INTERPRETING OHIO'S SUNSHINE LAWS: A JUDICIAL PERSPECTIVE

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A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm themselves with the power which knowledge gives.[1]

I. INTRODUCTION

The public availability of government information has long been recognized as a fundamental tenet upon which democratic theory rests.[2] This principle, venerated by the founding fathers and later codified by state legislatures, has its foundation in the common-law courts of England.[3] Applying a restricted theory of public access, these courts allowed citizens to inspect government records "only with the consent of the crown or by showing that inspection was necessary to maintain or defend a legal action."[4]

In the late Nineteenth Century, American courts expanded the common-law right to inspect public records by concluding that the English rule did not require a direct private interest or, alternatively, that such a requirement was not binding on the courts of this

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1. Letter from James Madison to W. T. Barry (Aug. 4, 1822), *in* 9 THE WRITINGS OF JAMES MADISON 103 (Gaillard Hunt ed., 1910). Similarly, Thomas Jefferson wrote:

> The way to prevent [errors of] the people is to give them full information of their affairs thro' the channel of the public papers, and to contrive that those papers should penetrate the whole mass of the people. The basis of our governments being the opinion of the people, the very first object should be to keep that right . . . .

Letter from Thomas Jefferson to Edward Carrington (Jan. 16, 1787), *in* 11 THE PAPERS OF THOMAS JEFFERSON 49 (Julian P. Boyd ed., 1955).

2. James B. Recchie & John J. Chernoski, *Government in the Sunshine: Open Meeting Legislation in Ohio*, 37 OHIO ST. L.J. 497, 497 (1976).

3. *Id.*; Gary Elson Brown, *The Right to Inspect Public Records in Ohio*, 37 OHIO ST. L.J. 518, 518–19 (1976).

4. State *ex rel.* Nat'l Broad. Co. v. City of Cleveland, 526 N.E.2d 786, 788 (Ohio 1988).

country.[5] Unlike modern cases, however, these decisions concerned whether an individual possessed the right to inspect public records rather than whether a particular document was, in fact, a "public record" subject to inspection.[6]

The common-law right to inspect government documents has been recognized in Ohio since the earliest reported court decisions.[7] As there was no statutory provision to the contrary (and no constitutional mandate), the right to inspect public records was subject only to the condition that the inspection did not endanger the safety of the record or unreasonably interfere with the duties of the public official having custody of the record.[8] These early Ohio cases, like those of other jurisdictions, recognized that public records were available for inspection regardless of whether an individual had a private interest in the record.[9]

Against this backdrop, the Ohio General Assembly promulgated the Ohio Public Records Act and the Ohio Open Meetings Act in the early 1950s and 1960s. These Acts, collectively referred to as Ohio's "Sunshine Laws," were primarily based on a "public trust" theory—a theory holding that "public records are the people's records, and that the officials in whose custody they happen to

5. Brown, *supra* note 3, at 519 (citing State *ex rel.* Ferry v. Williams, 41 N.J.L. 332 (1879)).

6. *Id.* Early courts employed a variety of principles in defining the class of citizens to whom the right of inspection vested, including citizenship theories (or deviations therefrom), "public trust" theories, and the mere absence of any statutory prohibition of public inspection. *Id.* at 520 (citing State *ex rel.* Thomas v. Hoblitzelle, 85 Mo. 620 (1885); Gleaves v. Terry, 93 Va. 491, 25 S.E. 552 (1896)). A citizenship theory provides that "the mere status of citizenship or residency within a political entity vested in the person seeking inspection a right to examine public records of that entity." *Id.* The municipal corporation theory, on the other hand, "embod[ied] the idea that an individual has a right to inspect public records merely because he is a member of the municipal corporation." *Id.* The "public trust" concept theorized "that a public official is elected or appointed to act on behalf of the people he or she serves and merely holds public records in trust for the public who, as beneficiaries of this trust, may inspect this property in the absence of an overriding governmental interest against inspection." *Id.* at 519–20.

7. *Id.* at 520. *See, e.g.*, Wells v. Lewis, 1901 WL 900, at *5 (Ohio Super.); State *ex rel.* Sullivan v. Wilson, 1937 Ohio Misc. LEXIS 1035, at *8 (Ohio Com. Pl. June 19, 1937); State *ex rel.* Withworth Bros. Co. v. Dittey, 1911 WL 1712, at *8 (Ohio Com. Pl. Nov. 25, 1911); Krickenberger v. Wilson, 1905 WL 825, at *1 (Ohio Com. Pl. June 13, 1905).

8. Brown, *supra* note 3, at 520; State *ex rel.* Louisville Title Ins. Co. v. Brewer, 70 N.E.2d 265, 266 (Ohio 1946).

9. Brown, *supra* note 3, at 520. *See also Withworth*, 1911 WL 1712, at *1.

be are merely trustees for the people . . . ."[10] Nevertheless, the array of disputes that has arisen under Ohio's Sunshine Laws has rendered the "public trust" concept, however sound in theory, often problematic in application.[11]

This Article examines Ohio's Sunshine Laws from the perspective of the Ohio judiciary and, in so doing, considers the oft-competing interests of the public to inspect government records and the state in protecting the privacy rights of its citizens and facilitating the efficient operation of government. Part II of this Article provides a background to the Ohio Public Records and Open Meetings Acts. Part III observes that Ohio courts have traditionally applied such laws under a textual approach to statutory interpretation, and suggests that this approach is shaped as much by the nature of the statute at issue as by the vision of the interpreter. Part IV compares the Ohio Sunshine Laws to those of our sister states and of the federal government. Finally, Part V concludes that the approach of the Ohio judiciary with regard to such laws—in contrast to many jurisdictions—is a paradigm of strict interpretation in the face of intuitive application.

It should be noted that this Article does not advance normative claims about the judicial interpretation of the Ohio Public Records and Open Meetings Acts. Nor should the Article be construed as the author's approval (or disapproval) of the interpretation techniques herein described. Rather, this Article provides a descriptive account of the tendency of Ohio courts in interpreting such laws.

