

# The 'Open' Book

A guide to Ohio law on public records, open meetings



## **The 'Open' Book November 2019**

### **Letter From Ohio Attorney General Dave Yost**

Welcome to the first of our quarterly newsletters about public records and open meetings.

President Abraham Lincoln characterized our government as “of the people, by the people, and for the people.”

In short, he meant that the government belongs to the people. The business of government is the people’s business. Because the government exists to serve the people, the workings of government must be open to public scrutiny, subject only to strictly construed exceptions that serve the public interest or are essential to the protection of personal privacy.

And that is the fundamental principle that informs our laws mandating public records and open meetings, our so-called “Sunshine Laws.”

The nickname is rooted in a quotation usually attributed to the late U.S. Supreme Court Justice Louis Brandeis, who wrote that “sunlight is the best disinfectant.” Justice Brandeis understood that government corruption is fostered and thrives in secrecy and darkness. If the public cannot see the government’s records and is barred from the meetings during which government bodies make their decisions, corruption and misfeasance can flourish and grow. There is no accountability.

But public records and open meetings act like sunshine, exposing the activities of government officials for all to see, allowing the people to hold their officials fully accountable.

When I was a newspaper reporter, I treasured Ohio’s Sunshine Laws because they helped me stay on top of the doings of government. It would be a mistake, though, to view our Sunshine Laws as a tool only for journalists. The Sunshine Laws are tools for every citizen.

If someone wants to know what her local school board or village council is doing, what its priorities are, how it is spending her tax money, she can look at public records and attend open meetings to find out. If a citizen is seeking election to a public office, he can find out what the

incumbent has done in the job. If residents are concerned about the environmental impact of some new business or development project, they can look at the permit applications submitted to government officials and examine the decisions government officials made about those permits.

As public officials, we should ensure that our decisions and actions are transparent to the public we serve. We must remember that the records we hold do not belong to us; they belong to the people we serve.

With limited exceptions, the people's right of access to government records and to meetings of public bodies is sweeping. We cannot require people to state a reason for their desire to see a document or to attend a meeting. We can't even require that they identify themselves.

Nor should we regard a demand for public records or access to an open meeting as an imposition or an annoyance. Most government officials sincerely want to do their jobs honestly and effectively. A government official who is corrupt, lazy or ineffective brings disrepute on all other government officials. As conscientious public officials, we have an interest in curbing corruption and rooting it out when it occurs. So we should welcome the cleansing effect of the sunshine.

Obeying the Sunshine Laws is part of our duty as public officials to provide honest and ethical services to our employers, the people of Ohio.

To advance that purpose, we are launching this quarterly newsletter. We hope to make it useful for a broad audience, including:

- Attorneys who represent and advise local governments on Sunshine Law compliance.
- Employees and officers of local governments who are primarily responsible for handling public- records requests or conducting open meetings.
- Legal counsel who represent clients seeking to exercise their rights under Ohio's Sunshine Laws.
- The news media.
- Any citizen interested in transparent governance.

Our aim is to compile and analyze complaints and issues that arise and developments that occur in relation to the Sunshine Laws. We also plan to provide information on the judicial interpretations of the relevant statutes.

In short, we hope to make this the go-to source for all matters related to open government in Ohio.

We hope you find the newsletter informative, and we welcome your comments and suggestions.

Yours,

A handwritten signature in black ink that reads "Dave Yost". The signature is written in a cursive, flowing style with a large, looped initial "D".

Dave Yost  
Ohio Attorney General

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## **From the Editor**

We are pleased that you have received this first edition of “Open Book” and hopeful that the quarterly newsletter will benefit and guide you. Compliance with Ohio’s Public Records Act and Open Meetings Law is important to public officials (who serve the people) and the people themselves (who benefit from transparency in local government).

We want this publication to become a go-to resource for information on legislative changes and judicial interpretations related to the state’s Sunshine Laws. It will include case notes on recent judicial decisions and legislative amendments, updates on the filing and disposition of public-records complaints with the Court of Claims, and feature articles on developments of significant interest. We will also include listings of upcoming Sunshine Law trainings, along with specifics on how to register and how local governments can arrange for trainings in their areas.

