Ohio Coalition for Open Government

OPEN GOVERNMENT REPORT

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Blueprint for a public records loophole

By John C. Greiner, Graydon Head

The Ohio Open Meetings Act serves as a critical check on Ohio's public bodies by requiring the majority of official business to occur in plain sight. The preamble states the law "shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."

Earlier this year the Ohio Supreme Court declined to hear the appeal in a case dealing with the Act. In doing so, the Court let a flawed court of appeals decision stand, which created a major loophole for public bodies to avoid the provisions of the Act and public accountability.

The case resulted from a dispute between the Cincinnati Enquirer and the Cincinnati Board of Education over a violation of the Act stemming from an Emergency Special Public Meeting called to discuss a proposal to defer an annual payment due from the City of Cincinnati. By asking the Board to agree to a deferral, City Council hoped to use the $2.5 million, previously given to the Cincinnati School System, to avoid police layoffs. Understandably, this was a political hot button. At the meeting, a Board member who was up for re-election moved to convene in an executive session "to discuss contractual issues" related to the proposal. The motion was approved. The Cincinnati Enquirer immediately objected to this violation of the Act, and filed an injunction action in Hamilton County Common Pleas Court.

To qualify under an executive session exception to the Open Meetings Act, public bodies must meet both a substantive and procedural component. Substantively, public bodies may only convene executive sessions

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Vindicator wins public records victory in Youngstown corruption case

By David Marburger, Baker and Hostetler

The Vindicator newspaper recently won a high-profile public records case when the Ohio Supreme Court ordered Judge William Wolff to vacate his orders sealing key records in a high profile criminal prosecution in Youngstown. The case arose when a county grand jury indicted members of the well-known Cafaro real-estate development family — Anthony Cafaro, Sr. and his sister, Flora, and three of their companies; John McNally, a Mahoning County Commissioner; John Reardon, a former Mahoning County treasurer; John Zachariah, a former director of the Mahoning County department of Job and Family Services; and Martin Yavorcik, an unsuccessful candidate for Mahoning County prosecutor. The grand jury accused them of engaging in a pattern of corruption, including bribery, money laundering, perjury, and tampering with the content of public records.

At the defendants' request, Judge Wolff initially required the defendants and the special prosecutor assigned to the case to file under seal virtually every court record that contained information that suggested the potential guilt of a defendant, including written legal argument. The judge justified the order as needed to prevent prejudicial pretrial publicity from tainting potential jurors.

Youngstown's daily newspaper, The Vindicator, and its leading television station, WFMJ, then sued the judge in the Ohio Supreme Court to compel him to unseal the heavy volume of sealed records.

Meanwhile, the special prosecutor asked Judge Wolff to dismiss the indictment because federal investigators had declined to share incriminating evidence with the special prosecutor. The judge granted that request, and then unsealed most of the sealed court records.

But Judge Wolff kept two records under seal. One was the special prosecutor's bill of particulars, a key record that supplements a grand jury's indictment with specifics about the defendants' roles in the alleged crimes. The other was a six-page statement of facts in a written legal argument that the special prosecutor had filed earlier in the case.

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OCOG must look toward future

By Dennis Hetzel, OCOG President

Hetzel

Available time and multiple priorities have ways of interfering with our best-intentioned goals. That is what happened to me in 2013 as your president.

We hope to change that in 2014, because the need for us to expand our role is there. Early in 2014, we plan to gather our board and other interested parties to do more thinking about OCOG's future roles and resources.

Currently, OCOG has two primary activities: We generate two annual newsletters that focus on developments with open government issues in Ohio and, upon request, we consider funding amicus "friend-of-the-court" cases that raise significant legal issues.

What if we did more? Here are some things we might consider. These and many other ideas will, I hope, be part of our upcoming retreat:

- Create a smartphone and tablet app that makes Ohio open government information and tips quickly and readily available to all citizens on subjects such as open records, open meetings and open courts. (We have done some preliminary work on this already.)
- Bolster our available funds to get involved in more court cases, perhaps even creating a special "defense fund" to engage in legal proceedings.
- Hold training seminars and public forums around the state on open government.
- Get involved at some level with the training that local government officials receive on open records and open meetings.
- Create a unique presence for OCOG on the Internet and on social media sites, fostering greater dialogue and access to resources.

Well, you get the idea. However, we can't expand without generating more income. The sources are pretty obvious: donations from media organizations, donations from foundations and greatly expanding our individual memberships. It's also all-too true that we won't generate more income without expanding our limited staff time to solicit those funds or increasing volunteer efforts.

If we're going to ask for money, first we need a plan. And that is why we will hold the retreat.

We welcome your suggestions. Just send them my way: dhetzel@ohionews.org.

Legislative report card still incomplete

At this writing, we are watching to see what will happen in the "lame duck" session that will occur after the election and conclude the two year legislative cycle. This historically is a time when a lot of surprises, even mischief, can occur.

The biggest threat we see is a potential effort to limit access to public records, perhaps by charging fees for staff time involved in meeting public records requests. This is a response to "voluminous" requests that both the executive and legislative branches, controlled by Republicans, are fielding – most often from Democratic Party activists. We may see this issue pop up next year as well.

It probably is true that some requests are overly broad and mainly designed to harass. However, you don't punish the class when one student acts up. The vast majority of records requests are legitimate, and no one should be required to state a reason to see a public record.

Most citizens would say that searching for public records is a legitimate cost for government. It amounts to double-dipping to charge for staff time when government already is being funded to provide this service. The temptation to use public records as a profit center will be too much for some governmental bodies to resist.

Plus, as my friend and counsel Dave Marburger points out, even records that are requested for poor reasons serve a purpose – transparency keeps government on its toes. And even fishing expeditions can catch big fish.

As you will learn elsewhere in this issue, Ohio case law already grants government broad authority to limit requests. The situation is getting worse as a ruling in one recent case illustrates: The Ohio Supreme Court agreed with the ridiculous assertion that

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Columbus State University couldn't sort emails based on "from" and "to," and that a request for e-mails between a terminated employee and her supervisor was too broad.

That said, there also have been positive developments. The bill on JobsOhio, while still far from ideal in terms of transparency, got better in terms of access to information, particularly thanks to the intervention of Attorney General Mike DeWine after ONA expressed concerns. DeWine's public records mediation process also appears to be working well and may get even better in the future.

The Cleveland schools bill, that involved extensive reforms to that system, had excellent language on transparency. And the ONA has been working with a variety of state and local officials to come up with thoughtful concepts that would allow for use of modern technology in some public meetings.

Dennis Hetzel is executive director of the Ohio Newspaper Association, parent organization for OCOG. To reach him, call 614-486-6677 or send email to dhetzel@ohionews.org.

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to discuss one of seven permissible subjects. Procedurally, the public body must convene the executive session properly by first setting forth the appropriate statutory purpose for the session. The trial court ruled that the Board violated the Act both procedurally and substantively. However, the trial court also found the Board reasonably believed its actions were not a violation of the Act and that the session served the public policy of the Act. For that reason, the trial court declined to award attorneys' fees. Both the Board and the Enquirer appealed.

The First District Court of Appeals reversed the trial court's finding and found that the Board members did not deliberate or have discussions at the session, and therefore did not conduct a "meeting" as defined by the Act.

This decision is flawed for two reasons. First, it permits public bodies to cure a violation of the Act by its subsequent conduct, eviscerating the spirit behind the rule. The Act is clear that a public body commits a violation as soon as it enters an executive session on improper ground, regardless of what occurs thereafter. The court of appeals skipped the crucial first step in the Act's analysis: determining whether the session followed the procedural requirements. The motion to convene an executive session stated that the purpose was to discuss with the Board's attorney "contractual issues" surrounding the City's proposal. That is not a permissible basis for an executive session and the Board violated the Act the minute it closed the door.

