Ohio Coalition for Open Government

OPEN GOVERNMENT REPORT

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Ohio Supreme Court minimizes public interest in allowing judges to seal records

By David Marburger, Baker and Hostetler

A sharply divided Ohio Supreme Court ruled 4-3 that judges have inherent power to bar the press and the public from seeing records filed in lawsuits over which the judges preside. In an opinion by Justice Terrence O'Donnell, the court ruled that judges can "seal" records by deciding that there is no "compelling" reason for the court system to maintain the records, and that closing them would advance the legitimate interests of someone who moves to close the records.

The majority opinion, joined by Justices Paul Pfeifer, William O'Neill, and Gene Donofrio, a court of appeals judge sitting for Justice Sharon Kennedy, said that only "unusual and exceptional circumstances" can justify sealing court records.

The court concluded that such unusual and exceptional circumstances "appear to exist" in the case before it, Schussheim v. Schussheim. When she was married to her husband, the former Mrs. Schussheim had moved a trial court for a civil protective order against him. She claimed that he had yelled at their daughter, backing her against a hotel room wall, and shoved Mrs. Schussheim against the bed when she tried to intervene. After a hearing, the trial judge ordered the husband to vacate their home and to stay 100 yards away from the rest of the family.

But within a month, Mrs. Schussheim moved to dissolve the order. The judge then dissolved it and dismissed the case.

Two years later, the husband—Alan Schussheim—moved the trial court to bar all public inspection and copying of the civil protective order against him and every other record of the proceedings that had resulted in that order. His former wife supported his

(see **OHIO SUPREME COURT** *page 4)*

Ohio Supreme Court to police: Records law means what it says

Editor's Note: *For OCOG's special coverage of the recent Ohio Supreme Court ruling on police departments and the Public Records Act, see pages 6 and 7.*

By John C. Greiner, Graydon Head

The Ohio Supreme Court issued a 7-0 decision on Tuesday September 3 that does not establish any new public records law, but does remind police departments throughout Ohio that the Public Records Act means what it says. And while it's unfortunate that an obstinate State Highway Patrol forced a public records requester to prosecute the case to the Ohio Supreme Court, it is good to see a positive result.

The case arose when Mark Miller of Cincinnati requested records from the State Highway Patrol in 2011. According to the Supreme Court decision, while the patrol provided some of the materials requested, it didn't release others Miller believed to be public records.

The highway patrol send a March 2012 letter, in which it contended that certain records were "investigatory work product" for an ongoing criminal investigation and, for that reason, exempt from disclosure under the public records law. Specifically, the highway patrol refused to release impaired-driver reports and video and audio recordings from Trooper Joseph Westhoven's cruiser related to a traffic stop, detention, arrest, and transport of Ashley Ruberg on July 15 or July 16, 2011.

Miller filed a mandamus action in the Twelfth Appellate District, seeking a writ to compel the highway patrol to produce the withheld records. Apparently, however,

(see **COURT TO POLICE** *page 6)*

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Inside This Issue

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‘Second-chance’ bills add restrictions on public records; and what should we do about the ‘mug shot’ websites?

By Dennis Hetzel, OCOG President

Hetzel

Senate Bill 143 is one of several recent measures in which an unusual amount of bipartisanship has erupted in the Ohio Legislature. All have the goal of helping many offenders get a second chance to overcome obstacles that anyone with a criminal record faces, no matter how well-motivated.

By and large, these are good bills. If I still had a newspaper editorial page to manage, I’d be supporting them. Our prisons are overflowing with non-violent offenders. We also have the absurdity of people being trained in prison for jobs that the law won’t allow them to fill, or they lose their driver’s licenses for offenses that have nothing to do with driving. Most people would agree that juveniles in particular deserve some extra consideration as they try to move on with their lives.

However, these bills also share a troubling, common thread – well-intentioned but wrong-headed efforts to seal and even destroy court records that today are open.

Last year, we worked to successfully remove a provision in one of these bills that would have allowed the expunging – the destruction – of records of those pardoned by a governor.

This is absurd. First of all, a pardon is simply that. The defendant is being excused for any number of reasons. It may or may not mean he or she is innocent. In most cases, the crime was committed.

Secondly, there are times when governors and presidents pardon people for less-than-noble reasons. (See “Bill Clinton and Marc Rich.” Or, recall Dick Cheney’s efforts to convince President George W. Bush to pardon Scooter Libby.) All pardons by elected political leaders deserve special scrutiny.

Most importantly from a journalist’s perspective, destroying and sealing records means hiding the most accurate and credible account of what happened in the case, making it much harder to assess why the system failed when someone is wrongly convicted. Sealing or destroying records protects those who screw up and those who cover up. It serves an important, greater good for these records to remain open, even though it causes pain for some individuals at times.

And that brings us to a real-world reason why these records should remain open. In our digital age, you cannot un-ring the bell, to cite a cliché often used in courtrooms. Sometimes life isn’t fair. Information you don’t want to be public will remain available no matter how hard you try to remove it all. You can seal court records but not gossip, innuendo and speculation.

In the case of SB 143, we were concerned about a provision that would have denied access to any information about juveniles being held in adult facilities. This is something that only should happen in Ohio under rare and highly regulated circumstances. The public has a right and need to know when and how juveniles are being held.

When I testified as to why this was a bad idea, I learned the impetus behind this provision was to block the “mug shot sites” from putting the booking photos of juveniles on the Internet or in publications. Mug shots are taken of anyone booked into an adult facility.

These sites are a national problem. Their business model should offend any decent person. In essence, the sites use public records as profit centers. They can obtain the photos because the mug shots are public records. Then they force people to pay them if they want the photos taken down. Even if you pay them, the photo can pop up on another site. That isn’t journalism. It’s commercial exploitation.

The thorny problem for First Amendment advocates like us is that it is a fundamental principle that government should not ban a public record because of a potentially bad purpose or usage.

Other means should be found to address the issue. And that is happening, which I pointed out to the committee. The Plain Dealer recently did an excellent story on this issue, as did the New York Times. An Ohio lawsuit is leading the charge against these operators, and the private sector is reacting in other ways. For example, PayPal, Discover and other credit card companies started to refuse to accept payments to these sites, which could put them out of business. Perhaps most significantly, Google has changed its search criteria so

(see **HETZEL** *page 3)*

HETZEL, continued from page 2

that links to the mug shot sites now are buried deep in the results if you search on someone's name.

Still, I think there are logical reasons not to treat juveniles as though they are simply miniature adults. With SB 143, we have agreed to compromise language. Information about juveniles in adult facilities would be parallel to what is made available when youths are held in juvenile facilities. You will be able to learn the offense, county of residence and other demographic information but not specific identifying information. (It is important to remember that juveniles technically are not charged with crimes but are facing delinquency proceedings.)

This means the "mugs" of juveniles in adult facilities would not be released. The solution we accepted after quite a bit of negotiation avoids a bad precedent over public records. We'll see what happens as SB 143 continues to move through the Legislature.

Then, on Oct. 22, the Ohio Supreme Court issued what we believe is a terrific decision that a governor's pardon does not mean a criminal conviction should be automatically sealed.

"Although a pardon grants the recipient relief from any ongoing punishment for the offense and prevents any future legal disability … it does not erase the past conduct," Justice Judith Ann Lanzinger wrote. "In other words, what's done is done."

That's exactly what we have been saying for several years.

However, only a few hours after the decision was released, a juvenile-justice advocate urged senators during a committee hearing to amend SB 143 to reverse the Supreme Court so that it would be easier to seal such records.

I don't think that will happen with this bill, but stay tuned. We must keep making our case that sealing and destroying more court records will neither serve the public nor protect individual offenders in the long run.

Legislative Update

At this writing – Nov. 22, 2013 -- I count 18 bills pending in the Ohio Legislature that will have impact on open government if they become law. Several bills would create new exemptions to open records or make it harder to obtain records. There also are several bills that will positively expand citizen access to records or meetings.

