

A VIEW FROM THE NEWSROOM:

SUNSHINE LAWS



OUTLOOK *STILL* CLOUDY



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THE COMMON LAW OF PUBLIC RECORDS AND PUBLIC MEETINGS

In England the fountain head of justice is the king. In theory at least the courts are his courts, and the government is his government. Whatever power the people have he has granted to them; and if no grant has been made to them to examine the public records, it may well have been held in England that they have no such power.

But in this country we proceed upon an entirely different theory of government. Here the people are the fountain head of justice. The courts are their courts; and the government is their government. Whatever power they have not granted to their officials remains with them; and to settle the question of the application of this principle to the people of this state it is declared in Bill of Rights, Art. 1, Sec. 20, that, "This enumeration of rights shall not be construed to impair or deny others retained by the people; and all powers not herein delegated remain with the people."

As public records are but the people's records, it would seem necessary to follow that unless forbidden by a constitution or statute, the right of people to examine their own records must remain.

Albert D. Wells v. Eugene L. Lewis, Auditor, 170 O.C.C., N.S. 12 (1901)

The public does not have the common-law right to attend meetings of governmental bodies. Therefore, any right the public has to attend a governmental activity must arise out of a provision in local, state or constitutional law. *Beacon Journal Publishing Co. v. Akron* (1965) 3 Ohio St. 2d 191.

Smith v. Cleveland 94 Ohio App. 3d 780 (1994)

RIGHT OF ACCESS TO DOCUMENTS
(§ 149.43 O.R.C.)

I. MATERIAL SOUGHT MUST BE A RECORD

A. Definition of a "Record":

1. Any document, device or item regardless of physical form;
2. Created or received or coming under jurisdiction of a public office; and
3. Which serves to document the organization, functions, policies, decisions, procedures, operations or *other activities of the office*.

B. Examples:

1. Written documents, computerized records, videotapes; and
2. Compilations and analysis prepared by or held by a public office.

C. Exemptions:¹

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| 1. Medical records; | 12. Department of Youth Services records; |
| 2. Probation and parole records; | 13. Intellectual property records; |
| 3. Minor's juvenile court abortion records; | 14. Donor profile records; |
| 4. Department of Health adoption records and original birth records; | 15. Department Job and Family Services records regarding child support obligors; |
| 5. Records of the putative father registry; | 16. Peace officer residential and familial information; |
| 6. Probate Court, agency, and Department of Health adoption information release files, indices and records; | 17. County hospital trade secrets; |
| 7. Trial preparation record; | 18. Child fatality review board records, except for the annual report submitted to Ohio Dept. of Health; |
| 8. Confidential law enforcement investigatory records; | 19. Records and statements of executive director of a public childrens services agency or prosecuting attorney concerning deceased child; and |
| 9. Mediation and discrimination charge records; | 20. Nursing home licensure test, examination or evaluation tools administered by the Board of |
| 10. DNA records stored in DNA database; | |
| 11. Department of Rehabilitation inmate records; | |

¹ Burden of establishing exempted status is on public body; redaction of protected information and issuance of unprotected information is *required*. *State ex rel. National Broadcasting Company, Inc. v. City of Cleveland*, 28 Ohio St. 3d 79 (1988).

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|--|---|
| Examiners of Nursing Home Administrators (or private entities contracted therewith); | 21. Recreational activities records of a person under 18; and |
| | 22. Records release prohibited by Federal/State law. |

II. RECORD MUST BE HELD BY A PUBLIC OFFICE

A. Definition of a "Public Office":

1. "Any *state agency*, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." [Emphasis added.] (See, § 149.011(A) O.R.C.);
2. "*State agency*" is defined as "every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state supported institution of higher education, the general assembly, or any legislative agency, any court or judicial agency, or any political subdivision or agency thereof." [Emphasis added.] (See, § 149.011(B) O.R.C.)

B. Governmental/Proprietary Function *Not* Relevant;

C. Records Need *Not* be Physically Located in Public Office:

"When a private entity carries out the duties or responsibilities of a public office and the public office has a right of access to records documenting this, the records are within the public office's jurisdiction and the public office must make them available for public inspection per R.C. 149.43(B)." *State, ex rel. Mazzaro v. Ferguson*, 49 Ohio St. 3d 37 (1990).

III. REMEDY

A. Mandamus Action.

If governmental unit fails to comply, "person aggrieved" may commence a mandamus action to compel release, in either:

1. Court of common pleas of county in which alleged non-compliance occurred;
2. Court of appeals for appellate district in which non-compliance occurred ; and
3. Ohio Supreme Court.

B. Court May Award Attorney Fees And Costs.

9-27-63 VERSION

Availability of public records.

Sec. 149.43. As used in this section, "public record" means any record required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except records pertaining to physical or psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which is prohibited by state or federal law.

All public records shall be open at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. (*Enacted in Amended Substitute House Bill No. 187*)

11-20-2001 VERSION

(A) As used in this section:

- (1) "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 [3313.53.3] of the Revised Code.* "Public record" does not mean any of the following:
 - (a) Medical records;
 - (b) Records pertaining to probation and parole proceedings;
 - (c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 [2919.12.1] of the Revised Code and to appeals of actions arising under those sections;
 - (d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;
 - (e) Information in a record contained in the putative father registry established by section 3107.062 [3107.06.2] of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;
 - (f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;
 - (g) Trial preparation records;
 - (h) Confidential law enforcement investigatory records;
 - (i) Records containing information that is confidential under section 2317.023 [2317.02.3] or 4112.05 of the Revised Code;
 - (j) DNA records stored in the DNA database pursuant to section 109.573 [109.57.3] of the Revised Code;
 - (k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;
 - (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

* The purpose of the school, which purpose shall be to serve students who are on suspension, who are having truancy problems, who are experiencing academic failure, who have a history of class disruption, or who are exhibiting other academic or behavioral problems specified in the resolution.

- (m) Intellectual property records;
 - (n) Donor profile records;
 - (o) Records maintained by the department of job and family services pursuant to section 3121.894 [3121.89.4] of the Revised Code;
 - (p) Peace officer residential and familial information;
 - (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
 - (r) Information pertaining to the recreational activities of a person under the age of eighteen;
 - (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 [307.62.1] to 307.629 [307.62.9] of the Revised Code, other than the report prepared pursuant to section 307.626 [307.62.6] of the Revised Code;
 - (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 [5153.17.1] of the Revised Code other than the information released under that section;
 - (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
 - (v) Records the release of which is prohibited by state or federal law.
- (2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:
- (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
 - (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;
 - (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
 - (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source;

- (3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.
- (4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.
- (5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.
- (6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.
- (7) "Peace officer residential and familial information" means either of the following:
- (a) Any information maintained in a personnel record of a peace officer that discloses any of the following:
 - (i) The address of the actual personal residence of a peace officer, except for the state or political subdivision in which the peace officer resides;
 - (ii) Information compiled from referral to or participation in an employee assistance program;
 - (iii) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer;
 - (iv) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer by the peace officer's employer;
 - (v) The identity and amount of any charitable or employment benefit deduction made by the peace officer's employer from the peace officer's compensation unless the amount of the deduction is required by state or federal law;

(vi) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer.

(b) Any record that identifies a person's occupation as peace officer other than statements required to include the disclosure of that fact under the campaign finance law.

As used in divisions (A)(7) and (B)(5) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

- (a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;
- (b) The social security number, birth date, or photographic image of a person under the age of eighteen;
- (c) Any medical record, history, or information pertaining to a person under the age of eighteen;
- (d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(B) (1) Subject to division (B)(4) of this section, all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

11-20-2001 VERSION (Cont'd)

- (2) If any person chooses to obtain a copy of a public record in accordance with division (B)(1) of this section, the public office or person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy.
- (3) Upon a request made in accordance with division (B)(1) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage and other supplies used in the mailing.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

- (4) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution of any public record concerning a criminal investigation or prosecution were an adult, unless the request to inspect or

to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be justiciable claim of the person.

- (5) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer shall disclose to the journalist the address of the actual personal residence of the peace officer and, if the peace officer's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in division (B)(5) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

- (C) If a person allegedly is aggrieved by the failure of a public office to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a public office or the person responsible for the public record to make a copy available to the person allegedly aggrieved in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section and that awards reasonable attorney's fees to the person that instituted the mandamus action. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of the Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.
- (D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

- (E) (1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction cost, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.
- (2) As used in divisions (B)(3) and (E)(1) of this section:
- (a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.
 - (b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies of surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.
 - (c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.
 - (d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.
- (3) For purposes of divisions (E)(1) and (2) of this section, "commercial surveys, marketing, solicitation, or resale" shall be narrowly construed and does not include reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

**SIGNIFICANT CASES FROM 2001 REGARDING OHIO'S PUBLIC RECORDS ACT,
R.C. 141.43**

1. *State ex rel. Stys v. Parma Community Gen. Hosp.* (October 17, 2001),
93 Ohio St. 3d 438

Mandamus sought to compel production of numerous records and documents of Parma Hospital for inspection -- Parma Hospital is not a public institution and, therefore, not subject to the Public Records Act, R.C. 149.43.

Facts

In January 1957, Parma, Parma Heights, North Royalton, and the village of Brooklyn Heights entered into a cooperative agreement in order to provide for the construction, management, and financing of a hospital to be known as the Parma Community General Hospital ("Parma Hospital"). In January 1958, the village of Seven Hills also became a signatory to the cooperative agreement.

All of the cooperating municipalities agreed to issue bonds to pay for their share of the hospital and to levy taxes to pay the principal and interest on such bonds. The total revenue generated for the initial construction of Parma Hospital was close to \$3 million. The city of Parma leased the Parma Hospital facilities to respondent, Parma Community General Hospital Association (the "Association"), a non-profit corporation organized under R.C. Chapter 1702.

The lease commenced on December 22, 1958. The lease is currently effective until December 21, 2069. From the inception of the lease until 1998, rent was in the amount of \$1 per year. In 1998, the rent increased to \$25,000 per year.