We aspire to involve our readers in the process of shaping the focus and content of our newsletter. If you have questions related to Ohio’s Public Records Law or Open Meetings Act, please feel free to convey them to us. In future editions, we will venture to answer questions of general interest.

If you learn of any case filings or issues in your area involving open government, please let us know. Ohio is a big state, and we can use your help to keep current with what’s going on across our 88 counties. To err is human, it has been said, and, from time to time, you may perceive something in this publication that is incorrect or requires clarification. If so, please let us know. We will always strive to get it right. Although we look forward to providing information and interacting with our readers, we emphasize that local officials should consult regularly with their legal counsel about any issues and questions of legal significance.

I have spent most of my career in public service, as an assistant county prosecuting attorney, a county commissioner, a city law director, and a village solicitor and administrator. Along the

way, I have worked with local officials at the village, city, township and county levels of government and with school districts. Before my appointment as director of open government for Attorney General Dave Yost, I served for more than four years as his chief legal counsel during his tenure as Ohio's auditor of state.

I have come to understand the significant challenges that local governmental officials confront regularly in serving Ohio communities – and to value that service. I'm hopeful that, through our efforts, we are able to facilitate compliance with Ohio's Sunshine Laws for the benefit of government entities and the advancement of public access to their workings.

Please feel free to contact me at (614)-466-2859 or via [email](#). I look forward to hearing from you.

Mark Altier  
Director of Open Government  
Ohio Attorney General's Office

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## **Ohio Supreme Court: Even in Open Meetings, Secret Ballots Violate Ohio's Open Meetings Act**

**By: Mark W. Altier, Director of Open Government for Ohio Attorney General Dave Yost**

Recently, the Ohio Supreme Court entered its unanimous decision in the matter of *State ex rel. Bratenahl v. Village of Bratenahl*, 2019-Ohio-3233, 2019 Ohio LEXIS 1640, 2019 WL 3805295 (Decided Aug. 14, 2019). In January 2015, the council of the village of Bratenahl (Cuyahoga County) gathered for its first meeting of the year and took up the matter of electing a president pro tempore.<sup>1</sup> The village mayor, who was presiding over the meeting, asked the council members whether they wanted to proceed in the selection by a “show of hands” or by “secret ballot.”

One council member suggested that they use a secret ballot, the way the council had “always done it.” Another council member questioned the legality of such a process, but the council proceeded to vote in a properly convened-and-noticed open meeting by secret ballot.

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<sup>1</sup> R.C. 731.10 requires that the members of a council of a village operating under the statutory scheme of government, “[a]t the first meeting in January of each year...shall immediately proceed to elect a president pro tempore from its own number, who shall serve until the first meeting in January next after his election.” The president pro tempore, so elected, and during his or her tenure, is to serve as “the acting mayor” and to “have the same powers and perform the same duties of the mayor” during the absence of the mayor or during periods when the mayor is “unable for any cause, to perform his duties.”

After the first ballot, the village solicitor tallied the votes and advised that a second ballot would be necessary because one member had voted for someone who was not nominated. A second vote also ended in a tie. Following a third vote, the solicitor announced that a president pro tempore had been selected but did not publicly detail the final vote count.

A year later, a community news publication known as “MORE Bratenahl” and its operator, Patricia Meade, sued the village. The lawsuit sought a declaratory judgment, finding that the village had violated Ohio’s Open Meetings Act, R.C. 121.22 by conducting the election by secret ballot. It also requested that the village be enjoined from similar future actions and be required to pay attorney fees and a civil forfeiture of \$500.

As part of discovery in the case, the village provided the ballot slips, each with an attached sticky note purporting to identify the council member who had cast the ballot. Both parties filed motions for summary judgment. The trial court denied the MORE Bratenahl motion but granted the village’s motion. On appeal, the 8th District Court of Appeals affirmed the trial court’s ruling, holding that the plaintiffs failed to prove that the village council violated the Open Meetings Act because the vote was conducted in an open council session and the voting slips were maintained as public records.