Any OCOG member or reader of this newsletter who would like to see a full list, just let me know, and I will e-mail it to you.

For now, here are a few highlights (and lowlights) of this year in the Ohio Legislature as it relates to open government.

JobsOhio is a subject all by itself. Democrats have a bill to allow more access to information about this secretive agency. This agency is a creature of tax dollars. Supporters believe that checks-and-balances are adequate, and that this secrecy is essential to the work of economic development and job creation. Opponents disagree, and say JobsOhio is a scandal waiting to happen. We all will learn who is right in the coming years. (HB 189, SB 67)

The state budget contained a new exception to the open meetings law that allows local governmental bodies to go into executive session to discuss economic development matters. The Ohio Newspaper Association was able to obtain language that placed several limitations on the use of this new exception. (HB 59)

Rep. Mike Duffey and Rep. Christina Hagan have introduced a package of bills that aim to help Ohio move faster into the digital age. These bills would offer more information about government spending to citizens on the Internet in standardized, easy-to-follow formats. (HB 321, HB 322, HB 323, HB 324)

One of the more intriguing bills deals with the touchy subject of school safety and the arming of educators to help in crisis situations. The pending bill also makes more information confidential about a school's safety policies and whether educators are armed. The newspaper association is seeking compromise language so that some of this information will be publicly available. (HB 8)

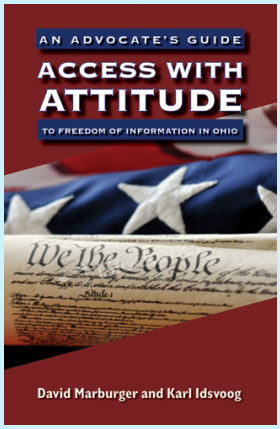
A number of groups are working together on bills that set strict parameters in circumstances where it is appropriate to allow certain governmental bodies to have some members participate by audio-conference or video-conference. (SB 155, HB 279, HB 286)

A bill by Sen. Joe Uecker regarding concealed carry gun permits would remove the last vestige of public access by blocking journalists from viewing any permit information. So far, the bill has not moved beyond initial testimony. (SB 60)

Again, that is just a sampling of activity. Let us know if you have any questions or need more information.

Dennis Hetzel is executive director of the Ohio Newspaper Association and president of OCOG. Send e-mail to dhetzel@ohionews.org.

Receive discount on open government reference book and support OCOG



David Marburger and Karl Idsvoog have written a book that should be in every Ohio newsroom. *Access with Attitude: An Advocate's Guide to Freedom of Information in Ohio* is an essential user's guide to navigating the complexities and occasional weirdness of Ohio's open records laws.

Now, Buckeye State journalists and open-record advocates have another reason to purchase this book: Marburger and Idsvoog are donating their proceeds from this book to the Ohio Coalition for Open Government.

Marburger, an attorney with Baker & Hostetler in Cleveland, is a member of the OCOG committee and has represented many Ohio Newspaper Association members in Sunshine Law cases. Idsvoog is a journalism professor at Kent State and an award-winning investigative reporter.

The retail price for the book is $29.95, but Ohio University Press is offering OCOG supporters a 30 percent 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 percent discount on orders of five or more books, contact Ohio University Press's business manager, Kristi Goldsberry, at (740) 593-1156 or goldsbek@ohio.edu.

Open Government Commentary

Ohio Supreme Court minimizes public interest in allowing judges to seal records by David Marburger

continued from page 1

motion with an affidavit.

The former wife's affidavit said:

- "I have no objection to the application of Alan Schussheim's application . . . to . . . seal the record";
- "Alan Schussheim was never charged with an act of domestic violence related to this incident or at any other time during our marriage";
- "Alan Schussheim and I co-parent our two minor children";
- "I believe it would be in the best interest of both myself, Alan and our children if the record of proceedings in this matter was expunged and sealed."

Alan Schussheim's separate motion speculated that keeping the records open could adversely affect his chances for promotions and pay raises, and said that he was never criminally charged.

In a dissenting opinion, Justice Judith French asked rhetorically, "[I]f 'ususual and extraordinary circumstances' can create an undefined, judicial expungement power—then what is so unusual or extraordinary about this case?"

Chief Justice Maureen O'Connor, dissenting separately, called the majority opinion "disturbing judicial activism" and insisted that, unless a statute allows courts to seal particular records, they have no authority to do it. Justice Judith Lanziger concurred in both Justice French's and Chief Justice O'Connor's dissenting opinions.

Longstanding precedent across the nation contradicts the dissenting justices' opinions. Judges have always enjoyed the inherent power to seal records filed in lawsuits over which they preside.

As an independent branch of government, courts exist solely to satisfy society's need to peacefully resolve disputes among people, businesses, and other government agencies. The courts will fail if people don't have faith in judicial decisions because they don't trust the judges.

Justice Oliver Wendall Holmes declared over a century ago:

> *The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print.*

Justice Holmes' remark explains why the public trusts the courts to resolve disputes. We trust that judges base their rulings only on "the record" because the record is open for all to see—except in discrete, exceptional, and judicially-recognized and judicially-announced circumstances.

If the judiciary had to obey the dictates of the legislature, the legislature would have the power to destroy the public's faith in judicial rulings by decreeing, for example, that the entire court record is closed to the public in all suits, allowing only the litigants and their attorneys to see those records.

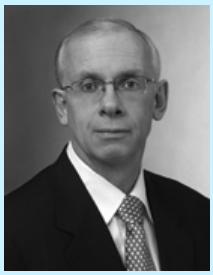
The slim majority of the Ohio Supreme Court ruled consistently with long-standing precedent that judges have the inherent power to decide which records filed in litigation are open or closed to the public, and that only exceptional circumstances warrant use of that power to close any of those records.

But the majority went wrong in three key ways. First, the only interests that the majority weighed were those of the people seeking to close the records and the institutional interests of the court merely to "retain" the records. The majority erred by ignoring the public interest in an open court system, which dovetails in the courts' institutional interest in using the open court record as the chief vehicle for sustaining public acceptance of judicial rulings.

Second, the Schussheims had no opponent before the Ohio Supreme Court to argue against sealing the records. Even without someone to argue against the Schussheims, the trial court and the court of appeals ruled against sealing the records. Because of the statewide importance of the Ohio Supreme Court deciding the case, the court should have appointed an amicus to argue against the Schussheims. That would have given the court the benefit of thorough argument in favor of affirming the two lower courts' rulings.

Third, as dissenting Justice French pointed out, there was nothing unusual about the circumstances in the Schussheim case that would justify sealing the civil protective order and the documented proceedings surrounding it. Mere bald conclusions comprised Mrs. Schussheim's abbreviated affidavit. Like Mr. Schussheim's motion to seal, the affidavit amounted to little more than the kind of speculation commonplace in motions that ask judges to close court records to the public.

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.



Marburger

OCOG files amicus brief in 911 records case

By David Marburger

OCOG is asking the Ohio Supreme Court to rule that a public agency can't respond to public requests to see agency records by going to court. Sometimes agencies sue or file other papers in court when they don't want to grant requests to see records that they claim aren't public records. When that happens, the agencies ask a judge to rule that they have no duty to disclose the requested records, which forces requesters to either surrender or litigate to defend their requests.

OCOG's argument to the high court came as amicus curiae—friend of the court—in litigation between the Butler County Prosecutor and the Cincinnati Enquirer. The litigation arose when the Enquirer asked to hear the recordings of a series of calls between the county sheriff's 911 operator and Michael Ray, who told the 911 operator that he'd killed his father.

First, Prosecutor Michael Gmoser emphatically denied the newspaper's request to hear the recordings. Then, he asked a grand jury to indict Ray for the murder. When the grand jury indicted Ray, Gmoser filed a new criminal case in Butler County Common Pleas Court. The case was assigned Judge Michael Sage.

Then, on the same day, Gmoser asked Judge Sage to issue an order barring "public dissemination" of the recordings. He argued that the recordings were not public records and that publicly disclosing them before Ray's trial would jeopardize his constitutional right to an impartial jury. Ray's counsel joined the prosecutor's request.

