

A VIEW FROM THE NEWSROOM:

SUNSHINE LAWS



OUTLOOK CLOUDY



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TABLE OF CONTENTS

	Page(s)
The Common Law of Public Records and Public Meetings.....	2
Right of Access to Documents (§149.43 O.R.C.).....	3
I. Material Sought Must Be a Record.....	3
II. Record Must Be Held By a Public Office.....	4
III. Remedy	4
O.R.C. Section 149.43 (9-27-63 version)	5
O.R.C. Section 149.43 (8-30-95 version)	6
O.R.C. Section 149.43 (3-22-2001 version)	8
Significant Open Record Cases	15
I. Privacy	15
II. Access to Police Records.....	32
III. Miscellaneous	43
Right of Access to Public Meetings (§121.22 O.R.C.).....	54
I. Group Must Be a Public Body.....	54
II. Public Body Must Be Conducting a Meeting.....	54
III. Executive Session	54
IV. Remedies.....	55
Meetings of Public Bodies to be Public; Exceptions (§121.22 O.R.C.).....	56
Significant Open Meeting Cases.....	63
I. Public's Right to Attend Meetings	63
II. What is a Public Body?.....	63
III. Charter Cities	70
IV. Executive Session	73
V. Remedies.....	75

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*)

8-30-95 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, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records containing information that is confidential under section 4112.05 of the Revised Code, DNA RECORDS STORED IN THE DNA DATABASE PURSUANT TO SECTION 109.573 OF THE REVISED CODE, and 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.

- (B) All public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Upon request, a 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, governmental units shall maintain public records in a manner that they can be made available for inspection in accordance with this division.
- (C) If a person allegedly is aggrieved by the failure of a governmental unit 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 person responsible for it to make a copy available to THE PERSON in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the governmental unit 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 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 Article IV, Ohio Constitution.
- (D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

3-22-2001 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, except that "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;
 - (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.

- (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 OPEN RECORD CASES

I. PRIVACY.

1. *State, ex rel. Dispatch Printing Co. v. Wells; 18 Ohio St. 3d 382 (1985).*

Records contained in a civil service personnel file recording employment history must be disclosed. Other records contained therein clearly outside of the scope of R.C. 149.43 need not be released.

Court's Ruling

The issue presently before this court is whether the personnel files of Detective Thompson are subject to inspection as a public record under R.C. 149.43.

A "public record" is defined in R.C. 149.43(A)(1) as "any record that is required to be kept by any governmental unit." In accordance with R.C. 124.40(A), municipal civil service commissions are required to perform the same duties with respect to the civil service of the city as are the Director of Administrative Services and the State Personnel Board of Review with respect to the civil service of the state. Hence respondent must keep records of all their proceedings and maintain a complete roster providing the name, address, date of appointment, and various other essential employment information of all persons in the city civil service. All of this information is stipulated to be available for public inspection.

In light of the above it is clear that the Logan Civil Service Commission would be under a legal duty to maintain pertinent information regarding Detective Thompson's employment, including the order demoting Thompson. Accordingly, this information would constitute a public record under the purview of R.C. 149.43.

* * *

However, we do note that all of the information which may be contained in Thompson's personnel file may not necessarily be subject to public disclosure. Thompson's personnel file may very well contain documents which are neither required to be maintained by law, nor are necessary to respondents' execution of their duties and responsibilities. Any such information would clearly be outside the scope of R.C. 149.43 and not subject to public disclosure.

Further, if a document composed of information outside the scope of R.C. 149.43 was found to be "personal" in nature as defined in R.C., 1347.01(E), then respondents would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure.

To protect against the unfettered disclosure of personnel records which do not fall within the purview of R.C. 149.43, determination of an application for disclosure must be made on an *ad hoc* basis with the court being the final arbiter as to whether the information is subject to public disclosure. ***Only if the information in question does not fall within the scope of R.C. 149.43 must a determination be made as to whether its release would constitute an invasion of personal privacy as prohibited by R.C. Chapter 1347.***

2. ***State ex rel. Toledo Blade Co. v. Univ. of Toledo Found; 65 Ohio St. 3d 258 (1992).***

A private nonprofit corporation that acts as a major gift-receiving and soliciting arm of a public university and receives support from public taxation is a "public office" pursuant to R.C. 149.011(A), and is subject to the public records disclosure requirements of R.C. 149.43(B).

The names of donors to such a gift-receiving arm of a public university are "public records" pursuant to R.C. 149.43, and are not subject to any exemption to disclosure.

Court's Ruling

Clearly, these entities received support from public taxes. *See Fostoria*, 40 Ohio St. 3d at 12, 531 N.E. 2d at 316 (rent-free use of a building owned by public body constitutes support by taxation). These facts demonstrate that the predecessor foundations operated essentially as gift-receiving and soliciting arms of the university, despite their status as private, nonprofit corporations.

Even after these arrangements [foundation began paying rent], however, the university continued to pay Public Employees Retirement System ("PERS") benefits on behalf of foundation employees who had previously been university employees.

Respondents argue that the foundation is exempt from the public records statute because the purpose of the R.C. 149.43 is, like the federal Freedom of Information Act, to inform the public about "what their government is up to." *Because disclosing donor names does not inform the public about the conduct or activities of an office, and because the foundation play no policy – making role in the University, the foundation's activities should not be subject to R.C. 149.43. The respondents claim the foundation's donor list is a trade secret, which Ohio's trade secrets law, R.C. 1333.51 protects. Respondents cite no authority, however, holding that a public office can even have its own protected trade secrets under R.C. 1333.51. The protection of competitive advantage in private, not public, business underpins trade secret law.*

Finally, respondents assert that federal and state common-law privacy rights prohibit the disclosure of donor names. We do not agree the court has a duty to enforce a statute as written and no "to add to, enlarge, supply, expand, extend or improve the provision of statute to meet a situation not provided for". In open records cases, the General Assembly has already done the weighing and has not accorded any weight to whether the investigation is ongoing." *Id.* at 42, 549 N.E.2d at 168.(fn3).

3. ***State ex rel. Beacon Journal Publishing Co. v. Akron; 70 Ohio St. 3d 605 (1994).***

R.C. 149.43 does not mandate that a city disclose the Social Security numbers of its employees upon demand, as such are protected by federal constitutional privacy rights.

Facts

The Akron Beacon Journal and Paynter asked the city and Sowa to provide them with computer tape records of the city's year-end employee master files for the years 1990 and 1991 pursuant to R.C. 149.43. These payroll files contain various information including employees' *names, addresses, telephone numbers, Social Security numbers* ("SSNs"), birth dates, education, employment status and positions, pay rates, service ratings, annual and sick leave information, overtime hours and pay, and year-to-date employee earnings.

The city provided copies of these records *with the SSNs deleted*. ABJ and Paynter then requested a copy of the same records complete with SSNs. The city refused to disclose the employees' SSNs.

Court's Ruling

We are asked to determine whether the city is obligated to provide the ABJ with the SSNs of approximately two thousand five hundred city employees pursuant to Ohio's public records statute. For the following reasons, we find that disclosure of this information is *not* required.

The city and Sowa contend that they are not obligated to provide the SSNs because they are not "records" for purposes of the Public Records Act. We disagree.

To compel the city to disclose the SSNs of its employees, the ABJ must prove that they are public records. Records that are "public records" as defined in R.C. 149.43(A) must be disclosed pursuant to R.C. 149.43(B).

The city and *amici* contend that disclosure of the SSNs would violate the *right to privacy* of city employees and, thus, is not permissible. R.C. 149.43(A) expressly

excludes the release of records which would *violate state or federal law. Because we find that the disclosure of the SSNs would violate the federal constitutional right to privacy, we find them to be excluded from mandatory disclosure.*

The right to avoid disclosure of personal matters is so broad in scope that it applies to the most public of our public figures. Even the President of the United States possesses this right.

Thus, according to the Nixon case, there is a federal right to privacy which protects against governmental disclosure of the private details of one's life. Nixon, although not dispositive of the case before us, sets forth the parameters of the right to privacy that we apply to the present case. *We must use an analysis similar to that used in Nixon to determine whether the right to privacy of city employees is invaded when the city reveals their SSNs to all inquirers. We must determine whether the city employees have a legitimate expectation of privacy in their SSNs and then whether their privacy interests outweigh those interest benefited by disclosure of the numbers.*

Due to the federal legislative scheme involving the use of SSNs, city employees have a legitimate expectation of privacy in their SSNs. Having held that employees of the city have a reasonable expectation of privacy regarding the disclosure of their Social Security numbers, we must weigh these privacy interests against those favoring disclosure.

The public's interest in obtaining city employees' SSNs must be weighed against the harm caused by the invasion of employees' privacy resulting from the release of the SSNs.

It is fundamental tenet of democracy that the people, the press, and the media be fully informed about the processes of their government. However, this right is by no means boundless or unconditional.

The city's refusal to release its employees' SSNs does not significantly interfere with the public's right to monitor governmental conduct. The numbers by themselves reveal little information about the city's employees. The city provided appellees with enormous amounts of other information about each city employee; only the SSNs numbers were deleted. Employees' addresses, telephone numbers, salaries, level of education, and birth dates, among other things, were all provided. The data supplied by the city provides far more enlightening information about the composition of the city's workforce than would SSNs.

While the release of all city employees' SSNs would provide inquirers with little useful information about the organization of their government, the release of the numbers could allow an inquirer to discovery the intimate, person details of each city employee's life,, which are completely irrelevant to the operations of government.

We find today that the high potential for fraud and victimization caused by the unchecked release of city employee SSNs outweighs the minimal information about governmental processes gained through the release of the SSNs. We conclude that the United States Constitution forbid disclosure under the circumstances of this case. Therefore, reconciling federal constitutional law with Ohio's Public Records Act, we conclude that R.C. **149.43** does not mandate that the city of Akron disclose the SSNs of all of its employees upon demand.

Douglas *J., dissenting.* Today's decision is judicial activism at its best. Being troubled that a person's social security number might become the subject of public scrutiny (a proposition to which I am not unsympathetic), the majority fashions yet another exception to R.C. **149.43** and concludes that the disclosure of the city of Akron employees' social security numbers to appellees would violate the employees' constitutional right to privacy. Because there is no legal authority for such a holding and, indeed, because the law is actually to the contrary, I must respectfully dissent.

In support of this novel proposition, the majority cites no section of the Ohio Revised Code. There is good reason for this. There is none. The majority does not cite any provision of the Ohio Constitution supporting its position. There is good reason for this. There is none. The majority does not cite any federal statute in support of its holding. Again, there is good reason. There is none. No provision of the United States Constitution is cited in support. Why? There is none. No case law either federal or state of Ohio is given as authority. Why? Same answer – there is none.

Simply put, the majority has concocted an exception to R.C. **149.43** that does not, in law, exist. In doing so, the majority creates a corresponding right where none presently exists under either Ohio or federal law.

4. State ex rel. Thomas v. Ohio State Univ.; 71 Ohio St. 3d 245 (1994).

Names and addresses of state university animal research scientists not protected from disclosure under R.C. 149.43.

Facts

By letter dated May 2, 1994, relator, requested from respondents, Ohio State University ("OSU") certain information under the state Public Records Act, R.C. **149.43**.

Respondents contend that *the names and other information disclosing the identity of the animal research scientists* do not constitute records for purposes of the Public Records Act.

Although respondents have withheld information concerning the names, work departments, addresses, and telephone numbers of the scientists, Thomas now contends that he only wants the "names and work addresses" of these public employees. Therefore our analysis is limited only to foregoing information.

Court's Ruling

The names and work addresses of the animal research scientists serve to document the organization, functions, and operations of OSU's animal research activities. Therefore the names and work addresses of the individual scientists were improperly redacted from the provided records pursuant to R.C. 149.43(A)(1).

Respondents generally assert that redaction of names and other identifying information is proper when it is *reasonably believed to be necessary to protect the personal privacy and safety of the individual scientists and when the redaction does not unduly inhibit the public's right to know the organization's functions policies*, decisions, procedures, operations or other activities of the public university. More particularly, respondents assert that the "identity of individuals engaged in specific scientific research projects using animals *must be found to be constitutionally protected from public disclosure.*"

Respondents appear to advocate a balancing test similar to that adopted in the Freedom of Information Act ("FOIA"), the federal counterpart to R.C. 149.43. Pursuant to this FOIA exemption the court must balance the privacy interest of the individual against the public interest in disclosure.

However as respondents concede FOIA does not apply here, and R.C. 149.43 contains no similar personal-privacy exception.

In *State ex rel. Toledo Blade Co.*, 65 Ohio St. 3d at 266, 602 N.E.2d at 1164-1165, this court rejected contentions by the University of Toledo Foundation that federal and state common law privacy rights prohibit disclosure of donor names.

The right to privacy has several constitutional meanings, including the Fourth Amendment's restriction on government search and seizures and the due process and equal protection right to engage in highly personal activities; more specifically, it relates in a due process and equal protection context to certain rights of freedom of choice in marital, sexual, and reproductive matters. 3 Rotunda & Nowalk, *Treatise on Constitutional Law* (2 Ed. 1992) 298, Section 18.26. Names and work addresses do not appear to implicate the constitutional right of privacy.

