



Ohio Sunshine Law In a Nutshell

***Presented by
Ohio Attorney General Mike DeWine***

***Angela M. Sullivan
Senior Assistant Attorney General***



MIKE DEWINE
OHIO ATTORNEY GENERAL

Disclaimers

- *This is an overview of the Sunshine Laws and is not legal advice*
- *Contact your local prosecutor with specific questions regarding Sunshine Laws*



Topics

- Overview of enabling statutes*
- Public Records Law*
- Open Meetings Act*



Overview of Veterans' Services Commissions' Enabling Statute

- R.C. Chapter 5901 governs the Commissions
- Commission is a “creature of statute” and have “no more authority than that specifically conferred upon [it] or clearly implied by the statute.” *In re Guardianship of Spangler*, 126 Ohio St.3d 339, 342-343 (2010).



Overview of Commissions’ Enabling Statute

- R.C. 5901.03 – Duties of Commissions
 - Lists numerous various duties of the Commissions
 - “Any other actions required by law” – e.g. applications for financial assistance – most relevant when discussing the Sunshine Laws



Ohio Public Records Act

Definitions

Public Records Exceptions

*Rights & Responsibilities of Public
Offices & Requesters*

Liabilities



Definitions

Public Record:

R.C. 149.43(A)(1)

“Public Record’ means records kept by any public office. . . . “Public Record’ does not mean any of the following:”



Definitions

Record:

- 1) Fixed medium
- 2) Created, received by, or coming under the jurisdiction of the public office
- 3) Documents organization, functions, policies, decisions, procedures, operations or other activities

Non-record:

- Fails 3-part “record” test



**An e-mail can never be a “public record”
because it is not on a “fixed medium”**

1. True

★ 2. False



Looking Deeper: What is a Record?

Information stored on a **fixed medium**:



Looking Deeper: What is a Record?

Created, received by, or **coming under the public office's** jurisdiction:

- "Public office" includes "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government."
- R.C. 149.43 must be construed liberally in favor of broad access, and any doubt should be resolved in favor of disclosure of public records." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 156 (1997).



Looking Deeper: What is a Record?

Does it document the activities of a public office?



Electronic Records

Email

- Handle electronic records just like any other tangible record
- Electronic “paper”
- Analyze based on **content**, rather than storage medium



Personal Notes



- Can be “records” but if so, are usually transient
- Generally not records if :
 - 1) Kept as personal papers, not official records
 - 2) Kept for personal convenience; e.g., to recall events
 - 3) Other employees do not use or access them



Drafts

If a draft meets the definition of a record, it is subject to both the Public Records Act and records retention laws.



A public office can address the length of time that drafts must be kept in its records retention schedules.



What is a Public Record as Applied to Veterans Commissions?

“Public record” does not mean any of the following:

R.C. 149.43(A)(1)(a) – (bb)!

Every item that meets the “record” test that is kept by a public office is a “public record” **UNLESS** it fits within one of these exceptions.



Which of the following documents are public records?

1. Applicants' statement of income and assets
2. Application for financial assistance
3. Documents supporting the statement or application
- ★ 4. None of the above



Looking Deeper: What is a Public Record?

“Public record” does not mean any of the following:

R.C. 149.43(A)(1)(v) – “Records the release of which is prohibited by state or federal law”



R.C. 5901.09(A)–(C) – applications and accompanying documents submitted for financial assistance are not public records



R.C. 5901.09 – Application for Relief and Confidentiality

- R.C. 5901.09(B)-(C) – Application and Interviews for Financial Assistance
- Clearly states that the following are **not** public records:
 - ✓ Statement concerning income and property
 - ✓ Application for financial assistance
 - ✓ Any documents that accompany the statement or application
 - ✓ Other documents possessed by the Commission that may affect determination of eligibility for assistance
 - ✓ Application to obtain benefits under other laws



Can the Commissions compile statistical data from the statements and release the data as public records?

- ★ 1. Yes
- 2. No



Looking Deeper: What is a Public Record?