II.
STATUTORY BACKGROUND

The promulgation of Ohio's Sunshine Laws substantially broadened the common-law approach to public records and open meetings laws. The General Assembly's codification and expansion of the common law in turn provided the legislative foundation on which Ohio courts established the body of case law governing the right to inspect government affairs. A sound comprehension of this body of law thus requires a brief background on the Ohio Public Records Act and the Ohio Open Meetings Act.

10. Dayton Newspapers v. City of Dayton, 341 N.E.2d 576, 577 (Ohio 1976) (citation omitted).

11. *See* Recchie & Chernoski, *supra* note 2, at 497. **R**

A. Ohio's Public Records Act

The Ohio Public Records Act regulates the circumstances under which the public is entitled to inspect government records.[12] As a general rule, the Act requires every "public office" to promptly prepare and make available for inspection all "public records," at all reasonable times, during regular business hours.[13] In determining the applicability of the statute, therefore, the definitions of "public office" and "public record" are of primary import.

1. Definitions of "Public Office" and "Public Record"

Section 149.011(A) of the Ohio Revised Code defines "public office" to include "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."[14] Thus, the statutory right to "inspect 'public records' in Ohio applies to all three branches of government and to governmental entities at all levels."[15] Moreover, an entity need not be operated by the state or a political subdivision to be a "public office" under section 149.011(A).[16] Because of the expansive definition of "public office," however, its scope has occasioned only limited public debate.[17]

12. OHIO REV. CODE ANN. § 149.43 (West 2002); *see also* Brown, *supra* note 3, at 520–21.

13. § 149.43(B)(1).

14. § 149.011(A).

15. Brown, *supra* note 3, at 521–22.

16. Indeed, an entity that performs a public function and is supported by public tax money has been held to be a "public office" within the meaning of OHIO REV. CODE ANN. § 149.011(A) (West 2002). *See, e.g.*, State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159, 1165 (Ohio 1992); State *ex rel.* Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n., 531 N.E.2d 313 (Ohio 1988) (holding that a nonprofit corporation operating a city hospital under a rent-free lease with the city is a public office under OHIO REV. CODE 149.011(A)); State *ex rel.* Fox v. Cuyahoga Cty. Hosp. Sys., 529 N.E.2d 443 (Ohio 1988) (holding that a public hospital is a "public office" and therefore subject to public records disclosure requirements).

17. Brown, *supra* note 3, at 522 ("Although there may be ample room for dispute concerning whether a particular record is public and thereby subject to inspection, in the absence of a specific statutory exclusion there can be little dispute about whether the particular governmental entity involved is subject to coverage of the act."). *But see Cuyahoga*, 529 N.E.2d at 446 ("[A] public hospital which renders a public service to residents of a county and which is supported by public taxation, is a 'public institution' and thus a 'public office' pursuant to R.C. 149.011(A) . . . .").

The definition of "public record," on the other hand, has been the subject of considerable litigation in Ohio courts. Section 149.43(A)(1) of the Ohio Revised Code, in relevant part, defines "public record" as "*records* kept by any public office . . . ."[18] Accordingly, the definition of a "public record" must be read in conjunction with the term "record." Section 149.011(G) defines "record" to include "any document . . . 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."[19] To the extent that an item does not serve to document the activities of a public office, it is not a public record and need not be disclosed.[20]

2. Public Records Exemptions and General Rules of Construction

Further limiting the accessibility of government information, the Ohio General Assembly exempts numerous items from the operation of the statute.[21] Chief among these exemptions is the so-

18. OHIO REV. CODE ANN. § 149.43(A)(1) (West 2002) (emphasis added).

19. §149.011(G).

20. State *ex rel.* McCleary v. Roberts, 725 N.E.2d 1144, 1146 (Ohio 2000); State *ex rel.* Fant v. Enright, 610 N.E.2d 997, 999 (Ohio 1993).

21. Although courts rarely make the distinction, these exclusions appear to be *exemptions*—that is, they do not fall within the ambit of a "public record" and are thus not subject to the operation of the statute (as opposed to *exceptions*, which meet the statutory definition, but are excluded by the statute). The exemptions include: medical records, OHIO REV. CODE ANN. § 149.43(A)(1)(a) (West 2002); records pertaining to probation and parole proceedings, § 149.43(A)(1)(b); records pertaining to adoption proceedings and certain other adoption-related records, § 149.43(A)(1)(d); putative father registry records, § 149.43(A)(1)(e); trial preparation records, § 149.43(A)(1)(g); confidential law enforcement investigatory records, § 149.43(A)(1)(h); certain records pertaining to mediation, § 149.43(A)(1)(i); DNA records stored in the DNA Database, § 149.43(A)(1)(j); inmate records released by the Department of Rehabilitation and Correction (DRC) to the Department of Youth Services (DYS) or a court of record, § 149.43(A)(1)(k); records maintained by DYS pertaining to children in its custody released by the DYS to the DRC, § 149.43(A)(1)(l); intellectual property records, § 149.43(A)(1)(m); donor profile records, § 149.43(A)(1)(n); records maintained by the Department of Job and Family Services (DJFS) to locate individuals for purposes of establishing paternity, or establishing, modifying, and enforcing support orders being administered by child support enforcement agencies, or to detect fraud in any DJFS administered program, § 149.43(A)(1)(o); peace officer residential and familial information, § 149.43(A)(1)(p); county hospital records that document trade secrets, § 149.43(A)(1)(q); information pertaining to the recreational activities of a person under the age of eighteen, § 149.43(A)(1)(r); information, documents, or reports presented to a child fatality review board, all statements made by review board members during meetings, and all work products of a review board other than a specific annual report,

called "catch-all" exemption, which allows state agencies to withhold records the release of which is prohibited by state or federal law.[22] Other exemptions include medical records,[23] confidential law enforcement investigatory records,[24] and records pertaining to probation and parole proceedings.[25]