Later, the Board defended the session by contending that it was a meeting with counsel to discuss pending or imminent court action. But there was no pending or imminent court action. So the Board then changed its course and called the closed door session a "fact finding" session with counsel. The Court of Appeals bought this last excuse. But by overturning the trial court's decision, the Court of Appeals ignored the procedural requirements of the Act, which is critical to effectuate the purpose of the Act. Simply put, the Court of Appeals allowed the Board to correct an obvious violation based on the events that allegedly occurred at the closed door session. The Act does not allow for an after-the-fact defense.

Second, the court chose to ignore the obvious facts when it determined that no deliberations or decisions had taken place. The undisputed evidence established that whatever "fact finding" occurred at the executive session, Board members discussed the issue among themselves as well. Furthermore, following the executive session, the acting Board president announced that based on discussions in the closed session, the Board would listen to the City's proposal. A decision to listen to a proposal is a decision. Thus, for the appellate court to rule that the executive session was merely a fact finding session, where no discussion or deliberation occurred, is to ignore reality.

Additionally, to rule that a closed door session is not a "meeting" based on the presence of an attorney is to expand case law to a degree that it will subsume the Act. The Act explicitly addresses the circumstances that allow a public body to confer privately with counsel—only to discuss pending or imminent court action. To allow a public body to privately engage in a "fact finding" session with counsel on any topic, however, invites abuse. If the public body cannot justify the closed door session based on the categories set out in the Act, the fact that an attorney is present should prove no cover.

The Enquirer appealed to the Supreme Court of Ohio to exercise its discretionary jurisdiction to review the flawed ruling. The Supreme Court declined. That short-sighted decision allows a flawed holding to stand—one that ignores both the letter and the spirit of the Act.

Thanks to the appellate court's flawed holding, all Ohio public bodies received a blueprint outlining how to exploit the Act to conduct a politically charged discussion in private. First, make a motion to convene an executive session on whatever grounds it cares to invent. Second, invite counsel into the meeting. Third, when challenged, contend that no formal action was taken and that the session was merely a fact finding exercise with counsel. The First District's failure to abide by the Act's admonition to interpret the Act broadly, coupled with the Ohio Supreme Court's inexplicable refusal to review the decision, resulted in a grievous limitation on the public's right to know.

John C. Greiner is a partner at Graydon Head LLC, where he practices commercial litigation and First Amendment law. He wishes to thank Jacklyn Johnston for her valuable assistance with this article.

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Although Judge Wolff had unsealed most of the records that The Vindicator and WFMJ had sued the judge to unseal, The Vindicator and WFMJ insisted the Ohio Supreme Court should order Judge Wolff to unseal the bill of particulars and the statement of facts. The judge resisted, arguing that he had not actually used the bill of particulars or the special prosecutor's statement of facts to decide anything, and that neither would have played any role in any of the judge's rulings.

The Ohio Supreme Court rejected Judge Wolff's arguments, and ordered him to unseal the bill of particulars and the special prosecutor's statement of facts. The court applied portions of its Rules of Superintendence. In 2009, the court adopted rules that tell lower courts when they should or should not seal records filed in litigation.

Those rules require lower courts to presume that records filed in litigation are open to the public, subject to arguments and evidence that would justify closing them. The court decided that Judge Wolff's expressed concerns about prejudicial publicity tainting the jury pool were too speculative to justify his sealing orders.

David Marburger's Open Government Commentary

Ohio Supreme Court expands definition of 'education records' in closely watched OSU / ESPN case

By David Marburger

The score is Ohio State 1, ESPN almost-nothing in the Ohio Supreme Court after the global sports and entertainment broadcast network sued to see former Buckeye football coach Jim Tressel's e-mails in the scandal that ultimately cost Tressel his job.

While head coach, Tressel received e-mails from an attorney advising him that some star players on his team — including star quarterback Terrelle Pryor — may have received tattoos from the owner of a Columbus tattoo parlor, and paid for them using Ohio State football memorabilia. Tressel did not inform his bosses at Ohio State about this violation of NCAA rules and nine months later, when the players' trading of memorabilia for tattoos became public, Tressel still hadn't told his superiors at Ohio State that he'd already received tips about the problem.

Invoking Ohio's Public Records Act, ESPN demanded that Ohio State release copies of e-mails exchanged between Tressel and three identified Ohio State administrators containing the key word "Sarniak." Ted Sarniak is a Pennsylvania businessman who acted as a mentor to Pryor during his high-school and college football career. ESPN also asked to see e-mails listing people whom the university had barred from receiving free game tickets, and e-mails between the NCAA and Ohio State athletic department officials about the football program potentially violating NCAA rules.

ESPN sued the university in the Ohio Supreme Court after Ohio State denied ESPN's requests, and the Ohio Supreme Court ruled unanimously for Ohio State on all but a few of the contested e-mails. The court ruled that Ohio State correctly relied on a federal privacy law in denying ESPN's requests.

The federal privacy law, officially named the Family Educational Rights and Privacy Act (FERPA), says that federal funds will not be made available to a state or private university that has a policy or practice of releasing "education records" to the public without the written consent of their parents.

Federal law defines "education records" as records maintained by the university that "contain information directly related to a student." ESPN argued that records about whether Ohio State coaches and administrators violated NCAA regulations, and records about Sarniak, didn't qualify because they are not "directly related to a student."

The Ohio Supreme Court disagreed because the "records here — insofar as they contain information identifying student-athletes — are directly related to the students" and therefore qualify as "education records." The court ruled that Ohio State "properly withheld identifying information concerning the student-athletes by redacting it from the records that the university released."

The court ordered Ohio State to release a few of the contested records because they didn't identify any students, such as an e-mail chain between Tressel and Ohio State officials scheduling a meeting.

Court rules against revealing names of wounded Cincinnati police officers

By David Marburger

The Ohio Supreme Court ruled unanimously against the Cincinnati Enquirer in its suit to learn the names of two Cincinnati police officers wounded in a gunfight with a motorcycle gang.

In September, 2010, the Iron Horsemen motorcycle gang forced a bar to close with patrons inside so that they could discover whether some of the patrons were members of a rival gang--and if so, beat them up. When 14 Cincinnati police officers surrounded the bar, agunfight broke out between the gang and police, killing the Iron Horsemen's national enforcer and wounding two police officers.

Cincinnati's police chief denied the Enquirer's request for records that would identify the two wounded police officers, citing his belief that the Iron Horsemen might retaliate against the officers for the death of the gang's national enforcer if the gang knew the officers' names.

The Enquirer then sued the police chief to try to get the records. The Hamilton County Court of Appeals,ruled against the Enquirer. When the newspaper appealed to the Ohio Supreme Court, the lower court ruling was affirmed.

The court of appeals and the Ohio Supreme Court both decided the officers' constitutional right to privacy trumped the Enquirer's statutory right to the records. The constitutional right to privacy prevails, the high court ruled, when releasing someone's identity would create a substantial risk of serious bodily harm to that person.

The court did not explain, however, why it allowed the police chief to raise the constitutional rights of the police officers instead of requiring them to raise those rights themselves, which they could do by entering the case using pseudonyms. Nor did the court explain why the two wounded officers were at risk for the gang's retaliation as compared with any of the other 1,053 officers on the city's police force or the other 12 police officers who were in the gunfight.

The Enquirer cross examined the police chief in a deposition, but part of the police chief's transcribed testimony was filed with the Ohio Supreme Court under seal. In ruling against the newspaper, the court said that the sealed testimony was admissible to establish the chief's perception that the gang might retaliate against the two wounded officers. Despite admitting the sealed testimony as evidence that influenced the court's ruling, the court did not describe that testimony, which apparently remains sealed.