In *State ex rel. Beacon Journal Publishing Co.*, *supra*, the court recently determined that federal constitutional privacy rights forbid disclosure of Social Security numbers ("SSNs") under R.C. 149.43 in the particular circumstances involved. *Although this court engaged in weighting interests benefited by disclosure against privacy interests, we emphasized that "[d]ue to the federal*

*legislative scheme involving the use of SSNs, city employees have a legitimate expectation of privacy in their SSNs. There is no similar legislative scheme protecting the names and work addresses of public employees in general or animal research scientists in particular. Additionally, although there is evidence of an increase in reported incidents of threats, harassment, and violence against animal research scientists, there does not appear to be the same "high potential for *** victimization" found by the court to be apparent from the disclosure of SSNs.* *Id.* at 612, 640 N.E. 2d at 169. Therefore, respondents' assertion that the constitutional right to privacy excepts names and work addresses from disclosure under R.C. 149.43 is without merit.

Respondents further claim that the disclosure of the names and work addresses of animal research scientists would have a chilling effect on their constitutional right to academic freedom. We rejected a similar contention by OSU in seeking to withhold tenure evaluators' names in *James*, finding the claimed injury to academic freedom of not receiving candid information in the tenure process to be "remote and attenuated." *James*, 70 Ohio St. 3d at 171, 637.

Therefore, while there is a concern that criminal conduct might result from the release of names and work addresses of animal research scientists under R.C. 149.43, the "answer is that criminal conduct should be punished by criminal sanctions" or that the General Assembly should consider a personal privacy exemption similar to those in FOIA, rather than resolving the matter through judicial expansion of the constitutional rights to privacy and academic freedom to forbid their disclosure.

5. *State ex rel. Keller v. Cox; 85 Ohio St. 3d 279 (1999).*

Purely personal information contained in the personnel file of a police officer which "might" be used by a criminal defendant "to achieve nefarious ends" is protected against disclosure by the constitutional right of privacy and the "good sense" rule.

Facts

Carl J. Faehl is the defendant in *United States v. Faehl*, case No. CR-3-98-035, a criminal case pending in the United States District Court for the Southern District of Ohio, was appointed to represent Faehl.

In April 1998, Beth Goldstein Lewis, an Assistant Federal Public Defender in Keller's office, written request under R.C. 149.43, Ohio's Public Records Act, to appellee Wilma Mahan,, the Miami County Sheriff's Department Records Custodian, to inspect and copy all personnel and internal affairs records relating to Miami County Sheriff's Detective Paul Reece. Keller wanted access to these records as part of his pretrial investigation and preparation on behalf of Faehl.

Keller believed that Detective Reece would be called as a witness against Faehl in the criminal trial.

In May 1998, the United States filed a motion in the federal case to order Faehl and his attorneys to cease and desist all efforts to obtain personal information about government law enforcement officers who would be witnesses in the criminal case. The government asserted that disclosure of the requested records would give Keller and Faehl access to the records that they would not otherwise be entitled to in the criminal case under Fed. R. Crim. P. 16 or *Brady v. Maryland* (1963), 373 U.S. 83, 83 S. Ct. 1194, 10 L.Ed. 2d 215, and that such disclosure would also violate Detective Reece's constitutional right to privacy.

Following the government's motion in the federal criminal case and the refusal of appellees, Mahan and Miami County Sheriff Charles A. Cox, to provide access to Detective Reece's personnel and internal affairs records, Keller filed a complaint in the Court of Appeals for Miami County to compel appellees to provide such access pursuant to R.C. 149.43. Appellees attached to their memorandum in support of a motion to dismiss an affidavit of Detective Reece stating that Faehl and an individual whom Faehl had contacted had threatened Detective Reece and his wife.

In September 1998, the court of appeals granted appellees' Civ. R. 12(B)(6) motion and dismissed Keller's mandamus complaint. The court of appeals reasoned that this result was mandated by paragraph two of the syllabus of *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E. 2d 83, which provides that "[i]n the criminal proceeding itself, a defendant may use only Crim. R. 16 to obtain discovery.

Court's Ruling

Keller asserts that the court of appeals erred in granting appellees' Civ. R. 12(B)(6) motion and dismissing his mandamus action for failure to state a claim upon which relief can be granted.

We do find that the court of appeals erred in overruling Keller's motion to strike the attached affidavit and unsworn factual allegations in appellees' memorandum in support of their Civ. R. 12(B)(6) dismissal motion. Movants like appellees cannot rely on allegations or evidence outside the complaint to support their motion.

Nevertheless, the court of appeals' error in overruling Keller's motion to strike did not prejudice Keller.

Regarding Keller's main contentions attacking in court of appeals' decision to dismiss pursuant to Civ. R. 12(B)(6) his complaint for a writ of mandamus, we disagree with the court of appeals that *Steckman* applies to this case.

But based on *Kallstrom v. Columbus* (C.A. 6, 1998), 136 F. 3d 1055, the requested records are exempt because they are protected by the constitutional right of privacy. Police officers' files that contain the names of the officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, medical information, and the like should not be available to a defendant who might use the information to achieve nefarious ends. ***This information should be protected not only by the constitutional right of privacy, but, also, we are persuaded that there must be a "good sense" rule when such information about a law enforcement officer is sought by a defendant in a criminal case.*** On the other hand, any records needed by a defendant in a criminal case that reflect on discipline, citizen complaints, or how an officer does her or his job can be obtained if any exist, through internal affairs files in accordance with previous decisions of this court.

Cook, J. dissents.

As a preliminary matter, I agree with the majority that the constitutional right of privacy exempts certain personnel records of police officers from disclosure under the Public Records Act. See *Kallstrom v. Columbus* (C.A. 6, 1998), 136 F. 3d 1055.

However any argument that Detective Reece's constitutional right to privacy exempts all of the requested records is, at this juncture, premature. *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St. 3d 605, 640 N.E. 2d 164. Exemptions from disclosure must be strictly construed against the public records custodian, and the custodian has the burden to establish an exemption. Based solely on the allegations of the complaint, appellees have not established that all of the contents of the requested personnel files and internal affairs investigative reports relating to Detective Reece are exempt. In this regard, *Kallstrom*, the sole authority cited by the majority to support its holding, does not hold that the constitutional right to privacy necessarily exempts from disclosure the entire contents of the testifying officers' personnel files. *Kallstrom* merely holds that disclosure of testifying police officers' addresses, phone numbers and driver's licenses, as well as the names, addresses, and phone numbers of their family members, violates their fundamental constitutional rights to privacy, but that other information in their personnel files would have to be analyzed to see whether it also violated these constitutional rights.

By affirming the dismissal of Keller's action, the majority had to have assumed, before the court of appeals conducted an in camera inspection of the records that all of the requested personnel records in this case are of the types that are shielded from disclosure by the constitutional right of privacy.

Finally, to the extent that the majority relies on a "good sense" rule in addition to the constitutional right of privacy, we have rejected analogous public-policy exemptions by holding that "in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighted and balanced the competing public policy considerations between the public's right to

know how its state agencies make decisions and the potential harm inconvenience or burden imposed on the agency by disclosure."

6. ***Officer Melissa Kallstrom, et al. v. City of Columbus; Sixth Circuit Court of Appeals; United States District Court; Decided and Filed: February 12, 1998; Case No. 96-3853.***

A city's disclosure of personal information about police officers to criminal defense counsel involves a privacy right of "constitutional dimensions."

A city's policy of freely releasing personal information about undercover police officers from personnel files, creates a constitutionally cognizable "special danger," giving rise to liability under 42 USC § 1983.

Facts

The three plaintiffs are undercover officers employed by the Columbus Police Department. All three were actively involved in the drug conspiracy investigation of the Short North Posse, a violent gang in the Short North area of Columbus, Ohio. Plaintiffs testified at the trial of eight of the Short North Posse defendants.

During the Russell criminal trial, defense counsel requested and obtained from the City Kallstrom's personnel and pre-employment file, which defense counsel appears to have passed on to several of the Russell defendants. The City additionally released Officer Coelho's file to the Police Officers for Equal Rights organization following its request for the file in the fall of 1995 in order to investigate possible discriminatory hiring and promotion practices by the City.

Prior to accepting employment with the City, the plaintiffs were assured by the City that personal information contained in their files would be held in strict confidence.

The officers brought suit under 42 U.S.C. 1983 and 1988 against the City, claiming that the dissemination of personal information contained in their personnel files violates their right to privacy as guaranteed by the Due Process Clause of the Fourteenth Amendment.

The district court determined that the law of this circuit foreclosed the officers' constitutional claims. Specifically, the court concluded that the Six Circuit has "steadfastly refused to recognize a general constitutionally – protected right to privacy that would shield an individual from government release of personal information about the individual."

Court's Ruling

Section 1983 imposes civil liability on a person acting under color of state law who deprives another of the "rights, privileges, or immunities secured by the Constitution and laws." *The threshold question, therefore, is whether the City deprived the officers of a right "secured by the Constitution and laws."*

The Supreme Court has long recognized that the due process clause "bar[s] certain government actions regardless of the fairness of the procedures used to implement them." This substantive component of the Due Process Clause includes not only the privileges and rights expressly enumerated by the Bill of Rights, but includes the fundamental rights "implicit in the concept of ordered liberty."

Although the Supreme Court first recognized the right to privacy over thirty years ago, the boundaries of the right to privacy have not been clearly delineated. The first line of cases involves the individual's interest in independent decision making in important life-shaping matters, while the second line of cases recognizes the individual's interest in avoiding disclosure of highly personal matters.

The officers claim the City's disclosure of the personal information contained in their personnel records implicates their fundamental interest in family relationships, or "the right not to have your family subject to harm merely because of your career."

Although the *Whalen* and *Nixon* costs appear to recognize constitutional protection for an individual's interest in safeguarding personal matters from public view, in both cases the Court found that public interests outweighed the individual's privacy interests.

This circuit has read *Whalen* and *Nixon* narrowly, and will only balance an individual's interest in nondisclosure of informational privacy against the public's interest in and need for the invasion of privacy where the individual privacy interest is of constitutional dimension. The question then is whether the officers' privacy interests in the personal information contained in their personnel records "are of constitutional dimension." We hold that the officers' privacy interests do indeed implicate a fundamental liberty interest, specifically their interest in preserving their lives and the lives of their family members, as well as preserving their personal security and bodily integrity. It goes without saying that an individual's "interest in preserving her life is one of constitutional dimension."

In light of the Short North Posse's propensity for violence and intimidation, the district court found that the City's release of the plaintiffs-appellants' addresses, phone numbers, created a serious risk to the personal safety of the plaintiffs and those relatives named in the files. We see no reason to doubt that where disclosure of this personal information may fall into the hands of persons likely to seek revenge upon the officers for their involvement in the Russell case, the City created a very real threat to the officers' and their family members' personal security and bodily integrity, and possibly their lives. *Accordingly, we hold that*

the City's disclosure of this private information about the officers to defense counsel in the Russell case rises to constitutional dimensions, thereby requiring us under to balance the officers' interests against those of the City.

The district court found that although there was no indication that the Police Officers for Equal Rights organization posed any threat to the officers and their family members, *disclosure even to that group of the officers' phone numbers, addresses, and driver's licenses, and their family members' names, addresses and phone numbers "increases the risk that the information will fall into the wrong hands."*

We do not mean to imply that every governmental act which intrudes upon or threatens to intrude upon a individual's body invokes the Fourteen Amendment.

Having found that the officers have a fundamental constitutional interest in preventing the release of personal information contained in their personnel files where such disclosure creates a substantial risk of serious bodily harm, *we must now turn to whether the City's actions narrowly serve a compelling public purpose.*

The City believed Ohio's Public Records Act, Ohio Rev. Code Ann. § 143.43 required it to disclose the personal information contained in the officers' records.

For purposes of this case, we assume that the interest served by allowing public access to agency records rises to the level of a compelling state interest. *Nevertheless, the City's release to the criminal defense counsel of the officers' and their family members' personal information does not narrowly serve these interests.*

We simply fail to see how placing this personal information into the hands of the Russell defendants in any way increases public understanding of the City's law enforcement agency.

Accordingly, we hold that the City's actions in automatically disclosing this information to any member of the public requesting it are not narrowly tailored to serve this important public interest. Before holding the City liable for violation of the officers' constitutional rights to privacy, we must address whether the actions or potential actions of private acts, namely the gang member of the Short North Posse, can be attributed to the City.

Several courts of appeals have recognized a constitutional violation under a state-created-danger theory of liability. In other words, while the state generally does not shoulder an affirmative duty to protect its citizens from private acts of violence, it may not cause or greatly increase the risk of harm to its citizens without due process of law through its own affirmative acts. *Although our circuit has never held the state or a state actor liable under the Fourteenth Amendment for private acts of violence, we nevertheless have recognized the possibility of doing so under the state-created-danger theory.*

Applying the state-created-danger theory to the facts of this case, we hold that the City's actions placed the officers and their family members in "special danger" by substantially increasing the likelihood that a private act would deprive them of their liberty interest in personal security.

We therefore hold that the City's policy of freely releasing this information from the undercover officers' personnel files under these circumstances creates a constitutionally cognizable "special danger," giving rise to liability under 1983.

The procedural component of the Fourteenth Amendment's Due Process Clause, however, at a minimum requires that the City notify the officers of a request for their addresses, phone numbers, and driver's licenses, and the names addresses, and phone numbers of their family, prior to releasing this information so that they may have the opportunity to invoke their constitutionally protected rights to privacy and personal security.