The Ohio Supreme Court disagreed, overturning the appellate ruling. The court noted that R.C. 121.22(A) indicates that the Open Meetings Act is to 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 is specifically excepted by law.” The court also pointed out that R.C. 121.22(C) provides that “[a] resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body.” The ruling noted that the village did not dispute that its council is a “public body,” that the election of a president pro tempore of the council constitutes “official action” on “public business” and that the council’s gathering in January 2015 was a “public meeting.”

The opinion indicated that the words “open” and “open meeting” are not defined by the Open Meetings Act and, as such, must take on their plain and ordinary meaning. The court opined that “open” may be defined as “completely free from all concealment; exposed to general or particularly perception or knowledge” or, more narrowly, as “free to be entered, visited, or used,” or “[I]n a state which permits access, entrance, or exit.”

Based on the text of the law, its structure and its statement of legislative purpose, the court chose the former, more liberal interpretation. The court concluded that, although conducted in an open setting, a meeting is not open in compliance with the Open Meetings Act unless it meets the fundamental requirement that the public has meaningful access to that which takes place. In addressing the village’s argument that the act prescribes no particular method for the selection process and that the council may make its own rules, the court indicated that this does not alter the requirements of the act.

These requirements are not satisfied simply because the doors of the council meeting place are open to the public. Instead, meaningful access requires an ability to discern the deliberations that take place among the members of the public body, including being able to determine how members vote on matters and issues. The court indicated that a meeting of a public body, even though conducted in a public setting, would not satisfy the requirements of the law if the members of the body conversed in whispers or conducted their business in a foreign language, thereby frustrating the public's understanding of the proceedings. On that basis, the court held that "the use of secret ballots in a public meeting violates the Open Meetings Act."<sup>2</sup>

The village also argued that the matter at issue had become "moot" because the term of the president pro tempore elected by secret ballot had expired. The court cited R.C. 121.22(I)(1), which provides that an action alleging a violation of the Open Meetings Act may be brought within two years after the date of the alleged violation. On that basis, the determination of the court was that the action was appropriate and the provision of the requested injunctive relief was required.

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<sup>2</sup> *In 2011 Op. Att'y Gen. 038, then-Ohio Attorney General Mike DeWine advanced reasoning similar to that of the Supreme Court in the Bratenahl case. Attorney General DeWine indicated that the "'open meetings' mandate of R.C. 121.22 requires more than simply granting members of the public physical access to a meeting of a public body." He advised that "a meeting is not 'open' to the public where the members of the public body vote by way of secret ballot," which is the "antithesis of the definition of 'open'."*

*In so doing, the Attorney General overruled 1980 Op. Att'y Gen. 083, in which one of his predecessors had indicated his judgment that a county party central committee, when meeting for the purpose of filling the vacancy in a county office as provided by R.C. 305.02, must vote on the appointment in an open meeting but may do so by secret ballot. Attorney General DeWine wrote that "a public body that is subject to the requirements of the Ohio open meetings law may not vote in an open meeting by secret ballot."*

# Ohio Supreme Court Finds That Email Exchanges Can Constitute Public Meetings

**By: Mark W. Altier, Director of Open Government for Ohio Attorney General Dave Yost**

Differing positions that pitted one member of an Ohio board of education against his four colleagues led to the decision of the Ohio Supreme Court in *White v. King*, 147 Ohio St. 3d 74, 2016-Ohio-2770, 60 N.E. 3d 1234, 2016 Ohio LEXIS 1157, 2016 WL 2342968. The litigation stemmed from the time when the board of the Olentangy Local School District (Delaware/Franklin counties) was made up of Adam White, Julie Feasel, Kevin O'Brien and Stacy Dunbar, plus board President David King.

White independently investigated allegations that two district employees had improperly spent district funds. Subsequently, one of the employees resigned and the other reimbursed the district. King, Feasel, O'Brien and Dunbar then amended a board policy to require that all communications from members of the board to district employees first pass through the district superintendent or treasurer. White voted against the proposal. On Oct. 11, 2012, The Columbus Dispatch published an editorial praising White for his actions and implicitly criticizing the other board members for their response.

