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Ohio Auditor of State

2018 Local Government
Officials Conference



**VILLAGE LEGAL
UPDATE**

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AGENDA

- Legislative Update
- Recent AOS Bulletin
- Case Law Update
- Ethics Opinions
- Common Legal Issues
- Force Accounts



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LEGISLATIVE UPDATE



THE OHIO LEGISLATURE
132ND GENERAL ASSEMBLY



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Personal Information

- Under R.C. 149.43, *personal information is exempt from disclosure under the Ohio Public Records Law requirements.*



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Employee Birth Dates

- Each public office must keep a *list of its employees' names and birthdays.* The list is a public record. (R.C. 149.434)



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PUBLIC RECORDS MAINTAINED ON A WEBSITE

- If a public office has some or all of its public records on a website, fully accessible to and free to the public at all times, then the public office may limit the number or records requested in digital format by a single person to ten per month.
- Limitation on number of requests does not apply if:
 - Requested records are not available on the website, or
 - Requester certifies, in writing, that he does not intend to use the information requested for commercial purposes.

ORC 149.43(B)(7)(c)(ii)



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CASE UPDATE

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Red Light/Speed Cameras *Dayton v. State*

- Requirement that a law enforcement officer be present at the location of the photo-monitoring device.
 - Unconstitutional per *Dayton v. State*.
- Prohibits fines from being administered to drivers unless the driver's speed exceeds 6 m.p.h. in school zones and 10 m.p.h. in other areas.
 - Unconstitutional per *Dayton v. State*.
- Requirement that a municipality perform a safety study and conduct a public information campaign prior to using a photo-monitoring device.
 - Unconstitutional per *Dayton v. State*.

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Public Records Act

Quick Overview

- Public Records Act = ORC 149.43
- General Obligations
 - Adopt public records policy
 - Promptly prepare records and make available for inspection
 - Make copies within a reasonable time
 - Follow an approved records retention schedule

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Public Records Act

Quick Overview

A "record" is:

1. Any document, device, or item, regardless of physical form or characteristic, including electronic records,
2. Created or received by or coming under the jurisdiction of any public office
3. Which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.



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Public Records Act

Time to Respond



- After receiving a request for public records, a public office or person responsible for public records is required to make copies "within a reasonable period of time."
 - There is no specific deadline by which a public office must respond
 - "Reasonable period of time" depends on the pertinent facts and circumstances of each request
 - ❖ Includes time to retrieve, review, redact, and obtain legal advice (when necessary)



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Public Records Act

Case Law Update

Time to Respond

State ex rel. Cincinnati Enquirer v. Deters, 148 Ohio St.3d 595 (2016)

- Facts
 - On July 19th, a police officer with the University of Cincinnati Police Department shot and killed Samuel DuBose during a traffic stop
 - The events of leading up to and immediately following the shooting were recorded on the officer's body camera.
- Timeline
 - July 20 - Media made a request to the county prosecutor's office to obtain a copy of the body cam video
 - July 21 - the prosecutor's office received the video
 - July 27 - mandamus action was filed
 - July 29 - body camera video was provided



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Public Records Act

Case Law Update



Did the prosecutor provide the records promptly?

- The prosecutor was entitled to review the video to determine if any redaction was necessary
- The prosecutor produced the video six business days after it was received by his office

Court determined that the prosecutor responded in a reasonable period of time.



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Public Records Act

Case Law Update



Time to Respond

State ex rel. Patituce & Assocs., L.L.C. v. Cleveland, 2017-Ohio-300

- Law firm sent a public records request to Cleveland for:
 - Policies, manuals, and regulations relating to police body cams and videos in the City's possession; policies regarding search warrants, a list of officers in the Gang Impact Unit, personnel files, training certifications, disciplinary reports, continuing education classes for nine specific police department employees and officers in the Gang Impact Unit.
- Review and production of records took the City about 3 months



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Public Records Act

Case Law Update

- Prior to production of records, the law firm filed a mandamus action
- Law firm's argument
 - City did not respond within a reasonable time because:
 - Records were not produced until three months later and after the mandamus action was filed
 - The City did not respond to several of the Law Firm's requests for status updates
- City's argument
 - Responded within a reasonable time based on the voluminous nature of the request



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Public Records Act

Case Law Update



- Eighth District Court of Appeals determined:
 - The request included a large amount of information that needed reviewed and redacted
 - The City advised the requester that records would be compiled and produced after review
- Based on the size and nature of the request, the court held that the City provided records within a reasonable period of time.