Nevertheless, the foregoing exemptions must be narrowly construed in favor of disclosure, "and any doubt should be resolved in favor of disclosure of public records."[26] Moreover, the custodian of the records bears the burden of establishing that the requested information falls within one of the enumerated exemptions.[27] If the government meets its burden and the record contains both exempt and non-exempt information, the exempt information may be edited out—a process known as "redaction."[28] Indeed, the government may withhold the entire record if the exempt information is inextricably intertwined with the remainder of the record.[29]

B. Ohio's Open Meetings Act

Balancing these same interests of public access, constituent privacy, and efficient government, the Ohio Open Meetings Act confers on the public a qualified right of access to certain government and quasi-governmental meetings. The Open Meetings Act requires public bodies "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."[30] Similar to the Pub-

§ 149.43(A)(1)(s); records provided to and statements made by the executive director of a public children services agency or prosecuting attorney under certain circumstances involving deceased children whose deaths may have been caused by abuse, neglect, or other criminal conduct, § 149.43(A)(1)(t); and test materials, examinations, or evaluation tools used in nursing home administrator license examinations, § 149.43(A)(1)(u).

22. § 149.43(A)(1)(v).

23. § 149.43(A)(1)(a).

24. § 149.43(A)(1)(h).

25. § 149.43(A)(1)(b).

26. State *ex rel.* Strothers v. Wertheim, 684 N.E.2d 1239, 1241 (Ohio 1977).

27. State *ex rel.* Nat'l Broad. Co. v. City of Cleveland, 526 N.E.2d 786, 790 (Ohio 1988).

28. State *ex rel.* Fostoria Daily Review Co. v. Fostoria Hosp. Ass'n., 531 N.E.2d 313, 316 (Ohio 1988); State *ex rel.* Outlet Communications, Inc. v. Lancaster Police Dep't, 528 N.E.2d 175, 179 (Ohio 1988).

29. State *ex rel.* Master v. City of Cleveland, 667 N.E.2d 974, 976 (Ohio 1996); State *ex rel.* McGee v. Ohio State Bd. of Psychology, 550 N.E.2d 945, 947 (Ohio 1990) *overruled on other grounds by* State *ex rel.* Steckman v. Jackson, 639 N.E.2d 83 (Ohio 1994).

30. OHIO REV. CODE ANN. § 121.22(A) (West Supp. 2002).

lic Records Act, the Ohio Open Meetings Act must be construed in favor of public access.[31]

1. Definitions of "Public Body" and "Meeting"

In establishing the right of access to meetings of a public body, the General Assembly has broadly defined the terms "public body" and "meeting." Under section 121.22(B)(1)(b) of the Open Meetings Act, a "public body" is defined as "[a]ny board, commission, committee, council, or similar decision-making [governmental] body . . . ."[32] Similarly, the General Assembly broadly defined a "meeting" as "any prearranged discussion of the public business of the public body by a majority of its members."[33]

2. Open Meetings Exceptions and General Rules of Construction

Despite the broad sweep of the Open Meetings Act, certain meetings and entities that would otherwise be subject to the statute are specifically excepted from its operation.[34] These exceptions include grand jury sessions,[35] audit conferences conducted by the auditor of state,[36] and certain meetings of the Adult Parole Authority.[37] The Open Meetings Act also permits a public body to hold private executive sessions under the limited circumstances specified in section 121.22(G).[38]

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31. *Id.*

32. § 121.22(B)(1)(b).

33. § 121.22(B)(2).

34. Recchie & Chernoski, *supra* note 2, at 500 ("The exceptions appear to be based upon a determination that the business conducted by these bodies is such that the interests served by maintaining secrecy are more important than those promoted by informing the public."). R

35. OHIO REV. CODE ANN. § 121.22(D)(1) (West Supp. 2002).

36. § 121.22(D)(2).

37. § 121.22(D)(3). Other exceptions include: meetings of the organized crime investigations commission, § 121.22(D)(4); meetings of a child fatality review board, § 121.22(D)(5); particular meetings of the state medical board, § 121.22(D)(6); meetings of the board of nursing, § 121.22(D)(7), the board of pharmacy, § 121.22(D)(8), and the state chiropractic board, § 121.22(D)(9), when determining whether to suspend a license or certificate without a prior hearing; and 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 the Emergency Planning sections of the Revised Code, § 121.22(D)(10).

38. These circumstances include the consideration of appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, OHIO REV. CODE ANN. § 121.22(G)(1) (West Supp. 2002); the consideration of the purchase of property for public purposes, or for the sale of property at competitive bidding, § 121.22(G)(2); conferences with an attorney for

In addition to these statutory exceptions, numerous types of meetings fall outside the ambit of the statute. Meetings between a public officer and his or her staff, for example, may not be subject to the Act.[39] Further, the statute does not expressly cover the Ohio courts or the General Assembly, leading some scholars to conclude that such entities are beyond the reach of the statute because they "cannot properly be regarded as a 'board, commission, committee or *similar* decision-making body.'"[40]

In determining whether the meeting of a public body is subject to public access, however, the Open Meetings Act is only the beginning of the analysis. The Ohio Constitution provides that when a charter municipality has properly enacted an ordinance that conflicts with a state law, the charter provision will control.[41] As a result, one must examine not only the Open Meetings Act, but also any local ordinances, statutes, and bylaws that may conflict with the Act.

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the public body concerning disputes involving the public body that are the subject of pending or imminent court action, § 121.22(G)(3); preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment, § 121.22(G)(4); matters required to be kept confidential by federal law or regulations or state statutes, § 121.22(G)(5); details relative to the security arrangements and emergency response protocols for a public body or a public office, if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office, § 121.22(G)(6); and, 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, § 121.22(G)(7).

39. *See, e.g.*, Smith v. City of Cleveland, 641 N.E.2d 828, 831 (Ohio Ct. App. 1994); Beacon Journal Publ'g Co. v. City of Akron, 209 N.E.2d 399, 403 (Ohio 1965).