Parma Hospital opened in 1961. The Association must provide triennial reports to ensure that the leased property is being properly maintained and utilized, and is solely responsible for all capital improvements and maintenance. At the end of the lease, the Association has a right of first refusal; if is not exercised, the land and improvements revert to the city of Parma

Relators (citizens, and taxpayers of the city of Parma) seek to inspect numerous records, including the Association's board of trustees' meeting minutes, as well documents relating to the development of the Parma Fay Senior Community Project. *Respondents rejected the request on the grounds that Parma Hospital is not a "public institution" as defined in R.C. 149.01(A) and is therefore, not subject to R.C. 149.43.*

Court's Ruling

The issue to be decided by this court is whether Parma Hospital, a non-profit corporation, is a public institution pursuant to R.C. 149.01(A), subject to R.C. 149.43. We hold Parma Hospital is not a public institution.

In *State ex rel. Fox v. Cuyahoga City Hosp. Sys.*, 39 Ohio St. 3d 108, we stated that "[a] public hospital, which renders a public service to residents of a county and which is supported by public taxation, is a 'public institution' and thus a 'public office' pursuant to R.C. 194.011(A), making it subject to the public records disclosure requirements of R.C. 194.43." ***Thus, in order for respondent to be deemed a public institution, it must satisfy our three-part test: (1) it must be a public hospital, (2) it must render a public service to residents of a county, and (3) it must be supported by public taxation.***

First, Parma Hospital was erected pursuant to a cooperative agreement, not pursuant to R.C. 749.04, which would have made it a hospital operated by the municipalities. The affidavit of Paul Cassidy, attorney for the Association, indicates that Parma Hospital does not meet the standards set forth in R.C. 749.04. In pertinent part, the affidavit asserts:

- [T]he various communities purposely decided not to create a municipal hospital pursuant to Section 749.04;
- Parma Hospital is operated by an eighteen-member board of trustees that is composed of residents from all of the cooperating municipalities;
- The employees are not covered under PERS;
- [T]he various communities decided to build a building which could be maintained as a charitable hospital and have the City of Parma lease the building to the Association;
- [P]ersons appointed to the Association Board do not become city officials;
- [T]he fiduciary duty of appointees to the Board of Trustees of [the Association] is to the Association and not the cities;
- None of the municipalities has provided any subsidization for any of the capital improvements, repairs, maintenance, or other costs for which the Association is responsible pursuant to the lease between the City of Parma and the Association for the Hospital; and
- Further, affidavits from several board members support the position that Parma Hospital is not a "public hospital."

* * *

It is clear from these affidavits that none of the cooperating municipalities have any control over the operation of the hospital.

Relators contend that the case at bar is similar to *Fostoria* and *Fox*, and that Parma Hospital should be deemed a public office for purposes of R.C. 149.43. We disagree.

- In *Fostoria*, the hospital involved was run as a municipal institution for over thirty years, after which time control was vested in the Fostoria Hospital Association to manage and maintain.
- In *Fostoria*, the lease agreement stipulated that the land, building, and equipment would be leased but that the Association would not pay any rent.
- In *Fox*, the hospital was owned and operated by the county and was never under the control of a private corporation.

We, therefore, conclude that Parma Hospital does not meet the definition of "public office" or "public institution" as outlined in R.C. 149.011(A).

This should end our inquiry, since Parma Hospital does not meet the first prong of the test outlined in Fox; however, due to the importance and frequency of cases involving the Public Records Act, we will proceed to succinctly consider the remaining two prongs.

The second prong is that the entity must render a public service to residents of a county.

- Although Parma Hospital does serve the residents of the seven municipalities, ***this fact alone cannot and does not lead to the conclusion that it is a public institution.***
- The lease agreement does not stipulate that Parma Hospital must serve the public regardless of race, creed, color, or ability to pay.
- Hospital care has never been considered a uniquely governmental service.

If we were to accept relators' argument in this case, it is conceivable that many corporations could be deemed public institutions, since at some point in time, a public benefit could be derived from a service that is provided.

To be a public institution, the entity must be supported by public taxation. Relators aver that the initial bonds issued by the cooperating municipalities, along

with the amount of rent that the association is required to pay, constitute public taxation.

- The bonds issued were used for the cost of erecting a hospital building; no other funds were generated to support or to equip the hospital.
- There is no evidence in the record to support the conclusion that lease provision for payment of rent is insufficient to cover fair market value.

For the foregoing reasons, we hold that Parma Hospital does not meet the statutory definition of a "public office" as codified in R.C. 149.011(A), and, therefore, is not subject to the Public Records Act, R.C. 149.43. ***Our holding today is a narrow one limited to the unique facts and circumstances of this case.*** We strongly believe that the Public Records Act is a necessary and valuable tool in ensuring that the public has access to the records and documents of all governmental entities. However, there is ***no doubt*** in this case that Parma Hospital is not a public entity, and, therefore does not fall under the purview of R.C. 149.43.

Moyer, C.J., Pfeifer, Cook and Lundberg Stratton, JJ.,
concur.

DISSENT

Sweeney, dissenting (J. Douglas concurring).

Contrary to the majority's findings, I believe that Parma Hospital does in fact meet these requirements of *Fox*.

First, Parma Hospital is a public hospital.

- Sixteen of the eighteen board members are direct appointees of the mayors of six different municipalities.
- The remaining two board members are appointed by these direct appointees.
- The board sets policy for the management of the hospital and delegates authority to implement such policy.

The composition of the *board* therefore allows the municipalities to effectively control the operations of the hospital. For these municipalities to take such prominent roles in the operation of the hospital without a mechanism to hold them accountable to the public is contrary to the policy behind R.C. 149.43.

Second, Parma Hospital is rendering a public service. By operating as a charitable, non-profit entity, the association provides services without discrimination as to race, creed, or national origin.

- The lease evidences an intent on the part of the municipalities to provide hospital services to all of its residents.
- The lease forbids the Association from using the premises for anything but a general hospital.
- The municipalities have assisted in providing hospital services to their residents by imposing these restrictions.

The majority finds that a public service is not being provided, since hospital care is "not always provided by government entities" and is not "a uniquely governmental service." Yet, in *Fox*, this court observed that "[a] public office is any entity that exercises any function of government." This was found to encompass both proprietary and governmental functions.

Here, the municipalities represented on the board have chosen to take a role in the operation of an entity having a proprietary function, and in doing so they have injected a public component into a service that could otherwise have been provided by a private entity alone.

Third, the evidence shows that Parma Hospital is supported by public taxation. In *Fostoria*, we reasoned that "[b]y excusing the payment of rent, the city provided support," since it passed up income to which it would otherwise have been entitled. Under the terms of the original lease in this case, the Association was required to pay as rent the sum of \$1 per year for use of the leased premises. ***The majority finds no evidence to support the conclusion that the rent was insufficient to cover the fair market value of the property. However, it seems clear that under any set of market conditions one dollar is less than fair market value for the use of such a large piece of property.***

[W]e have consistently held that R.C. 149.43 is to be construed liberally in favor of broad access to public records. [Citations omitted.] Furthermore, any "doubts as to the 'public' status of an entity should be resolved in favor of finding it subject to the disclosure statute." [Citations omitted.] The majority disregards these basic principles in concluding that Parma Hospital's records are not subject to disclosure.

LOCAL NEWS

Parma hospital to fight suit seeking open records

Battle began over plans for care center

By JOSEPH L. WAGNER
PLAIN DEALER STAFF WRITER

PARMA — Parma Community General Hospital and its City Hall allies are making it clear they intend to vigorously defend the hospital against a lawsuit seeking to open the hospital's records and meetings to the public.

The hospital has retained a powerful Columbus law firm, Bricker & Eckler, to represent it on the suit filed with the Ohio Su-

preme Court last month by Parma Councilwoman Michelle Stys. Parma Heights Mayor Paul Cassidy stepped aside as hospital attorney, a hospital spokeswoman said, because he may be called as a witness.

Bricker & Eckler responded to the suit by saying that the hospital is not public but a "private charitable enterprise in a reasonable, arm's-length transaction with the city of Parma... free of reliance on public funds."

The firm said the six municipal governments of Parma, Parma Heights, Seven Hills, Brooklyn, Brooklyn Heights and North Royalton never intended to control the hospital when they banded together to establish the hospital in the late 1950s.

"What trade secrets does a hospital have? They're not a research hospital."

TED SIIWINSKI, lawyer for Councilwoman Michelle Stys

In a 6-2 vote Tuesday, Parma City Council objected to Stys' lawsuit, which she filed as a private citizen. The majority also asked the state to exempt the hospital from the Open Meetings Act if it is determined to be a public body.

The battle began in March when Stys and 30 families opposed the hospital's plan to build an assisted care center on the site of old Parma Fay Junior High School.

Stys contends she and residents of her ward are entitled to know details of the hospital's plans for the Parma Fay site.

The hospital argues that opening its files to the public could give critical information to rival hospitals seeking to lure away patients. For example, hospital spokeswoman Martha Brunstein said, if details of a proposed expansion were revealed, competitors "could scoop us."

Stys' lawyer, Ted Sliwinski,

scoffed: "What trade secrets does a hospital have? They're not a research hospital. They're a primary care hospital. There's no secret about that."

Sliwinski said taxpayers paid for the right to know about hospital operations when they invested \$3 million in the early 1960s to build it — an investment that would amount to \$30 million today if adjusted for inflation. In addition, the \$1-a-year lease the hospital enjoyed, until it was raised to \$25,000 annually in 1998, amounts to a taxpayer subsidy, he said.

He added that the trustees are all publicly appointed and therefore should be accountable to residents.

"It's bizarre," said Sliwinski. "Six cities get together to form a hospital, and no one knows what's going on."

Council President Charles Germano, who is also chairman of the hospital's foundation, warned that the escalating political war could hurt the hospital's reputation and backfire on Stys and her allies, who are pushing for more openness.

"She may win the battle but will lose the war because we will ultimately lose local control," if hospital trustees sever ties with the mayors and break off communication, said Germano.

