

OPINION NO. 88-087

Syllabus:

1. A board of township trustees has authority to adopt reasonable rules for the conduct of its meetings. Such rules may not prohibit the audio and video recording of township proceedings. Rules regulating recording must promote the orderly transaction of business without unreasonably interfering with the rights of those present. Reasonable rules may require recording equipment to be silent, unobtrusive, self-contained and self-powered to avoid interference with the ability of those present to hear, see and participate in the proceedings.
2. A rule of a board of township trustees for the conduct of its meetings may regulate the audio and video recording of its proceedings but must not violate the public's right of access to governmental proceedings found in the First Amendment of the Constitution of the United States of America and Article I, Section 11 of the Constitution of Ohio. The public's right of access to governmental proceedings includes the right to record township meetings. Any regulation of the right to record must be precisely and narrowly drawn to be no broader than necessary to insure the order of the proceedings.

To: David P. Joyce, Geauga County Prosecuting Attorney, Chardon, Ohio
 By: Anthony J. Celebrezze, Jr., Attorney General, October 25, 1988

I have before me your request for my opinion regarding the right of members of the public, press and participants to make audio or video recordings of township meetings. You refer to a specific resolution of the Board of Chardon Township Trustees, Resolution #20, 1988, Procedure #2, which states:

That audio and video recordings at township meetings be prohibited by all persons participating or attending, with the stipulation that under certain conditions recordings may be produced with the majority consent of the Board of Trustees.

Specifically, you ask two questions:

1. Did the board of township trustees have the authority to adopt the resolution set forth above?
2. Does the resolution set forth above violate R.C. 121.22, the First Amendment of the Constitution of the United States as made applicable to the states by the Fourteenth Amendment, or Article I, Section 11 of the Constitution of Ohio?

A board of township trustees has limited powers, which are granted by the General Assembly. Powers not expressly conferred are unavailable to the board unless incidental to a statutorily granted power. The Ohio Supreme Court stated:

It is settled that neither the township nor its trustees are invested with the general powers of a corporation; and hence the trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them.

Trustees of New London Township v. Miner, 26 Ohio St. 452, 456 (1875). See also *Hopple v. Trustees of Brown Township*, 13 Ohio St. 311 (1862); 1981 Op. Att'y Gen. No. 81-103.

A board of township trustees is expressly empowered to hold meetings. See R.C. 121.22 (board of township trustees is a public body; meeting is "any prearranged

discussion of the public business of the public body"; trustees are required 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"); R.C. 505.09 (board of township trustees may cause disorderly person to be confined or removed from "any township meeting"), R.C. 507.04 (township clerk required to keep "record of the proceedings of the board of township trustees at all its meetings"). Although the Revised Code is silent on the mode of conduct of township meetings, one of my predecessors has recognized the implied authority of a board of township trustees to adopt rules of meeting procedure. 1931 Op. Att'y Gen. No. 3266, p. 724, 726. Furthermore, an implied power may be found to exist where it reasonably relates to the execution of an express power. *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); *Federal Gas & Fuel Co. v. City of Columbus*, 96 Ohio St. 530, 118 N.E. 103 (1917). The power to conduct orderly meetings implies the power to adopt rules of procedure governing such meetings. Thus, I concur that a board of township trustees has the necessarily implied power to adopt reasonable rules of procedure for the conduct of township meetings.

In the absence of a statutorily prescribed method of the exercise of a power, as in this case, the legislative intent is that it be exercised in a reasonable manner. *Jewett v. Valley Railway Co.*, 34 Ohio St. 601 (1878). Whether a rule of procedure banning audio and video recording of township meetings is reasonable requires consideration of numerous factors. I will examine several of these criteria.¹ Reasonableness is dependent on the surrounding circumstances and factors best determined by those at the local level. 1987 Op. Att'y Gen. No. 87-042; 1987 Op. Att'y Gen. No. 87-018. The Ohio Supreme Court has fashioned a comprehensive test which considers four aspects of a regulation's reasonableness:

It must be remembered that neither the state in the passage of general laws, nor the municipality in the passage of local laws, may make any regulations which are unreasonable. The means adopted must be suitable to the ends in view, they must be impartial in operation and not unduly oppressive upon individuals, must have a real and substantial relation to their purpose, and must not interfere with private rights beyond the necessities of the situation. (citations omitted).

