

Municipal Officials Training Outline

I. INTRODUCTION TO MUNICIPAL GOVERNMENT

A. Municipal corporations are classified into cities and villages. A corporation having a population of 5,000 or more is a city and a corporation having a population of less than 5,000 is a village.¹

B. “Municipalities shall have authority to exercise all powers of local self government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.”²

1. “All powers of local self government” v. state-wide concern.

“All powers of local self government” relates to matters purely of local concern. If a local government regulation has an extraterritorial impact, the courts will balance the interests of the municipal corporation with the interests of the state. If the state’s interests are paramount, the local regulation will fail.

2. Police Powers

Municipal corporations are granted authority to adopt police, sanitary, and other similar regulations not in conflict with general laws. A conflict exists when a municipal corporation permits or licenses that which the state prohibits or the state permits or licenses that which the municipality prohibits.³

3. “Conflict” with “general law.”

What is a general law? A general law is a statewide legislative enactment with uniform application throughout the state and prescribes a rule of conduct for citizens. It must be a police or sanitary regulation and not merely a statement restricting municipal power.

4. Charter v. Non-Charter Municipal Corporations: Substance v. Procedure Distinction.

When a municipal corporation has adopted a charter pursuant to Article XVIII, Section 7 of the Ohio Constitution, the municipal corporation’s exercise of either a procedural or substantive power of local self government prevails over conflicting statutes.

¹ See Article XVIII, Section 1 of the Ohio Constitution.

² See Article XVIII, Section 3 of the Ohio Constitution.

³ See *Struthers v. Sokol* (1923), 108 Ohio St. 263 (1923).

When a municipal corporation has not adopted a charter, state law prevails in the exercise of local powers dealing with procedural powers (for example the procedures to be followed in passing an ordinance) and ordinances prevail over matters involving substantive powers (for example leave of absence provisions) of local self government.

C. What is a Charter?

Article XVIII, Section 7 authorizes any municipal corporation to adopt a charter. A charter establishes the framework of a municipal corporation and is adopted by the electors of the municipal corporation. A charter can only be amended by the electors. A Council can recommend and propose charter amendments to the electors, but cannot amend a charter.

D. What are Codified Ordinances?

The Codified Ordinances of a municipal corporation, also referred to as the Code, are those ordinances of a general and permanent nature that are passed by Council and included within the Codified Ordinances.

E. What is the difference between an ordinance and a resolution?

Ordinances and resolutions are both referred to as “legislation.” Ordinances govern the actions and/or set forth responsibilities of residents, businesses, and/or municipal departments. Resolutions announce the position of the Council on a particular issue.

F. What is an *emergency* ordinance or *emergency* resolution?

An *emergency* ordinance or resolution is enacted for the immediate preservation of public peace, property, health or safety or to provide for the usual daily operation of a municipal department. The *emergency* enables the ordinance or resolution to take effect earlier than a non-emergency ordinance or resolution. Labeling an ordinance or resolution an *emergency*, generally, enables the ordinance or resolution to take effect upon passage and the Mayor’s signature.

G. What does it mean to “suspend the rules” when passing an ordinance or resolution?

Municipal charters, generally, require an ordinance or resolution to receive three readings with the vote occurring at the time of the third reading. Suspension of the rules, in most communities, occurs when two-thirds of the Council members agree to suspend the rules regarding the three readings. If suspension of the rules occurs, ordinances and resolutions may be passed after the first or second reading.

H. Can the Mayor veto an ordinance or resolution?

Municipal charters, generally, provide for a Mayor's veto and the process for a Council over-ride of the Mayor's veto.

I. What is an initiative ordinance?

An initiative ordinance is a proposed ordinance that is filed with the municipal corporation, in accordance with the applicable Charter provisions or state law, requiring the submission of the ordinance to the electors.

J. What is a referendum ordinance?

A referendum ordinance is a proposed ordinance suspending the effective date of an ordinance passed by the Council until the electors approve the ordinance passed by the Council. Emergency ordinances are not subject to referendum.

K. What is a recall?

Recall is the process whereby an elected official of a municipal corporation, upon filing of the necessary paperwork, is subject to a recall vote and removal from office.

II. THE ROLE OF COUNCIL

A. Council may bind the City only through a formal vote by a majority of its members. When a vote is taken, all members of Council, including those in the minority, are bound by the decision of the Council.

B. The Council is the legislative branch of municipal government. The Mayor is responsible for the administration of the municipal government, including the day to day operations of the government and implementation of Council's legislative directives.

C. A legislative body may act in an administrative capacity when the Charter authorizes it to do so. For example, in some communities, the Council is vested with the authority to approve zoning variances, an administrative function.

D. It is important to remember that members of Council and their family members must avoid any interest in a contract of the municipal corporation they represent. Members of Council must also avoid the appearance of any conflict, whether or not there is an actual conflict. Conflict situations are further discussed in Section VI, Ethics Issues for Public Officials.