Ohio Supreme Court: Requests for public emails by identity of sender and recipient too 'ambiguous'

By David Marburger

In a startling opinion, the Ohio Supreme Court has ruled that public offices do not have to grant requests for copies of e-mails based on the identities of the person who sent or received the e-mails.

The ruling arose from the firing of a public employee named Sunday Zidonis. In 2010, Columbus State Community College fired Zidonis and, when she appealed to the Ohio Personnel Board of Review, her lawyer tried to use the Public Records Act to get e-mails from the college. He asked for copies of all e-mails that Zidonis had sent to her boss, Deborah Coleman, and that Coleman had sent to Zidonis.

The college, represented by Ohio's Attorney General, responded that the request was "ambiguous" and that the college "was unable to reasonably identify" the specific records Zidonis wanted to see. The Attorney General claimed the college could "search" for the e-mails only if Zidonis asked for them according to specifically-named topic folders that Zidonis and Coleman may have created on the e-mail software and into which Zidonis and Coleman may have inserted copies of the e-mails.

Zidonis sued the college in the court of appeals in Franklin County, which ruled for the college. The Ohio Supreme Court affirmed.

Zidonis relied on a provision in the state open records law that says: "To facilitate broader access to public records, a public office shall organize and maintain public records in a manner that they can be made available for inspection or copying."

In a unanimous opinion, the court ruled that because the law "does not expressly require public offices to maintain e-mail records so that they can be retrieved based on sender and recipient," the court declines to require the college to retrieve them based on the identities of sender and recipient.

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While awaiting the court's ruling, the college had an information technician create "a special file and program" for an assistant attorney general to review Zidonis' and Coleman's e-mails to each other "to make potential redactions."

The court's opinion does not explain why the Attorney General would redact information from e-mails that Zidonis had written and received during her employment. Nor does the court's opinion describe the degree of ease with which the technician was able to retrieve the e-mails exchanged between Zidonis and her boss.

Court also rules on release of public records metadata

In a different decision decided the day after the Zidonis case, the Ohio Supreme Court ruled that, by asking for electronically-stored "documents" kept by the Mahoning County Prosecutor about particular topics, a defense attorney was not entitled to metadata. The defense attorney sought records related to the county prosecutor's suspected collaboration with a special prosecutor appointed to replace the county prosecutor because of a potential conflict of interest.

Metadata is information automatically stored electronically by word-processing and e-mail software that identifies when a specific document was created, modified, saved, and other specifics about its storage.

The court decided that a public office is obligated to produce metadata only if the requestor specifically asks for metadata. Asking for electronically-stored documents related to specific topics is not enough, the court ruled unanimously.

Court decides 50 days not too long to comply with public records request

By David Marburger

Since 2007, people requesting public records have had the option of suing for statutory damages when a public office takes too long to comply with the request. The Public Records Act says a court must award statutory damages if the court decides that the office failed to comply with its duty to promptly prepare requested records for inspection or to provide requested copies within a reasonable time. The law requires the court to award $100 for each business day during which the office failed to comply, starting with the day on which the requester filed suit to gain access to the records.

Gerald Strothers, an Internal Revenue Service employee and northeast Ohio gadfly, asked the mayor of East Cleveland for copies of a wide variety of records. He requested them on December 2, 2010, and sued one week later when he didn't receive any records. The mayor eventually complied with Strothers' request, which Strothers acknowledged was "large," but not until January 25, over 50 days after Strothers made the request.

Strothers filed his suit in the court of appeals in Cuyahoga County, which voted 2-1 to award him $1,000 in statutory damages. The mayor appealed to the Ohio Supreme Court, which unanimously reversed that award. The high court ruled: that "under the circumstances," the mayor produced the requested records "within a reasonable period of time."

Data Trace decision a big victory for Ohio open records — and anyone who buys and sells real estate

By David Marburger

In the last OCOG Newsletter, I discussed why the victory of Data Trace Information Systems and Property Insight in their recent Ohio Supreme Court ruling is also a victory for all Ohioans. However, not many people are familiar with what these two companies do, and how their competition benefits open records in general.

If you've ever used Lexis or Westlaw, which keep digitized copies of appellate court opinions and statutes in their databases, you'll understand what Data Trace and Property Insight do for the world of buying and selling land. Just as lawyers, courts, and others pay Lexis and Westlaw to gain access to their databases and to use their law search tools, so do banks, lawyers, and title insurers use Data Trace and Property Insight's records to search land records. The two companies put digitized copies of deeds, liens on land, and mortgages into their databases, and their customers pay for access and search tools to research who has the rights to particular parcels of land.

The two companies put digitized copies of deeds, liens on land, and mortgages into their databases, and their customers pay for access and search tools to research who has the rights to particular parcels of land.

Every county has a "recorder's office." It exists solely to give the public notice of who owns the rights to land within that county. If you acquire land, you take the paper deed to the recorder's office. Somebody there stamps the deed showing the time and date that you presented the deed, makes a copy of it and returns the original to you.

The recorder's office indexes and organizes all of its recorded deeds and other legal instruments showing who has a legal interest in parcels of land so that members of the public can search those records to research the quality of someone's claimed ownership of particular parcels.

The Cuyahoga County recorder keeps only digital copies of every deed, mortgage, and lien that it records. It keeps those copies on its computer system, makes them available to the public through its website, and keeps back-up digital copies on individual compact discs — CDs — each one covering all deeds and other legal instruments that the county recorded on one identified business day.

For 11 years, from 1999 to 2010, Cuyahoga County made copies of its CDs for Data Trace and Property Insight, charging $50 apiece for each copy. But when the two companies asked for copies of the CDs covering July and August, 2010, the county demanded over $208,000 from each firm, for a total of more than $417,000.

Data Trace and Property Insight sued the county in the Ohio Supreme Court, arguing that the Public Records Act limited the county's fee to its actual cost of producing the CD copies — about 30¢ apiece.

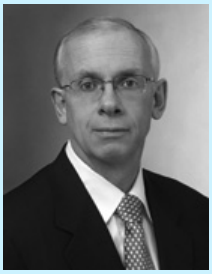
But the county cited a long-standing state law that allowed the county to charge $2/page for "photocopying a document." That led the county recorder's information-technology director to testify repeatedly under cross examination that he didn't understand what a photocopying machine is. "When you say 'photocopying machine,' what do you mean?" he testified.

The county justified the $417,000 fee by pointing to the fact that each CD contained digital representations that equated to thousands of paper pages, and multiplying the number of paper pages represented on each CD by $2.

The county declined to settle the case by accepting any fee below the $417,000 that it demanded, even though the companies said that they would settle by paying more than the $50/CD that they had paid for 11 years.

The Ohio Supreme Court ruled unanimously for Data Trace and Property Insight, ruling that the county could not charge above $1/CD as an estimate of the county's costs. The court ruled that making digital copies of CDs is not "photocopying a document," so the $2/page fee allowed by state law did not apply.

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.

Ohio Supreme Court reiterates that overly broad public records requests can be denied

By David Marburger

Over the last several years, the Ohio Supreme Court has ruled repeatedly that requests for public records were not valid because they sought too much information at once. Cleveland area attorney Michael O'Shea was the latest to learn that lesson when his law firm asked the Cuyahoga County Metropolitan Housing Authority for "copies of all documents which document any and all instances of lead poisoning in the last 15 years in any dwelling owned or operated by CMHA."

The Ohio Supreme Court said O'Shea's request was too broad, but when O'Shea identified more specific kinds of records, the court decided that O'Shea could have redacted versions of them. O'Shea focused most on answers that housing project residents gave to the housing authority's questionnaires.