Froelich v. City of Cleveland, 99 Ohio St. 376, 391, 124 N.E. 212, 216 (1919). See also *Cincinnati Motor Transportation Association v. City of Lincoln Heights*, 25 Ohio St. 2d 203, 267 N.E.2d 797 (1971).

The end promoted by rules of meeting procedure is the orderly transaction of business. H. Roberts, *Roberts' Rules of Order Newly Revised* 12-13 (1970). Order is required so that all present enjoy equal opportunity to participate and that information is presented and received freely without interruption or interference. A. Sturgis, *Standard Code of Parliamentary Procedure* 7-9 (3d ed. 1988). Order requires that no one present may disturb another or the meeting itself by causing noise, distracting movement or physical obstruction. L. Cushing, *Manual of Parliamentary Practice* §§36, 37, 223 (E. Cushing rev. ed. 1877).

Rules of procedure that restrict the use of audio or video equipment may be reasonable if they are carefully drafted and implemented to promote orderly meetings. While I am not aware of any Ohio decisions that have established guidelines, courts in other jurisdictions have dealt with the limits within which restrictions upon recording governmental meetings have been found acceptable.

¹ I have previously stated that the Attorney General's authority to issue opinions does not include authority to pass on the issue of reasonableness in a particular case. See, e.g., 1987 Op. Att'y Gen. No. 87-051, 1983 Op. Att'y Gen. No. 83-087. Therefore I am constrained from stating my opinion of the reasonableness of the rule that is the subject of this opinion. Instead I will confine my opinion to a discussion of several of the relevant factors that comprise reasonableness.

In *Nevens v. City of Chino*, 233 Cal. App. 2d 775, 44 Cal. Rptr. 50 (1965), the court found that a city council has unquestioned power to prohibit any disturbance of its meetings so the rights of those present are not infringed. The rule of a city council banning recording of its meetings, however, was determined to be unreasonable where the recording device was silent and unobtrusive, did not interfere with the meetings of the council, did not interfere with the auditory rights of other citizens and the operator did not occupy more space than any other citizen.

The New Jersey Superior Court, Chancery Division, in *Sudol v. Borough of North Arlington*, 137 N.J. Super. 149, 348 A.2d 216 (1975), permanently restrained city council from interfering with or prohibiting the tape recording of its meetings where the recording disturbed no one; it made no noise, did not obstruct vision, and the equipment was a small self-contained, self-powered tape recorder with an integral microphone. The *Sudol* Court stated it was "satisfied that Mrs. Sudol is entitled to record the proceedings of the public meetings of North Arlington for the reasons and logic expressed in *Chino*." *Sudol*, 137 N.J. Super. at 155, 348 A.2d at 219.

In an action for declaratory and injunctive relief, the court, in *Belcher v. Mansi*, 569 F. Supp. 379 (D.R.I. 1983), found that the public's right to know and its right to expect institutions of government to be accountable are to be safeguarded. The Court, in upholding the public's right to record school committee meetings and without intending to be all-inclusive, discussed the extent of the public's right to record:

This is not to say that every citizen armed with a recording device must be granted carte blanche in all events and under all circumstances. There may well be reasonable restrictions which could lawfully be imposed, e.g., those designed (i) to preserve the orderly conduct of a meeting by controlling noise levels, spatial requirements and the like, or (ii) to safeguard public facilities against damage by the use of equipment unsuited to the meeting hall's electrical system, or (iii) to require fair payment by the wielder of the device for electricity used.

New Jersey also allows video taping of school meetings by the public. Such recording was allowed where the equipment was silent, inoffensive and unobtrusive, having been operated without augmented or supplemental lighting. The court in *Maurice River Township Board of Education v. Maurice River Township Teachers Association*, 193 N.J. Super. 488, 475 A.2d 59 (1984), suggested the adoption of reasonable guidelines for recording by the public. "Such guidelines should include the number and type of cameras permitted, the positioning of the cameras, the activity and location of the operator, lighting and other items deemed necessary to maintain order and to prevent unnecessary intrusion into the proceedings." *Maurice River Township Teachers Association*, 193 N.J. Super. at 493, 475 A.2d at 61-62.