Moreover, without a clear development of the factual circumstances that would accompany any future release of personal information included in the officers' future release of personal information included in the officers' personnel files, any finding regarding future risk to the personal safety of the officers and their family would be speculative.

The City has voiced its intention to continue releasing all personal information contained in the officers' personnel files upon requests by members of the public for such information under Ohio's Public Records Act. Ohio's Public Records Act, however does not require state agencies to notify public employees whenever a member of the public requests release of their personnel files. If the officers and their families are to have a meaningful opportunity to protect themselves against unjustified or arbitrary deprivation of their fundamental rights to privacy and personal security, the City must provide the officers with prior notice and the opportunity to be heard.

On remand, the district court should consider whether release of other private information contained in the officers' personnel files also poses the same risk. In reconsidering the officers' motion for injunctive relief, the district court should look to fashioning the procedural protections that are appropriate to provide the officers with meaningful notice and the opportunity to be heard.

Because the City's decision to continue releasing this information potentially places the officers and their families at risk of irreparable harm that cannot be adequately remedied at law, the officers are entitled to injunctive relief prohibiting the City from again disclosing this information without first providing the officers meaningful notice. Accordingly we REVERSE the lower court order denying the officers' request for a preliminary and permanent injunction and dismissing their claims. We REMAND for further proceedings consistent with this opinion.

7. *State, ex rel. McCleary v. Robert*; 88 Ohio St. 3d 365 (2000).

Personal information of private citizens obtained by a "public office" reduced to writing, placed in record form, and used by public office in implementing some lawful regulatory policy, is not a "public record" as contemplated by R.C. 149.43.

Facts

In May, 1996, the City of Columbus implemented a photo identification for its Recreation and Parks Department ("Department"). The program was instituted primarily to combat the increase incidents of violent behavior and vandalism at city swimming pools. The photo identification program requires parents of children who use city pools and other recreational facilities to provide certain information regarding their children. Parents provide the Department with the names, home addresses, family information, emergency contact information and medical history information of participating children and, in return, each child is provided a photographic identification card to present when using pools and recreation centers.

In November of 1996, McCleary requested a copy of the Department's electronic database which contained the personal, identifying information regarding those children who were participating in the photo identification program. The Department refused to release the database. On January 24, 1997, McCleary filed a complaint in the Court of Common Pleas of Franklin County. The complaint sought, pursuant to R.C. 149.43, to compel the Department to provide a copy of the photo identification program database. Summary judgment was granted in favor of the City. This ruling was overturned by the Court of Appeals. The Court of Appeals ruling was reviewed by the Ohio Supreme Court.

Court's Ruling

The issue presented for our review is whether the Department's database containing certain personal, identifying information regarding children who use the city's recreational facility has a public record subject to disclosure pursuant to R.C. 149, Ohio's Public Records Act.

There is no dispute that the requested information is under the custody and control of a public office. Nonetheless, in order to resolve the issue under consideration, we must determine whether the information sought is a "record" as that term is defined by R.C. 149.011(G).

The contention that the information requested in this matter does not fall under the statutory definition of "record" in R.C. 149.011(G) is *well taken*. For the reasons that follow, we conclude that the information requested by appellee is not a "record" as that term is contemplated by the Ohio's Public Records Act. In

State, ex rel. Fant v. Enright, 66 Ohio St. 3d 186 (1993), we emphasized that "not all items in a personnel file may be considered public records." A "public record" is a "any record that is kept by any public office . . ." However, a "record" is something that is created or received by or coming under the jurisdiction of any public office . . . ***which serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the office.***" To the extent that any item contained in the personnel file is not a "record," *i.e.*, ***does not*** serve to document the organization, etc. of the public office, it is not a public record and need not be disclosed. To the extent that an item is not a public record and is "personal information" as defined by R.C. 1347.01(E), a public office "would be under an affirmative duty, pursuant to R.C. 1347.05(G), to prevent its disclosure." R.C. 1347.05(G) provides that all government agencies that maintain personal information systems shall "take reasonable precautions to protect personal information in the system from unauthorized modification, destruction, use or disclosure."

In a footnote, the Ohio Supreme Court noted that R.C. 1347.08(A) provides that any governmental agency which maintains a personal information system, "upon the request and proper identification of any person who is the subject of the personal information in the system," shall: " (2) Permit the person, the person's legal guardian, or an attorney who presents a signed, written authorization made by the person, to inspect all personal information in the system of which the person is a subject."

While the information sought was created by and under the custody of a public office, *i.e.*, the Department, the specific information requested consists of personal information regarding children who participate in the Department's photo identification program. Standing alone, that information, *i.e.*, names of children, home addresses, names of parents and guardians, and medical information does nothing to document any aspect of the city's Recreation and Parks Department.

At this point, the Ohio Supreme Court discussed privacy concerns identified by the United States Supreme Court under the Freedom of Information Act. Similarly, it cites to *Kallstrom v. Columbus*, 136 F.3d 1055, 1064-1065 where the Sixth Circuit exempted from disclosure certain personal information contained in the personnel file of law enforcement officers. The court also cites to *State, ex rel. Keller v. Cox*, 85 Ohio St. 3d 279 (1999) where the Court in reliance on *Kallstrom* exempted essentially identical information from disclosure.

After reviewing the foregoing, the court goes on to state the rationale espoused in the above-referenced cases as equally applicable to the instant action. ". . . we fail to see how release of the requested information to appellee, or anyone else, would provide any further insight into the operation of department's photo identification program than that already available."

* * *

In the instant matter, disclosing the requested information would do nothing to further the purposes of the act, *i.e.*, to ensure accountability of government to those being governed and the public's right to monitor the conduct of government.

The court finally noted that the information being requested was not contained in a personnel file. As such, the court went on to note "***It seems to us that there is a clear distinction between public employees and their public employment personnel files and files of private citizens created by government.***"

We, therefore, find that personal information of private citizens obtained by a "public office," reduce to writing and placed in record form and used by the public office in implementing some lawful, regulatory policy is not "public record" as contemplated by R.C. 149.43.

However, even if we were to conclude that the requested information is a "record" for purposes of R.C. Chapter 149, appellee would still not be entitled to the requested writ of mandamus. Specifically, appellant contends that the information sought is exempt under R.C. 149.43(A)(1)(p), now (q). This section of the Public Records Act specifically exempts from disclosure any record "the release of which is prohibited by state or federal law." ***Appellant urges that the records in contention are protected by the fundamental right of privacy founded in the Fourteenth Amendment due process clause of the United States Constitution.*** Assuming, *arguendo*, that the information requested herein is public record, we conclude that the Department has met its burden of proving that the information is exempt from disclosure.

In *State, ex rel. Keller v. Cox*, we recognized a constitutional right of privacy and certain personal information contained in the personnel files of law enforcement officers. ***We noted in Keller, that this information would be protected not only by the constitutional right of privacy, but, also, that there should be a "good sense" rule when such information is sought.*** In reaching our conclusions, we reasoned that personnel files containing the names of police officers' children, spouses, parents, home addresses, telephone numbers and medical information, and similar information should not be available to anyone "who might use the information ***to achieve nefarious ends.***"

Our decision in *Keller* was based on the Sixth Circuit Court of Appeals case in *Kallstrom v. Columbus*. The Federal Court of Appeals in *Kallstrom* held that the police officers' privacy interest and the personal information contained in the personnel records implicated a fundamental liberty interest in preserving their lives and lives of their family members as well as preserving their personal security and bodily integrity.

The information sought in the case at bar is no different from that information prohibited from disclosure in *Keller* and *Kallstrom*. The officers' personnel files in *Keller* and *Kallstrom* contained essentially the same type of information, *i.e.*, home addresses, phone numbers, names of family members, and medical records as that contained in the Department's database. As did the situations in *Keller* and

Kallstrom, a release of the requested information by the Department in this matter, places those who the subject of the records request at risk of irreparable harm, albeit not necessarily by appellee.

Furthermore, any perceived threat that would likely follow the release of such information, *no matter how attenuated*, cannot be discounted. We live in a time that has commonly been referred as to The Information Age. Technological advances have made many aspects of our lives easier and more enjoyable but have also made it possible to generate and collect vast amounts of personal, identifying information through everyday transaction such as credit card purchases and cellular telephone use.

In that regard, it is not beyond the realm of possibility that the information at issue herein might be posted on the Internet and transmitted to millions of people. Access to the Internet presents no difficulty. Anyone with a personal computer can transmit and receive information online via the Internet. The court has long recognized that children possess certain fundamental rights among which are the right "to be free from physical, sexual and other abuses." In re Schmit, 25 Ohio St. 3d 331 (1986). Because, unfortunately, we live in a society where children all too often fall victim to abuse, it is necessary to take precautions to prevent, or at least limit, any opportunities for victimization.

We do not suggest that the appellee poses any threat to the safety of the children who are the subject of the records sought. There is nothing in the record before this court or otherwise, that indicates that appellee intends any harm to these children. However, in *Kallstrom*, the court noted that disclosure of personal information, even to a benevolent organization posing no apparent threat to the safety of the officers or their families, increases the risk that that information will fall into the wrong hands. Moreover, this court in *Keller* and the federal court in *Kallstrom* were not unmindful that the release of such personal information could increase the potential for harm to those least able to protect themselves. Those decisions sought not only to protect police officers but the officers' family members as well.

The case now before us is no different. Because of the inherent vulnerability of children, release of personal information of this nature creates an unacceptable risk that a child could be victimized. We cannot in good conscience take that chance.

II. ACCESS TO POLICE RECORDS.

1. *State ex rel. Beacon Journal Publishing Co. v. Kent State Univ.*
68 Ohio St. 3d 40 (1993)

Objective facts and observations recorded by an investigating officer are not protected from disclosure under the confidential law enforcement exemption contained in R.C. 149.43A(2)(c).

Facts

In April 1992, relators, filed a complaint for mandamus against respondents, Kent State university ("KSU") and KSU's police chief and Director of Marketing and Communications. The Beacon Journal sought documents relating to reports that KSU employees working in the admissions office had received threatening letters. The Beacon Journal also sought documents related to reported misconduct by Bruce Riddle, former KSU Director of the Department of Admissions.

When faced with the Beacon Journal's mandamus petition, the respondents released a few records and submitted the remaining forty-four file folders of documents to the court of appeals for an in camera inspection. The court of appeals found almost every one of the documents to qualify as an exempt "confidential law enforcement investigatory record" under R.C. 149.43. The Beacon Journal and reporter Umrigar disagreed with the results of the in camera review, and have appealed as a matter of right to this court.

Court's Ruling

We find that the court of appeals erred in exempting from release virtually all of the KSU investigative file and accordingly remand the case to the court of appeals for release of further documents.

Admittedly, reversing the court of appeals' decision as to the disclosure of records on the basis of a factual determination, following its in camera review of the records, requires finding an abuse of discretion.

Respondents also overused the exemption for investigatory work product, R.C. 149.43(A)(2)(c). That exemption "protects an investigator's deliberative and subjective analysis his interpretation of the facts, his theory of the case, and his investigative plans. The exception does not encompass the objective facts and observations he has recorded." *NBC, supra*, at *State ex rel. Natl. Broadcasting Co. v. Cleveland* (1991), 57 Ohio St. 3d 77, 566.

2. *State ex rel. Steckman v. Jackson*; 70 Ohio St. 3d 420 (1994).

In a pending criminal case, persons seeking to secure records alleged to be "public records," access to which has been requested and denied, must, in accordance with R.C. 149.43(C), use mandamus. (*State ex rel. Scanlon v. Deters* [1989], 45 Ohio St. 3d 376, 544 N.E. 2d 680, progeny, overruled; R.C. 149.43[C], construed and applied.)

In the criminal proceeding itself, a defendant may use only Crim.R. 16 to obtain discovery.

Information, not subject to discovery pursuant to Crim.R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specifically exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4).

Once a record becomes exempt from release as a "trial preparation record," that record does not lose its exempt status unless and until all "trials," "actions" and/or "proceedings" have been fully completed.

Except as required by Crim.R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in R.C. 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation.

The work product exception does not include ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of driving while under the influence and records containing the results of intoxilyzer tests. Routine offense and incident reports are subject to immediate release upon request. If release is refused an action in mandamus, to R.C. 149.43(C), will lie to secure release of the records.

A defendant in a criminal case who has exhausted the direct appeals of her or his conviction may not avail herself or himself of R.C. 149.43 to support a petition for post-conviction relief. (*State ex rel. Clark v. Toledo* [1990], 54 Ohio St. 3d 55, 560 N.E.2d 1313, and its progeny, overruled.)

Discovery orders are interlocutory and, as such, are neither final nor appealable.

Court's Ruling

These cases come to us each in a different procedural posture from the others. In case No. 92-2254, the designee of a defendant in a criminal case, whose case has not yet been tried, has filed an R.C. 149.43(C) mandamus action to obtain records that are alleged to be public. In case No. 93-1336, we have a criminal defendant who was convicted and whose conviction was affirmed on appeal seeking public records by way of an R.C. 149.43(C) mandamus action to be used, presumably, in post-conviction relief proceedings. An additional wrinkle in case No. 93-1336 is that the records to be given to a designee to be named later. In case No. 92-1758,

we find a person charged with a crime, seeking by way of a pretrial motion in his criminal proceeding as opposed to bringing a mandamus action, records he alleges to be public.