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HOSPITAL

FROM 1-B

Records fight creates ill feelings

Hospital's records creating ill feelings

Residents, lawyers fight over access

By JOSEPH L. WAGNER
 PLAIN DEALER STAFF WRITER

At first glance, the battle over Parma Community General Hospital's expansion appears to be a mismatch.

Skirmish lines began forming in March over what seemed to be a seemingly routine zoning dispute over the hospital's plans to build an assisted-living center in south Parma. Today, it has escalated to an open-records battle pending before the Ohio Supreme Court, a case that could affect other hospitals like Parma that receive some taxpayer support.

On one side are homeowners who oppose the hospital's plans. They've been holding rigatoni and chicken dinners to pay their attorneys and are burning shoe leather distributing fliers. Their leader is an admittedly politically naive, 28-year-old rookie councilwoman, Michelle Stys, whose only political experience was as a White House intern in 1996.

The hospital, meanwhile, has a battery of powerful, high-priced lawyers in Columbus, support of well-connected local politicians and a public relations staff that is trying to sell the hospital's position to the media and public.

Undeterred, Teddy Sliwinski, a casually dressed lawyer sitting in his modest Slavic Village law office, believes his clients — the residents — have the edge. "We're going to win it," he says.

Sliwinski and co-counsel Gerald Phillips, who specializes in grass-roots causes, want the Supreme Court to order Parma hospital to disclose details on its expansion plans, arguing that the facility is public and subject to the state's open-records laws.

The hospital disagrees, saying it is not a public agency but a private, nonprofit enterprise. If forced to disclose critical financial, contractual, marketing and other information, it could not effectively compete with for-profit hospitals, its attorneys argue.

The stakes are high for Parma and similar hospitals, said Mary Yost, spokeswoman for the Ohio Hospital Association, a trade group that is wary of previous decisions by the state that she said have hurt the industry.

SEE HOSPITAL/8-B

"We're extremely interested in what the Supreme Court has to say affecting hospitals because our experience in recent years has not been favorable in the Supreme Court," Yost said.

In 1988, Phillips beat Metro-Health Medical Center on an open-records case in the Ohio Supreme Court. He said the hospital used the same argument then that Parma is using today — disclosure could hurt it in the sweepstakes for new patients.

"Metro lost and, today, Metro is stronger than they've ever been," Phillips said.

The two lawyers say Parma Hospital is a public agency because it:

- Was built in 1961 with \$4 million from Parma and five other cities: Parma Heights, Brooklyn, Brooklyn Heights, North Royalton and Seven Hills. Adjusting for inflation, that's \$30 million today, more than enough to buy the public access to hospital records.

- Has enjoyed a taxpayer subsidy in the form of heavily discounted rent on the land under the hospital building. For 25 years, the hospital paid the city \$1 a year. In 1998, the rate was raised to \$25,000, which Parma Law Director Tim Dobeck said "is way below market value."

- Has 16 trustees appointed by the mayors of the six member cities, including hospital attorney and Parma Heights Mayor Paul Cassidy. This alone makes Parma Hospital subject to the open records and meetings laws according to rulings — ignored by a majority of the City Council — by Dobeck and his predecessor, now Cuyahoga County Prosecutor Bill Mason.

- Has used Parma City Hall's bonding authority. Dobeck says that privilege saves the hospital interest costs but emphasized it does not count against the city's debt limit or represent any financial risk to the city.

Lawyers from the Columbus firm Bricker & Eckler argued in a brief filed with the Supreme Court that Parma Hospital "is a private, charitable enterprise in a reasonable arm's-length transaction with the city of Parma... free of reliance on public funds."

Tim Smith, a Kent State University journalism professor, attorney and director of a research group called the Ohio Center for Privacy and the First Amendment, sides with residents.

"The hospital ought to roll over and play dead. It would be a lot cheaper," Smith said. "I can't fathom how they can argue they are private."

He said a 1988 Ohio Supreme Court decision involving Fostoria Hospital established that hospitals that have received public funds are subject to the open records and meetings laws. "The Supreme Court said if it walks like a duck and talks like a duck, it's probably a public hospital," Smith said.

Other area hospitals with at least some public ties could be affected by the Parma case. Southwest General Medical Center in Middleburg Heights accepts more than \$1 million from taxpayers in Berea, Brook Park, Columbia Township, Middleburg Heights, Strongsville and Olmsted Falls. Yet none of its three trustee boards conducts business in public.

Jon Schurmeier, Southwest chief executive officer, said the subsidy was a small portion of its budget.

"We are not a political subdivision," said Susan O. Scheutzow, an attorney for the hospital.

Lakewood Hospital, once operated by the city, now leases property from the city but otherwise does not receive public funds. It has released meeting minutes and other documents to promote good public relations, spokeswoman Janet Day said. Its trustees vote by private ballot.

MetroHealth Medical Center and Robinson Memorial Hospital in Ravenna are among 22 hospitals in Ohio considered public by the hospital association, said one of the Ohio Hospital Association.

Their meetings and records are open, but they are permitted to discuss such items as legal issues, property acquisition and personnel in executive session. Last year, the state legislature gave county hospitals an additional exemption for trade secrets. Smith said hospitals like Parma could probably qualify for the trade secret protection.

In Lake County, the system including LakeWest and LakeEast hospitals classifies itself as private and nonprofit. But the two hospitals used to be county hospitals, still operate out of public buildings and have a board of trustees appointed by county commissioners. They no longer receive a tax subsidy.

Phillips, the residents' lawyer, said, hospitals like Parma and Lakewood play a "shell and pea game."

"They wear a public hat," he said, when they seek taxpayer assistance but call themselves private when groups push for disclosure or accountability. "They want the best of both worlds."

Yost disagreed. "The situation is such that they (hospitals) are forced to keep a foot in both worlds. It's not as much by choice but a requirement for survival. Maybe if we had a situation where we had a more reasonable and adequate system for paying for health care... we would not have hospitals feeling like they need to protect any competitive edge they have."

Phillips said hospitals want to shield their dealings with private partners who are gun-shy about public disclosure. He said it was unfair to taxpayers to channel hospital subsidies to private firms without informing the public.

In Parma's case, the hospital has teamed up with Generations Health Care, a private firm operated by the Coury family nursing home enterprise.

The Parma open-records case has triggered a debate among public officials.

Many, like Parma Council President Charles Germann, an ardent hospital supporter and chairman of its fund-raising arm, are convinced the hospital needs secrecy to be competitive.

"This publicity is hurting the hospital. People keep saying, 'What are they hiding?'" Germann said.

In contrast, Strongsville Councilman Mike Gallagher, currently a Southwest trustee, said, "If they take one cent of taxpayer dollars, they'd better open those doors — period."

As both sides searched for allies, communities in Parma Hospital's service area have been asked by Parma Heights Mayor Cassidy to approve resolutions supporting the hospital. So far, only Parma has endorsed the resolution, which has been tabled elsewhere after lobbying by Stys.

"I think they're going to sit it out and wait for the Supreme Court decision," Stys said.

Plain Dealer reporters Rosa Maria Santana, Kaye Spector and Chris Seper contributed to this article.

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January 19, 2001

The fight is on for Parma hospital records

By JOSEPH L. WAGNER
PARMA NEWS REPORTER

High court gets coalition's case

PARMA — Parma's hospital should either be forced to open its records to the public or to surrender the substantial public subsidies it gets, a statewide newspaper organization told the Ohio Supreme Court this week.

The organization, called the Ohio Coalition for Open Government, argued that Parma Community General Hospital meets the definition of a public agency, and thus can't shield its business from the general public's scrutiny. Conversely, the newspaper group contended, if the hospital is a private nonprofit entity that is free from state open records law, it is being subsidized illegally by the city.

The organization, an arm of the Ohio Newspaper Association, filed its brief Tuesday. The filing was part of a lawsuit demanding that the hospital open its records to a citizen

citizen and other citizens who oppose hospital plans to build an elder-care facility in the midst of the \$1 home Sassafras Estates subdivision.

The Plain Dealer signed on in support of the association's brief. A grants-grants group called The Taxpayers Coalition filed a separate but similar brief.

The lawsuit's resolution could affect other publicly subsidized nonprofit hospitals across the state, according to a trade group called the Ohio Hospital Association.

The hospital has not filed a reply in response and has until Feb. 5 to do so.

Hospital lawyers previously argued it is a private, charitable corporation in a reasonable area's health transactions with the city of Parma. The law of reliance on public funds.

Yet the Taxpayers Coalition brief contends the taken \$25,600 annual rent the hospital pays Parma is "a taxpayer-supported subsidy."

"If Parma Hospital wants to be private, then the city should get fair market value for the rent, which would be at a minimum \$1 million a year," said Councilwoman Michelle Stryz, who filed the suit last fall. "If they want to be public, which was the intent of the voters when they agreed to construct and fund a municipal hospital, they'd better open their doors."

Stryz said the brief gives credibility to the records-opening efforts of residents opposed to the planned facility in the midst of Sassafras Estates.

The 66-year-old Parma Hospital has other public ties. It was built with \$2 million in state-approved bonds that were repaid with tax dollars.

Sixteen of its 18 trustees are appointed by the mayors of Parma and five other communities. The city of Parma leads the hospital in credit rating for borrowing, giving hospital bonds tax-exempt status that attracts investors.

David L. Marburger, an attorney for the newspaper group, contended in the brief: "If this court ever is to find that Parma Community General Hospital is not a private hospital, then the government's very first use of the city's hospital and equipment constitutes an unlawful surrender of municipal control over municipal property and an unlawful transfer of municipal and state funds for private purposes."

Parma City Councilman Tom Stubbins said the case may force the city to re-examine its relationship, including the lease with Parma Hospital. "We're looking for clarification from the Ohio Supreme Court," he said.

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Nonprofit allies back Parma Hospital

They tell high court records aren't public

By JOSEPH L. WAGNER
PLAIN DEALER REPORTER

PARMA — Parma Community General Hospital's open-records case before the Ohio Supreme Court could lead to more unwanted government regulation of nonprofit agencies, a lawyer for a coalition of charitable associations claims.