King then sought to have Feasel, O'Brien and Dunbar join him in a public response to the editorial and directed the district superintendent and some district employees to help. The board members and district staff engaged in this process through a series of email exchanges. Thereafter, O'Brien submitted a proposed response signed by all the board members except White to The Dispatch, which published the response on Oct. 27, 2012.

About six months later, White sued King, Feasel, O'Brien and Dunbar, alleging that they had violated the Open Meetings Act. The defendant members of the board answered the complaint and moved for judgment on the pleadings. White's motion for leave to amend his complaint and to add the board itself as a party defendant was granted.

The trial court ruled that the individual board members were immune from suit and granted the board's motion for judgment on the pleadings on the grounds that no pre-arranged discussion of public business had occurred because the communications among board members originated with an unsolicited email. R.C. 121.22 does not apply to emails, and there was no pending rule or resolution before the board scheduled for discussion or deliberation.

On appeal, the 5th District Court of Appeals affirmed the decision of the trial court, finding that the definition of "meeting" set out in R.C. 121.22 does not include sporadic emails. In addition, even though the four board members ratified the response after it was provided to The Dispatch, there had not been a pre-arranged discussion of public business. The court of appeals noted that

the “mere discussion of an issue of public concern does not mean there were deliberations under the statute.”

Justice O’Donnell, writing for a five-member majority of the Ohio Supreme Court, addressed the issue of “whether an e-mail discussion by a majority of the members of a public body for the purposes of drafting a response to an editorial that is subsequently ratified at a public meeting qualified as a meeting for purposes of R.C. 121.22.”

He noted that, under R.C. 121.22(C), the meetings of all public bodies, including boards of school districts, are “declared to be public meetings open to the public at all times” and that the term “meeting” includes “any prearranged discussion of the public business of the public body by a majority of its members. R.C. 121.22(B)(2).”

The majority of the court noted that nothing “in the plain language of R.C. 121.22(B)(2) expressly mandates that a ‘meeting’ occur face to face,” finding that public meetings may be conducted “face to face, telephonically, by video conference; or electronically, by e-mail, text, tweet, or other form of communication.”

The opinion concluded that – because the board president directed district employees to help prepare the response, which subsequently was ratified by a majority of the board – it falls within the purview of the board’s duties, functions and jurisdiction. The response essentially falls under “public business,” the opinion said, subjecting the related deliberations to the requirements of the Open Meetings Act.

In a dissent, in which she is joined by Chief Justice O’Connor, Justice Lanzinger criticized the majority opinion as a “judicial rewrite,” noting that the 5th District and two other appellate courts have refused to apply the Open Meetings Act to email exchanges. The dissent argues that “meetings” differ from other types of communications in that they are events or gatherings, which involve real-time communication.

Justice Lanzinger acknowledged, however, that discussions via email may constitute a meeting in situations where a pre-arrangement is made for a majority of the members of a public body to be available at a pre-determined date and time for the purpose of exchanging emails about a matter of public business.

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## **Sunshine Law Training**

The Ohio Attorney General’s Office provides free Sunshine Laws Certification Training, also known as Certified Public Records Training (CPRT), in Columbus and elsewhere throughout Ohio.

The three-hour certificate session is available to public officials or their appropriate designees, public employees, and members of the general public. Attendance at a session satisfies the requirement of R.C. 109.43(B) that elected officials or their appropriate designees attend such training once during each term of office. The program also is certified for three hours of Continuing Legal Education (CLE) for Ohio attorneys.

Each session includes an in-depth analysis of the Ohio Public Records Act and a brief review of Ohio's Open Meeting Laws. Pre-registration is recommended.

To register for an upcoming training session, go to <https://www.ohioattorneygeneral.gov/Legal/Sunshine-Laws/Sunshine-Law-Training>.

To learn more about the training or to schedule a session in your area, contact Mark Altier, director of open government, at (614) 466-2859 or [by email](#).

