predicted such a dramatic hike.

That wasn't lost on our readers.

"The Dispatch has been doing a fantastic job with the AEP-PUCO rate case," one wrote. After reporting on the projected increase, The Dispatch "reported the customer outrage when the 35-40 percent approved increases were actually billed, then reported the PUCO commissioners' surprise reaction, and reported the commissioners feigned outrage and promises to 'roll back' the rate increase. Don't the PUCO commissioners understand the issue is about the PUCO? The PUCO reviewed and approved the increases!"

Last week, Charles Amata Jr., a small-business owner in Blacklick, offered his take on the rate hike:

"Based on our January bill, the new AEP rate structure has increased the distribution costs on our small service by 76 percent and has more than doubled (201 percent) the monthly distribution costs for our large service! These rate changes translate to a tangible annual electricity cost increase of more than $50,000 for our organization," Amata wrote.

"The new AEP rates were implemented with no notification, explanation or phase-in. Based upon articles published in The Dispatch over the last few weeks, we are not alone in our concern over the timing and magnitude of these rate changes.... This increase is a job killer."

Through stories like these, for which we fight like mad to root out the facts, we feel that we have lived up to the role our forefathers envisioned for a free press.

And through such cases, the public gains a better understanding of and appreciation for public-records laws. We hope that Ohioans will continue to become outraged when public agencies seek to do public business in secret or when legislators try to curb their access to public documents.

Charter schools need sunshine

From The Columbus Dispatch

A recent ruling by Franklin County Common Pleas Judge John F. Bender should establish an important principle from here on: Whoever is spending tax dollars to educate students in charter schools should have to make that spending transparent.

Charter schools are public schools, and the public is entitled to an accounting of how tax dollars are spent.

Accordingly, Bender recently ruled in favor of 10 charter schools that contracted with Akron-based White Hat Management to run the schools, but later sued the company because it refused to disclose its spending and claimed ownership of the desks, computers and other equipment bought for the schools with tax dollars.

Without a ruling in their favor, the schools wouldn't be able to change to a different school-operating company, because they wouldn't be able to afford to replace everything White Hat would keep.

The case illustrates the weakness of Ohio's charter-school system to date. Charter schools, which typically are started by groups with an educational concept but few material or financial resources, can turn over most of the state tax money they are given to professional management companies and, in the process, give up effective control of the schools.

This ignores the interests of taxpayers, who are investing in charter schools as an alternative for students who aren't being well served by conventional public schools.

Earlier in the case, Bender declared that when acting as the operator of a public school, White Hat is, in effect, a public official, and thus subject to the same public scrutiny as traditional schools. White Hat has argued that the declaration makes it impossible for private citizens to do business with state and local governments.

But providing an ordinary product or service to a governmental entity is one thing; taking over virtually every aspect of a public school, including hiring and firing of teachers and developing curriculum, is another.

Apart from the issues of principle, the important question raised by this case is, why is White Hat so unwilling to tell the public – or even its clients – how it spends their money?

Having started with one of the nation's weakest charter-school laws, Ohio has made strides, especially in making charter schools more accountable for their academic performance. But until rules are clarified to ensure that charter-school funds are spent in the best interest of the children for whom they are intended, school choice in Ohio won't work as well as it should.

Public has a right to details of suit against Macejko, city

From The Vindicator

There's no compelling reason for U.S. District Court Judge Christopher A. Boyko to maintain the seal on evidence submitted in a religious and race discrimination lawsuit, other than it was agreed to by the parties.

The suit, filed by Assistant Youngstown City Prosecutor Bassil Ally against his boss, city Prosecutor Jay Macejko, and the city of Youngstown, was settled last fall – just before trial was to begin. The sealing of documents and audiotapes relating to the case was part of the settlement that resulted in Ally's receiving a $110,000 lump sum payment and an annual pay raise of $4,000. His salary is now $65,621.

Macejko wrote a letter of apology to his employee.