Given the plethora of cases we, the courts of appeals and trial courts have decided on the issue of public records in criminal proceedings, each of the issues presented could demand extensive analytical ponderings. However given our decision today, detailed *infra*, that is no longer necessary. By necessity, we cannot list the citation to each and every case, that our decision affects even though we recognize that would be useful. Suffice it to say that any and all cases (even though not specifically cited) that are contrary, in whole or in part, to today's decision are of no further force or effect. We emphasize again that today's decision only affects public records involved in pending criminal proceedings as that term is hereinafter construed.

Therefore, in a pending criminal case, persons seeking to secure records alleged to be "public records," access to which has been requested and denied, must, in accordance with R.C. **149.43(C)**, use mandamus. No other procedure of any kind, whether by separate action, motion or otherwise, will be recognized. Accordingly, *State ex rel. Scanlon v. Deters* (1989), 45 Ohio St. 3d 376, 544 N.E. 2d 680, and its progeny are overruled.

If the records sought are, in fact, public and not subject to any exception as to their release, then whether or not a person is acting as a designee is not an issue.

Upon full consideration, a majority of this court now feels that some of our past decisions have not served well the criminal justice system. The playing field is not level as there is no reciprocal right of prosecutors to obtain additional discovery beyond Crim.R. 16(C). ***Witness intimidation is now more real than imagined.*** Criminal trials are now regularly being disrupted while R.C. **149.43** procedures are pursued. It would seem that the people also have a right to a speedy trial – a speedy trial of an indicted defendant. Trial courts, courts of appeals and this court are consuming tremendous time and resources to review, in some cases, boxes and boxes full of records alleged to be public. Much of the information being reviewed is detrimental to the defendant, which raises yet another problem – how can a trial judge and appellate judges, who become familiar with such information, fairly judge a defendant when they have reviewed information that may not ever be admitted or even admissible as evidence? Last, but not least, are the speedy trial issues raised by defendants when it is the state appealing an order to release documents.

Accordingly, we now hold, for reasons expressed *infra*, that in the criminal proceeding itself, a defendant may use only Crim.R. 16 to obtain discovery.

We are cognizant of, and have reviewed, all of our cases on this subject as well as a number of court of appeals and trial court decisions. We make this point so that any interested reader can be assured that even absent citation to a particular case,

we have in fact considered, in reaching our decision herein, each matter pertinent to this decision. The following listing of cases is only for purposes of illustration:

* * *

Any objective review of these cases leads to the conclusion that we construed the last cited case too liberally – the 1980 Beacon Journal case. That case involved records compiled by the University of Akron's Security Department concerning the alleged rape of a university student, the death of the student and circumstances surrounding the death. The Beacon Journal requested permission to inspect the police reports and the university refused to produce the records. The Beacon Journal brought a mandamus action. The records had been compiled in 1978. R.C. **149.43** was amended in 1980. 138 Ohio Laws, Part 1, 245. Pursuant to the amended statute, the court of appeals granted the writ and ordered the university to permit inspection and copying of the two reports. The university appealed to this court.

In the syllabus of Beacon Journal, we held: "Law enforcement records compiled before the amendment of R.C. **149.43** are available to the public provided they are public records as defined by R.C. **149.43** and are not exempted from disclosure by its provisions." (Emphasis added.) While there is considerable discussion in the case concerning the then – new amendments to R.C. **149.43**, the narrow holding of the case, as set forth in the syllabus, involves only the retroactive vs. prospective effect of the amendments. In addition, while this court held the records in question should be released, we described those records by saying that "[t]he materials sought by Beacon Journal can only be characterized as routine factual reports. In the last paragraph of the opinion, we said: "For the foregoing reasons, we conclude that the allowance of access to these routine incident reports by the Court of Appeals was proper, and its judgment is hereby affirmed." (Emphasis added.) *Id.* at 398, 18 O.O. 3d at 538, 415 N.E. 2d at 315.

From this narrow beginning, we, in NBC I, *supra* 38 Ohio St. 3d 79, 526 N.E. 2d 786, made a quantum leap (citing Beacon Journal) and in the third paragraph of the syllabus held that "[t]he specific investigatory work product exception, R.C. **149.43(A)(2)(c)**, protects an investigator's deliberative and subjective analysis, his interpretation of the facts, his theory of the case, and his investigative plans. The exception does not encompass the objective facts and observations he has recorded." NBC I was followed by one case after another (see listing *supra*) usually citing NBC I, which, upon reflection improperly consolidated and confused two separate exceptions found in R.C. **149.43(A)(2)(c)**. The word "or" in the section should not be ignored.

Following this trend, we then decided Clark I, *supra* 54 Ohio St. 3d 55, 560 N.E. 2d 1313, a case involving post-conviction relief. Even though NBC I had nothing to do with a post-conviction petition, nevertheless NBC I was cited in Clark I for the proposition that R.C. **149.43** had increased substantially the right of citizens to governmental information.

Relying upon these cases, courts (and the persons and agencies involved with producing and keeping such records) are regularly faced with demands to release the entire contents of a prosecutor's file and all the records accumulated and maintained by a police department in connection with a particular defendant and his or her criminal proceeding. Because of our cases, the exceptions to require disclosure found in R.C. **149.43(A)(2)(c)** – "specific investigatory work product" and R.C. **149.43(A)(4)** – "trial preparation record" -- have been virtually rendered meaningless. Additionally, these cases have, for all practical purposes, just about written Rule 16 out of the Criminal Rules. Simply put, this chaos cannot be permitted to continue.

Therefore, we now hold that information, not subject to discovery pursuant to Crim.R. 16(B), contained in the file of a prosecutor who is prosecuting a criminal matter, is not subject to release as a public record pursuant to R.C. 149.43 and is specially exempt from release as a trial preparation record in accordance with R.C. 149.43(A)(4).

To determine how long records exempt under R.C. **149.43(A)(4)** remain exempt,, we must look to the definitions of the words "trial" "action" and "proceeding."

"Trial" is defined as "[a] judicial examination and determination of issues between parties to [an] action whether they be issues of law, or of fact', before a court that has jurisdiction." Black's Law Dictionary (6 Ed. Rev. 1990) 1504. For 14 action "the definition" includes all formal proceedings in a court of justice attendant upon the demand of a right made by one person of another in such court, including an adjudication upon the right and its enforcement or denial by the court." *Id.* at 28. "Proceeding" is the "[r]egular and orderly progress in form of law, including all possible steps in an action from its commencement to the execution of judgment." *Id.* at 1204.

None of these definitions, including the definition of "trial" make any distinction between an initial court proceeding, direct appeals and/or post conviction relief. ***Accordingly, we also hold that once a record becomes exempt from release as a "trial preparation record," that record does not lose its exempt status unless and until all "trials," "actions" and/or "proceedings" have been fully completed.***

This holding may seem harsh but it is not without good reason.

In *State ex rel. Beacon Journal Publishing Co. v. Univ. of Akron*, 64 Ohio St. 2d 392, 18 O.O. 3d 534, 415 N.E. 2d 310, discussed extensively *supra*, this court purported to discuss the specific investigatory work product exemption found in R.C. **149.43(A)(2)(c)**.

The content of the record, not the fact that it was created during the investigation of a specific crime, determines whether material may be withheld as a 'specific investigatory work product' exception.

"Specific investigatory work product can best be defined as material that demonstrably contains or reveals the theories, mental impressions and thought processes of the investigator." NBC I at 84, 526 N.E. 2d at 790.

Given the foregoing it becomes necessary to determine the question: "What is work product?" R.C. **149.43** does not define the term. The Rules of Criminal Procedure do not define the term. What then is the origin of the term?

Accordingly, we further find that except as required by Crim.R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in R.C. 149.43(A)(2)(c), excepted from required release as said information is compiled in anticipation of litigation. The work product exception does not including ongoing routine offense and incident reports, including, but not limited to, records relating to a charge of driving while under the influence and records containing the results of intoxilyzer tests. Routine offense and incident reports are subject to immediate release upon request. If release is refused, an action in mandamus.

3. *State ex rel. Police Officers for Equal Rights v. Lashutka; 72 Ohio St. 3d 185 (1995).*

Records concerning the regulation and discipline of police officers in connection with the performance of their duties – provided there is no pending criminal prosecution or proceedings – must be produced under R.C. 149.43.

Facts

On March 23, 1995, relators filed an original action in this court denominated as "Petition for Writs of Mandamus and Prohibition."

Relators allege that, pursuant to R.C. **149.43**, they, over a period of time, requested from appropriate officials the opportunity to inspect certain records of the city of Columbus, specifically, records of the Division of Police.

Relators further allege that the respondents are about to destroy records of the Division of Police pursuant to the city of Columbus's records retention policy, adopted in June 1994, and that some of the records scheduled for destruction are records being sought by relators pursuant to their R.C. **149.43** requests.

All the records sought concern regulation and discipline of police officers in connection with performance of their duties. None of the records sought involves pending criminal prosecutions or proceedings.

Court's Ruling

This is yet another in a series of cases involving public records. While we have, time and time again, informed public officials and public agencies of their duties pursuant to R.C. 149.43 (to release records in their possession which records clearly belong to the public), we, nevertheless, continue to see obfuscation, cunctation, delay and even arrogance in far too many cases. This case is a good example.

In response to their request, relators received a letter (which is part of the record in this) from the Legal Bureau of the Division of Police. the letter, dated February 17, 1995, emphatically states that the request of relators for records is denied on the authority of *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E. 2d 83. The letter states, in part, that "[a]pplying the language in *Steckman* to Internal Affairs investigations, it is clear they re not public records." (Emphasis sic.) The Division of Police is just plain wrong!

The requested peremptory writ of prohibition is denied. That part of relator's petition is dismissed.

The act of destroying (or keeping) public records is neither judicial nor quasijudicial. thus, the first prong of the test for prohibition (that the court or officer against whom prohibition is sought is about to exercise judicial or quasijudicial power) is clearly nonexistent here. Therefore, the prohibition portion of the petition is denied.

The mandamus portion of relators petition, however, is granted.

In the previously reference letter of February 17, 1995, the Division of Police takes exactly the opposite view of what *Steckman* says and holds. It might very well be said that the action of respondents in relying on *Steckman* to deny relators' request is an intentional act of disregard. Throughout *Steckman*, we referenced "pending criminal case," "criminal proceeding itself," and "prosecuting a criminal matter," so as to make clear in what context *Steckman* applies. To now see the case being used to deny records that are clearly public and not exempt under any of the exceptions to R.C. 149.43 borders itself on the criminal. *Steckman* was designed to be used as a shield – not a sword.

4. *State ex rel. Multimedia, Inc. v. Snowden; 72 Ohio St. Ed 141 (1994).*

Investigative files on police applicants and the records contained therein are public records under R.C. 149.43 and must be disclosed unless specifically exempted.

Facts

Respondent, Cincinnati Police Chief Michael Snowden, is responsible for the city's police recruitment process. As part of this process, the police conduct an investigation of all applicants. The investigation generates the following records:

(1) polygraph examination report, (2) National Crime Information Center ("NCIC") and Regional Crime Information Center ("RCIC") "rap sheets," (3) personal history questionnaires, (4) police psychologist report, (5) background investigation report and (6) credit history. Police applicants are encouraged to be candid and forthcoming about their personal histories for the information disclosed by them.

Snowden concedes that the requested records are "records" for purposes of R.C. **149.43** and that they are held by the city's Police Division, which is a "public office." See R.C. 149.011(A) and (G). However, Snowden asserts that the records are excepted from disclosure under R.C. **149.43(A)(2)** as "confidential law enforcement investigatory records."

Court's Ruling

Snowden contends that not excepting the subject records as confidential law enforcement investigatory records will result, in police applicant's not being as forthcoming and candid in the recruitment process. *We have rejected similar contentions by holding that "in enumerating very narrow, specific exceptions to the public records statute, the General Assembly has already weighed and balanced the competing public policy considerations between the public's right to know how its state agencies make decisions and the potential harm, inconvenience or burden imposed on the agency by disclosure."*

Snowden next asserts that the release of records containing information derived from computerized criminal databases like NCIC and RCIC is prohibited. As relator concedes, NCIC and RCIC "rap sheets" generated in the investigation of police applicants are prohibited from being released by state and federal law.

Snowden finally contends that a psychological examination resulting from the referral of an applicant to a police psychologist from evaluation need not be released because it is an R.C. **149.43(A)(3)** "medical record" excepted from disclosure.

In *State ex rel. Toledo Blade Co. v. Telb* (C.P. 1990), 50 Ohio Misc. 2d 1, 10, 552 N.E. 2d 243, 251, the court held that documents containing opinions of psychologists sought by a sheriff to assist him in making a decision as to an employee's suitability for continued employment were not medical records excepted from disclosure under R.C. **149.43**.

Therefore, the psychological report that is part of the requested records is not a medical record that is excepted from disclosure.

5. ***Cleveland Police Patrolmen's Assn. v. Cleveland*; 110 Ohio App. 3d 796 (1996).**

Internal police investigatory records prepared by an organized-crime intelligence unit, were public records subject to disclosure under R.C. 149.43, absent a pending criminal proceeding.

Facts

Appellant, city of Cleveland, appeals from the judgment of the common pleas court that issued a writ of mandamus compelling the city to disclose certain investigatory reports to appellee, Cleveland Police Patrolmen's Association.

This dispute centers on an investigation as to whether city employees were improperly voiding parking tickets.

The city proceeded with an administrative investigation of the patrol officers. The CPPA filed for a writ of mandamus from the trial court, requesting that the court order the city to turn over certain investigatory reports. The report at issue is an investigative report prepared by an organized-crime intelligence unit.