If you have any questions regarding conflict situations, you are encouraged to contact the Law Director in advance of any formal consideration of a contract or

in advance of any action, including a discussion or vote, on a particular piece of legislation.

III. THE ATTORNEY-CLIENT PRIVILEGE

- A. From time to time, the Law Director may communicate with Council confidentially, either in writing or in an executive session.
- B. **What is the attorney-client privilege?** The United States Supreme Court has stated that “[t]he attorney-client-privilege is the oldest of the privileges for confidential communications known to the common law. *** Its purpose is to encourage full and frank communication between attorneys and their clients and thereby promote broader public interests in the observance of law and administration of justice. The privilege recognizes that sound legal advice or advocacy serves public ends and that such advice or advocacy depends upon the lawyer’s being fully informed by the client.” *Upjohn Company v. United States* (1981), 449 U.S. 383,389.

Black’s Law Dictionary (8th ed. 2004) defines attorney-client privilege as: “The client’s right to refuse to disclose and to prevent any other person from disclosing confidential communications between the client and the attorney.”

- C. **Who is the client?** The attorney-client privilege is for the benefit of the municipal corporation. That is, the client is the municipality.
- D. It is very important that the attorney-client privilege be maintained unless formally waived. Once such confidential information is disclosed, it cannot be retrieved and may be very damaging to the municipal corporation.
- E. **Example:** If a legal memorandum is addressed to Council, the attorney-client privilege must be waived by the Council as a body. An individual member of Council cannot waive the privilege. In making a decision to waive the attorney-client privilege, members of Council must act in the best interests of the municipality.

IV. OPEN MEETINGS

- A. Ohio law requires that meetings of public bodies, including Council meetings and committee meetings, be open to the public, except to the extent executive sessions are permitted under the Ohio Open Meetings Act.⁴
 - 1. The basic purpose of the Open Meetings Act is to require all public officials to take official actions and conduct all deliberations upon official business *only* in open meetings that the public may attend and observe, with certain exceptions set forth in the law.

⁴ Ohio Revised Code §121.22.

2. The Open Meetings Act is to be liberally construed with these purposes in mind.
 3. "Meeting" is defined as "any prearranged discussion of the public business of the public body by a majority of its members."⁵
 4. Rules may not prohibit the audio and video recordings of meetings, but they may require recording equipment to be silent, unobtrusive, self-contained and self-powered.
 5. Minutes of regular and special meetings of public bodies must be maintained and open for public inspection. Minutes for authorized executive sessions need only reflect the general subject matter discussed.
- B. All public bodies must take all official actions and hold all deliberations in meetings that are open to the public.
- C. Although not entirely clear, municipal charter provisions regarding the meetings of municipal bodies probably take precedence over the Ohio open meetings law provisions.
- D. Executive Sessions

An executive session is a portion of a meeting from which the public is excluded and at which only such persons as the public body may invite are permitted to be present.

E. Proper Reasons for Adjourning into Executive Session

Under Ohio Revised Code §121.22, a public body can enter into an executive session for one of the following reasons:

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 or official. 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 this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in 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.

⁵ Ohio Revised Code §121.22(B)(2).

2. To consider the purchase of property for public purposes, or for the sale of property at 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.
3. To confer with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action.
4. To prepare for, conduct, or review negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment.
5. To discuss matters required to be kept confidential by federal law or regulations or state statutes.
6. To review specialized details of security arrangements and emergency response protocols if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office.
7. Discussion of trade secrets by a county hospital, joint township hospital or municipal hospital.
8. To consider confidential information related to the marketing plans, specific business strategy, production techniques, trade secrets, or personal financial statements of an applicant for economic development assistance, or to negotiations with other political subdivisions respecting requests for economic development assistance, provided both of the following apply:
 - (a) The information is directly related to a request for economic development assistance provided under a specific section of the Ohio Revised Code or that involves public infrastructure improvements or the extension of utility services directly related to an economic development project.
 - (b) A unanimous quorum of Council determines, by a roll call vote, that the executive session is necessary to protect the interests of the applicant or the possible investment or expenditures of public funds to be made in connection with the economic development project.

F. If a public body holds an executive session to consider any of the matters listed in sections (2) to (8) above, 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.