40. Recchie & Chernoski, *supra* note 2, at 500. Recchie and Chernoski additionally note that although Ohio did not specifically except the judiciary from the statute, no state legislature has included courts within the scope of their open meetings legislation and no court has so interpreted statutes similar to the Ohio Open Meetings Act to include the judiciary. *Id.* at 500. Similarly, the General Assembly is not expressly covered by the terms of the statute and "[r]ules of statutory construction would prevent any interpretation which would so extend it." *Id.* at 501. **R**

41. OHIO CONST. art. XVIII, §§ 3, 7. *See, e.g.*, Johnson v. Kindig, No. 00CA0095, 2001 WL 929378, at *3 (Ohio App. 9 Dist. Aug. 15, 2001) (holding that where charter explicitly states all council meetings shall be public, the municipality must abide by those guidelines and may not adjourn into executive session for any purpose); State *ex rel.* Bond v. City of Montgomery, 580 N.E.2d 38, 41 (Ohio Ct. App. 1989).

III.
JUDICIAL INTERPRETATION OF OHIO'S SUNSHINE LAWS

A. Interpretation Techniques

Although statutory rights in Ohio are grounded in the language of the Ohio Revised Code, the parameters of such rights are invariably shaped by the interpretation techniques employed by Ohio courts. As Professor William Eskridge has noted:

> Notwithstanding the "statutorification" of American law (Grant Gilmore's phrase), courts retain a great role, because they apply and interpret statutes in the "hard cases" not clearly answered by the statutory language. Such hard cases are inevitable, partly because of the inherent imprecision of language and partly because of the inability of statute drafters to anticipate all problems or circumstances within the statute's ambit.[42]

Nevertheless, "the proper interplay among statutory language, legislative purpose, extrinsic material such as other statutes and legislative history, and the particular facts of the case at hand may not be discerned by any formula."[43] As a result, the interpretation of statutory language in "hard cases" requires substantial judicial discretion.[44]

According to Eskridge, three theoretical approaches have dominated the history of interpretive jurisprudence: (1) "intentionalism," in which the interpreter follows the original intent of the statutory drafters; (2) "purposivism," in which the interpreter identifies the purpose of the statute and renders a decision in accord with that objective; and (3) "textualism," in which the interpreter makes decisions based on the "plain language" of the statute.[45] Although "[t]hese different approaches rest upon different visions of the role of the interpreter,"[46] the following sections demonstrate that the use of such approaches may also depend on the type of statute at issue.

42. WILLIAM N. ESKRIDGE, JR. ET AL., CASES AND MATERIALS ON LEGISLATION: STATUTES AND THE CREATION OF PUBLIC POLICY 669 (3d ed. 2001).

43. *Id.* at 670.

44. *Id.*

45. *Id.*

46. *Id.*

B. Ohio's Sunshine Laws: A Textual Approach

Notwithstanding the broad discretion afforded to judges, Ohio courts have primarily approached the Ohio Sunshine Laws under a textual theory. The policy underlying this approach is, to some extent, attributable to the fact that the Ohio General Assembly has already balanced the relevant public and private interests *within* the Ohio Public Records and Open Meetings Acts.[47] Thus, many provisions of the Ohio Sunshine Laws leave little room for judicial balancing.[48]

1. Cases Interpreting the Definition of a "Public Office"

The Supreme Court of Ohio has historically refrained from judicial balancing in cases involving the statutory definition of a "public office." In *State* ex rel. *Fox v. Cuyahoga City Hospital System*,[49] for example, the court considered whether a county hospital was a "public office" subject to the Public Records Act.[50] Relying in part on the legal definition of a "public institution,"[51] the court held that "an entity organized for rendering services to the residents of its community and supported by public taxation is deemed a public institution."[52] Under this plain language approach, the court concluded that a hospital was a "public institution" and thus a "public office" for purposes of the Public Records Act.[53]

That same year, the Ohio Supreme Court addressed whether a hospital operated by a private, nonprofit corporation was a "public office" in *State* ex rel. *Fostoria Daily Review Co. v. Fostoria Hospital Ass'n*.[54] The court in *Fostoria* concluded that because the hospital provided a public service to residents and was supported by public taxation, it was "established by the laws of this state for the exercise of [a] function of government" and thus a "public office."[55] As a result, the court employed a textual approach in the face of the

47. State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159, 1165 (Ohio 1992).

48. *See, e.g.*, State *ex rel.* Fant v. Enright, 610 N.E.2d 997, 998 (Ohio 1993).

49. 529 N.E.2d 443 (Ohio 1988).

50. *Id.*

51. BLACK'S LAW DICTIONARY 719 (5th ed. 1979).

52. *Cuyahoga*, 529 N.E.2d at 445.

53. *Id.* at 446.

54. 531 N.E.2d 313 (Ohio 1988).

55. *Id.* at 315; *see also* State *ex rel.* Dist. 1199 v. Lawrence County Gen. Hosp., 699 N.E.2d 1281, 1283 (Ohio 1998); State *ex rel.* Fox v. Cuyahoga Hosp. Sys., 529 N.E.2d 443, 446 (Ohio 1988). *But see* State *ex rel.* Farley v. McIntosh, 731 N.E.2d 726, 728 (Ohio Ct. App. 1998) (holding that a private court-appointed psychologist is not a "public office").

arguably intuitive result—namely, that private, non-profit corporations are not subject to the Public Records Act.

Similarly, the court addressed whether a private, nonprofit foundation that acted as the fundraising arm of a state university was a "public office" in *State* ex rel. *Toledo Blade Co. v. University of Toledo Foundation*.[56] A newspaper publisher in *Toledo Blade Co.* requested the names of individuals who donated to a state university, arguing that the foundation was a "public office" for purposes of the Public Records Act.[57] The foundation countered that because it "plays no policy-making role in the university, employs and pays its own staff, pays rent to the university for its office space, and is supported by private donations, there [was] sufficient insulation between it and the university to exempt it from R.C. 149.43."[58] In perhaps its most direct recognition of the legislative balance in the Public Records Act, the court observed:

> It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code.[59]

In view of such legislative balancing, the court held that the foundation was a "public office" because "[o]n its face, the definition of 'public office' . . . is independent of what policy-making role, if any, the entity plays."[60]

The Ohio Supreme Court again considered the statutory definition of "public office" in *State* ex rel. *Strothers v. Wertheim*.[61] The corporation at issue in *Strothers* was organized for the purpose of assisting county citizens in the resolution of complaints against county agencies.[62] Relying on *Fox* and *Fostoria*, the court concluded that "even a cursory review of this court's prior case law interpreting R.C. 149.43 and 149.011(A) leads to the inescapable conclusion

56. 602 N.E.2d 1159 (Ohio 1992).