Three days later, after a closed-door hearing in which counsel for the Enquirer appeared, Judge Sage issued the order that the prosecutor wanted. The order, however, did not explain why the prosecutor needed an order to bar public disclosure of recordings that Gmoser exclusively controlled and staunchly refused to disclose. Gmoser hardly needed a court order to bar himself from disclosing the recordings, yet that was the practical effect of the order that the prosecutor requested and got.

The Enquirer then filed its own suit in the Butler County Court of Appeals. The newspaper sued Judge Sage and Prosecutor Gmoser, and asked the appellate court to prohibit Judge Sage from enforcing his order and to order the prosecutor to disclose the 911 recordings.

Before the court of appeals ruled, Ray went to trial, a jury was empaneled, and Gmoser delivered copies of the recordings to the Enquirer. The jury convicted Ray.

Then Gmoser and Judge Sage asked the court of appeals to dismiss the Enquirer's suit, arguing that the case was moot because Gmoser already had disclosed the recordings.

The court of appeals declined to dismiss the newspaper's suit, and ruled that the 911 recordings were public record. But the court of appeals also ruled that Gmoser had a right to try his pre-emptive strike and that Judge Sage had the power to act on it by issuing the contested order. All parties have appealed to the Ohio Supreme Court.

Supporting the Enquirer on all issues, OCOG's amicus brief in the high court attacked Judge Sage's jurisdiction to grant the prosecutor's motion for the secrecy order. However hotly contested, a disagreement is outside a court's jurisdiction if the person asking the court to rule doesn't need judicial relief to redress or avert some real injury. Gmoser did not need a court order to bar public disclosure of the recordings. He was doing that on his own. So Judge Sage had no jurisdiction to grant Gmoser's request, OCOG argued.

The 911 recordings were not filed in court. Gmoser had exclusive control over them, and he already was successfully and completely barring public disclosure of the recordings and he could continue to do so unless the Enquirer sued and won. In legalese, the disagreement between the Enquirer and Gmoser was not "justiciable" because Gmoser didn't need the judicial relief that he sought, and so the judge had no jurisdiction to issue it.

The Ohio Supreme Court is likely to rule late in 2013 or early 2014.

OCOG supports Enquirer in two major open government cases

By Dennis Hetzel, OCOG President

The board of the Ohio Coalition for Open Government has voted to support appeals in two Cincinnati-area cases involving Enquirer Media.

One case involves access to 911 calls and the other involves a Hamilton County juvenile court judge who was found in contempt after barring a reporter from her courtroom and attempting to ban publication or broadcast of the alleged offenders' names.

The board felt that both cases raised significant legal issues while also providing strong factual situations that could affirm the importance of open government. OCOG Counsel David Marburger of Baker & Hostetler in Cleveland will represent OCOG in the cases.

In the Butler County 911 case, the board voted to fund an amicus ("friend of the court") brief in support of The Enquirer following the decision of the Butler County prosecutor to appeal a finding that resulted in the 911 calls being released. The case also raises other significant legal issues regarding the way the prosecutor battled the media to withhold the information.

In the juvenile judge case, Marburger will work with Enquirer attorney John C. Greiner to determine whether a friend-of-the-court brief would be helpful. The judge has appealed her contempt finding to the Ohio Supreme Court. Marburger noted it is extraordinary for a judge to be found in contempt for blocking access to information.

WCPO television in Cincinnati also has pending litigation with this judge regarding access to her courts.

Special report on police departments and public records

Court to police: Records law means what it says by John C. Greiner

continued from page 1

Miller's case was riddled with procedural problems, contradictory claims and an inaccurate timeline. The Twelfth District concluded that Miller failed to establish a clear legal right to the records.

Miller then appealed to the Ohio Supreme Court. In an original action initiated in the court appeals, an unsuccessful party has an automatic right to appeal to the Supreme Court.

In its decision, the Supreme Court acknowledged the problems with Miller's case, but it also noted that despite those defects, Miller established the critical elements – a request for records and a refusal to produce them. The court also ruled that the highway patrol failed to satisfy its burden of establishing that the claimed exemption applied.

The highway patrol told Miller that the withheld records were exempt because they were "investigatory work product." But the Supreme Court pointed out a slight problem with that assertion – no such exemption exists. Apparently, the highway patrol intended to invoke the "confidential law enforcement investigatory records" exemption set out in R.C. 149.43(A)(1)(h). But the "CLEIR" exemption requires more than the incantation of "ongoing investigation."

The Supreme Court correctly pointed out that the CLEIR exemption is a two part standard. The party claiming the exemption is required to establish first that the record pertains to an ongoing "law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature" and second that disclosure of the record would create "a high probability of disclosure" of one of four kinds of information specified in the statute.

In this case, the highway patrol never even addressed the second part of the test in its response to Miller. When pressed in the mandamus suit, however, it contended that the release of the records would create a high probability of disclosure of "specific investigatory work product." This argument seems suspect, however, given that the withheld information was related to an initial incident report. In light of clear precedent establishing that routine incident and offense reports are not part of "specific investigatory work product" the highway patrol's after the fact justification sounds like a pretext.

The Supreme Court agreed, sending the case back to the appellate court and ordering that the highway patrol essentially put up or shut up. The Supreme Court ordered the Twelfth District to review the records and determine if they would in any way create a "high probability of disclosure" of "specific investigatory work product" – an analysis the highway patrol should have engaged in before it denied the records.

The Supreme Court's holding is welcome, but frustrating. The facts presented here – specifically the highway patrol's arrogant and high handed withholding of the requested records – happens on a daily basis throughout the state. Police departments and records clerks routinely deny requests under the mythical "ongoing investigation" exemption without pointing to any evidence (because in 99.9% of the cases none exists) that the production would disclose any protected information. In many cases, the requesting party lacks the knowledge or the resources to challenge the illegal conduct.

The Miller case did not discuss statutory damages or attorney fees, presumably because that issue was not ripe. Ideally, the Twelfth Appellate District will not only order the highway patrol to provide the records, but also pay every penny of Miller's attorney's fees. The facts here cry out for it.

Police duck the law on release of incident reports

by Randy Ludlow, The Columbus Dispatch

Columbus lawyer Mark Weaver, a media-law expert who represents local governments and educates police on their public-records responsibilities, believes state law and court rulings are clear. Police incident and offense reports must be released immediately and without redactions.

Yet, Dispatch reporters, and presumably the public, continue to encounter police agencies that don't know the law -- or don't care what it says.

After battling nine days to obtain an incident report from one area police department, The Dispatch received it (Nov. 27). Information, such as the names of juveniles and other details, was blacked-out. Information was both delayed and denied.

Police reasons for not immediately releasing the report included that the investigation was ongoing, the report had not been approved (although the officer's detailed narrative is marked as approved the same day the incident occurred) and a desire to be "sensitive" to the victim's family. Police said they faced no legal deadline to turn over the report.

"It's well settled by the courts that police departments should not redact information from an initial incident report using the confidential law enforcement investigation exception," said Weaver.

"Social Security numbers can be redacted but little else. Of course, the investigative work product itself can and should be withheld until the case is over," he said.

The Ohio Supreme Court has ruled repeatedly that incident and offense reports, and underlying statements and interviews, are not confidential investigatory records because they initiate an investigation and are not part of an investigation itself. The same applies to 911 call recordings.

And, such police reports must be released immediately upon request, the court says. (And, even drafts of documents, including police incident reports, are public records if they have been shared between at least two people.)

Further, no information -- including the names of victims, uncharged suspects and juveniles (except victims of child abuse) -- can be redacted with the exception of Social Security numbers and information provided by a children services agency.

Weaver stresses the above when he educates police officers about public-records laws. It appears some are not listening or need to attend his lectures.