- G. Before a public body can hold an executive session, it must conduct a roll call vote of its members.
1. The motion to go into executive session must state which one or more of the subjects permitted for executive session discussion is to be considered. An executive session may not be held unless such a motion, upon roll call vote, is approved by a majority of a quorum of the public body.
 2. If the specified purpose is to discuss one of the personnel-related matters stated above (Ohio Revised Code §121.22(G)(1)), the public body must specify which of the listed purposes it is going into executive session to discuss, i.e., “to discuss the dismissal of an employee.” The motion need *not* name the person who is to be discussed, however, it is not sufficient to move for an executive session to discuss “personnel.”⁶
 3. The motion to go into executive session to discuss any other matter mentioned above must specify the purpose(s) of the executive session, i.e., “to consider the purchase of property.” It does not appear that any specific transaction must be referenced in the motion.
- H. If, during the executive session, the Council, Board or Commission wishes to discuss a matter not described in the original motion, but permitted as a topic of executive sessions, it must return to open session and adopt a second motion to authorize discussion of the new topic. “Board of Education violated sunshine law by discussing student’s grade dispute in executive session closed to the public without requisite motion having been made in public hearing to move into executive session to discuss that particular subject.”⁷
- I. Executive Session Reminders:
1. Even when a matter is the proper subject of an executive session, the records discussed may still be a public record. For example, the discipline of an employee may be discussed in executive session, however, the personnel records of the employee are a public record.
 2. Executive sessions are confidential. It is a misdemeanor for a public official to disclose confidential information.
 3. If the reason for executive session is to discuss pending or imminent litigation, the municipal corporation’s lawyer must be present.
 4. You may not vote in executive session.

⁶ *Beisl v. Monroe County Bd. of Education*, 1990 WL 125485 (Ohio App. 7 Dist.); *Jones v. Brookfield Township Trustees*, 1995 WL 411842 (Ohio App. 11 Dist.).

⁷ *Vermillion Teachers’ Association v. Vermillion Local School District Bd. of Education*, 98 Ohio App.3d 524 (1994).

- J. Penalties for Violation of the Open Meetings Act.
1. "Any person" may bring an action to enforce Ohio Revised Code §121.22. There is a two (2) year statute of limitations.
 2. Court of common pleas may issue an injunction compelling the members of a public body to comply with the Open Meetings Act, upon proof of a violation or threatened violation of Ohio Revised Code §121.22.
 3. If an injunction is issued, the court of common pleas shall order the public body to pay a civil forfeiture of five hundred dollars to the party that sought the injunction. Reasonable attorney fees shall also be awarded unless the court determines that a well-informed public official would believe the challenged conduct would not violate the Act, and the conduct serves the underlying public policy asserted as permitting the conduct.
 4. A resolution, rule or formal action of any kind is invalid unless adopted in an open meeting in accordance with the Open Meetings Act.

EXAMPLES OF FREQUENTLY ASKED OPEN MEETINGS LAW QUESTIONS

- A. What is a public body?
- Any board, commission, committee, council or similar decision-making body of a state agency, institution, or authority, and any legislative authority, board, commission, committee, council, agency, authority, or similar decision-making body of a county, township, municipal corporation, school district or other political subdivision or any committee or subcommittee thereof.
- B. What if the public body does not have final decision-making authority?
- Courts disagree as to whether an ad hoc or advisory committee that lacks final decision-making authority is a public body.
- C. What is an executive session?
- An executive session occurs when members of a public body exclude members of the public from a portion of a public meeting, and they may be held only to discuss limited matters. Only persons invited by the public body to join the executive session may attend, and the public body may permit anyone it chooses to attend.

D. What is a meeting?

Before a public body is subject to the requirements of the Open Meetings Act, it must first be having a meeting. A “meeting” is a prearranged gathering of a majority of the members of a public body to discuss or conduct public business. Each of these characteristics must be present, otherwise the gathering is not a “meeting” and is not subject to the open meeting act requirements.

E. If the members of multiple public bodies meet together, whose meeting is it?

Where members of a public body gather with representatives of other public bodies, the gathering may be construed to be a separate, “meeting” for each public body with a majority attending.

F. What if the members of the public body are not “deliberating” or “discussing” public business?

Some courts have found that a gathering of the members of a public body is not a meeting where they act only as passive observers in a ministerial fact-gathering capacity or informational session.

G. Can a member participate in a meeting by telephone?

No. It is clear that a member must be present to be counted in a quorum or to vote. The Ohio Attorney General’s Office has strictly interpreted the Open Meetings Act as limiting a member to listening to a public meeting via telephone. A more liberal interpretation permits a member to participate in discussions, including executive session discussions, via telephone. A member, however, cannot be counted in a quorum or vote if the member is not present.

H. Can members of a public body have one-on-one conversations amongst themselves about public business without issuing notice for meeting?

Gatherings of public body members outside the traditional meeting context are difficult to characterize. Standing alone, one-on-one conversations between individual members, either in person or by telephone, do not violate the Open Meetings Act. But a conference call between a majority of the members where public business is discussed is prohibited.

A public body must not, however, circumvent the act by scheduling back-to-back discussions of public business, which, taken together, are attended by a majority of the members. Such round-robin or serial meetings appear to violate the Open Meetings Act.

Recently, the Ohio Supreme Court held in *White v. King*, 147 Ohio St.3d 74, 2016-Ohio-2770 that e-mail exchanges between a majority of school board members collaborating on a response letter to a newspaper editorial likely

constitutes a “meeting” under the Open Meetings Act. The court explained that a prearranged discussion may occur via e-mail, text, tweet or other communications. Take away – Do not use e-mail, text, instant message, telephone call or other form of communication to discuss public business as a majority of a public body. Public officials do not have to participate in “real-time” communications to violate the Ohio Meetings Act.