In New York, there is "no justifiable basis for prohibiting the use of unobtrusive, hand-held tape-recording devices at its public meetings." *Mitchell v. Board of Education*, 113 A.D.2d 924, 493 N.Y.S.2d 826 (1985). The court acknowledged that while a board of education has statutory authority to adopt rules for its government and operation, such rules must be reasonable. It then annulled the board's rule absolutely prohibiting the use of unobtrusive recording devices. *Accord, People v. Ystuenta*, 99 Misc. 2d 1105 (N.Y. App. Div. 1979).

I am aware that 1974 Op. Att'y Gen. No. 74-072 discusses regulating audio and video recording of meetings of the Public Utilities Commission of Ohio. The syllabus states:

The public utilities commission has authority to adopt rules for the conduct of its proceedings, and it may restrict the audio-visual recording of such proceedings so long as such restrictions are reasonable. The commission may, however, enact a rule, pursuant to R.C. 4901.13, permitting the use of audio-visual equipment, in its proceedings if it chooses.

I agree that this statement is still valid. I note, however, that one sentence in this

opinion might imply that a blanket prohibition against recording is permissible. ("...the commission [has] the power to establish rules prohibiting or governing the use of audio-visual equipment for coverage of its proceedings"). Op. No. 74-072 at p. 2-303. This implication is inconsistent with the relevant body of law which has shifted the weight of authority toward a right to record.²

In adopting a reasonable rule regulating the order of its meetings, the board of township trustees must be certain to comply with all statutes and constitutional provisions. Protection of private rights is a key consideration in determining reasonableness under the *Froelich* test.

With respect to your first question, therefore, I conclude that a board of township trustees has authority to adopt reasonable rules for the orderly conduct of its proceedings. Such rules may regulate, but not prohibit, the audio and video recording of its proceedings. Rules aimed at avoiding interference with the ability of those present to hear and see the proceedings may require recording equipment to be silent, unobtrusive, self-contained and self-powered. I now turn to your second question, which asks whether the resolution adopted by the Board of Chardon Township Trustees violates R.C. 121.22, the First Amendment of the Constitution of the United States as made applicable to the states by the Fourteenth Amendment, or Article I, Section 11 of the Constitution of Ohio.

The private right affected by a rule of meeting procedure prohibiting recording of proceedings has been characterized as the "right to know" or "the right of access." Ohio has partially codified this right as R.C. 121.22, commonly referred to as the "Sunshine Law." It mandates that all meetings of any public body be "public meetings open to the public at all times" except as specifically excepted by law. The purpose of R.C. 121.22 "is to afford to citizens the maximum opportunity, consistent with the protection of the public and of innocent persons, to observe and participate in the conduct of official business." Ohio Legislative Service Commission, *Analysis of Am. Sub. S. B. 74* (1975). The Sunshine Law, however, does not compel a public body to allow recording. See Op. No. 74-072, at 2-303 ("[A]lthough this Section specifically compels commission meetings to be open to the public, it does not require that the media be permitted to photograph, record or film such meetings.").

Since Ohio's Sunshine Law does not directly address the right to electronically record a public meeting but only requires meetings of government to be open, the Ohio and federal Constitutions must be examined. The right of access to government is found in the First Amendment to the United States Constitution, which states in relevant part: "Congress shall make no law...abridging the freedom of speech, or of the press...." The First Amendment is broad enough to encompass those unenumerated rights necessary for the enjoyment of the enumerated First Amendment rights. See *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 579-580 (1980); *Globe Newspaper Co. v. Superior Court*, 457 U.S. 596, 604 (1982). It serves to ensure that each citizen is able to effectively participate and contribute to our self-government. See *Globe Newspaper*, at 604; *Richmond Newspapers*, at 587-588; *Mills v. Alabama*, 384 U.S. 214, 218 (1966); *Thornhill v. Alabama*, 310 U.S. 88, 95 (1940). Through the Fourteenth Amendment, the First Amendment rights of freedom of speech and freedom of the press apply to the states. *Young v. American Mini Theatres*, 427 U.S. 50 (1976); *reh. den.* 429 U.S. 873 (1976); *Mills*