Special report on police departments and public records

Advice on how to deal with police and 'CLEIR confusion'

By John C. Greiner and Nick Ziepfel

I recently wrote about an Ohio Supreme Court decision (see previous page) that reminded police departments throughout Ohio that the Confidential Law Enforcement Investigatory Record ("CLEIR") exemption under the Public Records Act, which exempts certain law enforcement records from public disclosure, is a two-part standard. The Court explained that the party claiming the CLEIR exemption must first establish that the record pertains to an ongoing "law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature" and second that disclosure of the record would create "a high probability of disclosure" of one of four kinds of information specified in the statute.

A record qualifies for the CLEIR exemption only if it: 1) discloses the identity of an uncharged suspect; or 2) identifies a confidential source; or 3) discloses specific confidential investigatory techniques or specific investigatory work product or 4) discloses information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

But despite clear statutory language, and the Supreme Court's guidance, police departments and other public bodies remain confused. One recurring source of confusion (or abuse if you're a cynic) is the notion that the very existence of an ongoing investigation justifies application of the CLEIR exception. But because it is a two-step test, this "confusion" is completely unfounded.

But even among those public bodies that are able to comprehend that a two-step test actually requires two steps, confusion often reigns. And the concept of "specific confidential investigatory techniques" seems to particularly flummox them.

And while it's easy to assume that public records wrongfully claiming this exemption are withheld with some sort of malice, let's not be unfairly distrustful just yet. The Ohio Sunshine Laws 2013 Government Resource Manual, a "go-to" guide of Ohio governmental agencies for all things related to public records, may too hastily explain the exemption – especially for those unfamiliar with this law.

The manual defines "specific investigatory work product" as "[i] nformation, including notes, working papers, memoranda, or similar materials, assembled by law enforcement officials in connection with a probable or pending criminal proceeding." The manual includes court decisions that broadly apply the exemption and hold that records "may be protected even when they appear in a law enforcement office's files other than the investigative file," and that "[i]t is difficult to conceive of anything in a prosecutor's file, in a pending criminal matter, that would not be either material compiled in anticipation of a specified criminal proceeding or the personal trial preparation of the prosecutor." Almost as an afterthought, the manual mentions "some limits" to the exemption, yet lists in a footnote only two examples where records are not shielded by the specific investigatory work product exemption.

The specific investigatory work product exemption should be evaluated on a case-by-case basis. Specific investigatory work product is information assembled by law enforcement officials in connection with a pending or highly probable criminal or civil proceeding. Any notes, working papers, memoranda or similar materials, prepared by attorneys or law enforcement officials in anticipation of litigation fall within this exemption. The exemption offers no protection to ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of driving while under the influence and records containing the results of intoxilyzer tests. Even internal investigative records concerning the regulation and discipline of police officers do not qualify for the exemption.

Courts have also been clear to distinguish between an "ongoing investigation" and an investigation where a criminal or civil proceeding is "highly probable." A criminal or civil proceeding is considered highly probable only if "it is clear that a crime has in fact been committed." When an officer's or law enforcement official's investigation could lead to civil and/or criminal proceedings, the specific investigatory work product exemption does not apply. Materials are not considered work product in these circumstances because "it is not evident that a crime has occurred, [and] the records are then compiled by law enforcement officials in part to determine if any crime has occurred and not necessarily in anticipation of litigation. An active and ongoing criminal investigation "conducted in a manner similar to other criminal investigations aimed at possible prosecution…is [not] evidence that criminal charges…are either pending or highly probable as required from the work product exemption."

Even if criminal or civil proceedings are pending or highly probable, the requested records may still be subject to public disclosure if they were created before it was clear that a crime had been committed. Once clothed with the public records cloak, records cannot be defrocked of their status. An easy example? Just because the prosecutor puts the incident report in his file, that report remains a public record. Any item created prior to the commencement of the investigation retains its public status, no matter how it is handled in the investigation.

The takeaway: If a public body denies your request based on CLEIR, insist it identify which of the four exemptions apply. And if the exemption is the "specific investigatory work product" exemption, ask if any of those records were created before the investigation commenced. By conducting your own investigation, you might overcome the "confusion."

John C. Greiner *is a partner with Graydon Head in Cincinnati. He practices in the areas of First Amendment law and commercial litigation.*

Greiner

Nick Ziepfel *is an attorney whose practice focuses in the areas of employment and First Amendment/ public records litigation.*

For more information on Graydon Head, visit www.graydonhead.com.

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.

Audit finds accounting problems at JobsOhio

From The Cincinnati Enquirer

Ohio Gov. John Kasich's privatized job creation agency failed to document thousands of dollars in expenses and neglected for months to have executives and board members sign conflict of interest policies, a state audit found (Nov. 21).

Ohio Auditor Dave Yost's review of JobsOhio concluded that problems identified by auditors could "adversely affect" JobsOhio's ability to record and report the work it does.

The findings are relatively minor and do not involve financial penalties. They're part of the first and only review of JobsOhio's books that Yost will be able to perform.

After a long, contentious battle between Yost and the Kasich administration over the auditor's authority to conduct the audit, the General Assembly passed a bill this spring that shields JobsOhio from future public audits. Kasich has repeatedly said the privatized economic development group should be exempted from most public records laws so its job creation efforts would be unhindered by state bureaucracy.

Ohio Supreme Court denies attorney's public-record request for JobsOhio documents

From The Plain Dealer

JobsOhio doesn't have to respond to a public-records request seeking information on the economic development nonprofit's finances and potential conflicts of interest, the Ohio Supreme Court ruled (Dec. 3).

In a unanimous decision, the state's high court dismissed a complaint filed by Columbus attorney Victoria Ullmann seeking donation lists, conflict-of-interest forms, correspondence with the governor's office and other information. In a two-paragraph ruling, the court found that the General Assembly has largely exempted JobsOhio from Ohio public-records law.

JobsOhio has come under scrutiny in recent months over its refusal to open its books for public scrutiny. The private corporation is mainly funded from bonds backed by state liquor revenues.

Ullmann once had a leading role in a different, more prominent legal challenge to JobsOhio filed by ProgressOhio and two Democrats, but she was removed from that case. The Supreme Court heard arguments last month on whether ProgressOhio has standing in that case.

Kasich orders value of tax records to remain public

From The Columbus Dispatch

Gov. John Kasich has ordered a state agency to end its new policy of keeping secret the estimated values of hundreds of millions of dollars' worth of tax credits given to companies each year.

The Republican governor learned (on Sept. 16) that the state's Development Services Agency, which reports to him, recently had decided to consider the values of tax credits as "trade secrets" and would no longer release them to the public.

When JobsOhio, Kasich's privatized economic-development agency, recommends tax credits for a company that creates a certain amount of jobs and new payroll, part of the calculation that goes into the recommendation is how much the tax credit would cost the state.

Those values had long been a matter of public record, but in the past month the Development Services Agency stopped publishing those values online because the estimates were found to be often wrong.

But calling those values "trade secrets" was another step — at a time when JobsOhio is trying to move away from the perception that it is a secretive agency — and Kasich said at a morning news conference that it "doesn't sit well with me."

"If things are historically open, we want them to be open," Kasich said.

Otterbein University refuses to release police incident report on professor charged with sexual assault

Editor's Note: *For more on the release of police records under the Public Records Act's Confidential Law Enforcement Investigatory Record ("CLEIR") exemption,* *see pages 6 and 7.*

From The Columbus Dispatch

A former Otterbein University theater professor (was set to be arraigned in late October) after a student said he placed his hand inside the back of her pants at a performance last spring.

But Otterbein officials refused to release the incident report involving Ed Vaughan ... maintaining that the private liberal-arts college in Westerville is exempt from the Ohio public-records act.

It's a situation that is becoming increasingly common as more private colleges across the country assume greater control for policing on their campuses.

"If you're going to be given a badge, a gun and the ability to shoot to kill, then you should have the same responsibility to report about the crimes that happen on campus as the state law-enforcement agencies elsewhere," said Frank D. LoMonte, executive director of the Student Press Law Center in Arlington, Va.