57. *Id.* at 1160.

58. *Id.* at 1161.

59. *Id.* at 1164–65. *But see* State *ex rel.* Beacon Journal Publ'g Co. v. City of Akron 640 N.E.2d 164, 166 (Ohio 1994) (finding that social security numbers are not "public records" for purposes of the Ohio Public Records Act because their disclosure violates the constitutional right to privacy).

60. *Toledo Blade*, 602 N.E.2d at 1162.

61. 684 N.E.2d 1239 (Ohio 1997).

62. *Id.* at 1241.

that the [corporation] is a 'public office' and thus subject to the Public Records Act."[63]

Most recently, the Supreme Court of Ohio addressed whether a nonprofit corporation that provided fire-fighting services was a "public office" in *State* ex rel. *Freedom Communications, Inc. v. Elida Community Fire Co.*[64] The court rejected the corporation's argument that because it "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)."[65] Again noting that a strict interpretation of the phrase "public office" does not require such characteristics, the court held the corporation was subject to the Public Records Act.[66]

2. Cases Interpreting Other Public Records Issues

In addition to cases involving the statutory definition of a "public office," Ohio courts have applied a plain language approach to a variety of other issues arising under the Public Records Act. In *State* ex rel. *Fant v. Enright*,[67] the Supreme Court of Ohio addressed whether an individual may inspect the records of a public office irrespective of the purpose for his or her request.[68] Declining to look beyond the plain language of the statute, the court in *Fant* concluded that "any person" meant "any person, regardless of [the] purpose" of the request.[69] Indeed, the *Fant* decision is expressly grounded on the notion that certain provisions of the Act "leave[ ] no room for judicial balancing."[70]

The Supreme Court of Ohio additionally addressed whether a request can even fail to trigger the Public Records Act. In *State* ex rel. *Dillery v. Icsman*,[71] the court considered a request for copies of "any and all records generated, in the possession of [the city police department], containing any reference whatsoever to [a criminal defendant]."[72] Concluding that the requester failed to identify records with sufficient clarity, the court held that such an inquiry is

63. *Id.*

64. 697 N.E.2d 210 (Ohio 1998).

65. *Id.* at 212.

66. *Id.* at 212–14.

67. 610 N.E.2d 997 (Ohio 1993).

68. *Id.* at 998.

69. *Id.* (citing State *ex rel.* Clark v. Toledo, 560 N.E.2d 1313, 1314 (Ohio 1990)). *But see* State *ex rel.* Keller v. Cox, 707 N.E.2d 931, 934 (Ohio 1999).

70. *Fant*, 610 N.E.2d at 998.

71. 750 N.E.2d 156 (Ohio 2001).

72. *Id.* at 158.

not a proper request under the plain language of the statute.[73] One appellate court, citing the *Black's Law Dictionary* definition of a "request," has further noted that "a general request, which asks for everything, is not only vague and meaningless, but essentially asks for nothing."[74]

In another example of a textual approach to Ohio's Public Records Act, the Ohio Supreme Court in *State* ex rel. *Mazzaro v. Ferguson* considered whether a public office must honor a request for records to which a public office has access, but does not actually possess.[75] Holding that such records were subject to the Act, the court noted that "[w]e come to these conclusions because they are consistent with R.C. 149.43(C), which allows a mandamus action against either the governmental unit or the person responsible for a public record. In our view, the disjunctive used in R.C. 149.43(C) manifests an intent to afford access to public records, even when a private entity is responsible for the records."[76]

In *State* ex rel. *Cincinnati Enquirer v. Krings*, the court recently addressed a similar fact-pattern.[77] Refining the *Mazzaro* decision, the court held that a private entity is subject to the Public Records Act if three conditions are satisfied: (1) the private entity prepared the records to carry out a public office's responsibilities; (2) the public office is able to monitor the private entity's performance; and (3) the public office has access to the records for this purpose.[78] The court reiterated that "R.C. 149.43(C) permits a mandamus action against either 'the public office or the person responsible for the public record' to compel compliance with the Public Records Act. This language 'manifests an intent to afford access to public records, even when a private entity is responsible for the records.' "[79]

Ohio courts have also applied a plain language approach when addressing the copy costs and distribution methods of public records. In *State* ex rel. *Warren Newspapers, Inc. v. Hutson*, the Supreme Court of Ohio considered whether copies of public records

73. *Id.* at 159.

74. State *ex rel.* Zauderer v. Joseph, 577 N.E.2d 444, 446 (Ohio Ct. App. 1989).

75. 550 N.E.2d 464 (Ohio 1990).

76. *Id.* at 467.

77. 758 N.E.2d 1135 (Ohio 2001).

78. *Id.* at 1139.

79. *Id.* (citing State *ex rel.* Mazzaro v. Ferguson, 550 N.E.2d 464, 467 (Ohio 1990); State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159, 1163 (Ohio 1992)). *Mazzaro* specifically concluded that R.C. 149.43(B) required the public office to produce for inspection the records to which it had access, but did not actually possess. *Id.* at 1141.

should be available at actual cost without charge for labor.[80] The portion of the Public Records Act at issue in *Hutson* provided that "[u]pon request, a public office or a person responsible for the public record shall make copies available at cost, within a reasonable period of time."[81] Deferring to the plain language of the statute, the court held that "[s]ince the General Assembly could have, but failed to, specify 'reasonable cost,' we hold that R.C. 149.43(B) means 'actual cost.'"[82]

In addition, the Ohio Supreme Court considered whether the Public Records Act requires a custodian to mail copies of public records upon request in *State* ex rel. *Fenley v. Ohio Historical Society*.[83] Directly addressing its interpretation approach to the Public Records Act, the court stated:

> It is a frequently cited rule of statutory construction that "where the terms of a statute are clear and unambiguous, the statute should be applied without interpretation." . . . We thus find that the word "available" is not synonymous with "available by mail." To apply that interpretation would be to rewrite the statute beyond what its literal words will support. Such an interpretation of the statute would require this court to add words to R.C. 149.43. We refuse to do this without a more affirmative authorization from the General Assembly. Moreover, the General Assembly is well equipped to determine what the cost of such a mailing should reasonably be, if it does determine that a duty to mail can appropriately be placed upon the custodian of public records. . . . The General Assembly can weigh those burdens against the public's right to know and legislate an equitable balance.[84]

Indeed, the General Assembly ultimately amended the Public Records Act to require that custodians "transmit a copy of a public record to any person by United States mail. . . ."[85]

Ohio courts have also employed a plain language approach in considering the definition of a "public record." In *State* ex rel. *Beacon Journal Publishing Co. v. Maurer*,[86] the Ohio Supreme Court considered a request for an unredacted copy of an incident report containing officer statements made in connection with an officer-

80. 640 N.E.2d 174 (Ohio 1994).
81. OHIO REV. CODE ANN. § 149.43(B) (West 2002).
82. 640 N.E.2d at 181.
83. 597 N.E.2d 120 (Ohio 1992).
84. *Id.* at 122–23 (citations omitted).
85. OHIO REV. CODE ANN. § 149.43(B)(3) (West 2002).
86. 741 N.E.2d 511 (Ohio 2001).

involved fatal shooting.[87] The police department countered that the incident report was a "confidential investigatory record" and, as such, contained information that should be redacted under section 149.43(A)(1)(h).[88] That section defines "[c]onfidential law enforcement investigatory record[s]" as records that (1) pertain to a criminal, quasi-criminal, civil, or administrative law enforcement matter and (2) create a high probability of disclosing the statutorily described information.[89] Although the *Maurer* court acknowledged "the risk that the report may disclose the identity of an uncharged suspect," it concluded that "incident reports initiate the criminal investigation [but] are not part of it" and thus failed the first part of the statutory definition."[90]

3. The Interplay Between the Federal Constitutional Right to Privacy and the Ohio Public Records Act

Although Ohio courts have historically interpreted the Public Records Act under a textual approach, some of our courts have, on rare occasions, engaged in the balancing of public and private rights traditionally reserved to the General Assembly. These occasions, however, have been generally limited to cases in which courts have considered whether the constitutional right to privacy prevents the disclosure of records. In *Kallstrom v. City of Columbus*,[91] for example, the Sixth Circuit Court of Appeals considered whether the disclosure of information contained within the personnel files of police officers, pursuant to the Public Records Act, would violate the officers' constitutional right to privacy.[92] Balancing the privacy interests of the officers against the public's interest in disclosure, the Sixth Circuit concluded that "the officers' privacy interest [implicates] a fundamental liberty interest" and enjoined the disclosure of such information.[93]

One year later, the supreme court considered the same issue in *State* ex rel. *Keller v. Cox*.[94] Adopting the judicial balance reached in *Kallstrom*, the court observed that "the requested records are exempt because they are protected by the constitutional right to privacy."[95] The court noted in dicta, however, that such records

87. *Id.* at 513.
88. *Id.* at 514.
89. OHIO REV. CODE ANN. § 149.43(A)(2) (West 2002).
90. *Maurer*, 741 N.E.2d at 514.
91. 136 F.3d 1055 (6th Cir. 1998).
92. *Id.* at 1059.
93. *Id.* at 1062.
94. 707 N.E.2d 931 (Ohio 1999).
95. *Id.* at 934.

"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."[96]

Most recently, the supreme court held that the constitutional right to privacy prevented the disclosure of certain personal information in *State* ex rel. *McCleary v. Roberts*.[97] In *McCleary*, the city of Columbus implemented a photo identification program requiring parents of children who used city-owned swimming facilities to provide the Recreation and Parks Department with personal information regarding their children.[98] Although the court concluded that such information was not a "public record," it also cited *Kallstrom* and *Keller* for the proposition that the constitutional right to privacy prohibited the disclosure of personally identifiable information of the children who used the facilities.[99]

In point of fact, the judicial balancing of public and private interests in *Kallstrom*, *Keller*, and *McCleary* is not a departure from the plain language approach traditionally employed by Ohio courts. Indeed, both the "catch-all" exemption to the Public Records Act and the Supremacy Clause of the United States Constitution dictate that federal constitutional rights supersede the directives of the Ohio Sunshine Laws.[100] Because the determination of those constitutional rights must be conducted outside the statutory framework of such laws, these cases provide little indicia of the statutory interpretation techniques of Ohio courts. Nevertheless, the court's recognition of a "good sense" rule in *Keller*—albeit dicta—marks the first significant departure from the plain language approach traditionally employed by Ohio courts when interpreting the Public Records Act.

4. Cases Interpreting the Ohio Open Meetings Act

Despite the similar interests balanced by the Public Records Act and the Open Meetings Act, an Ohio appellate court recently held in *Sabo v. Hollister Water Association* that the entities subject to access under each Act may differ.[101] *Sabo* addressed whether a water association, organized as a private nonprofit corporation, was

96. *Id.*

97. 725 N.E.2d 1144 (Ohio 2000).

98. *Id.* at 1146.

99. *Id.* at 1147–48.