I. Are work session meetings subject to the Open Meetings Act?

Yes. Work sessions where public business is discussed by a majority of the members of a public body are meetings and must be noticed and open as any other meeting.

J. Where must public meetings be held?

The Open Meetings Act does not specifically address where meetings may be held, however, some case law suggests that meetings must be held in a public meeting place. The Ohio Attorney General's Office has opined that meetings should be held within the geographical jurisdiction of the public body, however, this is not an express requirement of the Open Meetings Act and there is no case law to that effect. Where space in the facility is too limited to accommodate all interested members of the public, closed circuit television may be an acceptable alternative.

K. What are the rights and remedies under the Open Meetings Act? What are the ramifications of violating the Open Meetings Act?

1. Rights. A person is guaranteed the right to attend a public meeting, not the right to be heard at that meeting. A disruptive person waives the right to remain and observe the meeting and may be removed.

Audio and video recording may not be prohibited, but the public body may establish reasonable rules regulating the use of such equipment, such as requiring equipment to be silent, unobtrusive, self-contained, and self-powered to limit interference with the ability of others to hear, see, and participate in the meeting.

Minutes of a public body's meetings are open for public inspection. Public release of information contained in the minutes that has a certain stigma attached to it or would negatively affect the subject of the information is not an invasion of privacy.

2. Remedies and Ramifications.

- a) Court Action. If a person feels that the Open Meetings Act has been violated, that person may file a court action called an injunction, which, if granted, will compel the members of the

public body to comply with the law. Any person may file an injunction to enforce the Open Meetings Act, and the action should be filed in the court of common pleas for the county where the meeting at issue took place within two years of the violation or alleged violation.

To prevail in an injunction action, the filing party must demonstrate the legal elements of irreparable harm and prejudice to the filing party. However, if the filing party proves that the public body violated or threatened to violate the Open Meetings Act, the court will conclusively and irrefutably presume these elements, which relieves the filing party from this responsibility. A “knowing” violation of an injunction may result in the removal from office of one or more members of the public body.

Once the court finds a violation of the Open Meetings Act, it must consider granting the injunction, regardless of the public body’s subsequent attempt to cure the violation. Ohio courts have disagreed as to whether an invalid action can ever be cured by rediscussion followed by official action taken in an open session.

Besides an injunction, a person may also file a mandamus action under the public records act to compel the creation of, or access to, meeting minutes. Mandamus is also appropriate to order a public body to give notice of meetings to the person filing the action.

- b) Invalidity. A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. Even if the formal action is adopted in an open meeting, if it results from deliberations that occurred in a meeting not open to the public, the action is still invalid, unless the deliberations were on a topic specifically permitted to be conducted in executive session.
- c) Fines and Attorney’s Fees. If a court issues an injunction, the court shall order the public body to pay a civil forfeiture of \$500.00 to the party that filed the action. In addition, the court shall also award to the filing party all court costs and reasonable attorney’s fees. However, the attorney’s fees award may be reduced or not awarded at all if the court finds that a well-informed public body reasonably would believe that the body was not violating the Open Meetings Act and that a well-informed public body reasonably would believe that the conduct that was enjoined served the public policy underlying the authority asserted for the conduct.

On the other hand, if the public body wins in court and the court does not issue an injunction, and the court deems the action to have

been frivolous, the court shall award to the public body all court costs and reasonable attorney's fees.

V. PUBLIC RECORDS

A. What is the Ohio Public Records Act?

Ohio Revised Code §149.43 contains the Ohio Public Records Act. The Public Records Act applies to public records of a public office. The Ohio Supreme Court has held “the rule in Ohio is that public records are the people’s records, and that the officials in whose custody they happen to be are merely trustees for the people”⁸ and Ohio’s public records law must be construed “liberally in favor of broad access and resolve any doubt in favor of disclosing the records.”⁹

Boards and Commissions, generally, do not become involved in the receipt and processing of public records requests, however, you need to understand the basis principles of Ohio’s Public Records Act and be aware that documents created, received, or maintained by a Board or Commission, including a member of a Board or Commission, may be a public record and subject to disclosure and retention in accordance with the Ohio Public Records Act.

Elected officials of a municipal corporation or their designee are required by Ohio law to attend three (3) hours of public records training for every term of office.¹⁰ The training is provided at no cost to elected officials by the Ohio Attorney General's Office. Successful completion of the training is documented by the Ohio Attorney General’s Office.

B. What is a public office?

A “public office” is any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of the State of Ohio for the exercise of any function of government.¹¹

C. What is a public record?

A “record” is any document, device, or item, regardless of physical characteristic, including an electronic record, 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.¹²

⁸ *White v. Clinton County Board of Commissioners* (1996), 76 Ohio St.3d 416 at 420.

