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NEWS FROM THE CIVIL DIVISION

In an effort to improve this newsletter, I am moving away from the six-page, semi-annual format. Instead, you will receive a brief update every few months to ensure that you receive news that is timely and relevant. I hope this change is beneficial to you. As always, I look forward to your feedback.

Stay safe,
Sherri Bevan Walsh

The Importance of Having, Enforcing And Updating Procedures

As many of you know, townships throughout Ohio vary in complexity and ability. Sometimes townships make well-intentioned “off the cuff” decisions without thinking of the long-term impacts.

These decisions often lead to needless litigation and stress. They can also open the door for courts to levy financial sanctions against these already cash-strapped agencies.

One of the easiest ways to protect the township from these types of situations is to have policies and procedures in place. These procedures are part of a comprehensive plan that allows a township to create a cohesive set of rules that will ensure it does not run afoul of the law.

For example, many townships do not have policies regulating employee use of township vehicles. This leaves ambiguity as to whether or not an employee is operating a vehicle within the scope of his/her employment.

As a result, an accident by an employee in a township vehicle could cause the township to incur significant liability, even if the township did not believe the employee was acting within the scope of business.

Another example is failure of township police departments to have up-to-date and robust policies and procedures. Evidence retention policies, tow inventory policies and search and seizure policies are a few areas of the law that are constantly changing and require townships to stay vigilant.

A faulty tow inventory policy could lead to suppression of evidence that would allow a would-be criminal to go free on a technicality. Failure to provide for sufficient checks and balances in evidence collection and retention procedures could have the added problem of encouraging misuse and abuse of evidence collected in criminal cases.

The key point is that townships need to ensure that they have uniform policies and procedures in place. These procedures protect the township from needless exposure and ensure that they are providing top-notch service to their constituents.

The Prosecutor’s Office encourages you to contact us if you would like help in creating and/or revising these policies.

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Public Records in Digital Form

Scioto County Engineer Craig Opperman maintains his tax map information with third-party copyrighted software known as Esri. The system allows a user to easily query the database and produce a map for a defined area. However, the complete mapping and photographic information contained in Esri cannot be easily extracted and viewed by other software. The data is essentially intertwined with the Esri software.

A local real estate appraiser named Robert Gambill requested a copy of the entire database and the associated photographic files. Because the data is essentially intertwined with Esri, the cost to extract the data was estimated in excess of \$2,000 because Opperman would have to hire an outside consultant to perform the extraction.

Gambill argued that the Engineer chose to keep his records using copyrighted software, and Gambill should not have to pay what he believed to be an excessive charge. A law suit resulted.

In early March, the Ohio Supreme Court ruled in favor of Opperman. The Court made the following determinations:

1. The requested electronic database is a record for purposes of the Public Records Act under R.C. 149.43. It is an electronic record created by the Engineer's Office by compiling data from various sources, including deeds recorded in the auditor's office, and serves to document the activities of the Engineer's Office. However, R.C. 149.43(A)(1)(v) exempts from public record any record that is prohibited by state or federal law to be released. Copyright law constitutes a federal law that exempts applicable records from disclosure under the Public Records Act. Consistent with other cases in which nonexempt materials are intertwined with exempt materials, the nonexempt records are not subject to disclosure under R.C. 149.43 insofar as they are inseparable.
2. There was no evidence that the Engineer's office intentionally combined the requested raw data with the exempt software so as to circumvent the Public Records Act.
3. R.C. 149.43(B)(1) provides that copies of public records shall be made available "at cost." This refers to actual cost and does not include labor costs for employee time to respond to the request and make the copies. However, this definition includes "actual costs paid to private contractors," as long as the decision to employ the services of the private contractor is reasonable.

The full opinion is on the Ohio Supreme Court's website, case number 2013-Ohio-761, State ex rel. Gambill v. Opperman.

Local Firearms Regulation

The issue of regulating firearms sales has become a hot and controversial topic. A common question being asked is whether local government can step in and regulate firearms sales where the federal or state government won't.

In Ohio, the answer is no.

Pursuant to Ohio Revised Code Section 9.68, the Ohio General Assembly has preempted any local regulation related to the ownership, possession, purchase, acquisition, transport, storage, carrying, and sale or other transfer of firearms and their ammunition.

The General Assembly has made it clear that the state intends to occupy the field in the right to bear arms regulation and precludes local governments from passing any regulatory laws, except with regard to zoning issues in residential and agricultural areas.

If a local government attempts such regulation, the court is directed to award costs and reasonable attorney fees to anyone who prevails in a challenge to such regulation.

After taking effect in March 2007, the City of Cleveland challenged

the law. The Ohio Supreme Court upheld it as being constitutional in 2010 (Cleveland v. State, 2010-Ohio-6318).

The Court held that R.C. 9.68 is a general law that displaces municipal firearm ordinances and does not unconstitutionally infringe on municipal home rule authority. The Court noted that the enactment of the law was intended to provide uniformity of law throughout the state so as to avoid conflicting local regulations.

Public Records Requests

American citizens are entitled to access the records of their government. For this reason, there are federal laws governing compliance with public record requests.

A public record is a document used in the course of conducting official business. This is not limited to actual pieces of paper, but can also include audio and video recordings, emails, texts, phone records, social media posts and mileage logs.

All of your organization's records are public unless specifically exempted under state or federal law.

When you receive a public records request, you may need to ask questions to clarify which documents are being sought.

The requester does not need to tell you their name or what they intend to do with the records. The request does not need to be submitted in writing or use specified language.

While you are required to make available all requested public records unless exempted under state or federal law, you are not required to create requested records if they do not currently exist. You are only required to provide records that exist at the time the request is made.

Therefore, you are encouraged to only create records during the normal course of business that are strictly necessary.

The time frame needed to complete a request depends on the amount of documents requested, where the documents are located

and whether the documents need to undergo a legal review.

Therefore, there is no defined time frame within which an organization must complete a public records request. However, you must make every effort to comply with the request within a reasonable period of time.

Certain requests will require a legal review to ensure that no documents contain confidential information prohibited for public release under federal or state law.

All of your organization's records are public unless specifically exempted under state or federal law.

If documents in the request contain such information, the request should not be denied. Instead, redact the confidential information in a way that makes clear what information has been removed.

If you do deny a public records request or any part of a public record through redaction, you must provide an explanation for the denial including the legal authority that allows you to deny the request. If the request was made in writing, your denial must also be in writing.

Requested records can be delivered in any manner requested. The requester can even personally inspect the records, although we recommend that copying be done by a member of the organization's staff to ensure the integrity of the original documents. For that

same reason, a member of the organization's staff should remain in the room with the records throughout the inspection.

You may charge for public records requests. However, you may only charge for the actual cost of producing the records (e.g. making copies of documents). You cannot charge for the time spent locating and compiling the records.

If the requester asks for the documents to be mailed, you can charge for the actual cost of shipping.

If you do not have a written public records policy, you are strongly encouraged to create one. Having a written policy makes the process less confusing for the public and helps protect against allegations of being arbitrary.

You should also have a formal retention policy and ensure that your employees are not only familiar with it, but adhere to it as well.

Additionally, it is wise to document public records requests as they are completed. Such documentation should include who made the request, the specific records requested (including a copy of the delivered documents), when the request was completed and the amount paid (with a copy of the check).

If you have any questions on public records requests compliance, contact the Civil Division at (330) 643-2800.