The housing authority had circulated the questionnaires to tenants where children lived and where health tests showed the child had an elevated level of lead. The purpose was to identify likely sources of exposure to lead, which would lead to testing of specific locales with an ultimate goal of trying to prevent poisoning. The questionnaires asked residents to identify where the child was likely exposed to lead, when the family moved into the home, questions about the child's exposure to lead-based paint, lead-contaminated dust hazards, and other household risks of exposure to lead.

The questionnaires also asked responding residents to identify themselves by name, address, and telephone number and to identify the names and birth dates of any children.

The Ohio Supreme Court ruled that the housing authority had to release the responses to the questionnaires, but could delete the names and phone numbers of the residents who responded and any information that identified their children.

As the court has ruled in several other cases, information that identified the residents did not qualify as "records" because the statutory definition requires that the requested information "document the organization, functions, policies, decisions, procedures, operations, or other activities" of the public office that possesses the information.

As it has in other cases, the court concluded that information that identifies people is not relevant to holding a public office accountable to the public for the office's performance of public duties. The court did not explain why, since the housing authority plainly believed that knowing the identities of the affected tenants was useful or beneficial in carrying out its duties, the information would not be useful to public oversight of the housing authority.

Nor did the court explain why that same reasoning would not apply by analogy to the identities of individuals whom the government has arrested or identified in police incident reports or licensed to conduct such occupations as private investigator, nursing, or emergency medical technician.

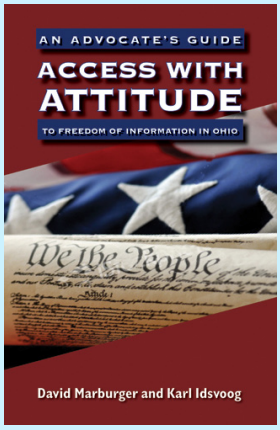
OCOG members receive discount for David Marburger's reference book

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.



To avoid denial, be specific in records requests

By Randy Ludlow
The Columbus Dispatch

"Overly broad" is the new mantra of some government officials in dealing with — and denying — some public-records requests.

And, in some cases, the Ohio Supreme Court agrees, those requesting records are failing in their duty to specify with "reasonable clarity" what exactly they are seeking.

In a ruling issued (in mid-September), the justices unanimously agreed that Columbus State Community College acted properly in denying a former employee's requests for records because they sought broad categories of records over a lengthy period.

The ruling broke no new legal ground, but serves as a reminder of the need for specificity in requesting records to avoid the "overly broad" slap back.

The former college employee wanted to review years' worth of records, without any narrowing limitations, and wanted all email exchanges between herself and another employee. The college provided some records, but pressed for more details on what was being sought to no avail.

It is vital in requesting records to specify a time frame and the content of what is being sought. To request entire classes of records is inviting denial.

Also, the court again reminded Ohioans that governmental entities cannot be forced to maintain their records in a manner that facilitates retrieval based on the requestor's desired method.

In denying records, government officials are required to work with requestors to more clearly identify what is being sought and how records are maintained. Take advantage of such opportunities if denied records.

OHIO ROUNDUP

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

Gov. John Kasich asserts executive privilege in records fight with Democrats

From The Plain Dealer

Gov. John Kasich has asserted the rarely used "executive privilege" in an attempt to deny records to the Ohio Democratic Party detailing his schedule over the summer.

The executive privilege exemption has remained unused since it was created in 2006 by an Ohio Supreme Court ruling when then-state senator Marc Dann was trying to jimmy loose records related to the "Coingate" scandal from then-Gov. Bob Taft. That changed this week when Kasich's legal team invoked the privilege among a handful of reasons why it says it should not be required to comply with the Democrats' request for the Republican governor's schedule.

"The governor has more or less pulled the nuclear option for open records," said Jerid Kurtz, a spokesman for the Democratic Party.

Democrats filed a lawsuit in Franklin County Common Pleas Court, saying the Kasich administration wasn't prompt in complying with a public records request for the governor's schedule from June 1 to Aug 27. At the time of the records request, the party asked for both future and past schedules.

No to foreclosure sale notices via websites

From The Cincinnati Enquirer

Editor's Note: Read the editorial on this topic by OCOG President Dennis Hetzel on page 12.

In property foreclosures, merely posting the scheduled property sales on a website isn't enough, the Ohio Supreme Court ruled (on Sept. 6).

"While we understand the interest in using technology to conserve resources, we find that notice by Internet posting is more akin to publication in a newspaper, and due process demands more in this instance," the court said. "While we are not holding that mail is the only form of notice that will satisfy due process… requiring a party to look at a website to find notice of the date, time and location of a sheriff's sale is insufficient."

The 7-0 ruling, which reverses a Middletown appeals court's decision, focuses on a disputed 2010 Clermont County sheriff's sale of a property that had gone through foreclosure. That legal process occurs when a borrower fails to make agreed-upon payments, and the lender, seeking to recover his funds, asks a court to order the property sold.

The case provides the latest example of courts and government agencies grappling with changes in information technology. Christo Lassiter, professor of law at the University of Cincinnati, says the Supreme Court made the right call. "You actually have to try to get notice directly to the people who are affected," he said, when the matter is as important as a person's property-ownership rights.

Dispatch sues over school board's private talks

From The Columbus Dispatch

The Dispatch Printing Company sued the Columbus Board of Education (on Oct. 8), saying the board violated Ohio law when it barred the public from meetings to discuss a student-data scandal.

The newspaper has asked a Franklin County Common Pleas judge to stop the board from holding more closed meetings and to require it to turn over records that show what was discussed in seven private meetings starting in August.

The board said it closed the meetings to meet with a lawyer about the data investigation, but the lawsuit contends that public boards are allowed to meet with their attorneys only about specific legal action against the district.

State law is clear, said Marion H. Little Jr., the attorney for Dispatch Printing, "that the public's business should be conducted in front of the public. The public is entitled to access. This is not to be conducted behind a closed door." Two separate Ohio appeals-court rulings have specified that public boards can't close meetings simply to meet with their lawyer.

Ohio's new system boosts fraud reports

From The Cincinnati Enquirer

Before May 4, trying to find records of fraud complaints against public offices involved dealing with a maze of dead ends. There was no guarantee that fraud complaints were investigated.

That changed when a new online database in the state auditor's office went live because House Bill 66 required it.

"This law makes sure public employees and all Ohioans have a safe place to tell someone when something is wrong," said auditor David Yost.

The new system is intended to make it easier for Ohioans to report fraud, theft or other infractions when they suspect public officials are violating the public trust. The law includes whistle-blower protections for civil services employees who use the system, including a right to appeal retaliatory actions.

OSU forbids reporters to tweet during press conferences

From Poynter

Before football coach Urban Meyer's press conference (on Aug. 27), Ohio State spokesman Jerry Emig laid down a ground rule for reporters: No using Twitter during Meyer's conferences.

Akron Beacon Journal reporter Jason Lloyd says the move "reeks of a power-hungry program flexing a little muscle in a rare area where they don't have any."

After speaking with a couple of the school's media relations people, the reasoning ranged from the success they had banning Twitter

during some closed practices over the summer to how reporters can't really listen to the news conference if they're constantly tweeting what Meyer is saying.

My job is to decipher what is worthy of reporting instantly on Twitter and what is worth saving for later. I don't need OSU officials to make the decision for me.

The press conference aired on the radio, Rick Chandler reports. Presumably listeners were free to tweet during the broadcast.

Legislators want transparency in Clean Ohio process changes

From Gongwer News Service

The Clean Ohio Council on (Sept. 14) opted to delay full implementation of its proposed policy overhaul after members expressed concern about transparency and the gathering of public input.