### Currently Scheduled Sessions

- **Dec. 6, 2019:** Columbus, Franklin County (in conjunction with County Commissioners' Association Annual Meeting), noon to 3:15 p.m.
- **May 12, 2020:** Kirtland, Lakeland Community College (time TBD)
- **May 20, 2020:** East Canton (location and time TBD)

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## Legislative Update

**SUBSTITUTE HOUSE BILL 8, 132<sup>ND</sup> General Assembly:** Amended R.C. 149.43 to include a subsection now numbered (A)(1)(gg) which excludes from the definition of "public record" the name, address, contact information, or other personal information of an individual who is less than 18 years of age that is included in any record related to a traffic accident involving a school vehicle in which the individual was an occupant at the time of the accident. The enactment also provides for the specific exclusion from the definition of public record of certain protected health care information as defined in 45 C.F.R. 160.103. R.C. 149.43(A)(1)(hh).

**SUBSTITUTE HOUSE BILL 139, 132<sup>ND</sup> General Assembly:** Amended R.C. 149.43 by the inclusion which now follows subsection (A)(1)(mm) of a provision indicating that any record that is not a public record under division (A)(1) of R.C. 149.43, and that, under law, is permanently retained, becomes a public record on the day that is 75 years after the day the record was created. Exceptions to the provision include any record protected by the attorney-client privilege; a trial preparation record as defined in R.C. 149.43; certain adoption records under R.C. Chapter 3107; and security and infrastructure records under R.C. 149.433.

**SUBSTITUTE HOUSE BILL 341, 132<sup>ND</sup> General Assembly:** The bill amended R.C. 149.43(A)(1)(p) to substitute reference to an exclusion from the definition of public record of “designated public service worker residential and familial information” for previous more diverse language. The phrase “designated public service worker” is defined at R.C. 149.43(A)(7) as a “peace officer, parole officer, probation officer, bailiff, prosecuting attorney, assistant prosecuting attorney, correctional employee, community-based correctional facility employee, youth services employee, firefighter, EMT, investigator of the bureau of criminal identification and investigation, judge, magistrate, or federal law enforcement officer.” R.C. 149.43(A)(8)(a) through (g) defines “designated public service residential and familial information.”

**SUBSTITUTE HOUSE BILL 425, 132<sup>ND</sup> General Assembly:** Amended R.C. 149.43 to include a definition of “body-worn camera” as a visual and audio recording device worn by a peace officer while in the performance of the officer’s duties (R.C. 149.43[A][15]), and a “dashboard camera” as a visual and audio recording device mounted on a peace officer’s vehicle or vessel that is used while the peace officer is performing the officer’s duties (R.C. 149.43[A][16]). The enactment adds as an exception to the definition of “public record” any “restricted portions of a body-worn camera or dashboard camera recording” (149.43[A][1][jj]) which are identified, under the bill, at 149.43(A)(17)(a) through (q).

**SUBSTITUTE HOUSE BILL 451, 132<sup>ND</sup> General Assembly:** Amended R.C. 149.43 to insert subsection 149.43(A)(1)(ii) which excludes from the definition of “public record” any depiction, by photograph, film, videotape, or printed or digital image when the depiction is that of a victim of an offense the release of which would be, to a person of ordinary sensibilities, an offense and objectionable intrusion into the victim’s expectation of bodily privacy and integrity, or the depiction captures or depicts the victim of a sexually oriented offense, as defined in Section 2950.07 of the Ohio Revised Code at the actual occurrence of that offense.

**AMENDED SUBSTITUTE HOUSE BILL 166, 133<sup>RD</sup> General Assembly:** Adds R.C. 149.43(A)(1)(mm) which excludes from the definition of public record the telephone numbers of any victim (as defined by R.C. 2930.01) of a crime, a witness to a crime, or a party to a motor vehicle accident which is subject to the requirements of R.C. 5501.11 (this section requires that within five days of an accident involving a fatality, personal injury, or property damage in excess of \$1,000 a report of the accident be filed with the Director of Public Safety) that are listed in any law enforcement record or report. The enactment also inserts R.C. 149.43(A)(1)(kk) which excludes from the definition of public record certain material presented to a fetal-infant mortality board acting under R.C. 3707.70 to 3707.77; and R.C. 149.43(A)(1)(ll) which similarly excludes certain material submitted to a pregnancy-associated mortality review board established under R.C. 3738.01.