R.C. 5901.09(A)–(C) - the following are not public records:

- Statement concerning income, real and personal property, investments, mortgages
- Application for financial assistance
- Documents accompanying the statement or application
- Any other documents used by the Veterans' Services Commission that may affect eligibility
- Interviews of applicants for financial assistance



Consent to Release Information

- Under R.C. 5901.09(E), an applicant or recipient may consent to the release of information in an application or statement by signing a separate release form each time the specific information is to be released.



Other exemptions to Public Records Law:

One exception is R.C. 149.43(A)(1)(v) – “records the release of which is prohibited by state or federal law”

- Also includes records that are privileged under the attorney-client privilege
 - Privilege extends to agents working on behalf of legal counsel - *State ex rel. ESPN, Inc. v. Ohio State Univ.*, 132 Ohio St.3d 212 (2012)



Which of the following people or entities are permitted to make a public records request?

1. Ohio residents
2. Reporters
3. Any United States resident including corporations or governments
4. Foreign individuals, corporations, or governments
- ★ 5. All of the above



Rights and Obligations

- **Any “person”** can make a public records request, including corporations and other governmental agencies
- **No special format or special language** required
- A request may be **written** or **verbal**
- The requester’s motive **is not relevant**. However, the request must at least be specific and describe in detail the records being sought
- A public office cannot require the requester to put it in **writing** or reveal his/her **identity**



If the agency has a database to organize records, does the agency have an obligation to run a query to produce the information sought by a public records requester?

1. Yes

2. No

★ 3. Sometimes



Rights and Obligations

No obligation to:

- Create new records – including electronic records
- Store records on particular media



- Provide complete duplication of the voluminous files of a public office
- Provide internet access to electronic public records



Is an agency required to inform the requester of any redactions to a record?

- ★ 1. Yes
- 2. No



Redaction of Private Information

- Redaction = obscuring or deleting private information from a document that otherwise is a “record”
- Must notify requester of any redaction or make the redaction clearly visible – e.g. black box
- Must cite to legal authority for redaction
- May only redact part of record, unless the redacted information is “inextricably intertwined” with the entire record



Rights and Obligations under Public Records Law

- **Prompt/reasonable** period of time
- **Regular business hours**
- Copies at **“cost”**
- Payment **in advance** (optional)
- Methods of **delivery**



Can an agency charge a requester for inspection of records during regular business hours?

1. Yes

★ 2. No



What are the possible consequences if an agency fails to comply with the Public Records Act?

1. Mandamus action against the agency
2. Attorney's fees
3. Statutory damages up to \$1,000
- ★ 4. All of the above



Liabilities for Violating the Public Records Act

- **Mandamus Action** by “person aggrieved” by violation of Division 149.43(B) of the Public Records Act
A legal action in common pleas, appellate court, or the Ohio Supreme Court to enforce the Act
- **Civil Damages** (only if violation caused actual lost use of records)
- **Attorney’s fees** and court costs
- **Possible reduction** of damages and fees



Open Meetings Act Overview

Definitions

Obligations

Executive Sessions

Liabilities



Who is Subject to the Open Meetings Act and When? Definitions



Public Body:

Any decision-making body of the state, its political subdivisions, and school districts (including any committee or sub-committee of each body)

Meeting: (1) **Prearranged** gathering of
(2) a **majority** of members of public body
(3) conducting or discussing **public business**



Looking Deeper: What is a Meeting?

- **Discussion/Deliberation vs. Information Gathering:**
 - Discussion and deliberation involve the weighing of reasons for and against a course of action and **must be conducted in open**
 - Gatherings **solely** to receive factual information **may** not be meetings – **but consult legal counsel first!**
- **Work sessions:**
 - **Prearranged** work sessions, retreats, etc. where **public business is discussed** among a **majority of the members** of the public body are “meetings” and must be noticed and open as any other meeting



Obligations

Give appropriate **notice**
R.C. 121.22(F)

Take action & deliberate on public
business in **open** session
R.C. 121.22(C)

Take & file **minutes**
R.C. 121.22(C)



How much notice must a Commission give prior to an emergency meeting?