But all too often, private college campuses are "islands of invisible crime" where even violent offenses such as aggravated assaults and sexual assaults are hidden from public view — posing a public-safety threat, he said.

Vaughan, 64, of Westerville, retired this summer after Otterbein placed him on leave. He had worked at the university for more than 20 years.

He is charged with sexual imposition and unlawful restraint, both third-degree misdemeanors that carry a maximum jail term of 60 days and up to a $500 fine.

'Integrity Index': Ohio ranks low in transparency

From The Columbus Dispatch

A Better Government Association study paints Ohio as a backwater when it comes to government integrity.

A national study released (in July) by the Chicago nonprofit watchdog ranked Ohio 40 th among the states in enabling citizens "to fight corruption by attending public meetings, reviewing government documents and raising questions without fear of retribution."

Ohio's overall "Integrity Index" score was pegged at 49.5 percent, below the national average of 55 percent, in the examination of state public record, open meeting, whistleblower and conflict-of-interest laws. (Ohio is slipping. The state ranked 31st in the U.S. in a similar study in 2008.)

Rep. Duffey looks to streamline access to public records

From This Week Community News

State Representative Mike Duffey (R-Worthington) has introduced a series of bills designed to make it easier to find and understand data about local and state government.

Called the DataOhio Initiative, the program would promote open standards and make Ohio government more accountable to Ohioans, he said.

Regular citizens, as well as journalists and researchers, would be able to easily find and compare apples-to-apples data about various jurisdictions. It would be similar to the Cupp Report program that standardizes data for Ohio public schools.

In introducing the bill, Duffey recalled his days on Worthington City Council. Whenever a council member would request information about another jurisdiction for comparison purposes, city staff members would have to start from scratch, he said.

Christina Hagan (R-Alliance) is the co-sponsor of the bills.

The first of the series, House Bill 321, requires state and local public agencies to adhere to an open data standard, thus making information easier to access and search. All data would be posted in an open format that would be machine readable and available to the public without restrictions.

Ohio State Auditor says counties, cities failing to obey public-records law

From The Columbus Dispatch

Ohio's local governments need to pick up their game when it comes to keeping the people's records and fulfilling public-records requests, state Auditor Dave Yost says.

A sampling of 20 counties and cities for compliance with Sunshine laws found weaknesses in the public-records policies and procedures in eight, or 40 percent, according to results to be released by the auditor's office (Sept. 12).

"It's disappointing in this day and age, with all the attention on transparency, that we don't do enough to make sure the people's records are accessible," Yost said in a statement. "We've just got to do better."

Yost announced the public-records audit during Sunshine Week in March, then asked his staff during its normal financial audits to examine how well some local governments handled records requests.

Auditors found no problems in five counties and seven cities (including Marysville, the only central Ohio government in the audit). But they cited three counties and five cities for not following either state laws or best practices.

The most-common problem, found in Allen County, Beavercreek, Bowling Green, Crawford County, Harrison and Portsmouth, was a lack of formal procedures to track public-records requests. Some did not track when requests were received or fulfilled, the auditor's office found.

Cuyahoga County, home to Cleveland, drew the harshest remarks in the public-records audit. Some departments did not save sent emails, and some officials could not prove they had attended state-mandated public-records training.

Ohio Supreme Court rules that a governor's pardon does not automatically seal records of the crime

From The Plain Dealer

The Ohio Supreme Court has ruled that a person granted a pardon by the governor is not automatically entitled to have the records of their crime and conviction sealed from public view.

Rather, absent requirements in Ohio's law that it be granted automatically, it should be evaluated on a case by case basis to determine if it is appropriate, the court ruled.

The case involved a woman from Cleveland, Montoya Boykin, who had multiple convictions for theft and receiving stolen property from the early and mid-1990s.

In 2007, Boykin requested a pardon for her crimes. The state's parole board voted unanimously to recommend clemency, and in November 2009 then-Gov. Ted Strickland pardoned Boykin for four crimes.

Following the pardon, Boykin sought to have her convictions sealed in Summit County Common Pleas Court and in Akron Municipal Court. She argued that the governor's pardon entitles her to have her records in these cases sealed.

Both courts denied her motions, as did the 9th Ohio District Court of Appeals. She then appealed to the Supreme Court..

Are UC trustees violating Open Meetings Act?

From The Cincinnati Enquirer

Several days before every public meeting of the University of Cincinnati Board of Trustees, members of the board divide into smaller groups and meet privately with top administration officials to ask questions about the biggest university business.

Ohio's Open Meetings Act requires public bodies to "take official action and conduct all deliberations upon official business only in open meetings where the public may attend and observe," the Ohio Attorney General says.

UC says the "pre-meetings" are informational and members don't deliberate or vote.

"It's a way for board members to get the information they need," Chairman Fran Barrett said. He said he doesn't believe the meetings violate the Open Meetings Act.

But comments by board members indicate they are discussing university business during the private sessions.

During the board's regular open Feb. 19 meeting, for example, several trustees discussed authorizing $2 million for design work on an expanded Nippert Stadium.

The Ohio Attorney General office's guidance on the Open Meetings law states that a public body "may not circumvent the requirements of the act by setting up back-to-back meetings of less than a majority of its members, with the same topics of public business discussed at each."

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.

Editors pull classified ad after Wright State University administrators threaten to revoke paper's funding

From The Student Press Law Center

Administrators at Wright State University ordered journalists at the school's student newspaper to pull a classified advertisement and threatened to pull all school funding if they did not, students say.

A few days before The Guardian at Wright State went to press last month, Alabama-based The First Freedom signed a four-week contract with the paper's advertising department to print a help-wanted ad, which asked for interested students to distribute its tabloid around the area, Guardian business manager Jared Holloway said.

"EARN MONEY distributing a rebel tabloid that dares, in today's 'freaking for diversity' climate, to represent even straight Whites. See www.firstfreedom.net and, if interested, write TFF, PO Box 385, Silverhill, AL 36576," the classified ad said.

The First Freedom's website states it is operated by the Nation of Aryans Against Commie Putrefaction, and the tabloid's motto is "Inviting the Zionist-controlled media'cracy to meet a rising free South."

A staff designer saw the ad the day before publication and alerted The Guardian's editorial board about the website's racist leanings, but after an editorial board meeting students chose to print the ad because they supported The First Freedom's First Amendment rights, Holloway said. The classified ad itself did not have overtly racist slurs, which made it more difficult to justify refusing to print it, he said.

"In our advertising guidelines, we have a list of things that are absolute no's, like illegal drug use," Holloway said. "But there are other things that are up to editorial staff discretion, and this was one of those."

Ohio State trustees hold private meetings, questions raised about legality

After the retirement announcement earlier this year of Ohio State President E. Gordon Gee, the university's Board of Trustees announced it would hold eight closed-door meetings. As reported by The Columbus Dispatch and The Lantern, these closed meetings included a 7 1/2-hour meeting of the full board on June 5.

Tom Hodson, a former Common Pleas judge who is now a communications professor at Ohio University, stated in a Dispatch article on June 6 that these meetings indicate OSU has a poor understanding of the Ohio Open Meetings Act. "Ohio law is pretty specific on the Open Meetings Act as to particularly what an organization can go into executive session about," Hodson said. "You can't use that as a vehicle to talk about the vision of the entire institution or the entire world."

The Open Meetings Act requires public officials "to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law."

The Dispatch article quoted OSU spokeswoman Gayle Saunders as saying the June 5th meeting was closed for a number of reasons, including privacy concerns arising from the Ohio Uniform Trade Secrets Act. However, Hodson said he thought "courts would perhaps look a bit askance" at OSU's claim that general planning discussions are trade secrets.

Columbus lawyer Fred Gittes, a public-records champion, agreed, and was quoted in the Dispatch as saying OSU's reasons for closing the meetings don't "meet the smell test."

State school board business is private business, too

From The Akron Beacon Journal

Sometimes the private business of state school board members overlaps into their roles deciding policy for Ohio.