100. U.S. CONST. art. VI § 2; OHIO REV. CODE ANN. § 149.43(A)(1)(v) (West 2002).

101. No. 93 CA 1582, 1994 WL 7218 (Ohio App. Ct. 1994).

subject to both the public records and open meetings laws.[102] Faced with comparing the statutory definition of a "public office" under the Public Records Act and a "public body" under the Open Meetings Act, the court of appeals concluded that the water association was a "public office" subject to the Public Records Act, but not a "public body" under the Open Meetings Act.[103]

Two years later, the supreme court again addressed both the Open Meetings Act and Public Records Act in *White v. Clinton County Bd. of Comm'rs*.[104] *White* considered the interplay between the Ohio Sunshine Laws in the context of a public body's duty to keep the minutes of its meetings.[105] Although neither statute explicitly specifies the level of detail that must be included in the minutes of a public body meeting, the court "glean[ed] more about the requirements of [the Open Meetings Act] by examining the last sentence of that subsection, which states that the minutes of a public body's *executive sessions* 'need only reflect the general subject matter of discussions . . . .' "[106] Because the meeting at issue was not an executive session, the court concluded that "[t]he minutes . . . must contain more substantial treatment of the items discussed, and certainly should not be limited to a mere recounting of the body's roll call votes."[107] Accordingly, the court concluded that the plain meaning of the Open Meetings Act required the board to create and disclose minutes that are full and accurate.[108]

Similarly, an Ohio court of appeals in *Smith v. City of Cleveland* employed a plain language interpretation when addressing whether an individual may constitute a "public body."[109] *Smith* involved an employee disciplinary hearing over which the city safety director presided.[110] An administrator sought leave to attend the hearing and filed a motion for declaratory judgment to that effect.[111] In denying access to the administrator, the court concluded that such a hearing did not fall under the auspices of the Open Meeting Act because the safety director's "actions [did not] constitute the ac-

102. *Id.* at *1.
103. *Id.* at *4–6.
104. 667 N.E.2d 1223 (Ohio 1996).
105. *Id.* at 1225.
106. *Id.* at 1229.
107. *Id.*
108. *Id.*
109. 641 N.E.2d 828, 831 (Ohio Ct. App. 1994).
110. *Id.* at 829.
111. *Id.*

tions of a board, commission or committee as set forth in the statute."[112]

In *TBC Westlake, Inc. v. Hamilton County Board of Revision*,[113] the Ohio Supreme Court again employed a textual approach to determine whether a quasi-judicial hearing was a "meeting."[114] At issue in *TBC Westlake* was whether the Board of Tax Appeals could lawfully refuse disclosure of an attorney examiner's report. Distinguishing between a "hearing" and a "meeting," the court concluded that quasi-judicial bodies, such as the Board of Tax Appeals, are not subject to the Open Meetings Act when discharging their adjudicative duties.[115]

To every rule, however, there are exceptions. The exception to the Ohio courts' traditional interpretation of the Open Meetings Act is *State* ex rel. *Cincinnati Post v. City of Cincinnati*, in which a newspaper sought a writ of mandamus to obtain the minutes of meetings held by the city council concerning the construction of new football and baseball stadiums.[116] Because a "meeting" is defined in the Open Meetings Act as "any prearranged discussion of the public business of the public body *by a majority of its members*,"[117] the council sought to circumvent the statute by deliberately scheduling back-to-back meetings, which, individually, were not attended by a majority of council members.[118] Although the court concluded that back-to-back sessions discussing exactly the same issues might be liberally construed as the same meeting, it nonetheless evinced a non-textual approach by noting that such maneuvering voids the clear intent of the statute.[119] In holding that such "round-

112. *Id.* at 831; *see also* OHIO REV. CODE ANN. § 121.22(B)(1)(a) (West Supp. 2002); Beacon Journal Publ'g Co. v. City of Akron, 209 N.E.2d 399, 403 (Ohio 1965); 1994 OHIO ATT'Y GEN. OPS. No. 94-096 (discussing the application of the Open Meetings Law). Nevertheless one court recently determined that a committee appointed by the Commission Chair and not by formation of the Commission is a "public body" for purposes of the Open Meetings Act. *See* Wheeling Corp. v. Columbus & Ohio River R.R. Co., 771 N.E.2d 263, 272 (Ohio Ct. App. 2001).

113. 689 N.E.2d 32 (Ohio 1998).

114. *Id.* at 34–35.

115. *Id.* at 35; *see also* Jones v. Liquor Control Comm'n, No. 01AP-344, 2001 WL 1631333, at *6 (Ohio Com. Pl. Dec. 20, 2001); Angerman v. State Med. Bd. of Ohio, 591 N.E.2d 3, 6–7 (Ohio Ct. App. 1990); City of Westerville v. Hahn, 556 N.E.2d 200, 205 (Ohio Ct. App. 1988); Carver v. Township of Deerfield, 742 N.E.2d 1182, 1187 (Ohio 2000).

116. 668 N.E.2d 903, 904–05 (Ohio 1993).

117. OHIO REV. CODE ANN. § 122.121(B)(2) (West Supp. 2002) (emphasis added).

118. 668 N.E.2d at 904.

119. *Id.* at 906.

robin" meetings were subject to the Open Meetings Act, the court observed that its "'paramount concern' is the statute's legislative intent."[120]

IV.
THE APPLICATION OF SUNSHINE LAWS IN OTHER JURISDICTIONS

The plain language approach of Ohio courts in applying the Public Records and Open Meeting Acts is perhaps best observed when juxtaposed to the public records and open meetings laws of our sister states and of the federal government. This section begins with a discussion of *State* ex rel. *Thomas v. Ohio State University*[121]—a case in which the Supreme Court of Ohio distinguished between the proper interpretation of the Ohio Public Records Act and the federal Freedom of Information Act (FOIA).[122] Drawing on this distinction, this section concludes with a triad of cases from other jurisdictions against which the interpretation approach of Ohio courts may be distinguished.

The Supreme Court of Ohio first addressed the philosophical divide among the Ohio and federal public records laws in *State* ex rel. *Thomas v. Ohio State University*. *Thomas* involved an allegation that the Public Records Act contained an exception similar to the personal-privacy exception included in its federal counterpart—FOIA.[123] Section 552(b)(6) of FOIA allows federal agencies to withhold information the disclosure of which would constitute "an unwarranted invasion of personal privacy,"[124] thereby necessitating a judicial balancing of the privacy interest of the individual against the public interest in disclosure.[125] Rejecting the argument that personal information is similarly exempt under the "catch-all" exception to the Public Records Act, the court again noted that "[i]t is the role of the General Assembly to balance the competing concerns of the public's right to know and the individual citizens' right to keep private certain information . . . . The General Assembly has done so, as shown by [its] numerous statutory exceptions . . . ."[126]

120. *Id.* (citing State v. S.R., 589 N.E.2d 1319, 1323 (Ohio 1992)).