Given that the case is over, the Islamic Society of Greater Youngstown has filed a motion with Judge Boyko to have the seal removed. It can be, if the parties to the settlement agree.

Although the Islamic Society is seeking the release, it would seem that Ally would have no objections to the documents and audiotapes being made public. Thus, it's up to the administration of Mayor Charles Sammarone.

Transparency in city government has been the hallmark of Sammarone's five-month tenure, and we have every reason to believe he will come down on the side of openness. Of course, the mayor will follow the advice of his law director, Anthony Farris, who said in an interview with The Vindicator, "I don't think we have any great secrets."

Thus, there should be no hesitation on the part of the city to support the Islamic Society's motion submitted by Atty. Scott R. Cochran to make the evidence public.

"Records filed in a judicial proceeding are presumptively public, and may not be sealed unless there is a compelling need to do so," Cochran argued. He noted that because the lawsuit was settled, there will not be a trial. Thus, fair trial rights of the defendants are not an issue.

In his lawsuit, Ally said he had been harassed because of his Muslim faith and Middle Eastern descent and that Macejko threatened his job because he took a late lunch break at 1:30 p.m. each Friday to attend a mosque service.

The suit said Ally was subjected to derogatory comments regarding his religion and national origin by a co-worker and another city employee.

Ally said he told his supervisors when he was hired that he would need an accommodation to his work schedule to attend Friday mosque services, the suit said.

The Islamic Society believes that making the evidence public will help promote tolerance for the Muslim religion.

Macejko, who is challenging Mahoning County Prosecutor Paul Gains in the March 6 Democratic primary, said it was up to the law director and others to decide.

But, his opinion does matter, which is why we would urge him to come out in favor of unsealing the documents and audiotapes.

The public has a right to know why the city settled with Ally. Even though the $110,000 lump sum payment was made by the city's insurance company, does anyone doubt that it will affect future premiums?

As for the pay raise, would Ally have received that amount had he not been forced to seek legal redress against religious and racial discrimination in the prosecutor's office?

Why journalists should care about public notices

By Al Cross, The SPJ Quill

The financial pressures of the news industry have made journalists much more aware of the business side that supports our journalism. But some journalists need to know more about an important part of the business that also helps inform citizens and helps us find stories: public-notice advertising in newspapers. Paid public notice is under threat, and SPJ members and chapters need to help defend it.

You may know public notices as "legal ads," because they are required by law, they can be part of court process, and classified sections often use "legal notices" as the heading. But public notices also include display ads and encompass a wide range of important information: government budgets, financial statements, audits, local ordinances, hearings, environmental permit applications, water-system reports, foreclosure sales and more.

Public notices are a necessary leg of the three-legged stool of open government, along with open-records and open-meetings laws. But local governments are lobbying state legislatures to eliminate or reduce newspaper publication of legal notices, arguing that it would be much cheaper for taxpayers if they're published on government websites, and just as effective.

The second half of that argument is an assumption, and repeated research shows that it's incorrect. Polls by the Donald W. Reynolds Journalism Institute at the University of Missouri have found that citizens are unlikely to surf government sites for public notices, while they do report reading them often in newspapers. Also, many Americans lack broadband or access to it, and Internet adoption appears to be leveling off, indicating that some Americans will never be online.

Public notices can provide tips for news stories and are a significant source of revenue for many newspapers, especially county-seat weeklies, so their reduction or elimination could lead to fewer jobs in journalism, and less journalism.

State newspaper associations are lobbying hard against efforts to reduce public notice. They have not always been successful, most notably in Ohio, where public notice was scaled back significantly in the 2011 legislature. Because the economic recovery is slow and stimulus dollars are gone, state and local governments will be under even more pressure to cut expenses, and public notice is likely to be an even greater target – especially for those public officials who don't get along with their local papers.

Unfortunately, some journalists who cover this issue lack necessary knowledge. Mark Thomas of the Oklahoma Press Association reported last year, "I was stunned a couple of months ago when we were fighting off two legal-notice bills by the counties. I was interviewed many times by reporters. Not only were longtime reporters a bit ignorant of public notice and its role in the entire process, but the newbie reporters were completely clueless.