⁹ *State ex rel. WBNS-TV, Inc. v. Dues* (2004), 101 Ohio St.3d 406 at 410.

¹⁰ Ohio Revised Code §109.43(B).

¹¹ Ohio Revised Code §149.011(A).

¹² Ohio Revised Code §149.011(G).

A “public record” is any record kept by any public office that does not fall within any of the exceptions to the Public Records Act.¹³

A document, device or item is a public record if:

- a) it is kept by a public office or by a person responsible for public records;*
- b) it is created by, received by, or coming under the jurisdiction of a public office;*
- c) it serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the public office; and*
- d) it does not fall within any of the exceptions to the Public Records Act.*

D. What are the exceptions to the Public Records Act?

Exceptions to the Public Records Act are created by state or federal law or case law. The following exceptions are relevant to the daily operation of municipal government:

- a) medical records, which are defined as any document or combination of documents that (1) pertain to a patient’s medical history, diagnosis, prognosis, or medical condition and (2) were generated and maintained in the process of treatment;
- b) trial preparation records, which means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding¹⁴;
- c) Confidential Law Enforcement Investigative Records, which are defined as records that (1) pertain to a law enforcement matter and (2) have a high probability of disclosing any of the following:
 - (a) the identity of an uncharged suspect;
 - (b) the identity of an information source or witness who has been “reasonably promised” confidentiality;
 - (c) information that would tend to reveal the identity of a source or witness, where the source or witness was reasonably promised confidentiality;
 - (d) specific confidential investigatory techniques or procedures or specific investigatory work product, or
 - (e) information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential source.
- d) peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;
- e) information pertaining to the recreational activities of a person under the age of 18, which includes any information that would reveal the person's:

¹³ Ohio Revised Code §149.43(A)(1).

¹⁴ Ohio Revised Code §149.43(A)(4).

- (a) address or telephone number, or that of their parent, guardian, custodian, or emergency contact person;
 - (b) social security number, date of birth, or photographic image,
 - (c) medical records, history, or information;
 - (d) information sought or required for the purpose of allowing that person to participate in any recreational activity or obtain admission privileges to any recreational facility owned or operated by the public office.
- f) records the release of which is prohibited by state or federal law (the catch-all exception).

E. Mandatory v. Permissive Exceptions

Mandatory exceptions prohibit a public office from releasing specific records or the release of specific information even if the public office would like to release the records or information. There may be civil or criminal penalties associated with the release of mandatory exception records. The following are examples of mandatory exceptions: physician-patient privileged records, criminal history records obtained through LEADS, criminal records sealed pursuant to statutorily authorized court order, social security numbers, and residential and familial information regarding police officers, firefighters, and EMT's.

Permissive exceptions give a public office the choice of either withholding or releasing specific records. Permissive exceptions includes trial preparation records, confidential law enforcement investigatory records, and information relating to the recreational activities of children younger than 18.

F. Database or List of All Public Officials and Employees

Each public office is required to maintain a database or a list of all public officials and public employees elected to or employed by the public office.¹⁵ This database or list is required to include the name and date of birth of each public official and public employee and is a public record.

G. Public Records Policy

Each public office must create and adopt a policy for responding to public records requests.¹⁶ This public records policy must be posted in the public office in a conspicuous location and in all branch offices. It may also be posted on the official website of the public office.

H. Obligations of a Public Office in Responding to a Public Records Request

- Upon request provide prompt inspection.

¹⁵ Ohio Revised Code §149.434.

¹⁶ Ohio Revised Code §149.43(E)(1).

- Upon request provide copies within a reasonable time. “Prompt” and “reasonable” take into account the volume of records requested, the proximity of the location where the records are stored, and the necessity for any legal review of the requested records.
- May only charge the actual cost of providing the copies and cost of postage or delivery, not for the personnel costs of locating and reproducing the records.
- Any person, corporation, government, or agency can make a public records request. No special form or language is required, however, the request must at least identify the records requested with sufficient clarity to allow the public office to identify, retrieve, and review the records.
- The motive of a Requestor is irrelevant.
- A public office cannot require the request to be in writing or require the Requestor to reveal his or her identity.

I. Retention of Public Records

Records of a public office may be destroyed, but only if they are destroyed in compliance with a retention schedule approved by the Local Records Commission, the Auditor of State’s Office, and the Ohio Historical Society. If a retention schedule does not address a particular type of record, the record must be kept until the schedule is amended to address that type of record. If a public record is retained beyond its approved destruction date, the record maintains its public record status. Public offices are required to maintain a copy of the office’s current records retention schedules at a location readily available to the public.¹⁷

J. Retention of E-mail Communications

An e-mail communication is a public record if it is created or received by a public office and serves to document the organization, functions, policies, decisions, procedures, operations or other activities of the public office. E-mails, however, are simply one type of public record and retention of e-mails is based upon the subject matter of the e-mail. You should, therefore, determine the subject matter of each e-mail and review your public office’s retention schedule to determine the appropriate retention period.