1. 72 hours
2. 48 hours
3. 24 hours
- ★ 4. Immediately notify all media outlets that have requested notice



Obligation 1: Notice (by rule)

Types of Meetings and the Notice Required

Regular Meetings



Meetings held at prescheduled intervals
Notice = time and place

Special Meeting



Any meeting that is not a regular meeting
Notice = at least 24 hrs advance notice of time, place, and purpose

Emergency Meeting



Requiring immediate action
Notice = immediate to news media



Obligation 2: Openness

Take Action & Deliberate in Public

Where must public meetings be held?

- In a public forum within the area that the public body serves

Does the public have a right to speak at public meetings?

- Not required by the OMA, but may otherwise be permitted or required

Can members of the public record proceedings?

- Yes, if it does not disrupt the meeting



Obligation 2: Openness

Take Action & Deliberate in Public

Commission must deliberate in public:

- “R.C. 121.22 prohibits any private prearranged discussion of public business by a majority of the members of a public body regardless of whether the discussion occurs face to face, telephonically, by video conference, or electronically by e-mail, text, tweet, or other form of communication.” *White v. King*, Slip Op. No. 2016-Ohio-2770, syllabus.



Must the meeting minutes be a verbatim transcript of the meeting?

1. True

★ 2. False



Obligation 3: Minutes

“The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to the public.”

– R.C. 121.22(C)

- Minutes do not have to be a verbatim transcript of the proceedings but must be accurate and enable the public to understand the rationale behind the public body’s decisions.
- Minutes must be kept for all meetings, including committee meetings



Obligation 3: Minutes

- There is no requirement to keep minutes of executive sessions.
- Minutes must “reflect the difficult decision-making process involved, and hopefully bring the public to a better understanding of why unpopular decisions are necessary.”
- Meeting minutes must be more than simply recording the roll call votes.
- Minutes must be readily accessible to the general public – on-line or at the office for copying/inspection



Executive Sessions

Proper Procedures:

- Must be preceded by specific motion, second, and **roll call vote**
- Motion should state the specific permissible topic(s) to be discussed
- Meetings must always begin & end in open session (cannot adjourn the meeting from within executive session)
- No vote to end executive session – simply open doors



Executive Sessions

Acceptable Topics for Discussion:

- Personnel (**must** state specific type of personnel matter to be discussed, but **not** identity of the person)
- Property
- Court action (only with the body's attorney)
- Collective bargaining
- Matters confidential by law
- Security arrangements
- County hospitals' trade secrets



Is it proper to interview applicants for financial assistance in executive session?

- ★ 1. Yes
- 2. No



Executive Sessions

Present in executive sessions:

Who may members include?

- anyone who is invited to stay
- If the subject is “pending or imminent court action,” duly appointed counsel for public body must be present

Who may the members exclude?

- any other members of the public



Restrictions on Executive Sessions

- There can be **no decision-making**
- **No voting**, including “straw polls”
- Non-permitted matters may **not** be discussed in executive session, even if intertwined with permitted matters



Executive Sessions - Records

- Executive Sessions provide private space for discussion, but they do not **make** any materials confidential, including documents that are handed out
- Handing records to members of public in Executive Session may waive any exceptions that might apply
- No minutes need to be taken (and probably shouldn't be) of executive session discussions
- Minutes should simply reflect the motion and roll call vote, general subject of the executive session, and what time the Board entered and left executive session.