"One reporter (at least) called back to ask me if newspapers get paid for these notices and how that worked. That was when I was stunned and a little depressed about our future.

"The paper does get money, but this is different than learning about how the car business works because auto dealers advertise. These notices are an important part of the three-legged stool, to use your example. They love to crow about how much they know and defend open meetings and records, but are completely silent on knowing about public notices. In fact, when they learn the newspaper gets paid for the notices, they actually run the other way in disgust."

(*see* **PUBLIC NOTICES** *page 15*)

Unless indicated, all articles excerpted from state and national news sources. For links to the complete articles, go to www.ohionews.org/category/ocog.

Penn State open-records law exemption comes under scrutiny

From The Vindicator

A northeastern Pennsylvania lawmaker says he wants to change the commonwealth's 3-year-old open-records law to get rid of an exemption that allows Penn State and three other state-related universities to keep their operations out of the public eye while receiving taxpayer money.

Democratic state Sen. John Blake of Lackawanna County told The (Allentown) Morning Call that he hopes to introduce a bill early (in 2012) to end the disclosure exemption for Penn State, Temple and Lincoln universities as well as the University of Pittsburgh.

The exemption has come under scrutiny since Penn State assistant football coach Jerry Sandusky was accused of sexual abuse involving eight boys over 15 years. School administrators Tim Curley and Gary Schultz are charged with not properly alerting authorities to suspected abuse and with perjury. In the wake of the scandal, Joe Paterno, Division I's winningest coach with 409 victories, was fired by university trustees. University president Graham Spanier also left his job under pressure

Terry Mutchler, executive director of the state Office of Open Records, says the four universities are required to disclose "nothing, zippo" under current law, even though they receive hundreds of millions of dollars each year in state funds. That stands in contrast with the disclosure requirements for the most- obscure state agencies or the smallest municipal government, not to mention the 14 state-owned schools in the Pennsylvania State System of Higher Education, which are fully subject to the law, Mutchler said.

Doubts on FOIA stats

Editor's Note: *During this year's Sunshine Week, a number of claims were made about how well the Obama administration handles Freedom of Information Act requests. According to the following article, claims of a reduction in FOIA requests should be greeted with skepticism.*

From Politico

A new installment (regarding FOIA requests) is John Hudson's Atlanticwire piece highlighting former Justice Department official Dan Metcalfe's deep skepticism about the department's claims of backlog reduction.

As the Obama administration's own reports acknowledge, backlog reduction is a laudable, but tricky, goal. When pushed too aggressively, it simply encourages agencies to take short cuts like pinging those who filed old requests until the requesters fail to respond, then closing the requests out without ever processing any records.

In any event, taking the official FOIA statistics with a grain of salt is probably wise. Nate Jones of the National Security Archive recently highlighted how the Justice Department's claimed "release rate" of about 95% is actually closer to 60% if you take into account all the ways a request can go unfulfilled, like an agency's search failing to turn up any records or a requester backing off after being assessed a large fee. (The White House has claimed a similar 93% to 94% release rate governmentwide.)

Arizona House panel rejects bill to move public notices online

From Cronkite News

A House panel rejected a bill (Feb. 14) that would have allowed governments to post required notices about public meetings, budgets and other matters on their websites instead of purchasing ads in newspapers.

"I simply do not trust government to keep me informed," said Rep. Bruce Wheeler, D-Tucson. "That's so vital, and I could not possibly support this kind of legislation."

The bill would have offered the option of putting notices on "a designated site" online rather than in print. He amended the bill Thursday to require that local governments to use their websites and maintain archives of public notices.