At least four board members have business and private interests that compete directly for education dollars. Two are lobbyists cruising the government hallways urging lawmakers and staffers to make decisions beneficial to their clients who have a stake in public education money and regulation of schools.

Another is married to a lobbyist for private schools who has attempted to sway the state board as recently as this month, and a fourth generates income from public education programs also administered by the board.

They suggest there is no problem with this activity, they police themselves, abstain as necessary and file the necessary statements with the Ohio Ethics Commission.

And while the ethics commission says the law may seem clear — state law "prohibits a member of a state board or commission from receiving compensation for services he or she performs personally on a matter that is before the board or commission on which he or she serves..." — the practice often falls into a gray area.

Democrats propose open-gov watchdog measures

From The Columbus Dispatch

Even though they know it's probably futile because they're Democrats in a GOP-dominated legislative world, a quintet from the minority party rolled out five proposals (Oct. 29) to open up state government and bring more accountability to public officials.

(The Democratic proposals include):

- The Corporate Tax Credit Disclosure Act would require the state to publicly disclose the value of tax incentives awarded to private companies.
- A Watchdog Independence Initiative would require two legislative leaders from each party to pick both the state inspector general and members of the Ohio Ethics Commission. The governor currently appoints them.

The Democrats also urged action on Carney's measure to bring accountability to JobsOhio—Kasich's privatized economic-development agency—as well as revamping how legislative and congressional districts are drawn and a measure sponsored by Rep. Dan Ramos of Lorain that would require broadcasting all Ohio House legislative hearings.

Kent State University has not released information on applicants for president

From The Plain Dealer

Kent State University's search for a new president is well underway but it has not released information on who has applied for the job, according to the Daily Kent Stater student newspaper.

It submitted a public records request to the university's general counsel, but all documents related to the search for the person to replace President Lester Lefton are at the offices of the university's search firm Storbeck/Pimentel & Associates in Media, Pa., Kent State spokesman Eric Mansfield told the paper.

"The process is still in the recruitment phase," Mansfield said. "This includes giving the search firm adequate time to process any applications submitted as part of advertisements for the position."

Mansfield added when Kent State has the applications, the university will respond to public records requests.

Search committee chair Richard Marsh has declined all media interviews. Marsh has not indicated in past interviews whether the search applicants would be made public at any time.

Marietta's bill for public records suit tops $422,000

From The Marietta Times

The city of Marietta's legal bills continue to pile up in a public records lawsuit that was filed against the city in 2011 by Tuscarawas County residents Edward and Dorothy Verhovec and their attorney, William Walker Jr.

"The city has so far paid a total of $422,840.72 in legal expenses for this case," said Angela Tucker, chief deputy auditor with the Marietta auditor's office.

Earlier this month city council's finance committee was asked for another $30,000 to help cover costs for the case which city law director Paul Bertram III says is not over yet. The request was approved by council (in late October).

Finance committee chairman Tom Vukovic, D-4th Ward, said he was a bit surprised to receive the funding request.

"I thought we were close to the end of that case, but we're apparently still going through the appeals process, so I don't think we're seeing the light at the end of the tunnel for now," he said. "But what else can we do? We're continuing to fight in order to recoup the money the city has paid out for this case."

The original lawsuit, filed June 26, 2011, by Edward Verhovec of New Philadelphia, involved a public records request for approximately 3,300 cable TV survey cards that were returned to the city by customers in 1999.

ODNR must release fracking waste-water emails

From The Columbus Dispatch

The Ohio Department of Natural Resources failed to supply all of the public records that a Trumbull County city and business should have received in a dispute over fracking waste, a federal appeals court ruled (Nov. 26).

Judge John A. Connor of Ohio's 10th District Court of Appeals in Columbus wrote the 3-0 opinion that ordered the agency to provide the city of Warren and Patriot Water Treatment with all of the remaining documents.

April Bott, an attorney representing Warren and Patriot, said the documents are deleted emails stored in the agency's record-keeping system.

Patriot Water Treatment recycles fracking waste from Utica and Marcellus shale wells in Ohio and Pennsylvania. Warren's sewage-treatment plant takes the treated waste water and dumps it in the Mahoning River.

The city and treatment company filed an appeal with the Ohio Environmental Review Appeals Commission in 2012 after state Ohio Environmental Protection Agency officials changed the terms of Warren's water-pollution permit to stop the practice.

Blade investigation discovers half of companies receiving state job-creation grants failed to generate promised jobs

From The Blade

It's a numbers game when it comes to job creation in Ohio.

A Blade investigation into whether taxpayer funding creates jobs revealed state documents contain vastly skewed numbers — inflating the number of jobs created by more than 11,000.

Officials at the Ohio Development Services Agency said they improved the process for tracking whether state loans, grants, and tax credits stimulate job growth, but The Blade found the state agency still is largely unaware if companies create the jobs they promise.

About 37 percent of the grant reports that businesses submitted to the state contained errors, including incorrect job-creation numbers. The Blade received reports that were dated as early as 2006 and continued through 2013.

The inaccurate grant reports are an example of lapses in the way Ohio manages its business incentives. The state often is in the dark about problems at firms and is hard-pressed to recoup the money it lends or gives to companies that fail to create jobs.

The state is dependent on the word of companies to assess whether they actually create jobs. Firms self-report their employment numbers via the Internet. Although the Development Services Agency, formerly the Ohio Department of Development, is responsible for keeping track of job-related data, its employees almost never visit businesses that receive state incentives.

And now, most of the records related to job growth are shielded from public scrutiny.

OSU invested millions with friend of Gov. John Kasich and Gordon Gee, but won't share details about the deal

From The Plain Dealer

Ohio State University has invested tens of millions of dollars in a new, untested fund co-founded by a venture capitalist who enjoys close relationships with recently retired university president E. Gordon Gee and Gov. John Kasich.

The deal was done behind closed doors, right around the time trustees changed OSU policy to allow top administrators more leeway over how to invest operating funds.

OSU's commitment to Drive Capital, launched this year by Silicon Valley veterans Mark Kvamme and Chris Olsen, is worth about $50 million, sources familiar with the arrangement told Northeast Ohio Media Group. It is unknown who recommended the investment or whether the university sought competing proposals. OSU officials have not provided details or documents that the news organization first requested (in September).

Kvamme, in an email, acknowledged that an agreement exists between Drive Capital and OSU -- one that requires university officials to notify him and Olsen whenever their fund is subject to a records request. But Kvamme and Olsen declined to discuss their business dealings on the record, citing Securities and Exchange Commission rules.

Open Government Editorials

Access is under siege as lawmakers chip away at Ohio's Sunshine Laws

Editorial from The Columbus Dispatch

Virtually all politicians claim to support government transparency, but many lawmakers cater to special interests over their constituents when it comes to introducing bills that would curtail access to public records.

Open-government advocates rightly are sounding the alarm about more than a half-dozen bills being considered in the legislature that would further undermine the state's well-regarded Sunshine Law.

Dennis Hetzel, executive director of the Ohio Newspaper Association, says that proposed legislation would allow some public officials to take a "de facto vote" during closed-door meetings; to shield from the public information on what fertilizer farmers are using; to redact some information about vehicle-accident reports from online law-enforcement reports; and to seal data on concealed-carry permits for gun owners, among other things.

Hetzel told Gongwer News Service recently that the growth of government and changes in technology are behind some of the drive to shield information from public view.

"As the world gets more complicated, and the volume and scope of government activity continues to expand, greater government secrecy becomes a too-easy solution," Hetzel said. When it comes to the availability of information on the Internet, he said, the question becomes "what tradeoffs are we willing to make to protect every perceived concern about people's privacy?"

Only medical records were carved out in Ohio's original Sunshine Law 50 years ago. Already since then, 29 classes of records have been excepted. While interest groups seeking exemptions from public disclosure is nothing new, Catherine Turcer of Common Cause Ohio says the pace of such drives is picking up.