K. Are E-mail Communications from a Private E-mail Account a Public Record?

Yes, if the e-mail meets the definition of a public record. The location of sending or receiving the e-mail does not change its status as a record. Public officials and employees that use a personal e-mail account to conduct public business are required to retain a copy of public e-mails in accordance with the public office’s retention schedule.

¹⁷ Ohio Revised Code §149.43(B)(2).

L. Mandamus Action Alleging Violation.

If a court finds a municipality violated the public records law, the court shall award the requester statutory damages (\$100 per day public official failed to comply; up to \$1,000 maximum) and court may award requester attorney's fees.

M. Ohio Court of Claims.

The state has created a program through the Ohio Court of Claims to assist requesters and governmental entities in mediating public records disputes. For a \$25.00 filing fee, the case is mediated. If mediation is not successful, the parties submit briefs and special master renders a decision. No statutory damages.

VI. ETHICS ISSUES FOR PUBLIC OFFICIALS

A. As a preliminary matter, if a Board or Council member has a question regarding ethical issues, the member should feel free to contact the Law Director's office in advance of or at any meeting.

B. Ohio law prohibits a public official or employee from:

- Receiving any benefit from a contract entered into by his or her public entity;
- Hiring or securing any contract benefits for his or her spouse, children (whether dependent or not), siblings, parents, grandparents, grandchildren, or any other person related by blood or marriage and living with him or her;
- Participating in matters where something of value will result for the public official or employee, his or her family, business associates, or others with whom the public official or employee has a close tie that could impair his or her objectivity.

C. Addressing Conflict of Interest Situations

Abstention.

When any Council or Board member has a conflict of interest as a result of the member's affiliation with any person or entity coming before the board, that member should abstain from all discussion regarding the matter and abstain from voting upon the matter. The member should in no way participate, formally or informally, in the decisions of the Council or Board.

- D. The Ohio Ethics Commission enforces the Ohio Ethics Law.
1. Any information that indicates that a public official or employee may have violated provisions of the Ethics Law can be referred to the ethics agency that has jurisdiction over the public official or employee in question. In the case of a city employee or official, the appropriate agency is the Ohio Ethics Commission. Allegation forms are available from the Ethics Commission.
 2. When a charge or allegation of unethical conduct is received by the Ethics Commission, its staff will determine whether the alleged misconduct falls within the authority of the Ethics Commission. If so, the Ethics Commission may direct the staff to conduct a confidential investigation into the charge based upon the factual support for the charge and the severity of the alleged unethical conduct.
 3. After an investigation, Commission staff may file a formal, sworn complaint before the Ethics Commission. The complaint will allege a specific factual violation of the Ethics Law. The Ethics Commission will then review the complaint and determine whether there is reasonable cause to believe that the facts constitute a violation. If so, the Commission must schedule a hearing for the public official or employee.
 4. A citizen may also file a sworn complaint alleging specific personal knowledge of facts and evidence supporting each element of a violation. Most investigations are initiated upon charges received and investigated by the Commission. The Commission may also settle a charge or complaint, including using alternative dispute resolution, referring the matter to a local prosecutor, or closing the matter.
 5. If the Commission schedules a hearing, the public official or employee has an opportunity to defend himself or herself against the complaint. The public official may be represented by a lawyer, examine the evidence against him or her and present evidence and witnesses. The public official may also question witnesses and those accusing the public official of misconduct. These hearings are closed to the public.
 6. After a hearing, the Commission decides by a preponderance of the evidence whether the facts stated in the complaint are true and constitute a violation of the Ethics Law.
 - a) If the Commission finds that a violation has occurred, the findings are turned over to the appropriate prosecuting authority for criminal prosecution. The referral will remain confidential unless the prosecutor fails to act on the referral within 90 days. If the prosecutor fails to take any action with respect to the referral, the Commission may make the referral public.

- b) If the Commission finds that a violation of the law is not supported by the evidence, the complaint will be dismissed. The matter must remain confidential unless the person charged with the violation requests that it be made public.