Executive Sessions – Recent Case Law

- *Triplett Chapel of Peace v. Ohio Bd. of Embalmers and Funeral Directors*, Franklin County Common Pleas No. 11CV10270 (Jan. 31, 2012)
 - Board went into Executive Session to deliberate and discuss an application with legal counsel.
 - Court held that it was impermissible to “deliberate” in executive session and found a violation of the law, even though no vote was taken in executive session.
 - Court granted an injunction, required the Board to pay a \$500 civil penalty, and ordered the Board to pay about \$26,000 in attorney’s fees and court costs



Reaction to *Triplett* Decision

- February 28, 2012 *Columbus Dispatch* Editorial – “In the Dark” –

A public board and its public attorney should have known better than to debate a public matter behind closed doors, a breach that costs the state money and public trust....

Those who sit on the state board are expected to know state open-meetings and open-records laws. The rules aren't overly complicated: Boards can meet privately to discuss lawsuits or pending litigation, real-estate transactions or personnel matters. Otherwise, discussions should take place in open session....The board demands transparency for those it governs, but failed to hold itself to the same high standard.



Remember!

- Your prosecutor can draft the motion to enter into executive session to ensure compliance with the law.
- If the Commission is going into executive session to discussing pending or imminent court action, the prosecutor (or other legal rep) **must** be present. *See* R.C. 121.22(G)(3).



Miscellaneous Topics:

Virtual Participation

- A member “**shall be present in person** at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting”
– R.C. 121.22(C)
- Virtual participation (teleconferencing) is only permitted when it is **specifically authorized by law**
- The Commissions are not permitted to teleconference



Penalties for Violating the OMA

Fines

Injunction

Court Costs

Attorney Fees

Action Invalidated

Removal from Office



Questions & Answers

Sunshine Laws Web Page:

www.ohioattorneygeneral.gov/Sunshine

Yellow Book Online:

www.ohioattorneygeneral.gov/YellowBook

Sunshine Law Informational Videos:

<http://www.ohioattorneygeneral.gov/Media/Videos/Sunshine-Law-Videos.aspx>

For Additional Information ...

Ohio Attorney General Mike DeWine

Public Records Unit Phone:

614-466-2872



The Ohio Dept. of Veterans Services



Ethics for Veterans Services Commissioners

Sean McCarthy
Chief Legal Counsel

Who is Regulated?

- Public officials and employees at every level of government
- Those who:
 - are doing/seeking to do business with public officials and employees
 - are regulated by government
 - have specific interests before agency





CONFLICT OF INTEREST

No need to chase ambulances when you're the one who calls them



- **Using authority or influence to secure something of value**
- **Soliciting or accepting something of value**

102.03(D)

Use of Authority or Influence



ABSTAINING/RECUSAL

- Voting
- Deciding
- Discussing
- Deliberating
- Recommending
- Reviewing
- Inspecting
- Investigating
- Any Other Action



"I'm going to have to recuse myself."



EXAMPLES?



“So, I’m the only one who sees a conflict of interest here?”

- Inspecting Brother’s Business
- Investigating private employer on behalf of agency
- Business with Official’s Employer
- Consulting/Outside Employment
- Job Seeking
- Requiring staff to take my community college class



102.03(E)

Solicit or Accept



R.C. 102.03(F) PROHIBITS PRIVATE SECTOR PARTIES FROM:



Promising or giving something of value to a public employee



WHAT IS "THING OF VALUE?"



tonicusso / FreeDigitalPl



Apikhomboonwaroot / FreeDi



SUBSTANTIAL AND IMPROPER



Image: renjith krishnan / FreeDigitalPhotos.net



“NOMINAL” OR “DE MINIMIS”





Substantial?