² One of the two cases cited in Op. No. 74-072 in support of the right to prohibit recording was effectively overruled by legislation. See, N.H. Rev. Stat. Ann. §91-A:2(II) (1987 Supp.), affecting 1590 *Broadcasting Corp. v. Public Utilities Comm'n*, 113 N.H. 258, 306 A.2d 49 (1973). The holding of *Sigma Delta Chi v. Speaker, Maryland House of Delegates*, 270 Md. 1, 310 A.2d 156 (Ct. App. 1973), the other case cited as authority in Op. No. 74-072, is of doubtful vitality. *Sigma Delta Chi* relied heavily on analysis of federal Constitutional rights. With the continuing exposition of the First Amendment "right of access" as discussed in *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555 (1980), and its progeny, *Sigma Delta Chi* lacks convincing precedential value.

v. Alabama, at 218; *Edwards v. South Carolina*, 372 U.S. 229, 235 (1963). Article 1, Section 11 of the Ohio Constitution independently reinforces the rights of free speech and free press by stating, in part: "Every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of the right; and no law shall be passed to restrain or abridge the liberty of speech, or of the press." The Ohio Supreme Court has held that both the First Amendment to the federal Constitution and Article 1, Section 11 of the Ohio Constitution have the same ideal: "that debate on public issues should be uninhibited, robust, and wide open...". *Scott v. News-Herald*, 25 Ohio St. 3d 243, 245, 496 N.E.2d 699, 702 (1986).

The First Amendment right of access extends to government proceedings generally and to the legislative process in particular. *WJW-TV, Inc. v. City of Cleveland*, No. C87-1524, slip op. (N.D. Ohio March 30, 1988) *appeal docketed*, No. 88-3341 (6th Cir. Apr. 21, 1988). See also *Richmond Newspapers* ("The right of access to places traditionally open to the public...may be seen as assured by the amalgam of the First Amendment guarantees of speech and press...", at 577; arbitrary interference with access to important information is an abridgment of the freedom of speech and of the press protected by the First Amendment, at 583 (Stevens, J., concurring)).³

The Ohio Supreme Court has recognized that the public's right of access exists in acknowledging "the public's right to know" what transpires in Ohio courtrooms. *State v. Rogers*, 17 Ohio St. 3d 174, 185, 478 N.E.2d 984, 995 (1985). The public's right to know outweighs a criminal defendant's objection to broadcasting his trial unless it would distract participants, impair the dignity of the proceedings or otherwise materially interfere with the achievement of a fair trial or hearing. In the context of local governmental legislative proceedings the right to know is deeply-rooted:

Our American democracy is partly founded on the premise that the public has a right, yeá even a duty, to oversee the decision-making procedures of those who have been chosen to govern. A public, not given the right of government oversight, is an uninformed public. With such action, the very integrity of the governing process is threatened.

State ex rel. Plain Dealer Publishing Co. v. Barnes, 38 Ohio St. 3d 165, 169, (1988)(Douglas, J., concurring).

The public's right of access to governmental proceedings must be granted on reasonable terms. *State ex rel. Cosmos Broadcasting Corp. v. Brown*, 14 Ohio App. 3d 376, 471 N.E.2d 874 (Lucas County 1984), *appeal dismissed*, No. 84-958 (Ohio Sup. Ct. Sept. 19, 1984). The court found that terms of access could not impede effective reporting:

As applied to members of the so-called "print media," *i.e.*, newspapers, news magazines and the like, there is no question that a constitutional right of access suffices to safeguard adequately their ability to report what goes on in the courtroom. Here, however, the context is slightly different. Members of the *electronic* news media are not themselves being denied access to respondent's courtroom, but their technology for effectively covering the *Bryant* trial is being excluded. Respondent's order, therefore, is rife with constitutional implications. In *Houchins v. KQED, Inc.* (1978), 438 U.S. 1, 17, Justice Stewart, concurring, stated:

"...[T]erms of access that are reasonably imposed on ...the public may, if they impede *effective* reporting without sufficient

³ The right of access also has a common law heritage. See, *e.g.*, *Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978), *reh. den.* 438 U.S. 907 (1978); *U.S. v. Criden*, 648 F.2d 814 (3d Cir. 1981). The right of access antedates the constitution. *U.S. v. Mitchell*, 551 F.2d 1252 (D.C. Cir. 1976) *rev'd* on other grounds *sub. nom. Nixon v. Warner Communications, Inc.*, 435 U.S. 589 (1978).

justification, be unreasonable as applied to journalists who are there to convey to the general public what the visitors see." (Emphasis added.)