Clean Ohio staff presented the panel with a list of changes to how the Revitalization Fund and Assistance Fund would operate. They said the proposals resulted from more than a year of input gathered from past grant recipients and other stakeholders.

Rather than vote to implement the changes, however, members approved them as a draft and agreed to gather public input for 30 days, after which changes can be made before final approval.

The move will allow interested projects to work up applications in the meantime and Clean Ohio to collect data so applications can be accepted as soon as the panel votes to approve the procedures.

"Our role in government is to ensure transparency in the process," council member Sen. Michael Skindell (D-Lakewood) said at the Columbus meeting. He added the Ohio Housing Finance Agency, also under DOD purview, has been criticized for making changes in policy without public comment.

Head Start provider settles Blade suit

From The Blade

The Blade and the Economic Opportunity Planning Association of Greater Toledo reached an agreement (on May 30) stemming from a lawsuit filed by the newspaper under Ohio's Sunshine Law.

At a planning association board meeting last week, members entered into an illegal executive session during a discussion of the agency's Head Start grant application.

According to the stipulated injunction reached in Lucas County Common Pleas Court, the agency must pay The Blade's court costs and attorney fees. It also agreed to comply with the Sunshine Law and provide notice of the agreement to all board members and officers.

At the meeting, board members questioned how the agency is preparing to reapply for a $13 million grant to run Head Start locally before going into the closed-door executive session.

The vote to enter the May 21 executive session was not conducted by a roll call as required by law, the motion to proceed into executive session did not state "with particularity" the matters that would be discussed in executive session, and the matters discussed in the session "were not matters that may be discussed in an executive session of a public body," according to the newspaper's lawsuit, filed by Toledo attorney Fritz Byers.

Ohio DNR settles public records lawsuit

From The Columbus Dispatch

The Ohio Department of Natural Resources has paid a $1,000 settlement and nearly $8,000 in attorney fees and court costs to end a public records lawsuit.

The Ohio Sierra Club filed the suit in a Franklin County Common Pleas court in April, claiming that agency officials had ignored their requests for public records for months. The advocacy group wanted to see all official records and emails related to the agency's plan to open up state parks and forests to fracking.

The Dispatch also had filed a public records request for the same records.

Documents and emails showed, among other things, that officials had considered keeping drilling rigs farther away from campgrounds and other attractions than a proposed 300 feet, that teams of agency officials were sent from their regular jobs to scour property records for state-owned mineral rights, and that officials had discussed whether they should sell water from state park lakes and streams for fracking.

The agency released a short statement on the settlement. "We consider this case closed and are pleased that this matter is resolved to the satisfaction of both parties," wrote spokeswoman Bethany McCorkle.

Jed Thorp of the Ohio Sierra Club said he was satisfied, too. "We hope that this lawsuit will improve ODNR's responsiveness going forward," he said.

Blog sues Mandel over denial of records

From The Columbus Dispatch

The liberal-leaning political blog Plunderbund is asking the Ohio Supreme Court to order Ohio Treasuer Josh Mandel to turn over public records it claims were illegally withheld by his office.

Plunderbund Media filed an action seeking a writ of mandamus from the court on Monday, claiming Mandel was alone among five Republican statewide officeholders in failing to turn over records requested in March.

In its complaint, the blog stated it asked Gov. John Kasich, Attorney General Mike DeWine, Auditor Dave Yost, Secretary of State Jon Husted and Mandel for copies of public-records requests, records-request logs and the offices' correspondence about the requests between Jan. 1, 2011 and May 31.

The officials, with the exception of Mandel, provided the requested records in a timely manner, the complaint says.

Unsolved homicide cases to be featured on Ohio public database

From Gongwer News Service

Thousands of additional unsolved homicide cases will be featured on a public database, as law enforcement agencies have responded positively to a new Ohio Unsolved Homicide Initiative, according to Attorney General Mike DeWine's office.

Mr. DeWine announced (on Oct. 16) that law enforcement agencies from across the state have agreed to add their cold cases to the database, which is hosted on the Attorney General's website. The initiative was launched in September.

According to Mr. DeWine's office, the initiative will feature one cold case per month in an effort to generate publicity and encourage individuals to come forward with information.

Among the cases in the database are the unsolved homicides of Lora Davis and Gregory Haworth, a couple murdered in their Cincinnati apartment in 2006.

OHIO ROUNDUP

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

Is auditor's office a law-enforcement agency?

From The Columbus Dispatch

Is the state auditor's office a law enforcement agency?

The office of Ohio Auditor Dave Yost seemed to make at least half a claim to same in denying a public-records request by the Ohio Democratic Party, in part, on an exemption most often cited by police and prosecutors.

The office of Republican Yost refused to release records into its pending investigation of whether some school districts, including Columbus, inflated their state report-card scores by altering attendance data.

State law declares that audits by Yost's office are not public records until they are officially filed and that work papers and other documents underlying audits remain exempt from disclosure even after audits are released.

So, why did the state auditor find it necessary to also deny the Democrats' records-request by invoking the "confidential law enforcement investigatory records" exemption in state law?

The exemption is designed to protect the identity of uncharged suspects, informants, witnesses and police officers and crime victims who could be endangered, as well as information gathered for probable criminal cases.

Police-report fees vexing central Ohio residents

From The Columbus Dispatch

When Indira Mulligan discovered recently that another motorist had scraped and dented her car's side door, she figured she'd get a police report for insurance purposes.

Printed on two sheets of plain paper, it cost her $4 — Upper Arlington's price for a traffic-crash report.

"Four dollars. I almost died. For two pages? I could get a whole ream of paper for $2.99," she said.

Mulligan would have been spared the aggravation had the fender-bender occurred in many other central Ohio communities.

Upper Arlington's records commission set its fee at $4 because that's what state law says it can charge, said City Attorney Jeanine Hummer. A potential side benefit to the fee: It might cut down on those annoying calls from attorneys, chiropractors, repair shops and other businesses that scour the reports to drum up business.

The fees were approved a few years ago, said Hummer, who also is a city records commissioner. "I looked at this as one of the opportunities for the city to legally charge this, and we did."

Thwarting those who profit from accidents was not the commission's objective, however.

"I do think that's a positive tangent that may have come from this, but I don't think that's what we thought about at the time," she said.

Ohio treasurer's office releases resumes

From The Dayton Daily News

The Ohio Treasurer's Office (in June) released 33 employee resumes to comply with an Ohio Democratic Party records request made 14 months ago.

The last release nearly completes the party's April 2011 request for records about employees hired under Treasurer Josh Mandel, who promised while running for office he wouldn't hire friends and political cronies like his opponent, then-treasurer Kevin Boyce.

Mandel is now running for U.S. Senate against Democratic Sen. Sherrod Brown and has come under fire from Democrats for missing investment board meetings and taking cross-country fundraising trips.

Initial requests were denied because they were "ambiguous and overly broad." ODP officials named specific employees in later requests and made their efforts public after a Dayton Daily News investigation found young, relatively inexperienced staffers from Mandel's 2010 campaign were given high-ranking jobs in the treasurer's office.

Mandel took office in January 2011 but several employees were hired during the treasurer's transition period. Treasurer's office spokesman Seth Unger said the transition activity didn't meet the statutory definition of "public office" so any records produced or received during that time are not public record.

Videos of trustee meetings cause stir in Orange Township

From The Columbus Dispatch

An Orange Township trustee has refused to comply with a public-records request for videotapes she has taken of trustee meetings and posted to the Internet.

Lisa Knapp, who took office in January, began taping the meetings in March and has since posted seven videos — one more than four hours long — to her YouTube channel. She said she wanted to promote decorum during meetings and hoped taping the sessions would do that.

She also includes commentary on the videos, which she says are posted to provide context to the meetings and to defend herself against what she calls attacks and "tirades" directed at her by other elected officials.