Martha Sweterlitsch, who represents clients like the Ohio Association of Child Caring Agencies, the Ohio Jewish Communities and the YMCA, sided with Parma Hospital. In a brief filed Monday, she said that a private nonprofit association, like the one operating Parma Hospital, does not automatically become a public agency if it receives taxpayer funds.

If that were the case, she mused in the brief, "then the Cleveland Indians and the Cincinnati Bengals should expect to read their scouting reports in *The Plain Dealer*."

If Parma Hospital loses the case, she said, countless other nonprofits would be subject to even more public scrutiny, like making personnel records open for public review. This would dissuade people from working for nonprofits.

The Ohio Hospital Association is raising similar arguments.

Last month, the Ohio Newspaper Association, including *The Plain Dealer*, submitted briefs supporting Parma Councilwoman Michelle Stys and some of her Ward 5 residents who are trying to view hospital records on a proposal for an elderly care center.

Meanwhile, as both sides in the ever-widening case recruit allies, the project that ignited the fight nearly a year ago has been placed on hold until the litigation is settled, Thomas Selden, Parma Hospital's chief executive, said yesterday.

Selden's announcement came during an interview when he broke his silence on the case and defended the hospital's financial ties to the city of Parma as a good deal for Parma taxpayers instead of the "rip-off" it has been characterized by lawyers representing Stys.

Stys' lawyers claim the hospital is public because it was built with \$3 million in taxpayer loans, its trustees are appointed by mayors of the six communities it serves, its below-market annual rent of \$25,000 a year amounts to a \$1-million-a-year subsidy, and the hospital uses the city of Parma's borrowing power to give its bonds tax-exempt status.

Selden said the hospital-Parma tie is actually a good deal because:

- Taxpayers are not required to pay \$2 million a year in maintenance.
- The city pays nothing toward indigent-patient care.
- When the lease expires in 2069, the city will own the hospital. If it were sold today, the city would get an asset worth \$74 million.

"This is one way of looking at how we are repaying the landlord [Parma] for the use of the buildings," Selden said.

Stys' lawyer, Gerald Phillips, said that maintenance costs are routinely picked up by hospitals in similar deals elsewhere, and that hospitals swallow indigent-care costs to qualify for federal aid.

"Parma taxpayers, at the end of the lease, will have lost \$72 million, money that could be used to build community centers, repair roads and buy parks," he said.

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Parma Hospital records should be open, court told

By T.C. BROWN
PLAIN DEALER STAFF

COLUMBUS — A hospital that provides service to the community and is supported by taxes should have its records open to the public, a lawyer told the Ohio Supreme Court yesterday.

Gerald W. Phillips, representing an open government coalition in its public-records fight with Parma Community General Hospital, said operation of the hospital is a government function. The hospital operates under a contract with the city.

"There would be no Parma Hospital if it wasn't for the residents of the six communities approving the initial tax burden," he said.

Hospital attorney Michael Gire argued the institution has received no public money for the last 40 years and its workers are not public employees.

He said the case has major consequences for nonprofits around Ohio.

"If we're going to call charities public institutions, then I think we're really exposing them to the whole sunshine act [on open meetings]," Gire said. "That's going to dramatically change the way charities function in this state."

The legal battle started when Parma Councilwoman Michelle Stys and some of her Ward 5 constituents asked to view hospital records on an elderly care center it had in the works.

The argument has since grown into a contentious contest between charitable organiza-

tions, eager to protect their privacy and limited resources, and a coalition for open government that includes the Ohio Newspaper Association and The Plain Dealer.

Charities, including the Ohio Association of Child Caring Agencies, Ohio Jewish Communities and the YMCA, have argued that the hospital is not automatically a public agency if it receives taxpayer funds.

Justice Paul Pfeifer wondered whether allowing the hospital to shield its records would chip away at access.

Pfeifer asked Gire: "If we accept your argument, would it not place any municipality in a position of taking one of their major functions, transferring it to a nonprofit corporation and saying it's not public?"

However, Justice Evelyn Ginsberg Stratton worried that the privacy of any business that works for government or receives tax breaks or state grants could be jeopardized.

"Do we open a Pandora's box, and do we now say all those entities are subject to public records [law]?" she asked.

Stys said after the hearing that "it is an issue of open government."

"You're using taxpayers' money ..." she said. "Why should they not turn over documents when they're receiving public subsidy?"

Plain Dealer reporter Julie Carr Smyth contributed to this report.

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2. **Randy R. Adams v. Metallica, Inc., et al., 143 Ohio App. 3d 482 (1st App. Dist. June 1, 2001).**

There is no clear, unqualified public right to inspect pretrial discovery materials even when they are filed with the trial court under either the First Amendment, the common law, the "open courts" provision of the Ohio Constitution or the Ohio Public Records Act enumerated in 149.43. However, since the Civil Rules contemplate that discovery documents on file with the court shall not be sealed from the public absent "good cause shown," there is a presumption in favor of public access to such materials.

Facts

Mr. Adams brings this appeal from the trial court's order denying his motion to intervene in a case that had previously been settled and voluntarily dismissed under Civ. R. 41(A). The motion to intervene was part of Adam's effort to modify a protective order that had sealed video recordings and transcripts of depositions filed in the dismissed case.

The main action involved a plaintiff named Keith Phillips and the heavy-metal band Metallica. Phillips had sustained serious injuries while at a Metallica concert after being "launched," *i.e.* tossed in the air, to be caught by the crowd.

Instead of catching him, the other participants fearing for their safety, parted and allowed Phillips to fall headfirst on the ground. Phillip's was rendered a paraplegic.

Unlike Phillips, Adams did not engage in "launching." Rather he alleged that his injury had occurred as a result of "chest trauma" inflicted by fans slamming against his body in an overly aggressive "mosh pit" that he had voluntarily joined.

Court's Ruling

Discovery has historically never been open to the public. The United States Supreme Court has held that "pretrial depositions are not public components of a civil trial" *Seattle Times Co. v. Rhinehart* (f1984), 467 U.S. 20, 33, 104 S. Ct. 2199, 2207, 81 L. Ed.2d 17. As the Court explained in a footnote: "Discovery rarely takes place in public. Depositions are scheduled at times and places most convenient to those involved. Interrogatories are answered in private."

In *State ex rel. MADD v. Gosser* (1985), 20 Ohio St. 3d 30, in the first paragraph of its syllabus, the court stated:

Any document appertaining to, or recording of, the proceedings of a court, or any record necessary to the execution of the responsibilities of a governmental unit is a "public record" and "required to be kept" within the meaning of *R.C. 149.43*. Absent any specific statutory exclusion, such record must be made available for public inspection.

Among the statutory exceptions to *R.C. 149.43*, there is none that specifically excludes discovery materials. But, in *State ex rel. WHIO-TV-7 v. Lowe* (1997), 77 Ohio St. 3d 350, the Ohio Supreme Court, citing *Seattle Times*, held that discovery exchanged by the prosecutor with the defendant under *Crim. R. 16* was not subject to release as a "public record."

In *United States v. Anderson* (C.A. 11, 1986) 799 F.2d 1438, that Court stated:

Discovery is neither a public process nor typical matter of public record. Historically, discovery materials were not available to the public or press. Moreover, documents collected during discovery are not "judicial records." Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private.

Although pretrial discovery was not open to the public at common law, both the United States Supreme Court and the Ohio Supreme Court have recognized a "historically based, common law right to inspect and copy judicial records and documents." *State ex rel. Scripps Howard Broadcasting Co., supra*, at 22, 652 N.E.2d at 183, citing *Nixon v. Warner Communications, Inc.* (1978), 435 U.S. 589,597, 98 S. Ct. 1306, 1312, 55 L. Ed.2d 570.

In sum, there appears to be no clear, unqualified public right to inspect pretrial discovery materials, even when they are filed with the trial court, under either the First Amendment, the common law, the "open courts" provision of the Ohio Constitution, or the Ohio Public Records Act. As a caveat, however, we note that the court's control over access to discovery documents is not unfettered. Simply because there is no clear public right to these materials does not mean that trial courts should feel free to seal them from inspection. The civil rules clearly contemplate that discovery documents on file with the court shall not be sealed from the public absent "good cause shown," thus creating a presumption in favor of public access to such materials.

Having determined that Adams has no absolute right to inspect the sealed depositions, we turn now to the various factors in this case.

The primary justification given by Adams for viewing the sealed documents is his desire to avoid repetitious discovery. Both suits, he contends are "vastly similar," and therefore he should be entitled to all discovery generated in the Phillips case.

As pointed out by Metallica, however, the Phillips case is actually quite different from the Adams case on its facts. The Phillips case involves launching, which although perhaps describable as a "moshing-type" activity, requires a much different and far more coordinated group effort than ordinary moshing.

In opposing intervention and modification, Metallica argued below that the videotape of the depositions in the Phillips case could be commercially exploited by publication over the Internet. Further, the band argued that it had a privacy interest in the testimony itself, presumably upon the basis that the depositions contain material that might be out of character for the public image of the band.

Because of the significant differences between the two cases, the fact that Adams is not precluded from deposing Metallica as part of the discovery in his case, and the legitimate privacy and commercial interests of the band in keeping the depositions under seal, we cannot say that the trial court abused its discretion in denying Adam's motion to intervene for the purposes of modifying the protective order in the Phillips case.

3. *State ex rel. The Cincinnati Enquirer v. Dinkelacker*, 144 Ohio App. 3d 725 (1st App. Dist.)

Records in the custody of public officials are public unless an exemption -- either statutory or court related -- applies. Pre-trial discovery materials introduced in court as exhibits for a motion hearing, can change character from discovery materials to court documents and therefore, subject to the Public Records Act, R.C. 149.43. However, a trial court may still impose an order not to release a public record if the right of the public to access the information does not outweigh the rights of the parties to maintain privacy.

Facts

A reporter for *The Cincinnati Enquirer*, submitted a public-records request under R.C. 149.43, seeking access to various documents in the case of *State v. Wehrung*. The defendant in the *Wehrung* proceeding objected to release of the material, arguing the records request constituted pretrial discovery between a criminal prosecutor and a defendant, under *State ex rel. WHIO-TV-7 v. Lowe* and such a request must be denied. The state suggested that the controlling law was *State ex rel. M.A.D.D. v. Gosser*, and that the records request should be granted.