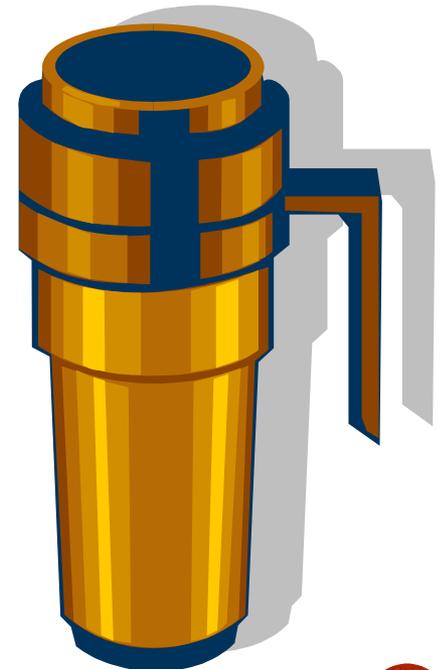
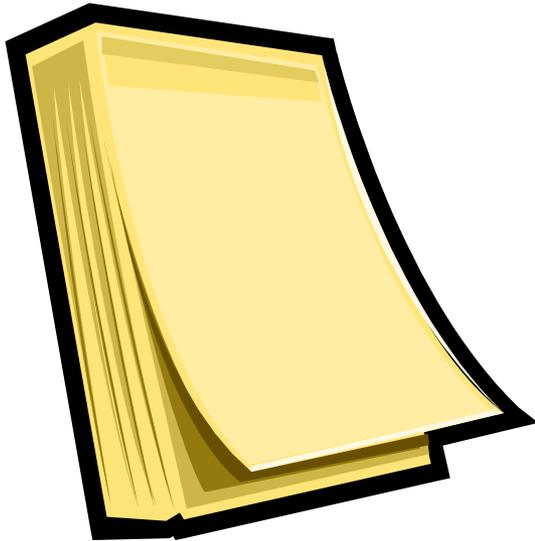
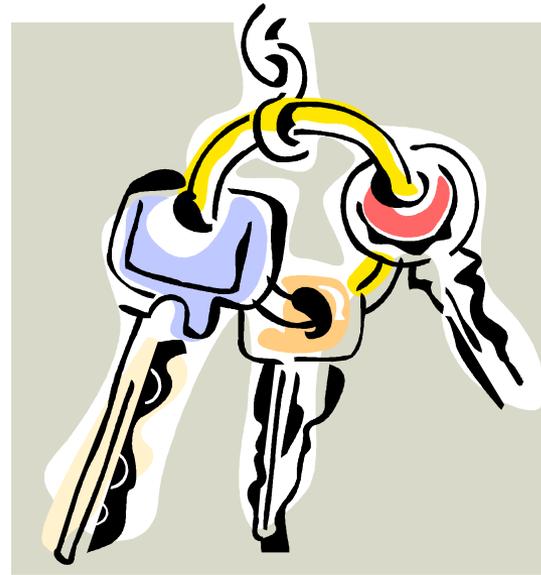




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Substantial?