The common pleas court enjoined the disciplinary hearing and granted the writ of mandamus, which ordered the city to produce the requested documents. The city timely appealed.

Court's Ruling

Generally, internal police investigatory reports are public records subject to disclosure. *State ex rel. Police Officers for Equal Rights v. Lashutka* (1995), 72 Ohio St. 3d 185, 188, 648 N.E. 2d 808 (police internal investigative reports which are not the subject of a pending criminal case are public records subject to disclosure); *State ex rel. Multimedia, Inc. v. Snowden, supra*, 72 Ohio St. 3d at 143, 647 N.E. 2d at 1377.

The recent Ohio Supreme Court case of *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E. 2d 83, redefined the parameters of discovery in criminal proceedings. The court stated in paragraph five of the syllabus as follows:

"Except as required by Crim.R. 16, information assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in R.C. **149.43(A)(2)(c)**, excepted from required release as said information is compiled in anticipation of litigation. The work product exception does not include ongoing routine offense and incident reports including but not limited to, records relating to a charge of driving while under the influence.

The city argues that *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E. 2d 83 prevents the disclosure of the report in question.

However, the Court holds that internal police investigation reports, in the absence of criminal prosecutions, are public record subject to disclosure.

6. *State ex rel. Beacon Journal Publishing Co. v. Maurer* (2001), 91 Ohio St. 3d 54.

Detailed narrative statements incorporated into an incident report, which is public record, becomes public record, notwithstanding the statements may disclose the identity of an uncharged suspect.

Facts

On February 28, 1999, Robert G. Huffman telephoned the Wayne County Justice Center. Huffman told the dispatcher there that he was at the Oak Grove Cemetery in Shreve, Ohio, waiting for the police to come and kill him. Wayne County deputy sheriffs and law enforcement officers from several municipalities converged on the cemetery. The officers talked with Huffman for about four hours; Huffman would not surrender. Then, several officers approached Huffman, and Huffman pointed his gun at the officers. One of the officers fired two shots at Huffman, killing him.

A deputy sheriff reported Huffman's shooting on an "Ohio Uniform Incident Report" form. He attached to the incident report four typed transcripts of taped statements by law enforcement officers. The incident report form totals two pages in length; the typed narrative statements and witnesses' statements total thirty-five pages.

On March 4 and March 8, 1999, a representative of the Beacon Journal Publishing Company asked Wayne County Sheriff Thomas G. Maurer to release a copy of this incident report.

On March 18, 1999, the sheriff submitted a copy of the incident report including the typed narrative statements and witnesses' statements, but with the names of law enforcement officers blacked out. It was explained that names were blacked out so as not to disclose the identity of an uncharged suspect, the officer who shot Huffman.

The Beacon Journal Publishing Company and Roane ("Beacon Journal") filed a petition for a writ of mandamus in the Court of Appeals for Wayne County. In the petition, the Beacon Journal sought an order to compel Maurer "to immediately provide relators the right to access, inspect and copy an unredacted version of the incident report."

The court of appeals treated the incident report and the typed narrative statements together as a confidential law enforcement investigatory record.

Court's Ruling

The Beacon Journal essentially argues that Maurer must immediately release this incident report without any redaction under *State ex rel. Steckman v. Jackson* (1994), 70 Ohio St. 3d 420, 639 N.E.2d 83, paragraph five of the syllabus, and *State ex rel. Cincinnati Enquirer v. Hamilton Cty.* (1996), 75 Ohio St. 3d 374, 662 N.E.2d 334. The sheriff's department counters that incident reports on homicides are confidential law enforcement investigatory records.

We have stated that incident reports initiate criminal investigations but are not part of the investigation. *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St. 3d at 378, 662 N.E. 2d at 337. Today, we hold that this report, including the typed narrative statements, is not a confidential law enforcement investigatory record but is a public record, and that its custodian, the sheriff's department, must release an unredacted copy immediately upon request.

In *Steckman*, we reviewed the work-product exception contained in R.C. 149.43(A)(2)(c). We ruled that information, including notes, working papers, memoranda, or similar materials, assembled by law enforcement officials in connection with a probable or pending criminal proceeding is work product under R.C. 149.43(A)(2)(c). We concluded that this code provision excepted this

information from disclosure as a public record, although disclosure may be required under Crim.R. 16. However, we ruled in paragraph five of the syllabus that the work-product exception "does not include ongoing routine offense and incident reports ***. Routine offense and incident reports are subject to immediate release upon request. If release is refused, an action in mandamus, pursuant to R.C. 149.43(C), will lie to secure release of the records."

* * *

We rule this way despite the risk that the report may disclose the identity of an uncharged suspect. A deputy incorporated the typed narrative statements by reference in the incident report. He consequently incorporated them in a public record. He cannot now remove the "public records cloak." In *Cincinnati Enquirer*, we stated:

"[I]t does not matter that the release of the tapes might reveal the identity of an uncharged suspect or contain information which, if disclosed, would endanger the life or physical safety of a witness.

". . . Once clothed with the public records cloak, the records cannot be defrocked of their status."

III. MISCELLANEOUS

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

R.C. 121.22, 149.43 and 305.10, when read together impose a duty on all boards of county commissioners to maintain a "full and accurate" record of their proceedings.

For purposes of R.C. 121.22 and 305.10, "full and accurate" minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision.

Court's Ruling

Had the commissioners maintained a full record that included the rationale and decision process of the orders that they issued, White would have had a better understanding of these orders. She could have challenged the rationale for those orders or she could have understood the process and accepted the commissioners' decision. But with no discussion of the decision-making process, or of the orders that were ultimately issued, White was unable to exercise her rights as a citizen to challenge the decision of those public bodies elected to represent her.

We recognize that it is not the business of this court to micro-manage the public record-keeping procedures of local governments; public bodies should be

trusted with a certain degree of latitude in the preparation of minutes and other records of their proceedings. Accordingly, we resist the temptation to prescribe any particular means of satisfying R.C. 121.22 and 305.10. Audio or videotape recordings, word-for-word transcripts, even abstracts of the discussions indicating the identity of the speakers and the chronology and substance of their statements, satisfying the requirements of R.C. 121.22 and 305.10. Accordingly, we refrain from laying don specific guidelines, *other than the dictate that for public records maintained under R.C. 121.22 and 305.10, full and accurate minutes must contain sufficient facts and information to permit the public to understand and appreciate the rationale behind the relevant public body's decision.* In light of this holding the mandamus relief ordered by the trial court in this matter, a preparation of minutes of the board's meetings, was proper.

2. *White v. Clinton Cty. Bd. of Commrs.*; 77 Ohio St. 3d 1267.

Court may award attorney fees and costs under R.C. 149.43 if there has been a sufficient benefit bestowed upon the public to warrant such an award.

Court's Ruling

On August 21, 1996, we decided the underlying issue in this case. We held that the mandamus relief ordered by the trial court was proper, and we awarded attorney fees because appellant relied upon R.C. 121.22 (the Sunshine Law) and **149.43** (the Ohio Public Records Act).

This matter is now before the court on the application of appellant, Lizbeth A. White, for costs and attorney fees pursuant to R.C. 121.22 and **149.43**. White seeks to recover \$84,150 in attorney fees and \$6935.04 in expenses and court costs incurred during this litigation.

The version of R.C. 121.22(I)(2) in effect at the time appellant's cause of action arose provided for an award of "all court costs and reasonable attorney's fees." **149.43(C)** states that a person aggrieved by a failure to observe R.C. 149.43 may commence a mandamus action and receive reasonable attorney fees for the successful prosecution of such an action.

An award of attorney fees in a public records case is discretionary and depends upon whether there has been a sufficient benefit bestowed upon the public to warrant the award. Because an award of attorney fees is punitive in nature, we look to whether a party was acting in good faith and had a reasonable legal basis for its failure to comply with the statute. *Id.*

White's case was one of first impression. It involved the novel issue of the interpretation of R.C. 121.22, **149.43** and 305.10.

In light of the above findings, we find it reasonable to reduce the amount of attorney fees requested by \$20,000.

We also deny appellant's request for the recovery of \$6,400 for preparation of the fee applications and the separate bills of \$6,138.81 and \$796.23 for litigation expenses. these items are not within the ambit of R.C. 149.43(C) and not within the definition of "costs." *State ex rel. Plain Dealer Publishing Co. v. Cleveland* (1996) 76 Ohio St. 3d 1218, 12199 667 N.E. 2d.

Therefore, we order appellees to pay appellant the sum of \$57,750 in attorney fees and \$190 as reimbursement for costs for a total of \$57,940.

3. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.; 82 Ohio St. 3d 37 (1998).*

**Relator's access to alleged racist electronic mail against her generated by individual corrections facility co-workers denied because it was not a "public record."
Writ and request for attorney fees denied.**

Facts

Relator, Trude Wilson-Simmons, has been employed as a corrections officer at respondent, Lake County Sheriff's Department, since March 1990. In February 1995, Wilson-Simmons complained to Frank Leonbruno, the administrator of the Lake County Detention Facility, that other corrections officers were using the jail's electronic mail (e-mail) system to make racial slurs against her.

Upon request, Wilson-Simmons submitted a specific request to view the e-mail of five corrections officers for a period of January 1 through January 28, 1995 and to make copies as needed. Shortly thereafter, on February 13, 1995, Chief Deputy William E. Crosier informed Wilson-Simmons that although e-mail was a public record and she had the right to view it, she would have to pay \$2,521.40 plus the cost of any copies she requested because it would take the Lake County Sheriff's Department's computer specialist one hundred forty hours (at her hourly rate of \$18.01 per hour) to reconstruct the requested e-mail. The Lake County Sheriff's Department's standard fee schedule for copies of public records was three dollars for reports consisting of five pages or fewer.'

The sheriff's department's e-mail records are not readily accessible and must be reconstructed in order to be printed out. In order to clear computer memory and prevent the detention facility's computer system from crashing due to lack of available memory, the computer system relegates e-mail older than one day that has not been deleted to a backup system, which is not readily accessible without expert reconstruction. During the period of the alleged racist e-mail, the e-mail system was not functioning properly, resulting in frequent loss of e-mail. In 1996 a new e-mail system was installed that cannot read data from the old system. In addition, the sheriff's department writes over backup data every week in order to

conserve storage space. Due to the volume of data stored in the computer system, any e-mail pertinent to Wilson-Simmon's request no longer exists.

In 1997, more than two years following the sheriff's department's refusal to give her access to the requested e-mail unless she paid \$2,521.40 for the cost of reconstructing the records, Wilson-Simmons filed this action for a writ of mandamus to compel the sheriff's department to provide access to the requested e-mail and to provide copies at cost rather than by charging reconstruction expenses and the standard fee of three dollars or more.

Court's Ruling

The sheriff's department asserts that the requested e-mail does not constitute "records" for purposes of R.C. 149.011(G), and therefore it is not accessible as "public records" under R.C. 149.43. The sheriff's department is correct.

The requested e-mail does not constitute "records" for purposes of R.C. 149.011(G) and 149.43. R.C. 149.43(A)(1) "does not define a 'public record' as any piece of paper on which a public officer writes something." "To the extent that any item is not a 'record,' i.e., does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed." Although reprehensible, the e-mail does not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the sheriff's department. There is no evidence or allegation that the alleged racist e-mail documented sheriff's department policy or procedures. It was allegedly circulated only to a few co-workers and was not used to conduct sheriff's department business.

Even assuming that the requested e-mail constitutes "records" under R.C. 149.011(G) and 149.43, Wilson-Simmons would still not be entitled to a writ of mandamus. Due to Wilson-Simmons's more than two-year delay in bringing this action, the requested records are no longer available.

4. *State ex rel. Freedom Communications, Inc. v. Elida Community Fire Co.*; 82 Ohio St. 3d 578 (1998).

An entity need not be operated by the state or a political subdivision thereof to be a "public office" under R.C. 149.011(A) and subject to R.C. 149.43.

A private, non-profit corporation which performs any function of government and is inextricably intertwined or otherwise controlled by governmental bodies, is a "public office."

Facts

In 1949, respondent, the Elida Community Fire Company ("ECFC"), was created as a private nonprofit corporation "[t]o provide an efficient and effective organization for fire fighting to operate in the vicinity of Elida, which is located in Allen County, American Township, Ohio."

ECFC contracts with certain Allen County townships, including American Township, to provide fire protection and emergency medical assistance. ECFC is composed of both paid employees and volunteers.

In March 1998, both ECFC Chief Charles Bailey and the Bowling Green Police Department earned of an incident in which a male ECFC volunteer allegedly sexually assaulted a female ECFC volunteer at a fire fighting training session in Bowling Green, Ohio. The police closed its investigation of the incident but did not file any charges. Chief Bailey prepared his own fourteen-page investigative report.

Based on Chief Bailey's report, ECFC terminated the two volunteers' association with ECFC. Shortly thereafter, Chief Bailey permitted a reporter for relator, Freedom Communications, Inc., d.b.a. The Lima News ("Freedom"), to inspect these documents.

In April 1998, Freedom requested copies of Chief Bailey's report and his termination letters. After ECFC refused, Freedom filed a complaint for a writ of mandamus to compel respondents, ECFC, Chief Bailey, and ECFC's records custodian, to provide access to the requested records under R.C. 149.43.