Court's Ruling

We begin with a presumption that records in the custody of public officials are public, n4 unless an exemption, either statutory or court-created, applies. n5 We hold that the documents in question did indeed change character -- from discovery materials to court documents -- when they were introduced in court as exhibits for a motion hearing. We further hold that the material is a public record -- but that does not end our analysis.

So while pretrial discovery material is not always subject to disclosure, pretrial discovery material becomes a public record when it becomes part of the court record. The nature of the materials changes, from pretrial discovery material to a public record. As such, it must be released when requested under R.C. 149.43(B), as it is no longer exempt under the judicially created exceptions for pretrial discovery material.

The court in *Metallica* (a civil case) reasoned that since a court has the discretionary power to seal court records when good cause is shown, there apparently is "no clear, unqualified public right to inspect pretrial discovery materials, even when they are filed with the trial court." n18 The court in *Metallica* then employed a balancing test of the interests involved to determine whether to modify a protective order, which would allow release of the material.

In *State ex rel Steckman v. Jackson*, n20 the Ohio Supreme Court attempted to clarify some of the boundaries between pretrial discovery material and public records. The court held that information not subject to discovery (and not filed in court), but held by a criminal prosecutor is not subject to release as a public record pursuant to R.C. 149.43. More specifically, the court held that such material was not subject to release as a public record because, under R.C. 149.43(A)(4), the material was a trial preparation record.

The material at issue under *Steckman* was not discoverable, and so was exempt from release under a statutory exemption in R.C. 149.43, as trial preparation material. It was never considered a public record, and the public had no right to the material. In *Metallica*, however, pretrial material became part of the court record by actually being filed in court. This action caused the material to become a public record. It was not simply trial preparation material, and could not be exempt from release under that exception. As a public record, it was subject to a different analysis than the material in *Steckman*.

Therefore, we hold that when pretrial discovery is submitted into court records, for whatever reason, the character of the pretrial discovery material changes, and it is no longer "discovery" material. In such a situation, the material becomes part of the court record, and becomes a public record. But we also hold that the trial court, with supervisory power over court records, may still impose an order to not release such a public record, pursuant to the application of a balancing test, weighing the right of the public to access information against the rights of the parties.

The court must apply a balancing test similar to that used in *Metallica*, and weigh the various factors to determine whether to release the material. In a criminal case, however, the court should focus on whether the state's or defendant's right to a fair trial would be affected by the release of the material.

Finding that *The Enquirer* has a clear legal right to the release of the material and that the respondents have a clear legal duty to release the material, we grant the writ of mandamus. But we stay the issuance of the writ for ten days, giving the trial court, as the trial court in the *Wehrung* case, an opportunity to determine whether the release of the material would be unfair to the defendant in that case.

4. *State ex rel. The Cincinnati Enquirer v. Krings Cty. Admr.* (2001), 93 Ohio St. 3d 654.

A private entity that works on behalf of the government is subject to public records disclosure pursuant to 149.43. If (1) it must prepare records in order to carry out a public office's responsibilities; (2) the public office must be able to monitor the private entities' performance, and (3) the public office must have access to the records for this purpose.

Facts

Pursuant to its authority under R.C. 307.023 n1 to construct sports facilities, the Hamilton County Board of Commissioners entered into contracts with appellant Getz Ventures ("Getz") and a joint venture consisting of appellants Turner Construction Company, Barton Malow Company, and D.A.G. Construction Co., Inc. ("TBMD"), to construct Paul Brown Stadium. Getz and the individual firms that constitute TBMD are privately owned and operated businesses that are not political subdivisions or governmental entities of Ohio, are not organized for a public purpose, and do not receive the majority of their revenues from taxes collected by or under the authority of the board of county commissioners. But Getz's and TBMD's compensation under their contracts with the board did come from tax revenue.

Under the board's contract with Getz, Getz agreed to be the project manager for the construction of the new football stadium. The contract provided that at the county's direction, Getz would be authorized to act on behalf of the county as its agent. Getz's contractual duties included identifying significant changes affecting the overall project budget, presenting them to the county during review meetings, advising the county on the development of construction estimates and on the breakdown of the project into appropriate costs attending cost meetings on behalf of the county, and monitoring expenditures against an agreed cost plan and reporting these items to the county.

The board contracted with TBMD to have it act as the construction manager for the Paul Brown Stadium project. The contract referred to a "construction team," consisting of the Board, Getz, TBMD, and the project architect.

In a March 6, 2000 letter, the Enquirer requested the County Administrator to permit the inspection under R.C. 149.43, of, *inter alia*, all documents related to cost overruns or potential cost overruns at Paul Brown Stadium, including memos and reports between different team members.

The county provided the Enquirer only those records *in existence and physically located in the county administration building*.

Getz and TBMD refused to provide documents stating: "We do not believe that internal business documents of a contractor are public documents covered under the Ohio Open Records Act."

The Enquirer filed for and received a writ of mandamus compelling the County Administrator, TBMD, and Getz, to provide it with access to the requested records.

Court's Ruling

The issue is whether the requested cost-overrun records in the custody of private entities like TBMD and Getz are public records for purposes of the Public Records Act.

In order for a private entity to be subject to R.C. 149.43, (1) it must prepare the records in order to carry out a public office's responsibilities, (2) the public office must be able to monitor the private entity's performance, and (3) the public office must have access to the records for this purpose. *State ex rel. Rea v. Ohio Dept. of Edn.* (1998), 81 Ohio St. 3d 527.

The construction of stadiums has historically been accomplished by public, rather than private enterprise. The overwhelming majority of courts from other jurisdictions confronting this issue have determined that construction of a publicly owned stadium to be leased to professional sports teams serves a public purpose.

Under R.C. 307.023, the Commissioners were authorized to construct Paul Brown Stadium. The board did so because it was believed the stadium was in the best interest of the county and city.

Pursuant to this statutory authority, the board contracted with TBMD and Getz to construct the stadium. Under these contracts, TBMD and Getz were obligated to prepare records related to construction costs for the publicly funded stadium, the board had the right to monitor their performance under the contracts, and the board was authorized to access records in order to monitor their performance.

These provisions are sufficiently broad to establish a right of access on the part of the county to TBMD and Getz's records concerning cost overruns on the public construction project.

Moreover, governmental entities cannot conceal information concerning public duties by delegating these duties to a private entity. *By undertaking to exercise its statutorily and historically supported authority to construct Paul Brown Stadium for specified public purposes, the board of county commissioners invoked the concomitant duty to provide public access, via proper records requests, to records relating to the construction.*

If we were to adopt appellants' view, a private entity performing a government contract that obligates it to act to further the best interest of the governmental entity could prepare records concerning massive cost overruns and fail to divulge these records to the public office unless the office specifically requested the records. *Given the scope of this undertaking, the public had a legitimate need to know whether the publicly funded project was proceeding as planned and the reasons for cost overruns, if any, in the project.*

"The inherent fundamental policy of R.C. 149.43 is to promote open government, not restrict it." This purpose is furthered here by construing R.C. 149.43 to encompass the requested records, and this construction is consistent with our duty to liberally construe the statute in favor of broad access and to resolve any doubt in favor of disclosure of the records.

Based on the foregoing, the court of appeals properly held that the requested cost-overrun records are within the jurisdiction of the County Commissioners, and that the records were public records for purposes of R.C. 149.43 and 149.011(G). By so holding, we need not address the Enquirer's contention that the construction team constituted a public office for purposes of R.C. 149.43. See, generally, *State ex rel. Stys v. Parma Community Gen. Hosp.* (2001), 93 Ohio St. 3d 438.

5. *Miami Valley Child Development Centers, Inc. v. District 925/Service Employees International Union, AFL-CIOM, CLC, 2002 Ohio 933 (2nd App. Dist. February 22, 2002.)*

Home addresses of employees of a public office are not "records," as defined by the statute.

Facts

Miami Valley Child Development Centers, Inc. (MVCDC) is a 501(C)(3) tax exempt organization and operates 60 Head Start centers in three counties. The centers serve about 4,091 children.

In August 1999, a labor union asked MVCDC to release a list of employee names and addresses. MVCDC refused, and filed a declaratory judgment action, claiming that the records were not subject to disclosure under the Public Records

Act. A magistrate found that MVCDC was not a public office and was not subject to the Public Records Act in that MVCDC did not perform a governmental function.

On review, the trial court found the MVCDC fit within the definition of a public office and ordered MVCDC to disclose the names and addresses of its employees.

Court's Ruling

The primary issue in this case is whether a private, not-for-profit Head Start grantee is a "public office" for purposes of Ohio's Public Records Act, R.C. 149.43.

The Ohio Supreme Court has considered the meaning of "public institution" and "public office" on several occasions. In *State ex rel. Fox v. Cuyahoga Cty. Hosp. System* (1988), 39 Ohio St. 3d 108, the court found a county hospital was a "public institution" for purposes of R.C. 149.011(A).

In contrast, another case decided the same year involved a public hospital operated by a non-profit corporation. *State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Assn.* (1988), 40 Ohio St. 3d 10. The corporation in *Fostoria* was not directly supported by tax money. However, it is indirectly supported because it did not pay rent to the city for the hospital building. Based on *Fox*, and the fact that rent-free use of the hospital constituted support by public taxation, the Ohio Supreme Court found that the hospital was a public institution.

In *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St. 3d 258, the court held that a private, non-profit foundation which acted as a fund-raising arm of the University of Toledo was a "public office." Unlike the institutions in their prior two cases, the foundation employed its own staff, paid its own rent, and was supported by private donations. However, the court relied on the foundation's connection to predecessor entities that had received support from public taxation.

In *State ex rel. Strothers v. Werthein* (1997), 80 Ohio St. 3d 155, the court considered the status of a private, non-profit corporation that operated an ombudsman office. Relying on *Fox* and *Fostoria*, the court held that the ombudsman office was a public office. In doing so, the court stressed that "R.C. 149.43 must be construed liberally in favor of broad access."