Memphis police delete photographer's cell phone pictures

Editor's Note: *We are hearing increasing reports from around the country of police deleting content from citizens' and journalists' cell phones and cameras without warrants or probable cause. If these photos are taken on public property, this activity by police likely is illegal. If anyone learns of this being done by Ohio law enforcement officials, they should contact OCOG President Dennis Hetzel at dhetzel@ohionews.org.*

From ABC 24, Memphis

If you are on a public street and take pictures or video of Memphis Police with your cell phone, you could end up in the back of a squad car and your pictures could be deleted.

ABC 24 News photographer Casey Monroe said that's what happened to him Sunday morning. Police never charged Monroe with a crime, but this could happen to anyone with a cell phone camera.

Monroe said police went too far outside Thai Bistro Restaurant in downtown Memphis that morning, and that they violated his rights.

FOIA portal moving from idea to reality

From the FOIA Ombudsman

Consider this: a multi-agency FOIA portal that automates FOIA processing and reporting, stores FOIA requests and responses in a repository and keeps records electronically. Not to mention allows

requesters to submit requests to fewer government websites, track the status of requests and find, view and download FOIA requests and agency responses, all in a secure online environment.

Sound like a dream? It was. Now it's becoming reality, thanks to the Environmental Protection Agency (EPA), the Department of Commerce and OGIS's parent agency, the National Archives and Records Administration (NARA). If all goes as planned, the project goes live this fall.

New Jersey legal ads still must be in newspapers; Legislature drops online proposal

From MyCentralJersey.com

A bill that would end requirements for governments to advertise budgets, bids for services and other public records in newspapers died (January 16) when the leadership of the state Legislature withdrew it from consideration.

The measure underwent extensive criticism from good-government advocates and newspaper executives at committee hearings nearly a year ago, then was brought back last week when listed for a vote.

The legislation would have allowed government entities to self-publish legal notices on their own websites rather than in newspapers.

Public access to federal mugshots at risk

From ASNE

While many states allow public access to photos taken during a criminal booking procedure, the U.S. Marshall's service in almost every federal circuit refuse to provide them, citing a FOIA exemption intended to protect subjects' personal privacy rights. The only exception is the Sixth Federal Circuit (i.e., Kentucky, Michigan, Ohio and Tennessee), where the Marshall's service has given mugshots to requesters for over 15 years.

The schism is the result of conflicting court rulings. In a case brought by the Detroit Free Press in 1996, the U.S. Court of Appeals for the Sixth Circuit ruled that the public's right to know outweighs an individual's privacy interest in their mugshot when the individual has already been indicted, made court appearances, and been publicly identified in connection with an ongoing criminal prosecution. The Courts of Appeals in the Tenth and Eleventh Circuits subsequently came down on the opposite side of the issue, and the Marshall's office in 11 of the 12 federal circuits cite these rulings in denying mugshot requests.

Justice department backs down on 'right to lie' FOIA rule

From About

The American Civil Liberties Union (ACLU) reports and takes quite a bit of credit for a decision by the U.S. Department of Justice (DOJ) to withdraw its proposed regulation that would have allowed federal agencies to respond to Freedom of Information Act (FOIA) requests by simply stating they did not have the requested documents... even if they really did.

According to the ACLU, lying about the existence of FOIA-requested material had "been a practice at DOJ for decades," and was revealed only after a lawsuit filed by the American Civil Liberties Union of Southern California.

The regulation proposed by the DOJ would have allowed the federal agencies to decide if FOIA-requested documents were too delicate to be made public and to proceed "as if the excluded records did not exist."

The proposed rule seemed to be in direct conflict with President Obama's executive order of January 21, 2009, ordering the agencies – including the DOJ – to treat FOIA requests with "a presumption in favor of disclosure," and not to withhold documents simply because government officials might be "embarrassed" by the information released.

Reporters Committee releases new edition of state-by-state Open Government Guide

From SNPA

The Reporters Committee for Freedom of the Press has published the 6th Edition of its Open Government Guide, a comprehensive overview of open records and open meetings laws in all 50 states and the District of Columbia.

The guide is available free on the Reporters Committee website at www.rcfp.org/ogg, where users can cross-reference and compare the laws in different states or simply get an in-depth analysis of one state. A CD version of the entire guide and hard copies of each state's section also can be ordered from the Reporters Committee for a small fee.