Court's Ruling

We grant Freedom a writ of mandamus to compel. ECFC is a public office as defined by R.C. 149.011(A), and the records requested by Freedom are public records under R.C. 149.43, Ohio's Public Records Act.

We reject respondents' argument that because ECFC is a private, nonprofit corporation that does not perform any function of government and is not inextricably intertwined or otherwise controlled by the townships, it is not a "public office" as defined by R.C. 149.011(A).

An entity need not be operated by the state or a political subdivision thereof to be a public office under R.C. 149.011(A). *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.* (1992), 65 Ohio St. 3d 258, 260, 602 N.E. 2d 1159, 1161.

Second, ECFC is a public office under R.C. 149.011(A) because it is a public institution. An entity organized for rendering service to residents of the community and supported by public taxation is a public institution. *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St. 3d 108, 110, 529 N.E. 2d 443, 445.

In 1997, ECFC received total income of \$952,264.61, of which \$923,446.77 (96.97% of total income) came from its contracts with townships, including \$780,032.08 (81.91% of total income) from American Township.

ECFC's articles of incorporation provide that one of its purposes is to "cooperate with township trustees in the maintenance of a fire fighting organization.

Third, ECFC is performing a function that is historically a government function. R.C. 505.37(A) permits townships to establish rules to guard against the occurrence of fires and either to employ persons to maintain and operate firefighting equipment or to enter into an agreement with a volunteer fire company for the use and operation of firefighting equipment.

Based on the foregoing, we hold that ECFC is a public office for purposes of R.C. 149.43.

We also reject respondents contention that the requested records are not "records," as defined in R.C. 149.011(G), and therefore are not accessible as "public records" under R.C. 149.43. The requested records document ECFC's investigation and decision to terminate the two volunteers' association with ECFC.

We turn to respondents' claim that these documents are exempt from disclosure because they are confidential law enforcement investigatory records under R.C. 149.43(A)(2)(a) and (c), donor profile records under R.C. 149.43(A)(1)(n), and records whose release is prohibited by the volunteers' constitutional right to privacy.

None of respondents' claimed exemptions applies.

The ECFC volunteers' constitutional right of privacy does not exempt the requested records. Respondents have introduced no evidence establishing the same "high potential for victimization" that courts have relied on to exempt Social Security numbers or personal information about undercover officers from disclosure based on the constitutional right to privacy. Cf. *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St. 3d 604, 609-612, 640 N.E. 2d 164, 167-169; *Kallstrom v. Columbus* (C.A. 6, 1998), 136 F. 3d 1055.

Finally, ECFC waived its entitlement to the claimed exemptions by previously voluntarily disclosing the requested records to a reporter employed by Freedom.

5. ***City of Louisville, Division of Police v. Ann McClure; Sixth Circuit Court of Appeals; Case No. 96-5942; Decided and Filed: February 17, 1999.***

A statute which prevents public access to certain governmental records, but allows access to such records by the news media, is unconstitutional.

Facts

A number of attorneys and chiropractors, as well as the proposed publisher of a commercial newspaper to be called The Accidental Journal, filed suit to challenge two Kentucky statutes, on restricting the disbursement of accident reports and the other allowing the state custodian of nonexempt public documents to charge commercial users "a reasonable fee" for producing copies of the reports. The district court permanently enjoined the enforcement of both statutes, finding that they violated the plaintiffs' First Amendment right to freedom of expression.

Background

Until 1994, Kentucky Revised Statutes 189.635(5) provided that "all accident reports filed with the Department of State Police...shall remain confidential." Despite the all-encompassing nature of the statutory language, a Kentucky Attorney General's Opinion issued in 1989 determined that the privacy exemption under Kentucky's Open Records Law was "discretionary." This had the effect of making all accident reports accessible to the public. Accident reports soon became a prime source for attorneys and chiropractors in Kentucky to identify prospective clients.

Not long after the Attorney General's Opinion was issued in 1989, a public groundswell developed against the release of accident reports to attorneys and chiropractors. one editorial described the attorneys who used such accident reports as "greedy, money grubbing lawyers" who seemed "to prey on the misfortunes of others."

In an attempt to protect accident victims from being hounded by unwanted solicitations from attorneys and chiropractors, the Kentucky general assembly amended 189.635 and 61.874 of the Kentucky Revised Statutes in 1994. The relevant text of the amended statutes is reproduced below:

189.635 VEHICLE ACCIDENT REPORTS

(5) All accident reports filed with the Department of State Police in compliance with subsection (4) above shall remain confidential except that the department may disclose the identity of a person involved in a n accident when his identity is not otherwise known or when the denies his presence at an accident. All other accident reports required by this section, and the information contained in the reports, shall be confidential and exempt from public disclosure except when produced pursuant to a properly executed subpoena or court order...

(6) The report shall be made available to a news-gathering organization, solely for the purpose of publishing or broadcasting the news.

61.874. ABSTRACTS, MEMORANDA, COPIES AGENCY MAY PROSCRIBE FEE

(3) The public agency may prescribe a reasonable fee for making copies of nonexempt public records requested for use for noncommercial purposes which shall not exceed the actual cost of reproduction, including the costs of the media and any mechanical processing cost incurred by the public agency, but not including the cost of staff required...

(b) The public agency from which copies of nonexempt public records are requested for a commercial purpose may require a certified statement from the requestor stating the commercial purpose for which they shall be used, and may require the requestor to enter into a contract with the agency. The contract shall permit use of the public records for the stated commercial purpose for a specified fee.

Almost immediately after passage, the plaintiffs filed suit against Ann McClure (a custodian of accident reports at a local state police post) and an assortment of other government officials, all in an effort to enjoin enforcement of the statutes. Following a lengthy hearing the district court permanently enjoined the enforcement of both statutes, holding that they violated the First Amendment.

Court's Ruling

A. The Challenge to 189.635

Because 189.635 is purportedly a "pure denial of access statute," Defendants claim that it is constitutional under the Supreme court's decision in *Houchins v. KQED, Inc.* 438 U.S. (1978), where the Court noted that the First Amendment does not "guarantee...aright of access to all sources of information within government control."

Subsection 6 of 189.635 clearly restricts a "news-gathering organization" from using or distributing any accident report that it obtains for a commercial purpose, other than to publish or broadcast the information in a news report. It is this content-based restriction with respect to news organizations which makes 189.635 fatally flawed.

The Supreme Court articulated a four-part test to analyze the constitutionality of government regulations limiting commercial speech:

[1] whether the expression is protected by the First Amendment. For commercial speech to come within that provision it at least must concern lawful activity and not be misleading; [2] whether the asserted governmental interest is substantial. If both inquires yield positive answers, we must determine; [3] whether the

regulation directly advances the governmental interest asserted; and [4] whether it is not more extensive than is necessary to serve that interest.

The parties agree that the speech at issue is neither illegal nor misleading.

The defendants argue that the governmental interest behind 189.635 is to protect accident victims' privacy and safety by keeping the personal information contained in such reports out of the hands of the general public. We are persuaded that such an interest is substantial, as evidenced by the fact that a number of other courts that have considered similar statutes have reached the same conclusion.

From this abundance of legal authority, we hold that the government's asserted interest in protecting the privacy and safety of accident victims is substantial and, hence, meets the second prong of the Central Hudson test.

We examine whether the challenged governmental regulation "advances the Government's interest 'in a direct and material way.'" "A governmental body seeking to sustain a restriction on commercial speech must demonstrate that the harms it recites are real and that its restriction will in fact alleviate them to a material degree."

The district court found that the amended statute does not directly and materially advance the government's interest in protecting the privacy and safety of accident victims. Specifically, the district court noted that "the fact that this information is available to the media and insurers is sufficient to warrant the holding that the privacy interest which the State asserts in defense of the statute is not protected by the restriction of the public records to newspapers and insurers."

The defendants have provided no evidence, aside from general averments contained in affidavits, that would support the contention that criminals would use accident reports to harass or further harm accident victims if they had access to the information contained in such reports. The personal information contained in accident reports was in fact available to the general public prior to the amendment of 189.635, without any evidence of adverse consequences. This asserted harm, therefore, appears to be nothing more than the type of speculation and conjecture that is insufficient to sustain a restriction on commercial speech.

Unlike the defendants' first argument, their second argument in support of the statute to prevent the direct and unnecessary intrusion into the private lives and homes of accident victims is at last directly and materially linked to the restriction on access to accident reports. The problem, however, is that the statutory exceptions serve to neutralize the government's attempts to protect the privacy of accident victims.

The exception to 189.635 (5) for news-gathering organizations precludes the statute from directly and materially advancing the government's purported privacy interest.

For the same reasons, the exception to 1819.635(5) for news-gathering organizations renders the statute unconstitutional under the First Amendment. There is no rational basis for a statute which purports to advance the governmental interest in protecting the privacy of accident victims to allow their names and addresses to be published or broadcast to the general public. Having one's name...and address printed in the local paper is a far greater affront to privacy than receiving a letter from an attorney...eager to help one overcome his present difficulties (for a fee, naturally).

The true motivation behind 189.635 appears to be directed at preventing attorneys and chiropractors from looking at accident reports, with the secondary consequence that direct mail solicitation practices would be curtailed.

Because we conclude that 189.635(6) does not directly advance the asserted governmental interest, there is no need for us to consider the final prong of Central Hudson (whether the restriction on commercial speech is more extensive than necessary to advance such interest).

B. The Challenge to 61.874

The plaintiffs contend that the agency responsible for implementing 61.874 has applied the "reasonable fee" provision in an arbitrary and discriminatory manner insofar as commercial users are concerned. Their brief alleges that "the Commonwealth increased the cost of the reports from \$.10 per page to \$40 per report for non-injury accidents; \$90 per report for injury accidents; and \$230 per report for fatal accident reports. The Commonwealth proposed to charge Appellee Lyon \$17,650 for two weeks of reports which previously would have cost him about \$68."

While the district court enjoined the enforcement of 61.874, it did so without making specific findings regarding the following four factors as set forth in *Washington v. Reno*.

In this case, the district court did not make a specific finding with respect to any of the factors enumerated above. Although the plaintiffs cite examples of the allegedly arbitrary and capricious manner in which the agency has charged fees since the enactment of the statute, no such findings are in the record before us.

Accordingly, we vacate and remand the case back to the district court to make findings of fact and conclusions of law with regard to how 61.874 has been applied by the state agency.

6. *State, ex rel. Strothers v. Murphy*, 132 Ohio App. 3d 645 (1999).

Writ of mandamus issued requiring that police chief charge five cents per page for copying public records, as

such was the agreed upon "costs" of making such copies by the parties.

Facts

Gerald Strothers, Jr. brought this action against Thomas Murphy, Chief of Police of Garfield Heights to compel him (1) to charge the "at cost" copying price required by R.C. 149.43, which should be no more than five cents per page, and (2) not to limit when, how long, or how many records may be inspected.

At issue in this case was a request to view over approximate 12,000 pages of police reports generated during the period March through September, 1998. At the time of the request, the city of Garfield Heights charged \$1.00 per page to copy of any document citywide. After receiving Mr. Strothers' request, the law director for Garfield Heights commenced an investigation as to what the so-called "at cost" price would be for copies. An attorney attended a seminar on November 22 through 23, 1998, conducted by the Ohio Association of Chiefs of Police and the Ohio Attorney General on records. As a result of research and that seminar, the law director concluded that the per page price for copying public records throughout Garfield Heights should be 5¢.

In light of the agreement of the parties as to the appropriate cost per page, mandamus was issued compelling the chief to charge 5¢ per page for copies.

On the second issue as to the time and location for viewing records, this court stated as follows: In *State, ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), [citation omitted], the Supreme Court of Ohio indicated that for a police department regular business hours should be 8:00 a.m. to 4:00 p.m., everyday. Certainly, it is reasonable for a governmental agency to wish to first assemble a voluminous request, and it is reasonable and prudent for a police department to have its records examined in a secured setting, certainly it is desirable for the parties to pre-arrange the review of a large request.

**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. Invalidation 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 OPEN MEETINGS CASES

I. PUBLIC'S RIGHT TO ATTEND MEETINGS

1. *Beacon Journal Publishing Co. v. City of Akron* (1965), 3 Ohio St. 2d 191.

It is clear that the public has no common-law right to attend meetings of governmental bodies. Open Meeting Statutes: The Press Fights for the "Right to Know," 75 Harvard L. Rev. 1199, 1203 (March 1962). Therefore, any right the public has to attend meetings of the governmental bodies referred to in cause must arise by reason of the provisions of the ordinance or the statute which have been referred to here.

2. *Smith, Appellant v. City of Cleveland, et al* (1994), 94 Ohio App. 3d 780.

The public has no common-law right to attend any meetings of governmental bodies. Any such right must arise out of a provision in state, local or constitution law.

II. WHAT IS A PUBLIC BODY?

1. *Maser v. Canton* (1978), 62 Ohio App. 2d 174.

Where a city council appoints a committee composed of several of its members to investigate problems in a municipal department and such committee is delegated powers normally restricted to the council, *all hearings held by the committee must be conducted in public*, pursuant to the mandate of R.C. 121.22.

2. *Stegall v. Joint Twp. Dist. Memorial Hosp.* (1985), 20 Ohio App. 3d 100.

The board of hospital governors of a joint township district hospital is a "public body" within the scope of the Sunshine Law, R.C. 121.22.

3. *State, ex rel. The Fairfield Leader v. Ricketts*; 56 Ohio St. 3d 97 (1990).