Three justices dissented in *Werthein*, including Chief Justice Moyer, who had written the lead opinion in *Fox*. After reviewing the facts of the case, Chief Justice Moyer concluded that the ombudsman office was not public, because (1) it did not exercise any government function; (2) it was not controlled by the county government to the extent generally required; (3) the office did not perform duties that were historically fulfilled by public institutions or entities exercising government functions; (4) the office also received money from other funding sources; and (5) no public entity had delegated its duties to the office.

In *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.* (1998), 82 Ohio St. 3d 578, the court found a private, non-profit corporation that was created to provide a fire-fighting organization to be a "public office." First, it stressed that private, non-profit corporations can be considered "public offices." Second, it found that the fire-fighting corporation was a public office under R.C. 149.011 because it was a "public institution." An entity organized for rendering service to residents of the community and supported by public taxation is a public institution. *Id.*, citing *Fox*. Third, the fire-fighting corporation performed duties that were historically governmental functions.

In the present case, the trial court found that MVCDC was a public institution because it rendered service to the community and was supported by public taxation.

Although the cases from the Ohio Supreme Court are not completely consistent, we conclude that the trial court properly classified MVCDC as a public office.

In *Freedom Communications*, the court impliedly rejected the significance of intertwined functions and government control, i.e., the court said that the absence of these factors does not prevent an entity from being classified as a public office.

Similarly, the issue of whether MVCDC had a duty to provide services for children is irrelevant.

The final factor mentioned is that MVCDC is not supported by significant state taxation. According to the record, MVCDC receives 95% of its revenue from the federal and state governments. Of that 95%, about 65% comes from the federal government and 35% comes from the state.

In reviewing the "public taxation" aspect of the test, we note that the Ohio Supreme Court has not relied on any particular percentage of funding that must come from taxation. In our opinion, if the State funds 35% of 95% of the budget (or about 33% of the total budget) of an entity, the State is providing major support.

The last factor is whether the corporation fulfilled a historical government function. Both the magistrate and trial court found that MVCDC did not perform a government function.

Although the Ohio Supreme Court has mentioned the term "historic government function," it has not specifically adopted this as a requirement. Instead, two features that have been consistently used are: 1) rendering public service to the community; and 2) being supported by public taxation. Nonetheless, most cases have focused to some extent on the presence of a "function" of government.

However, the cases are not completely consistent. In some situations, the court has focused on the fact that the activity in question was either a traditional

government function or was a function previously performed by a government agency. When *Fox* was decided, Ohio law classified the operation of hospitals as a proprietary function. However, the court noted the statute read "any function of government," not "governmental functions." As a result, the court stated that "[a] public office is any entity that exercises any function of government."

After reviewing the case law, one might conclude that some government connection must exist for an entity to be considered a public institution. This requirement could be satisfied in one of three ways. The agency could: 1) assume a function that a government agency has performed in the past; 2) perform activities that are intertwined with those of a government agency; or 3) perform a function that is historically considered governmental. If an agency meets any one of these three requirements, it is a "public institution," and is, therefore, a "public office," within the meaning of R.C. 149.43.

We believe that Head Start grantees perform a function of government when they provide preschool services to children and their families. We base this conclusion on several facts. First of all, educating the public is a "a fundamental function of the state government." As an additional matter, since March 17, 1989, school districts have been permitted to establish and operate preschool programs. Under the circumstances, preschool education of eligible disadvantaged children has become a function of state government. Consequently, even if the case law requires a government connection, such a relationship does exist.

The second assignment of error claims that even if it is a public institution, the names and addresses of its employees should not be disclosed. MVCDC also relies on *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St. 3d 365, which is a case involving the release of information about children who used a city's swimming pool and recreational facilities.

In *State ex rel. Keller v. Cox* (1999), 85 Ohio St. 3d 279, the court held that files containing the names and home addresses of police officers, as well as other personal information, should not be disclosed. ***In reaching this decision, the court relied on the constitutional right to privacy as well as a "good sense" rule to be applied when a criminal defendant seeks information about a police officer. Id.***

In *McCleary*, the court refused to order the release of children's names and addresses in the files of a city's parks and recreation department. In rejecting the request, the court first found that the information was not a "record" under the Public Records Act because it did not nothing to document any activity of the parks department. Instead, it was simply information about private citizens that the government happened to be storing.

The court also found that even if the information were considered a "record," it would be exempt under R.C. 149.43(A)(1)(q). The court concluded that the release of such information would violate the children's right to privacy and subject them to the risk of irreparable harm.

The Ohio Supreme Court has also refused to allow disclosure of employee social security numbers. *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St. 3d 605, 607. However, the court has additionally ordered disclosure of employees' names and work addresses, with emphasis on the fact that only the work address was being requested. *State ex rel. Thomas v. Ohio State Univ.* (1994), 71 Ohio St. 3d 245. The court remarked in *Thomas* that "names and work addresses do not appear to implicate the constitutional right of privacy."

In another recent case, the Ohio Supreme Court did allow disclosure of employee names and home addresses. *See, State ex rel. District 1199, Health Care and Social Serv. Union, SEIU, AFL-CIO v. Lawrence Cty. Gen. Hosp.* (1998), 83 Ohio St. 3d 351. In reviewing the matter, the Ohio Supreme Court first found, consistent with the *Fox* and *Fostoria* cases, that the hospital was a public office for purposes of R.C. 149.01(A) and R.C. 149.43. The court then ordered the records to be disclosed.

Certain employee information might be pertinent to any entity's activities or inner workings. However, we see no possible relevance of the employees' home addresses. Therefore, we agree with MVCDC that the home addresses of employees are not "records," as defined by the statute.

6. *State ex rel. Jones v. Summit Cty. Child Ser. Bd.* (January 24, 2001), Summit App. No. 19915, unreported, 2001 WL 96048, p. 4.

The Ninth Appellate District held that home addresses of employees are not public records because they do not document the activities of the public entity

Facts

Relator petitioned this court for a writ of mandamus compelling Respondents Summit County Children Services Board ("CSB"), to allow inspection of records pursuant to R.C. 149.43. Relator requested, *inter alia*, the following items, . . . (5) the names and addresses of the Board members; (6) the personnel files for specified employees with social security numbers redacted;

Respondent sent a certified letter to Relator as follows:

The following requested information was deemed outside the scope of the Public Records Act and was thus redacted:

A. From the personnel file the agency redacted the employees' home addresses and personal information which is not used to document procedures to wit: fingerprints, criminal background information, medical information and social security numbers to the extent that this information was contained in the requested personnel records.

Court's Ruling

There is no dispute that CSB is a public office. Any "record" kept by it must be allowed to be inspected unless the record fits within one of the exemptions listed in R.C. 149.43. We now address the specific objections to disclosure that were raised by Respondents in their letter to Relator.

I. Personnel Files

A. Home Addresses of Employees

We find that the home addresses are properly redacted from the personnel files. Cf. *State ex rel. McCleary v. Roberts* (2000), 88 Ohio St. 3d 365, 368 (home addresses of children utilizing public facility); *State ex rel. Keller v. Cox* (1999), 85 Ohio St. 3d 279, 282 (home addresses of police officers).

B. Fingerprints and Criminal Background

Information

Investigatory records of public employers that reflect upon the hiring or the disciplinary policy of the employer are generally considered to be public records subject to disclosure. R.C. 5153.111, however, provides that the report generated "is not a public record for the purposes of section 149.43 of the Revised Code[.]" In addition, it has been held that information derived from computerized criminal databases is not subject to disclosure. *Multimedia, Inc.*, 72 Ohio St. 3d at 144. To the extent that the information is not derived from a computerized criminal database, nor is not a report made pursuant to a request under R.C. 5153.111, it must be disclosed.

C. Medical Information

R.C. 149.43(A)(3) specifically exempts medical records from disclosure, *if it is generated and maintained in the process of medical treatment.*

The court cannot conceive of any reason why CSB would maintain or generate any documents "in the process of medical treatment" relative to its personnel. Accordingly, Respondents must disclose the medical information in the personnel files except copies of confidential medical records.

* * *

E. Social Security Numbers

The parties agree that the social security numbers of the employees are properly redacted from the personnel files.

RIGHT OF ACCESS TO PUBLIC MEETING
(§ 121.22 O.R.C.)

I. GROUP MUST BE A PUBLIC BODY

- A. Factors Establishing a "Public Body":
 - 1. Legal Duty Act;
 - 2. Decision Making Authority; and
 - 3. Composition: Public Officials vs. Private Members.

- B. Examples:
 - 1. Township Trustees;
 - 2. County Park Board; and
 - 3. Internal Security Committee of Industrial Commission.

- C. Exemption:
 - 1. Charter Cities.

II. PUBLIC BODY MUST BE CONDUCTING A MEETING

- A. Factors Establishing a "Meeting":
 - 1. Prearranged Discussion;
 - 2. Dealing with Business of Public Body; and
 - 3. "Majority" of Public Body's Members "Present".

- B. Examples:
 - 1. Meeting with Township Trustees;
 - 2. City council Pre-caucus Meetings; and
 - 3. Special Meetings.

- C. Exemptions:
 - 1. Fully Exempted Agencies: Grand Juries, Audit Conference (*see*, 121.22(D));
 - 2. Limited Exempted Agencies: Controlling Board, Development Financing Commission (*see*, § 121.22(E)).

III. EXECUTIVE SESSION

- A. Reasons for Executive Session:
 - 1. To consider employment issues *i.e.* appointment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or

the investigation of charges/complaints against a public employee, official, licensee or regulated individual, but not for disciplinary purposes relating to an elected official's performance of official duties or removal from office;

2. Consider purchase of property for public purposes, or for sale at competitive bidding;
 3. Attorney conferences concerning disputes involving the public body subject to pending or imminent court action;
 4. Bargaining sessions with public employees concerning terms and conditions of employment;
 5. Matter required confidential by federal or state laws;
 6. Security arrangements if details of disclosure could be used for committing, or avoiding prosecution for a violation of the law; or
 7. Consider trade secrets of county hospitals.
- B. Can only be Held After Roll Call Vote by "Majority" of "Quorum": Motion Must State Nature of Matter to be Discussed;
- C. Minutes Must be "Promptly Recorded," "Open to Public," and "Reflect General Subject Matter of Executive Session."