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COMMON LEGAL QUESTIONS



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What are the requirements for taking meeting minutes?

Open Meetings Act- Brief Overview

Meeting: A prearranged gathering of a majority of members of a public body conducting or discussing public business

Obligations:

- ☞ Give appropriate notice
- ☞ Deliberate on public business in **open session**
- ☞ Take and file minutes



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Open Meetings Act: Minutes



"The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to the public."

O.R.C. 121.22(C)



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Minutes

White v. Clinton Cty. Bd. of Commrs., 76 Ohio St.3d 416 (1996)

- Clinton County Commissioners adopted a policy regarding new requirements for building inspections
- County health dept. became concerned with how policies would impact health dept. procedures
 - Requested minutes of meeting at which Commissioners discussed and adopted new policy
 - Minutes provided did not mention the new policies
 - Minutes included only roll call votes



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Minutes

Court held:

- Minutes should not be limited to just roll call votes
- Minutes should have provided a better understanding of the Commissioners discussions of the new policy



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Minutes: Requirements

- Must be full and accurate
 - Do not have to be verbatim transcript
 - Should enable the public to understand the rationale behind decisions
- There is no requirement to keep minutes of executive sessions.
 - However, need to indicate specific reason for executive session



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Can Public Business Be Discussed Via Email?

White v. King, 147 Ohio St.3d 74 (2016)

The Open Meetings Act “prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by email, text, tweet, or other form of communication.”



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Are my notes from the meeting a public record?

- Notes of the meeting are not a public records if:
 - Personal papers
 - Kept for convenience; and
 - Others did not use or have access
- *State ex rel. Cranford v. Cleveland*, 2004 Ohio 4884



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Are my notes from the meeting a public record?

Example

State ex rel. Santefort v. Wayne Twp. Bd. of Trustees, 2015-Ohio-2009

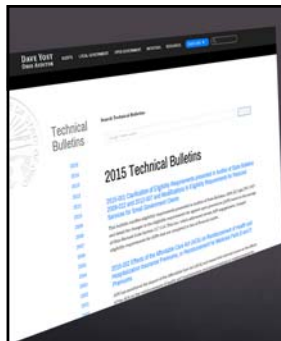
- Fiscal officer used combination of notes and memory to draft minutes
 - Notes were taken for her convenience
 - To remember names and proposed amendments
 - Notes were not used by the twp.
 - Took notes home with her
 - No one at twp. had access
 - Notes did not contain enough information to reflect an accurate record
- Court found that FO's notes were personal in nature and not a public record



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AUDITOR OF STATE BULLETIN



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CREDIT CARD CASH WITHDRAWALS *Bulletin 2016-004*

- Public transactions in cash are strongly disfavored
- Few reasons exist for a public entity to use cash
- Rebuttable presumption that cash withdrawals are not for a public purpose
- Public entities should develop, maintain, and strictly apply appropriate authorization and tracking controls incident to credit card usage, particular emphasis on cash withdrawals



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OHIO ETHICS COMMISSION OPINIONS





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OHIO ETHICS COMMISSION *OPINION #2016-001*



Restrictions on Public Officials Employed by Entities that Receive Public Financial Assistance

- Can a council member of a municipality that provides financial support to a nonprofit corporation be employed as the corporation's director?
 - R.C. 2921.42(A)(3) prohibits a public official from also being employed by a nonprofit or for profit corporation, company, or other entity, where:
 - the establishment or operations of the entity is dependent upon receipt of the public agency's financial assistance, OR
 - the public official would otherwise profit from the award of the contract.