Image: Suat Eman / FreeDigitalPhotos.net

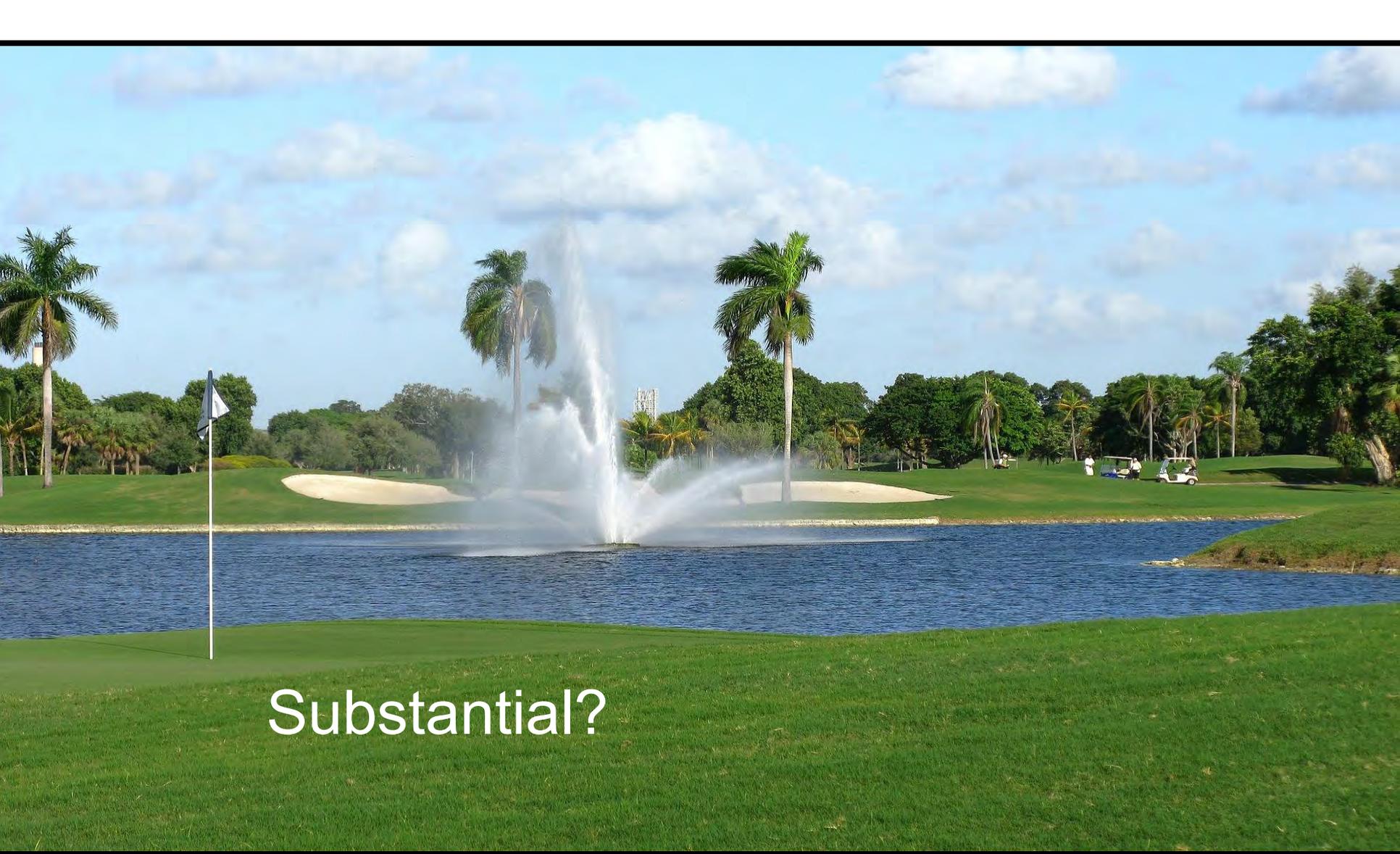


“SUBSTANTIAL”



Substantial?





Substantial?



Substantial?





Substantial?





Substantial?



Substantial?



SUBSTANTIAL AND IMPROPER



Image: renjith krishnan / FreeDigitalPhotos.net



Questions?





A state official can take her family for a week-long spring break vacation in Mexico and stay in a condo (with a deep-sea fishing boat) owned by a grantee of her county department if she pays him \$500, which the grantee says is ‘fair market value.’



A state employee, who is getting married, may accept a resort beach package from his childhood friend, Vinny, even though Vinny is a representative of an industry his agency regulates.



A member of a public regulatory board is attending a conference in Pittsburgh. He can attend a behind-the-scenes tour of the PNC Park, paid for by a corporation regulated by the board, because the event is “part of” the conference.



A state agency has a five-year contract to purchase computer hardware and software. The agency employees can take advantage of software discounts the company offers to clients.

Image: Rawich / FreeDigitalPhotos.net



A state building permit reviewer is prohibited from seeking a job from a company with building permits pending before the state.



Image: scottchan / FreeDigitalPhotos.net





A state employee attending a conference (as part of his/her job) is prohibited from accepting a flat screen TV that was donated to the agency by a vendor even if the winner is selected in a random drawing.

Image: graur razvan ionut / FreeDigitalPhotos.net





To assist to making the best purchasing decision, an IT supervisor can accept travel expenses from an IT company to go to Los Angeles to see the IT product in use.

