



July 2021



## Open Meetings Update: Nowhere are we?

In 2020, with the COVID-19 pandemic persisting, the General Assembly passed House Bill 197 and then H.B. 404, giving public bodies the ability to meet virtually instead of in person, as required by Ohio's Open Meetings Act (R.C. 121.22). The law change was temporary, however, and we are now back under the "old" law.

Effective **July 1, 2021**, all public bodies that are subject to Ohio's Open Meetings Act should have begun meeting in person again. Members of the public body must be present in person to be counted as part of the public body's quorum and to vote on any issue considered at the meeting. Further, all meetings of a public body must be open for the public to attend in person. Public bodies may continue to broadcast or livestream meetings, so long as the public still has the option of attending the meeting in person. The Ohio Attorney General's Sunshine Law Manual ([available here](#)) provides a complete rundown of the Open Meetings Act and the duties and obligations of a public body. For specific legal advice, be sure to consult with your legal counsel.

### The Open Meetings Act and Consent Agendas

Speaking of the Open Meetings Act, the Ohio Supreme Court recently issued an opinion concerning the use of consent agendas by a public body. In *State ex rel. Ames v. Portage County Board of Commissioners*, 2021-Ohio-2374, the Ohio Supreme Court considered whether a public body complied with the OMA when it approved in a single vote a consent agenda containing multiple items. The vote took place in a public meeting. The Relator argued that the use of the consent agenda violated the OMA because it effectively prevented the members of the public who attended the meeting from knowing which resolutions were being approved and from hearing any related deliberations.

Under the OMA, a public body's deliberation over public business must take place in an open meeting that complies with the OMA. That is why courts have found violations where members of a public body conducted in-person, back-to-back meetings with fewer than a majority of its members, when members voted via secret ballot and when members concealed deliberations by whispering or passing notes to one another in an otherwise-public meeting. In this case, the Relator argued that even though the public body voted on the consent agenda in an open meeting, it did not state or make public the specific resolutions being voted on. He claimed that by failing to publicly identify the resolutions being voted on, the board effectively voted in secret on the individual resolutions.

The Supreme Court of Ohio held that although the OMA does not prevent the use of consent agendas, a question remained as to whether the way the public body used one in this case

constructively closed the public meeting and was an impermissible end run around the OMA. The Supreme Court remanded the case to the Court of Appeals to consider whether the Relator was entitled to any relief on that basis.

The Ohio Supreme Court also considered whether the public body failed to comply with the OMA with respect to the meeting minutes. Specifically, the public body incorporated an exhibit by reference in the approved minutes, but it failed to provide the exhibit with the minutes when responding to the public records request. The Ohio Supreme Court recognized that the OMA requires public bodies to keep full and accurate minutes of its meeting and the Public Records Act permits the public to access the minutes. It held that, because the public body did not provide full and accurate minutes in response to the public records request — namely, the exhibit incorporated by reference — the Relator was entitled to a writ of mandamus compelling the public body to produce them. This was the case even though the missing attachment was available elsewhere.

Public bodies, especially ones that use consent agendas, should consult with their counsel regarding the impact of this case on their own practice. Although the Ohio Supreme Court explicitly stated that the OMA does not prevent the use of a consent agenda, bodies that use them should consider whether the *manner* in which they are using them effectively closes the public meeting. This case also underscores the importance of keeping full and accurate minutes and making them available upon request.

## Legislative Update

The state's recently passed biennial budget included some changes to Ohio's public records law. Some of the changes were within the Public Records Act itself, some are exceptions to the Public Records Act that fall under the "catch-all" exemption under R.C. 149.43(A)(1)(v), and some create a category of public records altogether. These new provisions, effective **Sept. 30, 2021**, are:

### **Changes to what is *not* a "public record":**

- R.C. 149.43(A)(1)(mm): Removed from this subsection telephone numbers of a party to a motor vehicle accident (but see 149.43(A)(1)(oo));
- R.C. 149.43(A)(1)(nn) (new): Preneed funeral contracts (under 4717.01), contract terms and personal identifiers contained in reports submitted by or for a funeral home to the board of funeral directors and embalmers;
- R.C. 149.43(A)(1)(oo) (new, moved mm): Phone numbers for a party to a motor vehicle accident subject to the requirements of R.C. 5502.11 that are listed on any law enforcement record or report, but these numbers become public record on and after the 30<sup>th</sup> day after the accident.

### **New exemptions under "catch-all" R.C. 149.43(A)(1)(v):**

- R.C. 155.33 (A)(3) (new): Makes confidential and not a public record information submitted to a state agency for an oil or natural gas development lease until a person is selected (same language present in 155.33(E) now as well).
- R.C. 4779.33(B)(1) (new): Makes confidential and not a public record information and records received and/or generated by the Ohio occupational therapy, physical therapy and athletic trainers board pursuant to an investigation.
- R.C. 3722.04(C) (new): Makes confidential and not a public record a final on-site survey report from the federal centers for Medicare and Medicaid services or an accrediting organization approved under 42 U.S.C. 1395bb(a) demonstrating that the hospital is certified or accredited.

### **New categories of public records:**

- R.C. 307.636(D) (new): Annual reports prepared by the newly established Drug Overdose Fatality Committee.
- R.C. 307.646(D) (new): Annual reports created by the newly established Suicide Fatality Review Committee.

### **The “Birthday List”:**

- R.C. 149.434(A): Removes the requirement that a public office maintain a database or a list that includes the name and birthdate of all public officials and employees elected to or employed by that public office. Note: The requirement that a public office maintain a database or list of names remains in place, but the list no longer needs to include the birthdate.

As always, the Ohio Attorney General’s Office will update next year’s Sunshine Laws Manual with these changes in the law. Please feel free to let us know how else we can support open government in Ohio: [Publicrecordsunit@ohioattorneygeneral.gov](mailto:Publicrecordsunit@ohioattorneygeneral.gov).