In practice, of course, what goes on in a courtroom can only be effectively reported if the technology for doing so is permitted to be used. Thus, if the print media, with its pens, pencils and notepads, have a right of access to a criminal trial, then the electronic media, with its cameras, must be given equal access too. "The public and the victims of crime are entitled to know what is going on. The public is entitled to know what is happening to the accused. There is no other way the busy ordinary citizen can evaluate how the judicial system is administering justice except through the media he reads, hears or watches." *State, ex rel. Dayton Newspapers, v. Phillips, supra*, at 467.

Consequently, under the First Amendment, the concept of equal access to courtroom proceedings and the effective reporting of courtroom events means at least this: unless there is an overriding consideration to the contrary, clearly articulated in the trial court's findings, representatives of the electronic news media must be allowed to bring their technology with them into the courtroom, even if only to a small degree (e.g., a single camera; see C.P. Sup. R. 11[B][1]).

Cosmos Broadcasting, at 382. It is clear that the media has the right to record governmental proceedings pursuant its right to know. Furthermore, it is well-established that the media's rights are no greater than that of the general public. See, e.g., *First National Bank of Boston v. Bellotti*, 435 U.S. 765, 782 (1978), *reh. den.*, 438 U.S. 907 (1978); *Nixon v. Warner Communications, Inc.*, 435 U.S. 589, 609 (1978); *Estes v. Texas*, 381 U.S. 532, 540 (1965). The electronic media's equal access rights, as enunciated by the *Cosmos Broadcasting* court, are equally possessed by the public at large. Inasmuch as the fair trial considerations present in *State v. Rogers*, are not present in a township meeting, the public's constitutional right to know, that is, its right of meaningful and effective access to government proceedings, includes the right of the public and the press to record township meetings.

A procedural rule may be unduly oppressive if it constitutes prior restraint or if it is overbroad. The rule regarding prior restraint is succinctly stated: "[W]hile the First Amendment guarantees of freedom of expression are not absolute, the barriers to prior restraint of First Amendment rights are high and there is a presumption against prior restraints." *State ex rel. Dispatch Printing Co. v. Golden*, 2 Ohio App. 3d 370, 373, 442 N.E.2d 121, 125 (Franklin County, 1982). Exercise of First Amendment rights contingent upon the discretion of a public official is generally unconstitutional prior restraint. See, e.g., *Cox v. Louisiana*, 379 U.S. 536 (1965); *Staub v. City of Baxley*, 355 U.S. 313 (1958); *Lovell v. City of Griffin*, 303 U.S. 444 (1938). It is a basic premise of constitutional law that for a limitation on First Amendment rights to avoid being an unconstitutional prior restraint the limitation must be no broader than necessary to accomplish the desired end. See, e.g., *Shelton v. Tucker*, 364 U.S. 479 (1960); *U.S. v. Columbia Broadcasting System, Inc.*, 497 F.2d 102 (5th Cir. 1974); *Dorfman v. Meisner*, 430 F.2d 558, 561 (7th Cir. 1970). Regulation of First Amendment rights must be precisely and narrowly drawn. *Cox v. Louisiana*.

Based on the existing case law, it appears that a blanket prohibition on recording governmental proceedings is unnecessarily overbroad. Reasonable, precise restrictions may be imposed to insure order during the proceedings. Reasonable restrictions, however, must be narrowly limited so they do not infringe upon statutory or constitutional rights. Therefore it is my conclusion, and you are so advised, that:

1. A board of township trustees has authority to adopt reasonable rules for the conduct of its meetings. Such rules may not prohibit the audio and video recording of township proceedings. Rules regulating recording must promote the orderly transaction of business without unreasonably interfering with the rights of those present. Reasonable rules may require recording equipment to be silent, unobtrusive, self-contained and self-powered to avoid interference with the ability of those present to hear, see and participate in the proceedings.

2. A rule of a board of township trustees for the conduct of its meetings may regulate the audio and video recording of its proceedings but must not violate the public's right of access to governmental proceedings found in the First Amendment of the Constitution of the United States of America and Article I, Section 11 of the Constitution of Ohio. The public's right of access to governmental proceedings includes the right to record township meetings. Any regulation of the right to record must be precisely and narrowly drawn to be no broader than necessary to insure the order of the proceedings.