A governmental body subject to R.C. 121.22, is under an affirmative duty to prepare minutes and make them available as public records, for all prearranged meetings of a majority of its members if official business is discussed. There is no exemption from this obligation merely because the meeting is paid for by another or not conducted at its regular location.

Facts

Relator, The Fairfield Leader (“The Leader”), publishes a weekly newspaper that chronicles events in Fairfield County, Ohio. Respondents are officials of Fairfield County and off two local governments in that county, the village of Pickerington and Violet Township. The Fairfield County respondents include the clerk and all three members of the Fairfield County Board of County Commissioners. The Pickerington respondents include the mayor, manager, and clerk of the village of Pickerington, and six members of the Pickerington Village Council. The Violet Township respondents include the clerk and two members of the Violet Township Board of Trustees.

On the morning of January 28, 1989, a Saturday, respondents, except for the clerks, met with other area officials at the Lenox Inn, in Reynoldsburg, Ohio. The meeting was arranged by Pickerington Mayor Rita Ricketts and Barry Zacks, a developer whose firm, Kinetic Ventures, had recently petitioned the Fairfield County Commissioners for the annexation of land, situated outside Pickerington, in Violet Township. According to the Pickerington respondents, the January 28 meeting was designed to be a “workshop” or “retreat” for area officials to discuss their respective communities’ combined concerns and plans for future development.

The public was not invited to attend this meeting. However, the editor of The Leader came to the meeting and asked to be admitted. Mayor Ricketts denied the editor’s request and gave him two documents in explanation.

The first document given to the editor related the Pickerington Law Director’s opinion that the “Sunshine Law [R.C. 121.22]” did not apply to a meeting “called by and paid for by a private developer wherein representatives from various governmental entities are invited to attend.” The second document related the Fairfield County Prosecuting Attorney’s opinion that the meeting could be legally closed to the public as long as the participants did not take formal action or deliberate on specific items of business.

The January 28 meeting lasted for approximately two and one-half hours during which Mayor Ricketts acted as moderator. (Zacks did not attend.) The

respondents in attendance discussed annexation generally, including their respective concerns about water and sewer service, planning, and traffic. NO specific proposals were made and no official action was taken at that time. However, the Fairfield County Commissioners later denied Kinetic Ventures' annexation petition, and the Pickerington Council later adopted a resolution to join Fairfield County in supporting a study about how to provide future water and sewer services to growth areas within the Violet Township area.

Court's Ruling

This case presents three questions for our review. First, we must decide if respondents have a clear legal duty to prepare and make available for public inspection minutes of the January 28 meeting. Second, we must decide if a writ of mandamus is appropriate to compel these acts. Third, we must decide if The Leader is entitled to attorney fees. For the reasons that follow, we answer all these questions affirmatively.

The Pickerington Respondents' Duties

The village of Pickerington is a chartered municipality exercising home rule powers under Sections 3 and 7, Article XVIII, Ohio Constitution. Thus, the Pickerington respondents must act in accordance with their charter, their administrative code, and the general laws of Ohio that are not inconsistent with the charter. The Leader argues that the local laws of Pickerington require the Pickerington respondents to prepared minutes of the meeting at issue and that R.C. 149.43(B) requires them to provide public access to the minutes they prepare. We agree.

Sections 121.04(d)(2)(B). (3) of the Pickerington Adm. Code. Clearly mandate the preparation of minutes. The term "meeting is defined only by Section 121.03 of the Pickerington Adm. Code, and it states that a "meeting" is "any prearranged discussion of the public business of any public body by a majority of its members." The January 28, meeting was prearranged, it facilitated discussions about development in and around Pickerington, and its was attended by a majority of the council. Thus, a duty to prepare minutes of that meeting exists.

The Fairfield County and Violet Township Respondents' Duties

The Leader argues that R.C. 305.10, "504.04 [*sic*, 507.04]," and 121.22(C) require the county and township respondents to prepare minutes of the January 28, meeting. R.C. 305.10 requires the board of county commissioners to "keep a full record of the proceedings of the board ***." R.C. 507.04 requires the township clerk to "keep an accurate record of the proceedings of the board of township trustees at all its meetings ***." In addition to the public meeting requirement discussed previously, R.C. 121.22(C) provides that "[t]he minutes of a regular or special meeting of any such public body shall be promptly recorded and open to public inspection."

R.C. 121.22(A) directs us to construe that statute liberally in favor of public disclosure. Thus, in our view, “of” is used in R.C. 121.22(C) to mean more than just meetings authorized by a public body; it also refers to any meeting that the public body causes to take place. *R.C. 121.2(B)(2), like the Pickerington Administrative Code, defines “meeting” as “any prearranged discussion of the public business of the public body by a majority of its members.” Accordingly, we hold that where, as here, the members of a public body agree to attend, in their official capacity, a meeting where public business is to be discussed and a majority of the members do attend, R.C. 121.22(C) necessitates that minutes of the meeting be recorded.*

Having determined that the Fairfield County and Violet Township respondents must prepare minutes of the January 28 meeting, we consider again the question of public access. *As mentioned above, R.C. 149.43(B) requires that minutes of a public meeting be promptly prepared and made available for public inspection.* By declaring the minutes of public meetings open to inspection, R.C. 121.22(C) restates this obligation. Thus, these respondents also have a duty to make the minutes they prepare available for public review.

We now consider The Leader’s request, made pursuant to R.C. 149.43(C), for attorney fees from the Pickerington respondents. An attorney fee award under R.C. 149.43(C) is discretionary and is to be determined by the presence of a public benefit conferred by the relator seeking disclosure. *State, ex rel. Multimieda, Inc. v. Whalen* (1990), 51 Ohio St. 3d 99, 554 N.E.2d 1321. Reasonableness and good faith of the respondent in refusing to make the disclosure are also to be considered. *State, ex rel. Beacon Journal Publishing Co. v. Ohio Dept. of Health* (1990), 51 Ohio ST. 3d 1, 553 N.E.2d 1345.

We hold that The Leader is entitled to reasonable attorney fees from the Pickerington respondents.

4. *Angerman v. Ohio State Medical Bd.* (1990), 70 Ohio App. 3d 346.

R.C. 121.22 does not apply to meetings of judicial or quasi-judicial bodies.

5. *Holeski v. Lawrence* (1993), 85 Ohio App. 3d 824

Any activity not qualifying as ether a rule, resolution, or formal action does not have to be adopted at an open meeting. The meeting of a governmental body for the purposes of information gathering or fact finding for “ministerial” purposes is not subject to R.C. 121.22.

Facts and Court’s Rulings

Appellant argues that R.C. 121.22 contains no requirement that any action be taken in order to meet the statute's definition. He asserts in the alternative that in his case, formal action, in the form of a decision as to his report, was in fact taken.

R.C. 121.22(B)(2) defines "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members." The statute further states that "(H) [a] resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body." (Emphasis added.)

Thus, the logical interpretation of subsection (B)(2) is that no formal action is required, *per se*, in order to constitute a meeting. The board must merely discuss the public business. However, subsection (H) makes it clear that in order to show a violation of the "open meeting" rule as appellant attempts to do here, either a resolution, rule or formal action of same kind must have been adopted by the public body at a meeting not open to the public. ***Thus, the logical inference stemming from section (H) is that any activity not qualifying as either a rule, resolution or formal action does not have to be adopted at an open meeting in order to be valid.*** Hence, public notice need only be given when formal action will take place. Accordingly, appellant's argument that the Sunshine Law contains no requirement that action of any kind be taken in order to meet the statutory definition of "meeting" has no merit.

The nature and purpose of R.C. 121.22 support the interpretation that the statute is intended to apply to those situations where there has been actual formal action taken; to wit, ***formal deliberations concerning the public business. Ohio's courts have recognized that information-gathering and fact finding are essential functions of any board, and that the gathering of facts and information for ministerial purposes does not constitute a violation of the Sunshine Law.*** See, *McIntyre v. Bd. of Cty. Comms* (Sept. 12, 1986), Ashtabula App. No. 1269,.

Similarly, in the case of *Theile v. Harris* (June 11, 1986), Hamilton App. No. C-860103, unreported, at 13, 1986 WL 6514, the court ruled that a meeting between the county prosecuting attorney and a majority of a board of township trustees, although unadvertised, was not a violation of the Sunshine Law because the meeting was strictly of an investigative and information- seeking nature, and did not involve actual deliberations of public business.

The law is also clear that the Sunshine Law is not intended to prevent a majority of a board from being in the same room and answering questions or making statements to other persons who are not public officials, even if those statements relate to the public business. ***The Sunshine Law is instead intended to prohibit the majority of a board from meeting and discussing public business with one another.*** In *DeVere*, the Twelfth District Court of Appeals determined that "discussion" of the public business means the exchange of words, comments or ideas by the board..

In the case sub judice, we do not have a situation where the trustees closed the doors and conducted a private meeting between themselves about the contents of appellant's report. Instead, we have a situation where the trustees engaged in an informal, information-gathering, question-answer session with the press in a room which any member of the public could have entered. Therefore, there is no indication that appellees' conduct was contrary to the spirit of the Sunshine Law or rose to the level of a secret meeting.

6. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St. 3d 540 (1996)

R.C. 121.22 cannot be circumvented by scheduling back-to-back meetings which, taken together, are attended by a majority of public body.

Facts

In June 1995, the city of Cincinnati was given a figurative "two-minute warning" by the owner of the Cincinnati Bengals – if the city and Hamilton County did not agree by the end of June to build a new stadium for the team, the Bengals would move to Baltimore. The Cincinnati Reds' ownership was also putting the "squeeze play" on the city – the Reds wanted a stadium separate from the Bengals and were reportedly looking at sites in Kentucky. Neither team was satisfied with the county-owned Riverfront Stadium.

The city believed that the key to retaining both teams was to provide them with new facilities, and the city sought to enter into an agreement with the county to achieve that goal, prior to the expiration of the Bengals' deadline.

Regular council meetings are held every Wednesday at 2 p.m. in council chambers at City Hall. Council can convene special meetings upon the request of any two council members with twelve hours' notice to the other council members, and with an advertisement in a newspaper of general circulation in the city.

Such was the system for council meetings when Shirey called his first series of nonpublic, back-to-back sessions with council members on the morning of June 21, 1995. In all, three sets of back-to-back meetings were held between the city manager and council members. The same procedure applied to each set. The city manager's administrative assistant scheduled the meetings so that at no session would there be a majority of council members. In depositions the city manager testified that "the reasons for having fewer than a majority of members of council at a meeting is so that we wouldn't violate Ohio[s] Open Meetings Law." Shirey testified that he understood that if a majority of council met to discuss possible business, and the public was excluded, the meeting would

violate Ohio's "Sunshine Law." All of the meetings were held in the city manager's office, and the county's proposal for building new stadiums was discussed at all the sessions.

A total of six council members attended the June 21, 1995 sessions. Together, the sessions lasted three hours. Even though council did not follow its procedure for convening executive sessions, the meetings were closed to the public. The county's proposal was not discussed at council's regular, public meetings were closed to the public. The county's proposal was not discussed at council's regular, public meeting that afternoon.

After being excluded from the back-to-back sessions and after council approved the agreement with the county, the Cincinnati Post asked the city to prepare and make available minutes describing what had been discussed at the sessions. The city refused, without acknowledging that the back-to-back sessions had actually occurred. The Post brought this action to compel the city to prepare and make available to the public minutes summarizing the discussions at the back-to-back sessions.

Court's Ruling

We hold that the Cincinnati City Council's back-to-back meetings, which taken together, were attended by a majority of council members, violated the provisions of R.C. 121.22, that the dictates of R.C. 121.22 are applicable to Cincinnati City Council, and that the Cincinnati Post is entitled to its requested relief.

In *State ex rel. Fairfield Leader v. Ricketts* (1990), 56 Ohio St. 3d 97, 564 N.E.2d 486, this court applied the Sunshine Law to supposedly "informal" meetings where discussions of public interest were held. In *Fairfield Leader*, the Fairfield County Commissioners met at a hotel on a Saturday morning for a "workshop" or "retreat" with a majority of the trustees of the Violet Township and a majority of the members of the council of the village of Pickerington. Topics for the meeting included water and sewer service, traffic patterns, and land use planning.

Construing an earlier, similar version of R.C. 121.22(C), this court issued a writ of mandamus compelling the commissioners and the trustees separately to prepare minutes, describing their discussions. The court held:

“[W]here, as here, the members of a public body agree to attend, in their official capacity, a meeting where public business is to be discussed and a majority of the members do attend, R.C. 121.22(C) necessitates that minutes of the meeting be recorded.” 56 Ohio St. 3d at 102, 564 N.E.2d at 491.

In this case, members of council agreed to attend a scheduled meeting to discuss public business. However, unlike in *Fairfield Leader*, a majority of council members were not present at any one session. R.C. 121.22(B)(2) defines a “meeting” as “any prearranged discussion of the public business of the public body by a majority of its members.”

The question becomes whether a public body may circumvent the requirements of the statute by setting up back-to-back meetings of less than a majority of its members, with the same topics of public business discussed at each. We hold that the statute prevents such maneuvering to avoid its clear intent.

First, we note that the statute states that it “shall be liberally construed.” Also, when construing a statute, this court’s “paramount concern” is the statute’s legislative intent.

To find that Cincinnati’s game of “legislative musical chairs” is allowable under the Sunshine Law would be to ignore the legislative intent of the statute, disregard its evident purpose, and allow an absurd result.