121. 643 N.E.2d 126 (Ohio 1994).

122. *Id.* at 129.

123. 5 U.S.C. § 552 (2000).

124. §552 (b)(6).

125. 643 N.E.2d at 129.

126. *Id.* at 129 (quoting State *ex rel.* Toledo Blade Co. v. Univ. of Toledo Found., 602 N.E.2d 1159 (Ohio 1994)).

As the General Assembly did not craft an exception similar to FOIA, the court refused to do so from the bench.[127]

Similarly, federal courts have looked beyond the plain language of the statute in interpreting FOIA. In *National Parks & Conservation Ass'n v. Morton*,[128] for example, the United States Court of Appeals for the D.C. Circuit addressed whether federal agency records concerning concessions operated in the national parks fell within a FOIA exception.[129] Section 552(b)(4) of FOIA excepts from its operation "matters that are . . . trade secrets and commercial or financial information obtained from a person and privileged or confidential . . . ."[130] The circuit court concluded that the requested information should not be deemed confidential unless it could also be shown that "non-disclosure is justified by the legislative *purpose* which underlies the exemption."[131] Examining the legislative history of this exemption, that court found that Congress had intended the exemption to "encourage[ ] cooperation with the Government by persons having information useful to officials," and to "protect[ ] persons who submit financial or commercial data to government agencies from the competitive disadvantages which would result from its publication."[132] Thus, the court held that a commercial or financial matter is "confidential" if its disclosure is likely "(1) to impair the Government's ability to obtain necessary information in the future; or (2) to cause substantial harm to the competitive position of the person from whom the information was obtained."[133]

In a similar fashion, several state courts have looked beyond the statutory text when interpreting their open meetings laws. In *Kitchen v. Ferndale City Council*,[134] for example, a Michigan court of appeals panel applied a non-textual approach to determine whether an audiotape of a closed-session meeting was part of the "minutes" and thereby subject to Michigan's public records law.[135] Concluding that "judicial construction of the term ['minutes'] is required," the court compared the common *purpose* of the FOIA

127. *Id.* at 130.

128. 498 F.2d 765 (D.C. Cir. 1974).

129. *Id.* at 765.

130. 5 U.S.C. § 552 (b)(4) (2000).

131. *National Parks*, 498 F.2d at 767 (emphasis added).

132. *Id.* at 768.

133. *Id.* at 770.

134. Nos. 224374, 226378, 2002 Mich. App. LEXIS 1318 (Mich. Ct. App. 2002).

135. MICH. COMP. LAWS ANN. § 15.267(2) (West 1994).

and the Michigan public records law.[136] In view of this common objective, the court looked "to the FOIA for guidance in interpreting the term 'minutes'" and concluded that the audiotape was part of the "minutes" subject to disclosure.[137]

Finally, a California court of appeals addressed whether a commission on judicial performance must disclose the disciplinary votes of individual commissioners under the California Constitution in *Recorder v. Comm'n on Judicial Performance*.[138] That section provides that all "proceedings" subsequent to the filing of formal disciplinary charges "shall be open to the public."[139] Employing a non-textual approach, the California court of appeals noted that "[g]iven the inherent ambiguity of the term 'proceedings,' we must look beyond the plain language of section 18(j) to ascertain its meaning and scope in the present context."[140] In holding that public disclosure was consistent with the intent of the constitutional provision, the court "look[ed] to external sources to determine whether the drafters and the voters intended the term 'proceedings' to encompass the 'step' or stage of the process in which individual commissioners cast their votes and thereby decide whether to impose discipline upon a judge . . . ."[141]

In marked contrast, Ohio courts have rarely looked beyond the plain language of the Ohio Public Records and Open Meetings Acts.[142] As evident from these cases, however, the discord between the interpretative techniques of Ohio courts and courts from other jurisdictions is not wholly attributable to the courts themselves, but rather to the statutes subject to their interpretation. Indeed, legislation such as FOIA, in which the Congress allows for substantial interpretive discretion, differs significantly from the Ohio Sunshine Laws, in which the General Assembly left "no room for judicial balancing."[143] Whatever the reasons for this discord, the Ohio approach to public records and open meetings law—in contrast to many jurisdictions—provides a model of strict interpretation.

136. 2002 Mich. App. LEXIS 1318, at *12.

137. *Id.* at *14.

138. 85 Cal. Rptr. 2d 56 (1999).

139. CAL. CONST. art. VI, § 18(j).

140. 85 Cal. Rptr. 2d at 65.

141. *Id.*

142. *See generally supra* Part III.

143. State *ex rel.* Fant v. Enright, 610 N.E.2d 997, 998 (Ohio 1993).

V.
CONCLUSION

In 1765, John Adams wrote that "[l]iberty cannot be preserved . . . without a general knowledge, among the people, who have a right . . . and a desire to know . . . the characters and conduct of their rulers."[144] This right, however, "is by no means boundless or unconditional."[145] Where and by whom these bounds and conditions are drawn is a matter of ongoing debate and divide among American courts. Yet, as this article has aimed to demonstrate, the divide may have as much to do with the type of statute at issue as the "different visions of the role of the interpreter."[146] And, in the end, this is to be expected—for the ever-changing "statutorification" of the American common law leaves more or less room for interpretive discretion depending on the precision with which lawmakers legislate.

144. *An Essay on Canon and Feudal Law*, *in* JOHN ADAMS, OBSERVATIONS ON THE COMMERCE OF THE AMERICAN STATES 52 (Research Reprints, Inc. 1970) (1765).

145. State *ex rel.* Beacon Journal Publ'g Co. v. City of Akron, 640 N.E.2d 164, 168 (Ohio 1994).

146. ESKRIDGE, *supra* note 42, at 670. **R**