A public-records request filed with the township in May under the name "Buddy Wilson" seeks the videos, but Knapp maintains that they're not public records and said she's not turning them over.

Knapp says Wilson, who said in an email to The Dispatch that he prefers to remain anonymous, had taken the videos off YouTube and edited them to mock her. She suspects that's what he'll do again if he gets them through the records request. Wilson hasn't said why he wants the videos but does not have to under Ohio public-records law.

An opinion from the county prosecutor's office, provided at the request of Joel Spitzer, the fiscal officer of the Delaware County township, says that the videos are public record but that Knapp is free to post the videos where she wants and with any kind of commentary. Spitzer said that, since the original request, two more residents have asked for the videos.

Ohio auditor warns fees illegal for online access to files

From The Cincinnati Enquirer

At least three of Ohio's 88 counties are violating Ohio law by charging subscriptions for online access to free public records.

That has prompted the state auditor to examine all county recorders more closely, The Enquirer has learned.

The subscriptions were designed for banks, title companies, mortgage brokerages and law firms, which are able to pay — or charge their clients — the fees. Those heavy users of public records, which incur costs allowed by law for copies obtained in person, sought a flat online subscription fee.

Even if they were legal, the subscriptions established by county recorders create prohibitive costs for individual online records searches, such as those by individual homeowners accessing records about their own property. A county recorder's office is responsible for maintaining records of property deeds and mortgages, among other documents.

Hamilton, Butler and Clermont counties do not charge for online access, while Warren County does not post documents online.

State Auditor Dave Yost told The Enquirer that county recorders do not have the authority to charge online fees for viewing or copying documents. Once created, online documents must be offered to the public for free, he said.

Rights to free speech upheld: Ohio law on picketing ruled unconstitutional by Valley appeals court

From The Vindicator

A state appeals court has deemed unconstitutional an Ohio law that it says infringed on First Amendment rights.

A state law that requires a public-employee labor union to give the employer at least 10 days advance written notice of its intent to picket imposes an unconstitutional infringement on free speech rights, the Youngstown-based 7th District Court of Appeals has ruled.

The ruling arose from peaceful informational picketing by the Mahoning County Education Association of Developmental Disabilities outside a Nov. 5, 2007, public meeting of the Mahoning County Board of Developmental Disabilities in Austintown, while the union was in negotiations for a new contract with the board.

The union represents teachers, teaching assistants, therapists, nurses, workshop specialists and secretaries employed by the board. The pickets carried signs saying "Settle now," and "MEADD deserves a fair contract."

The union appealed to the 7th District Court after the State Employment Relations Board and Judge Maureen A. Sweeney of Mahoning County Common Pleas Court upheld an unfair labor practice complaint by the DD board concerning the picketing.

A three-judge appellate court panel ruled unanimously on Thursday that the 10-day notice requirement "is not necessary to serve a compelling government interest and is not narrowly tailored to achieve that interest."

The appeals panel also said: "Ten days is a long time to force a public employee and her union to wait to voice an opinion through an informational picket of a board meeting, especially since board meetings are few and far-between. And, it does not take 10 days to arrange security or prepare a response to publicity."

The decision was written by Judge Joseph J. Vukovich, with Judges Gene Donofrio and Cheryl L. Waite concurring.

DeWine, Kasich administration agree to public records fix in JobsOhio bill

From The Columbus Dispatch

Attorney General Mike DeWine and Gov. John Kasich's office said (in April) that they worked out a solution to concerns that pending JobsOhio legislation could improperly "immunize" state agency documents from public scrutiny. Mr. DeWine said he discussed the measure with Gov. Kasich's staff and the two sides agreed to a minor revision that could prevent major problems with Ohio's public records law.

"It's a very narrow fix about a very narrow issue, but we thought it was a very important public records issue," he said in an interview. "I think it's resolved. But, obviously the legislature has to take a look."

(In April) the attorney general sounded the alarm that a public records provision in legislation designed to reorganize the Department of Development (HB 489) could be ripe for abuse.

"Our concern was if you have a document coming from somebody else, ODOT or somebody, it becomes immunized merely because it goes to JobsOhio," he said. "We have language now that just makes it very clear that's not going to happen."

Kasich spokesman Rob Nichols said the administration didn't share Mr. DeWine's concern, but agreed to revise the language to reassure the attorney general.

"Our people didn't have the same interpretation as the attorney general's office, but we said all along that if they thing there's an adjustment or tweak to the language that would provide them comfort, then we'd be willing to talk to them about it," he said. "We did and it's fixed."

Essentially, the proposed amendment would remove language specifying that any documents "received by" JobsOhio are not subject to Ohio's public records law, Mr. DeWine said.

The Ohio Newspaper Association and the American Civil Liberties Union of Ohio also warned the provision could permit undetectable corruption by sending documents to JobsOhio, the private, non-profit the legislature created to administer the state's economic development incentive programs.

Lawsuits fly over Stow school board meetings

From The Akron Beacon Journal

The Stow school board (in September) filed its response and counterclaim against board member Rod Armstrong, who charges the panel held illegal executive sessions.

The school board alleges that Armstrong violated the district's code of conduct by disclosing privileged information without authorization.

The lawsuit also accuses Armstrong of using his elected position for personal gain and contends that his disclosure of confidential information covered during executive sessions is a breach of his fiduciary duty.

"The district filed its answer and counterclaim last week with the U.S. District Court in Akron," district spokeswoman Jacquie Mazziotta said in a release. "We believe there is no merit to the allegations raised, and have asked the court to stop further leaks of confidential student information.

"There is no exception authorizing a board member to release student information without parental consent. The confidential release of student information could expose the district to liability, including a loss of all federal education funds."

Open Government Editorials

Sheriff's sale ruling says government website not good enough

By Dennis Hetzel
OCOG President

The Ohio Supreme Court recently issued a unanimous decision that provides some support for an argument we have been making for a long time: Government-run websites aren't good enough ways to inform people about public notices.

The case, PHH Mortgage Corp. v. Prater, also has some nuances for newspapers that are important to understand.

The case arose from a sheriff's sale of a foreclosed property in Clermont County. Those with direct interest in a sheriff's sale, such as an attorney for a mortgage corporation, are entitled to receive notice in writing of the specific time, date and location of a scheduled sale.

The sale was postponed several times at the request of the mortgage company attorney. At the time of the third scheduled sale, the sheriff sent a letter stating that due to "ever-increasing costs," the office was discontinuing the practice of sending sheriff's sale property advertisements directly to attorneys. Instead, the attorneys could check for themselves at the sheriff's department's website, www.clermontsheriff.org.

No written notice went to the mortgage company or the attorney for the fourth sale, and the property was sold. PHH sued to void the purchase, saying that they hadn't received proper notice to protect their interests. The Ohio Supreme Court agreed, overturning the appeals' court. The court said that giving notice "via a sheriff's office website is simply not sufficient or reasonably calculated to provide actual notices to all non-defaulting parties."

The Court also noted that many rural and older residents lack high-speed Internet access, saying that "(a) notice that misses 30 to 40 percent of its intended audience does not constitute the notice our Constitution demands when property is in jeopardy."

The Cincinnati Enquirer noted that several advocacy groups, including Pro Seniors and the Legal Aid Society of Columbus, urged the Supreme Court to overturn the ruling.

An important nuance is this: The court clearly said that newspaper notice also would be insufficient in terms of contacting the directly interested parties. Even so, I believe this case is important for newspapers as well as ironic, as you shall see.