IV. REMEDIES

- A. Invalidity of Resolution, Rule or Formal Action.
- B. Action to Enforce Shall Be Brought Within Two Years of Alleged/Threatened Violation.
1. Injunction by court of common pleas.
 - a. civil penalty to person bringing action;
 - b. court costs; and
 - c. award of attorney fees.
 2. Action brought was frivolous:
 - a. public body awarded court costs;
 - b. public body awarded attorney fees.
- C. Removal from office of member of public body.

MEETINGS OF PUBLIC BODIES TO BE PUBLIC; EXCEPTIONS
(§ 121.22)

- (A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.
- (B) As used in this section:
 - (1) "Public body" means any of the following:
 - (a) Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;
 - (b) Any committee or subcommittee of a body described in division (B)(1)(a) of this section;
 - (c) A court of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for the purpose of the appointment, removal or reappointment of a member of the board of directors of such a district pursuant to section 6115.10 of the Revised Code, if applicable, or for any other matter related to such a district other than litigation involving the district. As used in division (B)(1)(c) of this section, "court of jurisdiction" has the same meaning as "court" in section 6115.01 of the Revised Code.
 - (2) "Meeting" means any prearranged discussion of the public business of the public body by a majority of its members.
 - (3) "Regulated individual" means either of the following:
 - (a) A student in a state or local public educational institution;
 - (b) A person who is, voluntarily or involuntarily, an inmate, patient, or resident of a state or local institution because of criminal behavior, mental illness or retardation, disease, disability, age, or other condition requiring custodial care.
- (C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

- (D) This section does not apply to any of the following:
- (1) A grand jury;
 - (2) An audit conference conducted by the auditor of state or independent certified public accountants with officials of the public office that is the subject of the audit;
 - (3) The adult parole authority when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine parole or pardon;
 - (4) The organized crime investigations commission established under section 177.01 of the Revised Code;
 - (5) Meetings of a child fatality review board established under section 307.621 [307.62.1] of the Revised Code and meetings conducted pursuant to sections 5153.171 [5153.17.1] to 5153.173 [5153.17.3] of the Revised Code;
 - (6) The state medical board when determining whether to suspend a certificate without a prior hearing pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code;
 - (7) The board of nursing when determining whether to suspend a license or certificate without a prior hearing pursuant to division (B) of section 4723.281 [4723.28.1] of the Revised Code;
 - (8) The state board of pharmacy when determining whether to suspend a license without a prior hearing pursuant to division (D) of section 4729.16 of the Revised Code;
 - (9) The state chiropractic board when determining whether to suspend a license without a hearing pursuant to section 4734.37 of the Revised Code;
 - (10) The executive committee of the emergency response commission when determining whether to issue an enforcement order or request that a civil action, civil penalty action, or criminal action be brought to enforce Chapter 3750. of the Revised Code.
- (E) The controlling board, the development financing advisory counsel, the industrial technology and enterprise advisory counsel, the tax credit authority, or the

minority development financing advisory board, when meeting to consider granting assistance pursuant to Chapter 122. or 166. of the Revised Code, in order to protect the interest of the applicant or the possible investment of public funds, by unanimous vote of all board, council, or authority members present, may close the meeting during consideration of the following information confidentially received by the authority, council, or board from the applicant:

- (1) Marketing plans;
- (2) Specific business strategy;
- (3) Production techniques and trade secrets;
- (4) Financial projections;
- (5) Personal financial statements of the applicant or members of the applicant's immediate family, including, but not limited to, tax records or other similar information not open to public inspection.

The vote by the authority, council, or board to accept or reject the application, as well as all proceedings of the authority, council, or board not subject to this division, shall be open to the public and governed by this section.

- (F) Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.

- (G) Except as provided in division (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

- (1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or

the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing. Except as otherwise provided by law, no public body shall hold an executive session for the discipline of an elected official for conduct related to the performance of the elected official's official duties or for the elected official's removal from office. If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section are the purposes for which the executive session is to be held, but need not include the name of any person to be considered at the meeting.

- (2) To consider the purchase of property for public purposes, or for the sale of property at the competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. No member of a public body shall use division (G)(2) of this section as a subterfuge for providing covert information to prospective buyers or sellers. A purchase or sale of public property is void if the seller or buyer of the public property has received covert information from a member of a public body that has not been disclosed to the general public in sufficient time for other prospective time for other prospective buyers and sellers to prepare and submit offers.

If the minutes of the public body show that all meetings and deliberations of the public body have been conducted in compliance with this section, any instrument executed by the public body purporting to convey, lease, or otherwise dispose of any right, title, or interest in any public property shall be conclusively presumed to have been executed in compliance with this section insofar as title or other interest of any bona fide purchasers, lessees, or transferees of the property is concerned.

- (3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action;
- (4) Preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment;
- (5) Matters required to be kept confidential by federal law or regulations or state statutes;
- (6) Specialized details of security arrangements if disclosure of the matters discussed might reveal information that could be used for the purpose of committing, or avoiding prosecution for, a violation of the law;

- (7) In the case of a county hospital operated pursuant to chapter 339. of the Revised Code, to consider trade secrets, as defined in section 1333.61 of the Revised Code.

If a public body holds an executive session to consider any of the matters listed in divisions (G)(2) to (7) of this section, the motion and vote to hold that executive session shall state which one or more of the approved matters listed in those divisions are to be considered at the executive session.

A public body specified in division (B)(1)(c) of this section shall not hold an executive session when meeting for the purposes specified in that division.

- (H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

- (I) (1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

- (2) (a) If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees. The court, in its discretion, may reduce an award of attorney's fees to the party that sought the injunction or not award attorney's fees to that party if the court determines both of the following:

- (i) That, based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section.

- (ii) That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.
 - (b) If the court of common pleas does not issue an injunction pursuant to division (I)(1) of this section and the court determines at that time that the bringing of the action was frivolous conduct, as defined in division (A) of section 2323.51 of the Revised Code, the court shall award to the public body all court costs and reasonable attorney's fees, as determined by the court.
- (3) Irreparable harm and prejudice to the party that sought the injunction shall be conclusively and irrebuttably presumed upon proof of a violation or violation or threatened violation of this section.
- (4) A member of a public body who knowingly violates an injunction issued pursuant to division (I)(1) of this section may be removed from office by an action brought in the court of common pleas for that purpose by the prosecuting attorney or the attorney general.
- (J) (1) Pursuant to division (C) of section 5901.09 of the Revised Code, a veterans service commission shall hold an executive session for one or more of the following purposes unless an applicant requests a public hearing:
 - (a) Interviewing an applicant for financial assistance under sections 5901.01 to 5901.15 of the Revised Code;
 - (b) Discussing applications, statements, and other documents described in division (B) of section 5901.09 of the Revised Code;
 - (c) Reviewing matters relating to an applicant's request for financial assistance under sections 5901.01 to 5901.15 of the Revised Code.
- (2) A veterans service commission shall not exclude an applicant for, recipient of, or former recipient of financial assistance under sections 5901.01 to 5901.15 of the Revised Code, and shall not exclude representatives selected by the applicant, recipient, or former recipient, from a meeting that the commission conducts as an executive session that pertains to the applicant's, recipient's, or former recipient's application for financial assistance.
- (3) A veterans service commission shall vote on the grant or denial of financial assistance under sections 5901.01 to 5901.15 of the Revised Code only in an open meeting of the commission. The minutes of the meeting shall indicate the name, address, and occupation of the applicant, whether the assistance was granted or denied, the amount of the assistance

if assistance is granted, and the votes for and against the granting of assistance.

**SIGNIFICANT CASES FROM 2001 REGARDING
OHIO'S OPEN MEETING ACT, R.C. 121.22**

7. *The Wheeling Corp. v. Columbus and Ohio River Railroad Company* (10th App. Dist. Dec. 20, 2001), 147 Ohio App. 3d 460.

When an advisor committee makes recommendations to a public body, that advisory committee made decisions in determining its recommendations and therefore, needed to conduct its meetings in open public.

Facts

The Wheeling Corporation filed a complaint against Columbus & Ohio River Railroad Company ("C&OR") and the Ohio Rail Development Commission ("ORDC"). Count one sought a declaration as to Wheeling's rights under a request for proposals ("RFP") issued by ORDC. Under the RFP, ORDC sought a rail operator for the Panhandle Rail Line ("Panhandle line") running between Columbus and Mingo Junction, Ohio. At the time of the RFP, C&OR was the existing contract operator/common carrier on the Panhandle line. ORDC issued the RFP, establishing a competitive selection process, in order to determine the best qualified operator and to enter into an operating agreement. The proposal process was to consist of two phases. The top two proposers of the first phase would go on to Phase II. The top-ranked proposer in Phase II would be asked by ORDC to enter into an operating agreement.

Wheeling and C&OR were chosen as the top two proposers during Phase I. During Phase II, C&OR was ranked the highest scorer. On May 29, 1997, ORDC passed a resolution selecting C&OR to operate the Panhandle line and authorizing the ORDC staff to enter into a new operating agreement with C&OR. Such an operating agreement was entered into effective July 1, 1997.