E. Penalties for Violation of the Ohio Ethics Law.

1. The Ohio Ethics Laws are criminal prohibitions and most of the prohibitions, including the conflict of interest prohibitions, are first-degree misdemeanor criminal offenses, punishable by a fine of up to \$1,000 and/or a maximum of six months in jail.¹⁸
2. Violations of the provisions regarding an unlawful interest in a public contract, Ohio Revised Code §2921.42(A)(1) and (A)(2), are fourth-degree felony criminal offenses, punishable by a fine of up to \$5,000 and/or a maximum of eighteen months in prison.¹⁹
3. Violations of the provisions regarding soliciting or receiving improper compensation are first-degree misdemeanor criminal offenses, punishable by a fine of up to \$1,000 and/or a maximum of six months in jail.²⁰
4. In addition, a public servant who is convicted of a violation of soliciting or receiving improper compensation in violation of Ohio Revised Code §2921.43 is disqualified from holding any public office, employment, or position of trust in this state for a period of seven years from the date of conviction.²¹
5. In addition to its investigatory powers, the Ethics Commission is empowered to interpret the Ethics Law and related statutes and issue advisory opinions on ethics issues.
 - a) The Commission issues formal opinions on novel questions or questions of statewide concern and staff opinions on more routine questions.
 - b) When a public official or employee requests an opinion on an ethics question and an opinion is issued by the Commission, the opinion fully insulates the person making the request, and others similarly situated, if they comply with the opinion before they act, from criminal prosecution, civil actions, and actions for removal from office based on the facts presented.

¹⁸ Ohio Revised Code §102.99.

¹⁹ Ohio Revised Code §2921.42(E).

²⁰ Ohio Revised Code §2921.43(D).

²¹ Ohio Revised Code §2921.43(E).

VII. LIABILITY ISSUES FOR PUBLIC OFFICIALS

A. General Rule of Immunity. A political subdivision, generally, is not liable for damages in a civil action for injury, death, or loss to person or property allegedly caused by any act or omission of the political subdivision or an employee of the political subdivision in connection with a governmental or proprietary function.²²

1. A “governmental function” is a function that is imposed upon a political subdivision as an obligation of sovereignty and that is performed by a political subdivision voluntarily or pursuant to legislative requirement, a function that is for the common good of all citizens of the state, or a function that promotes or preserves the public peace, health, safety, or welfare and involves activities that are not engaged in or not customarily engaged in by nongovernmental persons and not defined as a “proprietary function” by the Ohio General Assembly.²³

a) Examples of governmental functions include the provision or nonprovision of police, fire, emergency medical, and ambulance services, the regulation of the use of, and the maintenance and repair of roads, highways, streets, and sidewalks, and the design, construction, repair, and maintenance of a recreational area or facility.²⁴

2. A “proprietary function” is a function that is not defined as a “governmental function” by the Ohio General Assembly and “is one that promotes or preserves the public peace, health, safety, or welfare and that involves activities that are customarily engaged in by nongovernmental persons.”²⁵

a) Examples of proprietary functions include the operation of a hospital by a political subdivision, the establishment, maintenance, and operation of a utility, and the operation and control of a public stadium, auditorium, civic or social center, or off-street parking facility.²⁶

B. Exceptions to the General Rule of Immunity.

1. A political subdivision is liable for injury, death, or loss to person or property caused by the negligent operation of any motor vehicle by its employees when the employees are engaged within the scope of their employment and authority. If, however, the motor vehicle was responding to an emergency call and the operation of the motor vehicle did not

²² Ohio Revised Code §2744.02(A)(1).

²³ Ohio Revised Code §2744.01(C)(1)(a)-(c).

²⁴ Ohio Revised Code §2744.01(C)(2).

²⁵ Ohio Revised Code §2744.01(G)(1)(a) and (b).

²⁶ Ohio Revised Code §2744.01(G)(2).

constitute willful or wanton misconduct, there is no liability as such circumstances are a full defense to liability.²⁷

2. A political subdivision is liable for injury, death, or loss to person or property caused by the negligent performance of acts by its employees with respect to proprietary functions of the political subdivision.²⁸
3. A political subdivision is liable for injury, death, or loss to person or property caused by the political subdivision's failure to keep public roads in repair and other negligent failure to remove obstructions from public records, except that it is a full defense to that liability, when a bridge within a municipal corporation is involved, that the municipal corporation does not have the responsibility of maintaining or inspection the bridge.²⁹
 - a) The term "public roads" is defined as "public roads, highways, streets, avenues, alleys, and bridges within a political subdivision." "Public roads" does not include berms, shoulders, rights-of-way, or traffic control devices unless the traffic control devices are mandated by the Ohio manual of uniform traffic control devices."³⁰
4. A political subdivision is liable for injury, death, or loss to person or property caused by the negligence of the political subdivision's employees and that occurs within or on the grounds of, and is due to physical defects within or on the grounds of, buildings that are used in connection with the performance of a governmental function.³¹
5. A political subdivision is liable for injury, death, or loss to person or property when civil liability is expressly imposed upon the political subdivision by the Ohio Revised Code.³²

C. When one of the Exceptions to the General Rule of Immunity Applies, Immunity Can Be Reinstated By One of the Following Defenses.

In a civil action brought against a political subdivision or an employee of a political subdivision to recover damages for injury, death, or loss to persons or property allegedly caused by any act or omission in connection with a governmental or proprietary function, the following defenses or immunities may be asserted to establish nonliability:

²⁷ Ohio Revised Code §2744.02(B)(1)(a)-(c).

²⁸ Ohio Revised Code §2744.02(B)(2).