First, as noted above, this reaffirms that government websites cannot function as the sole place for public notices. "Public notice" is about informing people. Some governmental bodies view notices, whether by mail or placed in newspapers, as mainly hassles that cost them money. The financial pressures they face only enhance this. While one can sympathize with Clermont County's sheriff dealing with multiple cancellations of a sheriff's sale, that's not a good enough reason to skip a step.

I often deal with politicians who think that it would be just fine to have all public notices only on government websites. "Good enough," they say. Senate Bill 234, which is still pending but inactive, would allow all notices of sheriff's sales to only appear on government websites. The bill is supported by some banking and mortgage interests that ultimately pay the cost of the newspaper notices in the closing of the sale.

Here's the irony: As this case demonstrates, the banks and mortgage companies expect the sheriff — and the taxpayers — to do what it takes to fully communicate with them, but when it comes to informing the public that houses are going up for sheriff's sales in neighborhoods, that's different.

Give me a break.

Government websites will never have the audience reach of local newspapers and their websites. Nor do they offer the third-party credibility and security that we provide by printing and posting public notices. The ONA has strong research that demonstrates the public wants and expects notices in newspapers. You can download and distribute our handout using the link below.

Meanwhile, local governmental bodies loudly complain that they don't have enough money to carry out their duties. We deal with this frequently in public records legislation. Some bodies want to turn public records into profit centers by charging for information that the public owns and already has funded with their tax dollars. One idea being floated would be to let citizens see public records for free on the Internet but charge them if they try to print a document.

Maybe you are sympathetic to these funding concerns. However, there are appropriate ways and inappropriate ways to operate. End-running statutory requirements or blocking citizen access to information isn't the answer.

That is why we urge newspapers that still are referring to "public notices" as "legal notices" in their classified columns to change the title. The term "public notices" serves as an important reminder that these are notices for the public, not just for a handful of interested parties.

Penn State's records exemptions: A cautionary tale for Ohio

By Dennis Hetzel
OCOG President

I urge OCOG members to read the article "How Open Records law would have stopped sex abuse sooner at Penn State," which can be found at http://www.poynter.org.

The article, by Al Tompkins at The Poytner Institute, examines the vast exemption to open records requirements that Penn State University has in Pennsylvania. It is a cautionary tale for Ohio on how excessive secrecy contributes to corruption and, in this case, terrible human tragedy.

Ohio may yet consider legislation on "enterprise universities" that could contain new restrictions on access to records of Ohio's public universities. College presidents such as Gregory Williams, the former president of the University of Cincinnati, and Gordon Gee at Ohio State University have raised this issue with state officials.

I can think of no compelling reason why an institution as powerful and important as a public university should be subject to less scrutiny than your local township or school district. The myriad exemptions in existing law protect the information that legitimately should be closed.

The ONA has expressed opposition to new exemptions. Jim Petro, chancellor of the Ohio Board of Regents that oversees the university system, supports the ONA position and did not propose any new records restrictions in his initial plan earlier this year. However, the proposal would create new restrictions for open meetings involving state universities.

ONA members may wish to contact Petro and thank him for his support. You also should express opposition to any new public records exemptions for Ohio's public universities as you encounter not only legislators but also officials from nearby state universities. Let us know if you need talking points or additional information.

New open records process can help Ohio journalists

By Dennis Hetzel
OCOG President

It happens to reporters and citizens all the time. You ask a local governmental body for a record. The local official says "no."

Now what?

In Ohio, the only recourse has been to hire a lawyer and go to court. The impact is that only those with the financial resources to go forward can pursue such cases. Even if you win, the chances of getting attorney fees covered are slim. This puts the advantage squarely on the side of those who would say "no" to records requests.

A new program announced in June by Attorney General Mike DeWine offers a welcome improvement.

DeWine's public records mediation process can avoid costly litigation and resolve matters faster. After all, no one's pockets are as deep as they used to be. Essentially, either side in a public records dispute can request mediation by filling out a simple form on the attorney general's website.

For years, Ohio has been in the minority of states that had no appeal process in which citizens who have been denied access could get an acceptable result without the expense, delay and frustration of filing a lawsuit.

Having worked in several other states, I believe this is the biggest flaw in Ohio's open records law, although there certainly are other issues as well. Off and on during the past six months, we have discussed ways to address this with not only DeWine but also State Auditor Dave Yost and the Kasich administration. A process similar to the one DeWine just announced almost was introduced in the just-ended legislative session.

Attorney General DeWine

Journalists should make aggressive use of this. You not only can pursue denials of records, you also can challenge situations such as the amount of time the governmental agency is taking to respond, whether the record should be redacted and other issues that emerge.

It will be most effective in situations in which the two sides aren't in a knockdown battle. That's because both sides have to agree to the process. However, many records disputes are in good faith. This also will save money for taxpayers by diverting litigation.

Importantly, participating in the process does not pre-empt one's right to sue if the outcome isn't satisfactory.

Other states have better systems. In Kentucky, for example, either side can appeal a denial and get a solid, legal ruling from the attorney general's office. Unfortunately, too, what is said during a mediation process is confidential – certainly ironic when it involves open records. However, as attorney Dave Marburger, an open records expert, has noted, this will encourage more participation by local governments.

Dave, Ohio Newspaper Association general counsel Lou Colombo and I agree that this should be an excellent step forward for open government in Ohio. We encourage ONA and OCOG members to use the process and let us know what they actually experience.

For more information about the Ohio Attorney General's Public Records Mediation Program, or to request mediation, go to www.ohioattorneygeneral.gov/PublicRecordsMediation.

The public's business; Local governments should know, comply with open-records law

An Editorial from The Columbus Dispatch

Ohio's public-records and open-meetings laws can be effective only if governments know and follow them.

Recent instances show that school districts, in particular, should brush up on their responsibilities under the law.

Regarding records, it's simple: State law holds that any record held by a public body that deals with its business "or other activities" is public. It doesn't matter if a lawyer drew up the document or whether it's in its final form.

The law has provisions to allow records to be withheld under very specific circumstances, but school districts and other government entities often don't cite any of those reasons when refusing to honor a records request; they simply say they don't have to honor the request.

Dispatch reporter Collin Binkley has cited five incidents since March in which central Ohio school districts have withheld records without justification. Three — Gahanna-Jefferson, Grandview Heights and Olentangy — wouldn't show the public proposed new contracts with a superintendent and teachers unions until after or just before they were approved by their boards of education. Columbus City Schools denied the existence of some records in an investigation of alleged brutality against a special-needs student by employees. Hilliard school officials claimed they couldn't turn over documents regarding accusations that an athletic director misused money because the matter was being investigated by police — even though police hadn't been called yet.

Such tightfistedness with public records is wrong in any event, because the documents belong to the public, whose taxes support public schools.

But it especially works against the public good when it prevents the public from knowing anything about a proposed action by the board of education until it is a done deal.

The point of open meetings and public records isn't just to satisfy people's curiosity; it is to allow them to attempt to influence actions. For example, protesting overly generous employee raises or a change in the school calendar is a lot less likely to be effective after a vote has been taken.

When state open-records law was updated in 2007 and then-Attorney General Marc Dann urged local governments to interpret the law in favor of openness, the Ohio School Boards Association advised its members to the contrary. For example, it encouraged school boards to have their employees ask people requesting records to identify themselves, even though the law doesn't allow that to be a requirement for releasing records.

It also advised, incorrectly, that emails about official school business aren't public if they occur via private email accounts.

School districts owe the public that sustains them the same degree of openness required of all governments. If employees don't understand that, either district policy should change or training should be improved.

Open Government Editorials

Behind the curtain of Ohio's quasi-public economic development agency

An Editorial from The Blade

JobsOhio and Gov. John Kasich lauded Mark Kvamme's achievements after he quit as head of Ohio's quasi-public economic development agency. To Ohioans looking in from the outside, those accomplishments, like the inner workings of the agency, are far from clear.