Each state's outline is prepared by attorney volunteers who are experts in access law; most have worked on earlier editions of the guide.

In addition to updating the material from previous editions, the latest Open Government Guide includes:

New categories, including access to government budgets, epidemiological records and economic development records.

Significant statute updates, including a new open records law in Pennsylvania and a revised open meetings law in Washington, D.C.

More specific category breakdowns on access to email, real estate and investigatory records, which enable users to better find and compare information.

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SPJ members and chapters should make an effort to educate journalists about the issue of public notice. The recent Federal Communications Commission report on the future of local news recognized a governmental responsibility to support activities that encourage transparency and accountability, saying the federal government should consider steering some of its advertising to local news outlets to support their journalism.

In addition to educating journalists about the issue, SPJ chapters should consider joining newspapers in lobbying against elimination or reduction of public notices. We can help generate and shore up support for public notice, because our organization has no direct financial interest in such issues. This is a case where a business issue for newspapers is also a freedom of information issue for journalists, and we should be informed and involved.

Ohio Coalition for Open Government

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The Ohio Coalition for Open Government (OCOG) is a tax-exempt 501 (c)(3) corporation established by the Ohio Newspapers Foundation in June 1992. The Coalition is operated for charitable and educational purposes by conducting and supporting activities to benefit those who seek compliance with public access laws. It is also affiliated with a national network of similar state coalitions.

The Coalition serves as a clearinghouse for media and citizen grievances that involve open meetings and open records, and offers guidance to reporters in local government situations. The activities of the Coalition include monitoring government officials for compliance, filing "amicus" briefs in lawsuits, litigation and public education.

The annual memberships to OCOG, as approved by the board, entitle a group or individual the use of the new FOI telephone hotline, handled directly by attorneys at Baker & Hostetler in Cleveland, and subscription to the newsletter.

OCOG is funded by contributions from The Ohio Newspapers Foundation and other outside sources. It's seven-member board includes public trustees from organizations with an interest in freedom of information. For board members, please see the masthead on page 2.

Donations to OCOG

OCOG represents a broad coalition of not only media people but also everyday citizens who support the cause of open government in Ohio through various means, including regular newsletters. OCOG sometimes is asked to do more. In 2011, for example, OCOG underwrote a "friend-of-the-court brief" to support an appeal in an Ohio case in which a government office was charging thousands of dollars to provide a CD with public records.

"We haven't scratched the surface of OCOG's potential to reach out and educate more citizens on the importance of open government," says Dennis Hetzel, ONA executive director and OCOG president. "I'm particularly intrigued about how we might use social media to educate, provide resource material and build coalitions. Unfortunately, OCOG's present resources will not keep pace with current needs, let along expansion of our efforts. So please consider donating to OCOG."

Donations to OCOG can be mailed to the address above. You can also submit donations online at www.ohionews.org/legislative/open-government.

Open Government Report subscriptions and news items

The OCOG Open Government Report newsletter is emailed twice yearly. To be placed on the distribution list, send your email address to Jason Sanford, Manager of Communications and Content at the Ohio Newspaper Association, at jsanford@ohionews.org.

You can also access continually updated OCOG information on the web at www.ohionews.org/category/ocog.

If you have news or information relevant to OCOG, please email it to Jason Sanford at the address at left.

Join OCOG

Any non-Ohio Newspapers Foundation member may submit an application for OCOG membership to the OCOG trustees for approval. Membership includes use of the OCOG hotline through the OCOG retainer to Baker & Hostetler and two issues of the OCOG newsletter. The cost of OCOG dues varies with the membership category the applicant falls under. The categories and dues prices are as follows:

Category	Dues
Attorneys and Corporate Members	$70
Non-Profit Organizations	$50
Individual Membership	$35
College & University Students	$25
High School Students	$10

To download the OCOG application form, please go to www.ohionews.org/legislative/open-government.