²⁹ Ohio Revised Code §2744.02(B)(3).

³⁰ Ohio Revised Code §2744.01(H).

³¹ Ohio Revised Code §2744.01(B)(4).

³² Ohio Revised Code §2744.01(B)(5).

1. The political subdivision is immune from liability if the employee involved was engaged in the performance of a judicial, quasi-judicial, prosecutorial, legislative, or quasi-legislative function.³³
2. The political subdivision is immune from liability if the conduct of the employee involved, other than negligent conduct, that gave rise to the claim of liability was required by law or authorized by law, or if the conduct of the employee involved that gave rise to the claim of liability was necessary or essential to the exercise of powers of the political subdivision or employee.³⁴
3. The political subdivision is immune from liability if the action or failure to act by the employee involved that gave rise to the claim of liability was within the discretion of the employee with respect to policy-making, planning, or enforcement powers by virtue of the duties and responsibilities of the office or position of the employee.³⁵
4. The political subdivision is immune from liability if the action or failure to act by the political subdivision or employee involved that gave rise to the claim of liability resulted in injury or death to a person who had been convicted of or pleaded guilty to a criminal offense and who, at the time of the injury or death, was serving any portion of the person's sentence by performing community service work for or in the political subdivision or resulted in injury or death to a child who was found to be a delinquent child and who, at the time of the injury or death, was performing community service or community work for or in a political subdivision and if, at the time of the person's or child's injury or death, the person or child was covered for purposes of Chapter 4123 of the Ohio Revised Code in connection with the community service or community work for or in the political subdivision.³⁶
5. The political subdivision is immune from liability if the injury, death, or loss to persons or property resulted from the exercise of judgment or discretion in determining whether to acquire, or how to use, equipment, supplies, materials, personnel, facilities, and other resources unless the judgment or discretion was exercised with malicious purpose, in bad faith, or in a wanton or reckless manner.³⁷
6. In addition to any immunity or defense referred to above, the employee is immune from liability unless one of the following applies:

³³ Ohio Revised Code §2744.03(A)(1).

³⁴ Ohio Revised Code §2744.03(A)(2).

³⁵ Ohio Revised Code §2744.03(A)(3).

³⁶ Ohio Revised Code §2744.03(A)(4).

³⁷ Ohio Revised Code §2744.03(A)(5).

- a) The employee's acts or omissions were manifestly outside the scope of the employee's employment or official responsibilities;
- b) The employee's acts or omissions were with malicious purpose, in bad faith, or in a wanton or reckless manner;
- c) Liability is expressly imposed upon the employee by a section of the Revised Code.³⁸

D. Statute of Limitations.

An action against a political subdivision must be brought within two years after the cause of action accrues, or within any applicable shorter period of time for bringing the action provided by the Ohio Revised Code. The statute of limitations does not begin to run on a minor who has a claim against a political subdivision until the minor reaches the age of 18.³⁹

E. Damages.

1. Punitive or exemplary damages shall not be awarded.
2. Damage rewards against political subdivisions are reduced by the amount of benefits received by the plaintiff from insurance or other sources.⁴⁰

F. Political Subdivision Defense of Employees.

1. A political subdivision shall provide for the defense of an employee when an employee is sued for an act or omission of the employee in connection with a governmental or proprietary function if the act or omission occurred while the employee was acting in good faith and not manifestly outside the scope of his employment.
2. A political subdivision, generally, shall indemnify and hold harmless an employee in the amount of any judgment, other than a judgment for punitive or exemplary damages, that is obtained against the employee for damages for injury, death, or loss to persons or property caused by an act or omission in connection with a governmental or proprietary function, if at the time of the act or omission the employee was acting in good faith and within the scope of his employment or official responsibilities.
3. A political subdivision may enter into a consent judgment or settlement and may secure releases from liability for itself or an employee, with respect to any claim for injury, death, or loss to persons or property caused

³⁸ Ohio Revised Code §2744.03(A)(6)(a)-(c).

³⁹ Ohio Revised Code §2744.04.

⁴⁰ Ohio Revised Code §2744.05.

by an act or omission in connection with a governmental or proprietary function.⁴¹

G. Sovereign Immunity Law Does Not Apply To:

1. Civil actions that seek to recover damages from a political subdivision or any of its employees for contractual liability;
2. Civil actions by an employee, or the collective bargaining representative of an employee, against his political subdivision relative to any matter that arises out of the employment relationship between the employee and the political subdivision;
3. Civil actions by an employee of a political subdivision against the political subdivision relative to wages, hours, conditions, or other terms of his employment;
4. Civil actions by sureties, and the rights of sureties, under fidelity or surety bonds;
5. Civil claims based upon alleged violations of the constitution or statutes of the United States, except that the provisions of Ohio Revised Code §2744.07, relating to political subdivision defense of employees, shall apply to such federal claims or related civil actions.

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⁴¹ Ohio Revised Code §2744.07.