Mr. Kvamme will step down this month as JobsOhio's president and interim chief investment officer. Governor Kasich hired him in 2011 to privatize Ohio's economic-development efforts.

The former California venture capitalist has not disclosed why he's leaving. That's hardly a surprise, given the cloud that obscures public scrutiny of most of the inner workings of the agency.

In a statement, JobsOhio credited Mr. Kvamme with helping to secure commitments to create 31,000 jobs and $6.1 billion in capital investment. Commitments aren't jobs, and potential investments aren't yet real, but it's a start.

In Toledo at the recent 5 Lakes Global Economic Forum, Mr. Kvamme touted the 123,000 jobs created in Ohio over the past three years. Toledoans appreciate the jobs, many of them in the auto industry, but JobsOhio didn't create most of them.

Keeping jobs carries a high price tag, according to a recent report by the Dayton Daily News. Incentives kept American Greetings in Ohio, but at a cost of more than $53,000 per job.

The state gave Marathon Petroleum of Findlay $78 million in incentives and an exemption from Ohio's commercial activities tax, even though Policy Matters Ohio says it wasn't going anywhere.

Mr. Kvamme might have more specific successes to cite if there was less doubt about JobsOhio's funding and future. Legal challenges have kept it from tapping its proposed funding source: the state's profits from liquor sales.

The lack of transparency that surrounds the job-creation agency remains troubling. While it waits for the liquor money, JobsOhio is funded in part by secret corporate donors. Ohioans have no way of knowing what influence or favors those donations might buy.

When JobsOhio gains control of liquor profits, the money — and how it's spent — will be removed from public view. The agency doesn't have to share how it determines how much of a return on investment is enough. That, it says, is a trade secret. Even Republican lawmakers question the agency's focus on short-term gains.

JobsOhio says Mr. Kvamme will continue to support the agency's work "in a different but equally meaningful way." Only time can tell whether Mr. Kvamme's legacy is written in stone or quicksand. Even then, Ohioans will know only what JobsOhio tells them. It doesn't have to be that way. Pull back the curtain.

Open the door: Public should be able to see inside seclusion rooms

An Editorial from The Columbus Dispatch

Confining a child alone in a room should be a last resort for schools that need to deal with children whose emotional and discipline issues are posing a serious, immediate threat. New rules proposed for Ohio's public schools should help increase transparency, discouraging improper use of seclusion rooms.

An August investigative report by The Dispatch and public-radio cooperative StateImpact Ohio prompted greater scrutiny of this discipline method; it found many cases of these rooms being used inappropriately. In one case, a student was physically restrained, causing bruises, in such a room simply for getting upset and slamming a book on a table.

Thanks to the media attention, the State Board of Education has proposed rules requiring schools to track and disclose how often they are restraining or secluding children. The new policy would also require schools to "greatly reduce, and in most cases, eliminate" the use of restraint or seclusion, in favor of handling emotional issues without force.

The new guidelines certainly would be a good first step. However, schools would not be required to make details of such incidents available to the public, including the reasons children were placed in seclusion rooms. Also troubling, the rules would not apply to charter schools.

Without any information on what prompted the use of seclusion rooms, it will be virtually impossible for the public to judge whether schools are following the new policy and using seclusion appropriately.

Further, the fact that the rules wouldn't extend to charter schools, which receive public funding, could stoke continued criticism of those schools for not being held to the same standards as public schools. Education Department officials said they don't believe they have the authority to impose the rules on charters.

The use of seclusion rooms should be rare and well-documented. The education board should continue its work toward ensuring both of these goals, with legislators providing necessary authority where needed.

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

Obama's FOIA record worse than Bush administration's

From Poynter

Bloomberg News found that 19 of 20 federal agencies did not comply within 20 days to a request for travel expenses made under the Freedom of Information Act. Jim Snyder and Danielle Ivory report:

"When it comes to implementation of Obama's wonderful transparency policy goals, especially FOIA policy in particular, there has been far more 'talk the talk' rather than 'walk the walk,' " said Daniel Metcalfe, director of the Department of Justice's office monitoring the government's compliance with FOIA requests from 1981 to 2007.

Analysis done by the Scripps Howard Foundation reveals that President Obama's administration granted a smaller percentage of open records requests in its first two years in office than George W. Bush's administration granted in its final three years.

White House spokesperson Eric Schultz defended the administration's transparency efforts, telling Bloomberg, "Over the past four years, federal agencies have gone to great efforts to make government more transparent and more accessible than ever, to provide people with information that they can use in their daily lives." Schultz "noted that Obama received an award for his commitment to open government," Snyder and Ivory write. "The March 2011 presentation of that award was closed to the press."

Bill to counter lawsuits vs. journalists introduced

From The First Amendment Center

A bill introduced Aug. 2 in the U.S. Senate would enable news media to counter SLAPP suits filed to suppress their reporting.

Sen. Jon Kyl, R–Ariz., introduced the Free Press Act of 2012 (S.B. 3493), a measure designed to protect the First Amendment rights of journalists and Internet service providers by giving them a mechanism to combat "Strategic Lawsuits Against Public Participation," or SLAPPs.

Under the measure, the media could file a motion to dismiss a lawsuit that "arises in whole or in part" from reporting "on a matter of public concern or that relates to a public official or figure."

"The Free Press Act of 2012 responds to a number of recent incidents in which defamation lawsuits have been used to try to squelch criticism of particular groups and individuals," Kyl said.

The bill would not apply to lawsuits filed by the federal government or state attorneys general. It also would not apply to claims arising out of commercial speech, defined as "a statement offering or promoting the sale of goods or services of the person making the statement."

Journalists pushing to limit leaks legislation

From TV News Check

Now that Congress is back in session, free press advocates are urging lawmakers to reject portions of proposed "leaks legislation" they say infringe on First Amendment rights.

"There are real concerns to us related to restrictions on government officials from talking to the media," says Mike Cavender, executive director of the Radio Television Digital News Association, one of the organizations opposing the bill.

The legislation was crafted to stop intelligence leaks to the media in the wake of recent breaches. Sen. Dianne Feinstein, the California Democrat who chairs the Senate Intelligence Committee, introduced it in July.

It was approved by the committee and is now awaiting action on the Senate floor. If it passes, the bill would still need the House of Representatives' approval.

Cavender calls the proposal "an overreaction by Congress. This bill tries to throw a blanket over everything and that's not the way you deal with these things," he says.

Journalists are upset about three provisions.

One would prohibit anyone except the highest-level intelligence officials from providing background or off-the-record briefings to the media. In doing so, the legislation would make it difficult for reporters to obtain information from individuals most knowledgeable about certain issues, opponents say.

Another provision would curb the media's use of intelligence experts by banning certain government employees with top-secret security clearance, as well as former employees who have been retired for less than a year, from entering into contracts with the media to provide analysis or commentary. Cavender says that clause is of particular concern to broadcasters, who regularly use those kinds of experts on air.

A third provision could make it easier for the government to compel testimony from reporters.

Reporter awarded nearly $500K in FOIA case

From Poynter

A U.S. District judge in San Francisco has ordered the Federal Bureau of Investigation to pay journalist Seth Rosenfeld $479,459 to cover his attorney's fees for two court cases over FOIA requests the agency didn't reply to.

Rosenfeld first sued the FBI in 1985 and sued again in 2007 for information he wanted about the bureau's relationship with Ronald Reagan. He reported on both subjects in a recently published book that informed a fascinating NPR story earlier this month about a Japanese-American Black Panther who may have been an FBI informant.

Rosenfeld will donate his award to the First Amendment Project in Oakland, Calif., "the organization that litigated the lawsuits free of charge for 20 years," a press release about the award says.

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:

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.