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OHIO ETHICS COMMISSION *Opinion 2010-03*

Can a public official or employee:

- Hire a family member
- Use influence to secure a job for family member
- Participate in matters affecting family member's employment
- Can two family members work for same public employer




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Ohio Ethics Commission

Opinion 2010-03 (cont'd)

Public officials or employees:

- ✗ Cannot hire a family member
- ✗ Cannot use influence to secure job for a family member
- ✗ Cannot give or use influence to secure for a family member

Raises Promotions Job advancements Overtime pay or assignments
Favorable performance evaluations Any other thing of value

👍 Two family members can work for same public employer



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Ohio Ethics Commission

Opinion 2010-03 (cont'd)

Family Member:

Parents or step-parents Grandchildren
Grandparents Siblings
Spouse Any other blood or marriage relative
Children or step-children (Dependent or not) Living in same household



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FORCE ACCOUNTS



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Force Account

Occurs when a road, street, bridge, or culvert project is undertaken by a public entity using its own labor, materials, and equipment.

- o Public entity acts as contractor.
- o Labor employed by public entity.
- o Equipment owned, purchased or leased.



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Force Account Overview

- AOS Bulletin 2008-004
 - Materials and equipment from outside vendors
 - Okay
 - Competitive Bidding
 - Cost Included
 - Outside contractors—cost included



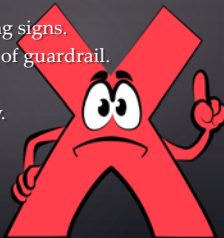
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Examples—Not Force Account

- Cleaning a culvert ditch.
- Placing, installing, or repairing signs.
- Installation and maintenance of guardrail.
- Clearing brush and debris.
- Mowing grass along roadway.
- Snow removal.



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Force Account Assessment Form — Materials

- Cost of Materials
 - List each type
 - Cost per unit
 - Total number of units
 - Total cost
- Overhead
 - "Safe Harbor" — 15%



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Force Account Assessment Form — Materials

- Each piece of equipment and hourly rate
- Owned equipment
 - Original purchase price
 - Maintenance cost estimates
 - Time of use
 - Depreciation
 - Freight
 - Fuel
 - Hauling
- Generally accepted rate
 - ODOT standards
 - Use same for all
- Actual rental



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Force Account Assessment Form — Labor

- Base wages of all employees
 - Hourly rate
 - Total hours
 - Markup for fringe benefits
 - Workers' Comp Premiums
- Fringe Benefits
 - Safe harbor rate — 30%
 - ◊ Total base wage amount.
- Overhead
 - "Safe harbor" — 38%
 - ◊ Total amount of base wages and fringe benefits.



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Force Account Project Audits

Rev. Code Section 117.16(A)

Force Account Project Assessment Form shall include the following:

- ❖ Employees' salaries and benefits
- ❖ Any other labor costs
- ❖ Materials
- ❖ Freight
- ❖ Fuel
- ❖ Hauling
- ❖ Overhead expenses
- ❖ Workers' Comp premiums
- ❖ Allowance for use of tools and equipment
- ❖ All other costs and expenses



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FORCE ACCOUNT COMPLAINTS

ORC Section 117.16(B)



- Complaint of force account violation
 - Auditor conduct audit
- Violation
 - First-Reduce for one year
 - County-\$10,000/mile road, \$40,000 bridge
 - Township-\$15,000 maintenance or repair of road
 - \$,5,000/mile construct or reconstruct
 - Municipality-\$10,000 street project
- Second in same or subsequent audit-Reduce for 2 years
- Third and subsequent-20% of total cost forfeiture
 - Tax commissioner withhold



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AUDITOR OF STATE BULLETIN 2003-003

- Labor
 - Base labor plus mark up for fringe and overhead
 - Hourly rate and expected hours
 - Overhead Safe Harbor—30%
- Materials
 - Actual cost
 - Overhead Safe Harbor—15%
- Equipment
 - All used in project
 - Assign rate
 - Purchase price
 - Maintenance costs
 - Time in service
 - Depreciation
 - Use ODOT assigned rates



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MUNICIPAL FORCE ACCOUNT

ORC Section 723.52

- Construction, reconstruction, widening, resurfacing, or repair
- Street or public way
- \$30,000 or less total cost
 - Force Account
 - AOS estimate sheet
- Over \$30,000
 - Competitive bids
- Maintain record (RC 723.53)



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