"They may have been giving lip service before," Turcer told Gongwer, "but now they're not even giving lip service…That is a change."

In many cases, these proposals appear to be a fix in search of a problem. Gun-rights advocates argue that publication of their names and addresses would leave them susceptible to being targeted by thieves. But for the past several years, concealed-carry permits in Ohio have been available only to journalists, not the general public, and the law prohibits any type of copying or even note-taking from the records, rendering it virtually impossible that such information could ever be gathered and published.

In the case of allowing more closed-door meetings of local-government employees to discuss economic-development matters, those types of discussions already can be shielded many times by existing law.

The newspaper industry has a naturally keen interest in government transparency, given its role as a watchdog for the public. But maintaining access to public records should be of concern to all Ohioans, since it provides a critical check on government power and the use of taxpayer money.

The importance of being able to keep an eye on government has been highlighted in recent weeks at the federal level by multiple scandals involving the secret abuse of power by officials to target and spy on average citizens, and by the disclosure of lavish spending on travel and trinkets by agencies including the Internal Revenue Service.

At the state and local levels, many instances of misconduct and questionable spending never would have been unearthed had it not been for public records.

Developing secrets: Proposal will hide use of public money

Editorial from the Akron Beacon Journal

Slipped into the Senate version of the two-year state budget is a provision that should outrage Ohioans — for its timing and substance. The proposal would open the way for local governments to discuss behind closed doors the shape and detail of economic development projects.

That's right: Decision-making about how to deploy public money, via such tools as tax incentives, would be shielded from public view. The measure is brazen in that economic development has come to represent a core function of local governments, touching jobs, revenues and quality of life.

The argument has been made that the provision merely echoes the confidentiality allowed JobsOhio at the state level. Actually, local governments would have more room to maneuver in secret — and at greater consequence. Anyway, the cloak cast over the operations of JobsOhio hardly serves as an example worth emulating.

Many questions have surfaced quickly about the provision. What, precisely, would be gained? Local governments already have too many avenues to executive sessions. They need another? What about the role of the public, or those paying the salaries of public officials? Where are the protections against the obvious, the likelihood of corruption following soon in the path of enactment?

Sound like legislation conceived and advanced in a hurry? There were no hearings on the proposal, let alone full debate. State lawmakers long have been whittling away at openness and transparency in government. Now Senate Republicans want local officials to shape economic development in secret. What they lack is a good reason why.

Editor's note: *This provision indeed made it into law when the budget was passed in the spring. However, lawmakers agreed with Ohio Newspaper Association proposals to add limitations on the use of this new exception. Also, for the first time, a unanimous vote is required before an executive session can be held on these matters.*

Public deserves to know how JobsOhio dollars are spent

Editorial from the Akron Beacon Journal

The chairman of the board of JobsOhio described the results of a state audit released (November 21) as "positive" overall. Jim Boland noted that the examination of the privatized economic development agency found "the types of minor discrepancies that are not uncommon to other companies during their first year of business." And there resides a problem. The state auditor won't get another opportunity to look at JobsOhio as it moves forward.

Republicans in charge of the legislature removed the organization from the jurisdiction of the state auditor. They did so after David Yost, a fellow Republican, insisted that he would conduct an audit, even issuing a subpoena after JobsOhio refused requests for documents.

Yost rightly held to the notion that his office has a duty to follow the public money, in this case, revenue from the state's liquor enterprise, transformed into operating funds for JobsOhio. Add to the imperative the spirit of the state constitution, which bars the use of public money in private enterprises, Ohio having learned hard lessons in the past. In that way, JobsOhio carries the appearance of an artful dodge.

What discrepancies did Yost find?

Those at JobsOhio all along have reassured that they are alert to the potential for conflicts of interest and meet the necessary ethical standards. Yet Yost noted that for the fiscal year 2012, the agency "had no clear formal procedure for senior management and employee conflicts of interest or any mechanism for managing these situations." The audit added that the agency "did not document any actions that it may have taken to informally screen for potential conflicts or to avoid or mitigate actual conflicts of interest."

JobsOhio challenges the conclusion. It also explained that its ethics policies have been updated, and an independent review panel recently was created to evaluate the effectiveness of its efforts to protect against conflicts of interest. These steps move in the direction recommended by the auditor.

Yost further advised that the organization tighten up its internal controls on expenditures. All such steps, large and small, are essential. Gov. John Kasich proposed JobsOhio as crucial to boosting the state's economy and argued that to be successful, it must operate beyond the public eye, with exemptions from state public records law and other requirements for disclosure.

The invitation is there for trouble, and with JobsOhio policing itself, it must be vigilant in ensuring that scandal does not visit.

There remains some cloudiness about what JobsOhio actually does, officials at one turn portraying its role as largely a facilitator and at another as part of every job created in the state. What is clear is that the governor and others are asking for public trust. With that in mind, there is one role still available to the state auditor. The office will have a place in the room where the contract will be written with a private auditing firm to conduct the next examination of JobsOhio. David Yost shouldn't hesitate to add his voice, even loudly, in advancing the public interest. Public money is in the mix, and the public deserves to know how its dollars are spent.

Bill would eliminate all journalist access to gun permits

Editorial from The Tallmadge Express

State Sen. Joseph Uecker has resurrected a measure that would effectively deny any public access to records about concealed handgun permits, a move he justifies in the interest of privacy and safety for those covered by the concealed-carry law.

Access to concealed-carry information already is limited. The general public has been denied access since 2004, and an exemption for journalists — in effect since 2007 — is hardly a model for transparency: Journalists can view concealed-carry records but cannot copy them or take notes on them. That effectively keeps the books closed for them, too.

Uecker's proposal, which died in a previous session of the Legislature, received new life after a New York newspaper published a map showing the locations of homes where concealed-carry permit holders resided after the Sandy Hook shootings. The existing restrictions on access to concealed-carry records make it highly unlikely that an Ohio newspaper could publish the same information, but that isn't deterring Uecker, a Republican from suburban Cincinnnati, from pushing ahead.

The limitations on access already on the books are problematic. Part of the watchdog role of the media is to monitor government. How can the press know if the laws dealing with concealed-carry permits are being carried out if the records are virtually sealed?

The concealed-carry law prohibits felons and those who are mentally unstable from receiving gun permits; with sealed records, it is very difficult, if not impossible, for the press to know that those with legal impediments to concealed-carry permits aren't, in fact, carrying guns.

There has been a consistent erosion in public access to government records in Ohio in the 50 years since the open-records law was passed in 1963. The original law listed only one exemption: Medical records were closed to public scrutiny. There are now 29 exemptions. This is more than a slippery slope.

Those who would argue that personal privacy trumps the public's right to access governmental documents might want to think twice about seeking more secrecy in government. While sealing concealed-carry permits might seem "logical" from a privacy standpoint, the same argument could be made for court records. Chipping away at public access is a dangerous thing.

We do not know how far Uecker will get with his bid to conceal gun permit information from the public. We hope that the objections raised by advocates of open government and the media will prevail.

We do know that when government is allowed to operate in secrecy, the potential for abuse increases. It's easier to cut corners when it seems like nobody is watching. And that's dangerous for democracy.

Fracking disclosure rules raise questions

By Katie Nix
Ohio Newspaper Association intern

As Ohio experiences a boom in using hydraulic fracturing to extract oil and gas, open government advocates have challenged secrecy surrounding questions about the environmental and medical impact of the process.

Ohio Senate Bill 315 allowed fracking companies to declare chemicals as "trade secrets" and therefore not share them with the public, in addition to not giving medical professionals the information they felt was needed to treat patients who might be suffering from the effects of fracking chemicals or wastewater.

"SB 315 contained many provisions designed to protect the interests of fracking companies over the interests of lessors, gasland neighbors and the public at large," said Melissa English, development director of Ohio Citizen Action, a non-profit environmental activist group. English said Citizen Action had particular concern about provisions that limited local control over siting of wells and allowed secrecy of chemical disclosure.