Wheeling filed an amended complaint adding a claim alleging ORDC and the Selection Committee had violated R.C. 121.22 ("OMA"). Wheeling sought a declaration that the July 1, 1997 operating agreement was invalid and void, pursuant to R.C. 121.22(H). The trial court concluded that the Selection Committee was a public body subject to R.C. 121.22 and that the Selection Committee and ORDC had violated the OMA. ***The trial court invalidated the Selection Committee's decision and the July 1, 1997 operating agreement.***

COURT'S RULING

ORDC contends the trial court erred in concluding the Selection Committee was a public body under R.C. 121.22(B)(1)(b) and was subject to the OMA. ORDC, which is a state agency, contends that the Selection Committee was not a public body because the Selection Committee was established on a temporary basis, solely for the limited purpose of evaluating and scoring proposals, was merely an

advisory group that made a recommendation to the full ORDC, and had no decision-making authority. The trial court found that the Selection Committee:

- Was comprised of a total of five members, three of whom were currently serving as Com-missioners of the ORDC.
- Existed to review and evaluate the proposals and to make a recommendation to the ORDC as to which proposer should be awarded the Operating Agreement.
- During its three private meetings, made decisions in evaluating and scoring the proposals submitted in response to the RFP and made decisions to amend and change the terms of the RFP.
- During its three private meetings, changed the scoring rules which had been publicly announced in the RFP.
- Reached its decision that C&OR should be given the right to negotiate for the new Panhandle Operating Agreement during the telephone conference call held on May 16, 1997.
- As soon as it reached a decision on May 16, 1997, it notified the ORDC's staff which immediately began negotiating the new Panhandle Operating Agreement with C&OR.

For reasons that follow, we find that the trial court did not err in concluding that the Selection Committee was a public body under R.C. 121.22(B)(1).

In *Thomas v. White* (1992), 85 Ohio App. 3d 410, 411, that court stated under a strict reading of R.C. 121.22(B) a committee need not be a decision-making body to be a public body. But if it did, the committee at issue was such a body because it made recommendations to the board and its enabling statute called for it to advise the board on policies and decision-making tasks.

In *The Cincinnati Enquirer v. Cincinnati*, 145 Ohio App. 3d, 335, the city of Cincinnati argued that the urban design review board was merely advising the city manager. Nevertheless, the court held the board still made decisions. Citing *Thomas*, the court stated that whether the board had the ultimate authority to decide matters was not controlling; the board actually made decisions in the process of formulating its advice.

Simply stated, it was a decision-making board that reported its decisions to the city manager and city council. Therefore, all of its meetings had to be public.

In the case at bar, the Selection Committee was, obviously, called a committee, and R.C. 121.22(B) specifically includes committees under the definition of "public body". The majority of the Selection Committee's members were commissioners of the commission itself. There is no question that, like the bodies

in *Thomas* and *The Cincinnati Enquirer*, the Selection Committee made decisions and then advised ORDC. The fact that the Selection Committee was established by the committee without formal action is immaterial. ***Given all of the above, the trial court did not err in concluding that the Selection Committee was a public body under R.C. 121.22(B).***

The ORDC contends the trial court erred in finding that the Selection Committee violated the OMA in conducting closed meetings and deliberating over the proposals during these meetings, failing to give notice of such meetings, closing the meetings to the public, and failing to motion or roll call vote to convene into executive session.

There is no dispute that a majority of its members were present at the three, prearranged meetings. See R.C. 121.22(B)(2). Therefore, the Selection Committee was subject to the requirement that such meetings be open to the public.

Further, any action it took at such meetings, such as the scoring of the proposals which resulted in C&OR becoming the winning proposer, can be held invalid under R.C. 121.22(H).

Even if we accepted the ORDC's assertion that *all* of the matters discussed were confidential under R.C. 121.22(G), which we do not, there is no dispute that the Selection Committee did not follow the requirements for holding an executive session. For this reason alone, the trial court did not err in concluding that the Selection Committee violated the OMA.

As to whether the Selection Committee violated R.C. 121.22(G) in attempting to enter an executive session during its meeting and in failing to specify the statutorily-allowed reason for entering executive session, we found it did.

The Chairman announced ORDC would enter an executive session to discuss "litigation" and "personnel" issues. However, draft notes made concomitant with the meeting and used to prepare the official minutes of that meeting ***neither reflect*** a motion was made and seconded to go into executive session; nor that a roll call vote was taken to go into executive session; nor do the minutes indicate for what purpose an executive session was to be held.

The official minutes of the meeting do not indicate that a motion was made and seconded and a roll call vote taken to go into executive session, but they do indicate the executive session was need to discuss "litigation" and "personnel" issues.

Based on the foregoing, the trial court properly concluded that ORDC violated R.C. 121.22(G) when it attempted to enter an executive session without a proper motion and without holding a roll call vote of a majority of a quorum.

We acknowledge that there was evidence that a motion and roll call vote did occur at the meeting. However, we need not address this factual issue. There is no dispute that, even if such motion and vote took place, there was no statement concerning which of the approved matters listed in R.C. 121.22(G)(2) through (6) was to be considered at the executive session.

8. ***Doran v. Northmont Board of Education* (2nd App. Dist. Feb. 1, 2002), 147 Ohio App. 3d 268.**

R.C. 121.22(F) requires public entities to establish a method for the general public to be notified of the time, place and purpose of special meetings.

Facts

It is alleged that the Northmont Board of Education ("the Board") violated R.C. 121.22(F) by not having a rule which establishes a method for the general public to be notified of the time, place and purpose for such special meetings. It is argued that because the Board does not have a rule establishing a method for the general public to learn about these meetings, any formal actions taken at that meeting should be "declared rescinded, canceled and held for naught" pursuant to R.C. 121.22(H).

Court's Ruling

The Board submits that as a matter of practice and not rule it routinely notifies *The Dayton Daily News* and *The Englewood Independent* at least twenty-four hours prior to every special meeting. **Technically**, this is a violation of R.C. 121.22(F), which would require invalidation of the action taken at the meeting pursuant to R.C. 121.22(H). However, some courts have found that actions taken by a board are not invalid simply because the board has not established, by rule, a reasonable method of informing the public of the time, place and purpose of such meetings. We agree with these courts. Instead, the purpose of R.C. 121.22(H) is to invalidate those actions taken by a board where insufficient notice was given to the public regarding the meeting. In this case ninety-five visitors were present at the July 29, 1998 meeting. There is no evidence in the record that insufficient notice was given. Therefore, any action taken at that meeting should not be disturbed.

However, we agree that the Board must establish a rule to comply with R.C. 121.22(F). The Board currently notifies *The Dayton Daily News* and *The Englewood Independent* of special meetings at least twenty-four hours in advance. If the Board would establish a rule providing it would notify these newspapers and direct the newspapers to publish this notice consistently, it would satisfy R.C. 121.22(F). Unfortunately, the Board does not so direct the newspapers; instead, publication is at the newspapers' discretion. We do not feel this provides "reasonable notice" to the public.

9. *St. ex rel. The Cincinnati Enquirer v. Hamilton County Commissioners* 1st App. Dist. (2002), 2002 Ohio 2038.

The requirement of "imminent court action" is satisfied when the public body formally commits itself to engaging in litigation.

Facts

At the commissioners' meeting, a motion was made to convene in executive session "for the purpose of discussing litigation." The motion was unanimously adopted. Following the executive session, the commissioners returned to open session and unanimously adopted a resolution that authorized the employment of an Indianapolis law firm of and a Cincinnati law firm as special legal counsel.

As required by R.C. 305.14, the commissioners then applied for authorization to employ special legal counsel in the court of common pleas.

Court's Ruling

The burden is on the public body to justify the resort to executive session under one or more of the exceptions to the Sunshine Law found in R.C. 121.22(G). Thus, for purposes of summary judgment, it was incumbent on the commissioners to establish below that it was beyond any factual dispute that the matters they discussed in executive session were the subject of "pending or imminent court action" within the meaning of R.C. 121.22(G). It is undisputed that court action was not pending at the time they conducted the executive session. This case turns, therefore, upon whether court action was "imminent" concerning the cost overruns.

In *State ex rel. Bond v. Montgomery* (1989), 63 Ohio App. 3d 728, this court considered the meaning of "imminent court action" in R.C. 121.22(G)(3). We observed that "although no Ohio case has specifically determined the scope or meaning of the word 'imminent,' it has been defined as an action or event 'on the point of happening' or one that is 'impending'. Black's Law Dictionary (5 ed. 1979) 676." *Id.* at 737, 580 N.E. 2d at 44. See also Recchie and Cheroski, *Government in the Sunshine: Open Meeting Legislation in Ohio* (1976), 37 Ohio St. L.J. 497, 509-510.

The commissioners could have provided far more compelling evidence that court action was "imminent." A public body cannot justify going into executive session by merely invoking the word "litigation" in its resolutions.

The Relator, however, misperceives the term "imminent court action" as defined in our *Bond* case. The definition we adopted in *Bond* - - something "about to happen" - - was not meant to have strictly a temporal meaning. The definition is more elastic because of the protean nature of litigation, in which court action is not always a foregone conclusion. Litigation is an inherently complex and

nuanced process. The plaintiff progresses, one step at a time, through various phases, starting with selection of legal counsel (or assemblage of a legal).

By including both "pending" court action and "imminent" court action within R.C. 121.22(G)(3), the legislature clearly contemplated that litigation need not have formally begun to reach a sensitive stage where the public's need to know is outweighed by the public body's need for confidentiality. ***We believe that the term "imminent" is satisfied where the public body has formally committed itself to a litigative solution and assumed a litigative posture.*** Such a posture is frequently manifested by the public body's decision to commit government resources to the prospective litigation.

We hold, therefore, that the record does not present any dispute of material fact whether litigation or court action was imminent when the commissioners went into executive session to discuss the hiring of special legal counsel. ***We hold, further, that the discussion of which outside legal firm to hire for purpose of spearheading the recovery of the funds was not a matter ancillary to the litigation, since such a discussion would necessarily have entailed consideration of the various causes of action, merits, strategy, and strengths and weakness of the case - - all of which were highly sensitive in the context of an impending lawsuit.***

The commissioners argue that the executive session to discuss the hiring of special legal counsel was also permitted under R.C. 121.22(G)(5). That allows the public body to convene an executive session to discuss "matters required to be kept confidential by federal law or rules or state statutes." We disagree. R.C. 121.22(G)(5) refers to matters that are "required" to be kept confidential.

The commissioners, however, are under no legal duty to assert the attorney-client privilege to keep confidential every discussion that they may have with the prosecuting attorney. As notes by Reechi and Peroski, "the General Assembly, in limiting the circumstances in which such a discussion can be held in executive session, has required a partial waiver of the privilege by the client-public body."