The statute requires that governmental bodies “conduct all deliberations upon official business only in open meetings.” R.C. 121.22(A). Its very purpose is to prevent just the sort of activity that went on in this case -- elected officials meeting secretly to deliberate on public issues without accountability to the public.

To rule in Cincinnati’s favor would be to endorse the behavior undertaken by city council and the city manager in this case and make it applicable to every city council meeting in Ohio. The statute that exists to shed light on deliberations of public bodies cannot be interpreted in a manner which would result in the public being left in the dark.

III. CHARTER CITIES

1. *State, ex rel. Plain Dealer Publishing Co. v. Barnes*, 38 Ohio St. 3d 165 (1988)

Although a case may be moot, a court may hear the appeal where the issues raised are “capable of repetition, yet evading review.”

A municipal charter vesting broad powers in the legislative body of municipality may also contain specific prohibitions and restrictions upon the exercise of those powers.

2. *State ex rel. Fenley v. Kyger* (1995), 72 Ohio St. 3d 164

Where a city charter provided that “all meetings of city council are to be open to the public,” but did not provide for executive sessions, executive sessions are not allowed.

Facts

Relator, Joseph J. Fenley, a Miami University journalism professor, in the company of his students frequently attends meetings held by respondents, members of Oxford City Council, to allow his students to observe local government as issues of public interest are discussed. Executive sessions were regularly scheduled for each council meeting. Council routinely adjourned its meetings to conduct executive sessions from which the public and media were excluded.

At the October 4, 1994 council meeting, relator advised respondents that he believed that the council practice of conducting private, executive sessions violated the open meetings provision of the Oxford City Charter. Respondents instructed Stephan McHugh, the Oxford Law Director, to study the issue and report his recommendations to council.

At council’s regularly scheduled meeting on October 18, 1994, McHugh advised council that the charter precluded executive sessions and that he felt that executive sessions could only be held for those matters involving attorney-client privilege.

The proposed agenda for council’s November 1, 1994 meeting contained a scheduled “Conference with Attorney” in the place normally reserved for “Executive Session.” At the November 1 meeting, respondents, with one member absent, voted to substitute the phrase “Executive Session” for “Conference with Attorney” on the printed agenda. Respondents later adjourned to an executive session for the specified purpose of “conferring with our attorney about current litigation.”

Court’s Ruling

Section 2.06 of the Oxford City Charter provides that regular meetings of council “shall be held as prescribed in the Council rules, but not less frequently than twice each month” and that “[a]ll meetings of Council shall be open to the

public.” The charter contains no exception to the open-meetings requirement and provides further in Section 1.03 that “[a]ll powers of the corporation shall be exercised in the manner prescribed by this charter.”

Since private, executive sessions are not authorized by the charter, they do not constitute exceptions from the charter provision requiring open meetings. State ex rel. Craft v. Schisler (1988), 40 Ohio St. 3d 149, 150, 532 N.E.2d 719.

Although R. C. 121.22, Ohio’s sunshine law, provides several exceptions to the general requirement of open meetings by allowing executive sessions in certain circumstances, ***R.C. 121.22 is not applicable where the charter supersedes it.***

Similarly, although Section 111.05 of the Oxford Administrative Code provides for “authorized executive sessions” and states that council shall comply with R.C. 121.22, the ordinance conflicts with the charter and is ineffective. *Fox, supra.*

Accordingly, Fenley is granted a writ of mandamus ordering respondents to open all of the council meetings, as required by the Oxford City Charter.

3. *State ex rel. Gannett Satellite Information Network, Inc., d.b.a. The Cincinnati Enquirer v. Cincinnati City Council* (2000), 137 Ohio App. 3d 589.

The Cincinnati City Charter specifically states that meetings of council shall be open. It makes no exception for closed executive sessions. The rules of council cannot supersede the charter. The Ohio Sunshine Law only permits executive sessions as an exception to the general rule that all meetings shall be open. Because the city charter itself requires all city council meetings to be open, no exception is implicated. This issue has previously been determined by the Ohio Supreme Court, and we reverse the decision of the trial court holding otherwise. Unless the city charter is changed, closed executive sessions are not permitted.

* * *

Section 5, Article II of the Charter of the City of Cincinnati states, "The proceedings of the council shall be public." The Enquirer argues that this section of the charter, which does not mention any exception for executive sessions, mandates that all council meetings be open to the public. In response, the city points to another provision of the charter that states that "meetings [of the city council] shall be held . . . in accordance with a rule adopted by the council which may be amended at any time." The city then refers to Rule 2.1 of the Rules of Council, which the city claims authorizes executive sessions. Rule 2.1 provides, "All meetings of the council and standing committees shall be open to the public; however, the council and its committees may at any meeting hold an executive session closed to the public pursuant to the law of Ohio as provided in this rules." The city also points to Ohio's Sunshine Law, which permits executive sessions in some circumstances.

In concluding that mandamus should have been granted, we first hold that the city charter mandates open proceedings. The rules of council cannot supersede this mandate And the mandate supersedes the provision in Ohio's Sunshine Law that permits executive sessions.

The city charter, which has no provision regarding executive sessions, clearly specifies that the "proceedings of the council shall be public." We believe that the charter means what it says. The language is clear and unambiguous.

* * *

Regarding the city's reference to Rule 2.1 of the Rules of Council, the Ohio Supreme Court has held that the plain language of a city charter is a superior authority that prevails over conflicting rules of council or city ordinances, even rules or ordinances promulgated pursuant to a city charter's authority. It is axiomatic that rules or ordinances cannot change a provision of a charter, just as legislation by Congress cannot abrogate a provision of the Constitution.

* * *

The remaining major issue is the effect that the Ohio Sunshine Law has on this case. The Sunshine law does provide for executive sessions. But the Sunshine Law does not alter the city charter's mandate that proceedings of council shall be public. Generally, in matters of local self-government, provisions of a municipal charter will prevail over parallel state law that expressly conflicts with the charter.

IV. EXECUTIVE SESSION

- 1. Gannett Satellite Information Network, Inc. v. Chillicothe Bd. of Edn. (1988), 41 Ohio App. 3d 218.***

The exceptions to Ohio's Sunshine Law, contained in R.C. 121.22(G)(1) through (6), are to be *strictly construed* to require a public body to open its meetings to the public *unless one of the statutory exceptions clearly applies.*

Where the purpose of a school board meeting is to discuss budget cuts which may affect employee salaries, R.C. 121.22(G)(1), which permits a meeting to be closed to the public if its sole purpose is to consider employment matters affecting "a public employee or officials," does *not* apply. This exception, strictly construed, permits exclusion of the public only where the sole purpose of the meeting is the consideration of employment matters affecting a specific individual.

2. ***Vermilion Teachers' Assn. v. Vermilion Local School Dist. Bd. of Edn. (1994), 98 Ohio App. 3d 524***

When a governmental body moves into executive session, it must publicly state one of the listed reasons for the executive session. If while in executive session it deliberates on matters other than those stated publicly, then it has violated R.C. 121.22.

Facts

In the 1990-1991 school year, David Frank Workman ("Workman") was a tenth grade student in appellant Bryan's ("Bryan") high school biology course at Vermilion High for both semesters. Workman received a passing grade for the fall semester but received an F for spring semester in biology.

On October 7, 1991, there was a regular meeting of the Vermilion Local School District Board of Education. Workman's parents were at this meeting and spoke to the superintendent, asking to speak privately to the board about their son's spring semester biology grade. The superintendent told the presiding board officer about this request. After the board conducted its regular session business, a motion was made to move into executive session to discuss personnel compensation. Workman's parents were invited into this executive session to discuss the issue of their son's grade. No motion had been made to move into executive session to discuss this specific issue.

A complaint was originally filed by Bryan and appellant Vermilion Teachers' Association, OEA/NEA ("the association"), on March 30, 1992, suing the board. Appellants sought a declaratory judgment that the board had violated the Sunshine Law and various provisions of R.C. Title 33, including the graded-course-of-study provision. Appellants also sought a preliminary and permanent injunction against changing Workman's grade and monetary damages as well as the civil forfeiture of \$100 and court costs and attorney fees pursuant to R.C. 121.22(I)(2).

Court's Ruling

In the case *sub judice*, a motion was made to move into executive session to discuss personnel compensation, one of the six exempted subjects delineated in R.C. 121.22(G). Once in executive session, after discussing this subject, the board proceeded to discuss Workman's course failure due to the school's override procedure, without a motion having been made to move into executive session to discuss the subject. Thus, the board violated the requirements of R.C. 121.22(G).

Appellees contend that because the board is required to keep a student's grade confidential, R.C. 121.22(G)(5), the exempted subject covering "matters required to be kept confidential by federal law or rules or state statutes," would apply.

Therefore, appellees argue, Workman’s failing grade due to the use of the override procedure could only have been discussed in executive session. This argument misses the point. ***When the board plans to discuss any exempted subject, a motion to move into executive session “shall state which one or more of the approved matters listed *** are to be considered at the executive session.”***

R.C. 121.22(A) states “this section shall be liberally construed.” Public bodies cannot broaden the scope of the six exempted subjects, even if it would be more convenient to discuss a subject in executive session. Once a violation of the Sunshine Law is found, the remedy provisions of R.C. 121.22(I) are mandatory. “Upon proof of a violation the court of common pleas shall issue an injunctive * * *.” *Fayette Volunteer Fire Dept. No. 2, Inc. v. Fayette Twp. Bd. of Twp. Trustees* (1993), 87 Ohio App. 3d 51, 621 N.E. 2d 855.

Even a “technical violation” of the Sunshine Law requires application of R.C. 121.22(I).

This cause is remanded to the trial court with instructions to issue an injunction pursuant to R.C. 121.22 to the board to prevent future violations and to order the board to pay a civil forfeiture of \$100 for the past violation of R.C. 121.22 and for a hearing regarding an award of appellants’ trial court costs and reasonable attorney fees incurred in enforcing the provisions of R.C. 121.22.

V. REMEDIES

1. ***Greene Cty. Guidance Ctr., Inc. v. Greene-Clinton Community Mental Health Bd.* (1984), 19 Ohio App. 3d 1.**

R.C. 121.22, the Sunshine Law, *invalidates* a resolution adopted at a public meeting only if it resulted from deliberations in a meeting not open to the public.

2. ***Danis Montco Landfill Co. v. Jefferson Twp. Zoning Comm.* (1993), 85 Ohio App. 3d 494**

Generally speaking, if a governmental body violates R.C. 121.22 by taking formal action based upon illegal deliberations, such action cannot be “cured” by subsequent acts. Rather, the decision making process must be commenced again.

Facts and Court’s Decision

The Sunshine Law requires public officials to conduct their official business in meetings open to the public. In the case at hand, the trial court found “that on at

least four different occasions, the Trustees took official action pertaining to [amendments to the township's zoning plan], at least one such action being a closed meeting [held on December 5, 1990] to discuss and deliberate additional proposals to be added to the original twelve amendments voted on by the zoning commission.”

In conclusion, we hold that the trial court did not err when it imposed on the appellant board of trustees a \$100 civil forfeiture fine for violating R.C. 121.22. Therefore, appellants’ first assignment of error is overruled.

In their second assignment of error the appellants claim that: “The lower court erred in finding that the board of trustees could not `cure` or enact amendments to the zoning resolution on their own (board of township trustees) initiative.”

We believe *State ex rel. Delph v. Barr* (1989), 44 Ohio St. 3d 77, is controlling with regard to the issue of whether a legislative body can “cure” a violation of R.C. 121.22 or whether it has to start its decision-making process over with regard to what was illegally deliberated or decided in a closed meeting. We find with the trial court that *State ex rel. Delph, supra*, forbids any such “cures” that appellants attempt to claim here.

3. *State ex rel. Randles v. Hill*, 66 Ohio St. 3d 32 (1993)

It is not necessary to show “intent” when claiming a governmental body held a closed meeting in violation of R.C. 121.22.

4. *Fayette Volunteer Fire Dept. No. 2, Inc. v. Fayette Twp. Bd. of Twp. Trustees* (1993), 87 Ohio App. 3d 51

The issuance of injunctive relief is a mandatory requirement upon the finding of a violation of R.C. 121.22.

5. *Ft. Frye Teachers Assn. v. Ft. Frye Local School Dist. Bd. of Edn.* (1993), 87 Ohio App. 3d 840

A decision finding a violation of R.C. 121.22, and an entitlement to attorney fees, but which does not fix the amount of fees, is not a final appealable order.

6. *State ex rel. Stiller v. Columbia Exempted Village School Dist. Bd. of Edn.*, 74 Ohio St. 3d 113 (1995)

R.C. 121.22(F) requires that the notice of a public meeting need only state the meeting's general purpose. It need not delineate all matters to be reviewed at the meeting. However, all matters reviewed at the meeting must be "ancillary" to the general purpose of the meeting.

- 7. *State ex rel. Mason v. State Emp. Relations Bd.* (1999), 133 Ohio App. 3d 213.**

Any person may bring an action to enforce the provisions of the Sunshine Law. A person seeking action to enforce the Sunshine Law need not demonstrate that he or she has been aggrieved or has a personal stake in the outcome or controversy in an official action of a public body deliberated or decided upon in a closed meeting overruling *Ohio Valley Mall Co. v. Wray*, 104 Ohio App. 3d 629 (Franklin Cty. 1995).