According to SB 315, any disclosure of fracking chemicals only was provided to the Ohio Dept. of Natural Resources. Citizen Action pointed to the federal Emergency Planning and Community Right-to-Know Act (EPCRA), which would seem to require that this information should have also been provided to the State Emergency Response Commission, the fire department within the well site's jurisdiction and the appropriate local emergency planning committee. However, SB315 allowed drilling companies to claim their chemicals as trade secrets, meaning they didn't need to submit the information to these other agencies.

Requirements for reporting chemicals vary from state to state. According to the Natural Resources Defense Council's July 2012 Issue Brief, Ohio drillers do not have any requirement to disclose the chemicals before drilling, but do have to keep all of the chemicals registered, even if they are claimed as trade secrets.

However, some states, such as Wyoming, have very strict policies regarding disclosure of fracking chemicals, including a mandatory pre-disclosure of chemicals and a required, factually justified, state evaluation for trade secret claims.

According to the Wyoming Oil and Gas Commission, without these regulations there can be serious medical issues with various parts of the body including sensory and gastrointestinal organs as well as the respiratory, nervous and immune systems and numerous others.

Not everyone agrees that more regulation is needed in Ohio.

"Currently, our regulations in Ohio on wastewater treatment and disposal regulations are some of the strictest in the nation," said Kayla Atchison, legislative aide for Ohio State Rep. Anthony DeVitis. "Not only did SB 315 strengthen existing regulations, it established necessary standards on how waste material should be handled and disposed."

But while SB315 does seek to prevent the release of fracking chemicals in Ohio, there is disagreement if the law also put restrictions on medical personnel gaining access to trade-secret information to treat patients during an emergency spill.

According to Ohio Citizen Action, SB315 hampered the release of this information. However, the Ohio State Medical Association disagreed with this assessment and believes the law did give medical personnel the right-to-know option when necessary.

"[Ohio Citizen Action] made it sounds like 'Even OSMA agrees with us and these chemicals need to be revealed,' " said Tim Maglione, OSMA's senior director of government relations. "The fact is, our interpretation of the law is different than theirs. We think that health professionals should have access to the chemical information and they do under [SB 315] even if they are trade secrets."

Many of the complaints about the lack of open information about fracking chemicals under SB315, however, may have been made moot mute by a recent U.S. Environmental Protection Agency memo. In September, the EPA sent fracking companies a memo detailing that they were to follow the EPCRA, instead of Ohio Senate Bill 315.

Maglione acknowledged that the EPA was right by insisting that emergency responders also have access to the chemical information.

"It wasn't included in the Ohio law, but I definitely think it's a beneficial provision to have," Maglione said.

Public has right to photograph, record police

By Randy Ludlow
The Columbus Dispatch

Cincinnati police have formally acknowledged that members of the public have the right to photograph and record officers as they go about their jobs on city streets.

The Queen City agreed to pay $40,000 to a "citizen journalist," who was arrested and whose camera was seized, to settle a federal lawsuit filed by the man, according to a story in The Cincinnati Enquirer.

City police also agreed to adopt a policy instructing officers not to interfere with street photographers and to not seize their cameras or delete images or recordings.

The Columbus Division of Police has no policy, but officers are trained that they are not to prevent members of the public from photographing or recording them or their activities, said Sgt. Rich Weiner, spokesman for the force.

People have a general legal right to photograph or record any person or activity that can be viewed from public property or anywhere else they have a legal right to be.

Still, members of the public – and the news media – have no right of access to crime scenes (even on a public street) or inside areas cordoned off by police to safeguard the public.

***Randy Ludlow** is a senior reporter for The Columbus Dispatch, where he writes on public records, open meetings and free-speech issues. He is also on the board of trustees for the Ohio Coalition for Open Government.*

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

Senate advances bill protecting confidential sources

From USA Today

After a decade of false starts and near misses, (a Federal shield law) may at last be on the verge of becoming law. And that's a good thing.

Sen. Charles Schumer, D-N.Y., a major force behind the bill, exudes confidence. "I think it will pass the House and the Senate, and I think it will become law relatively quickly, by congressional standards," Schumer said in a telephone interview.

A decade's worth of efforts by champions of the bill, aimed at preventing journalists from having to choose between betraying a source and going to jail, have ended in frustration. But things seem different this time, thanks to the Obama administration's heavy-handed treatment of journalists and news outlets in leak investigations.

"What happened recently has seemed to be overreaching by the Department of Justice," Schumer says. "That has rekindled interest" in the bill.

Kurt Wimmer, counsel for the Newspaper Association of America, is a veteran of the federal shield law crusade. He remembers all too vividly when the bill last seemed on the verge of passage. With the support of the Obama administration, a similar piece of legislation passed the House and was approved by the Senate Judiciary Committee in 2009. But it never got to the Senate floor, a casualty of Capitol Hill frenzy over Julian Assange and WikiLeaks.

Wimmer says things feel a little different these days. "There's a significant amount of momentum now," he says. "I think the stars have aligned."

Federal government muzzling the Freedom of Information Act

From Newsweek

The federal government is making it increasingly difficult, and prohibitively expensive, for journalists to get files that agencies want to keep secret, despite President Obama's pledge of transparency.

That's bad news for authors, editors, producers, writers, and publishers, as well as anyone else interested in democratic government. But it is great for ineffective, inefficient, and corrupt federal officials.

Federal agencies routinely flout the 1966 Freedom of Information Act, the so-called Open Government Act of 2007 that strengthens the 1966 law, and Obama's 2009 executive order directing agencies to err on the side of disclosure, not secrecy, a host of journalists, public-interest advocates and lawyers tell Newsweek.

Specialists in Freedom of Information Act requests say there has been a general tightening up and an increase in denials for both records and fee waivers for journalists. They attribute this to Freedom of Information staff budget cuts and the absence of pushback from Congress.

And what of President Obama's directive?

"All Obama's executive order did was give agencies that were good about disclosure something to back them, while requiring nothing of the bad actors" who gin up reasons to withhold, says Bradley P. Moss, a Washington lawyer who specializes in access to government records.

Moss and others cite the Central Intelligence Agency as obstinate, releasing hardly any information and refusing to comply with laws requiring machine-readable documents, like spreadsheets. The CIA only releases copies of records on plain paper.

Public access, photos barred at Newtown school demolition

From the Associated Press

Contractors demolishing Sandy Hook Elementary School are being required to sign confidentiality agreements forbidding public discussion of the site, photographs or disclosure of any information.

The News-Times reports that Selectman Will Rodgers says officials want the Newtown school where 20 children and six educators were fatally shot last December to be handled in a respectful way.

Project manager Consigli Construction has barricaded the property and intends to screen the perimeter to prevent onlookers from taking photographs. Full-time security guards will ensure the site is not disturbed.

Families of the victims and school staff visited the site, but public access is barred.

Demolition is set to begin (the third week of October) and be finished before the Dec. 14 anniversary of the shootings. A new school is expected to open by December 2016.

Federal judge unseals porn case against doctor

From The Columbus Dispatch

The child-pornography case against pediatric-cancer doctor Christopher E. Pelloski has been unsealed by a federal judge.

U.S. District Judge Algenon L. Marbley made the case public on (November 5), 15 days after he had sealed it.

Pelloski was director of the pediatric radiation-oncology program at Ohio State University when he was arrested in July and charged with one count of accessing child pornography. He signed an agreement with the U.S. attorney's office on Oct. 2 to plead guilty to the charge and register as a sex offender.

In mid-October, Pelloski's attorneys asked that the case be sealed because of "inordinate media coverage," the "resulting harm to the defendant's minor children and the potentially privileged information that would be presented at the sentencing hearing," according to a U.S. attorney's motion that was filed on (November 5) in opposition to the sealing.

"There is an important societal interest in open judicial proceedings in criminal matters," and sealing individual court documents is sufficient to protect confidential information in the case, the motion said.

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 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. Its 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.

Please consider a year-end donation 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. OCOG has also supported a number of other open government cases in the last two years.

"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.