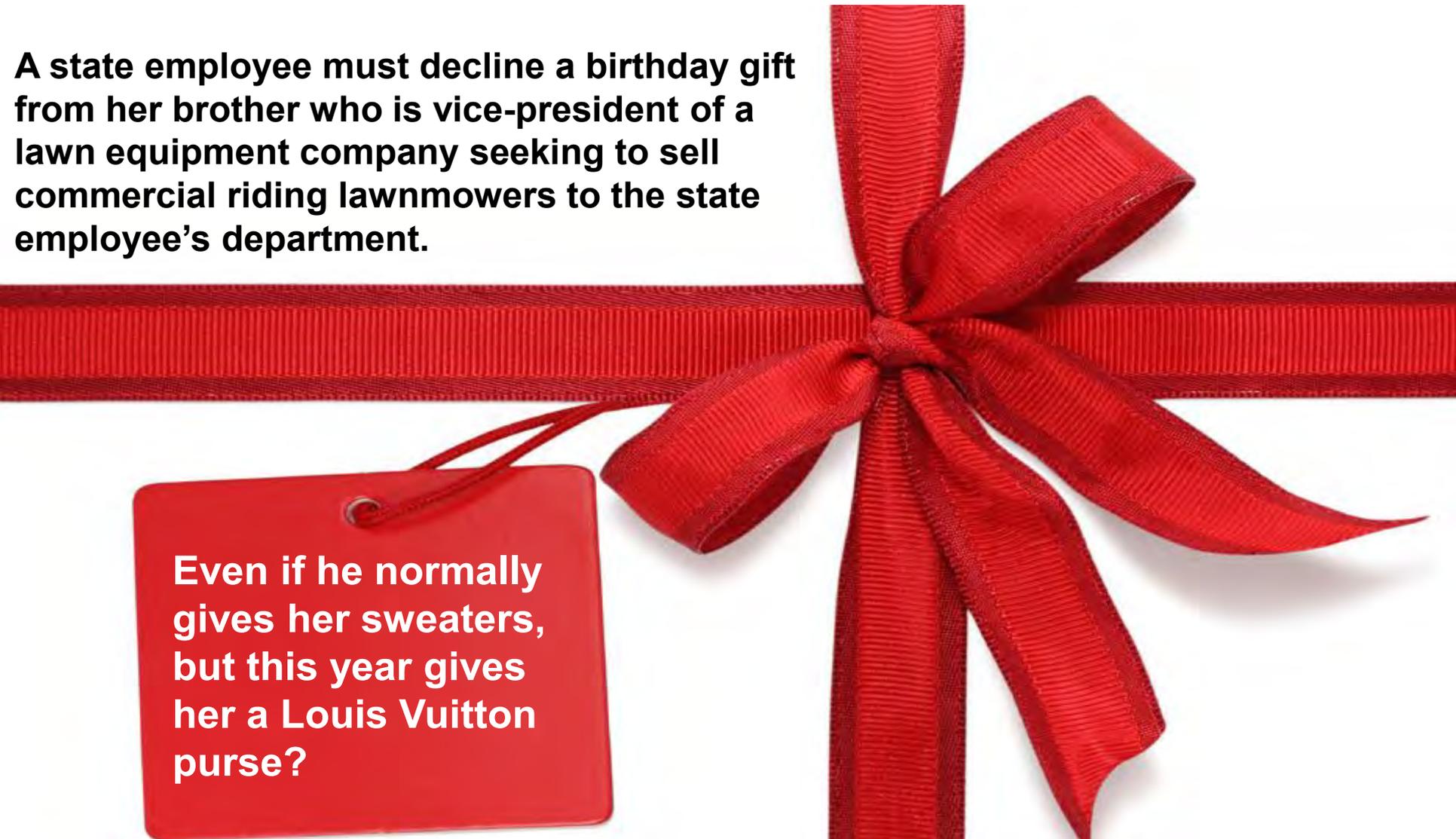




An employee at the State Library of Ohio may contract with library vendors for the local bookstore she owns.



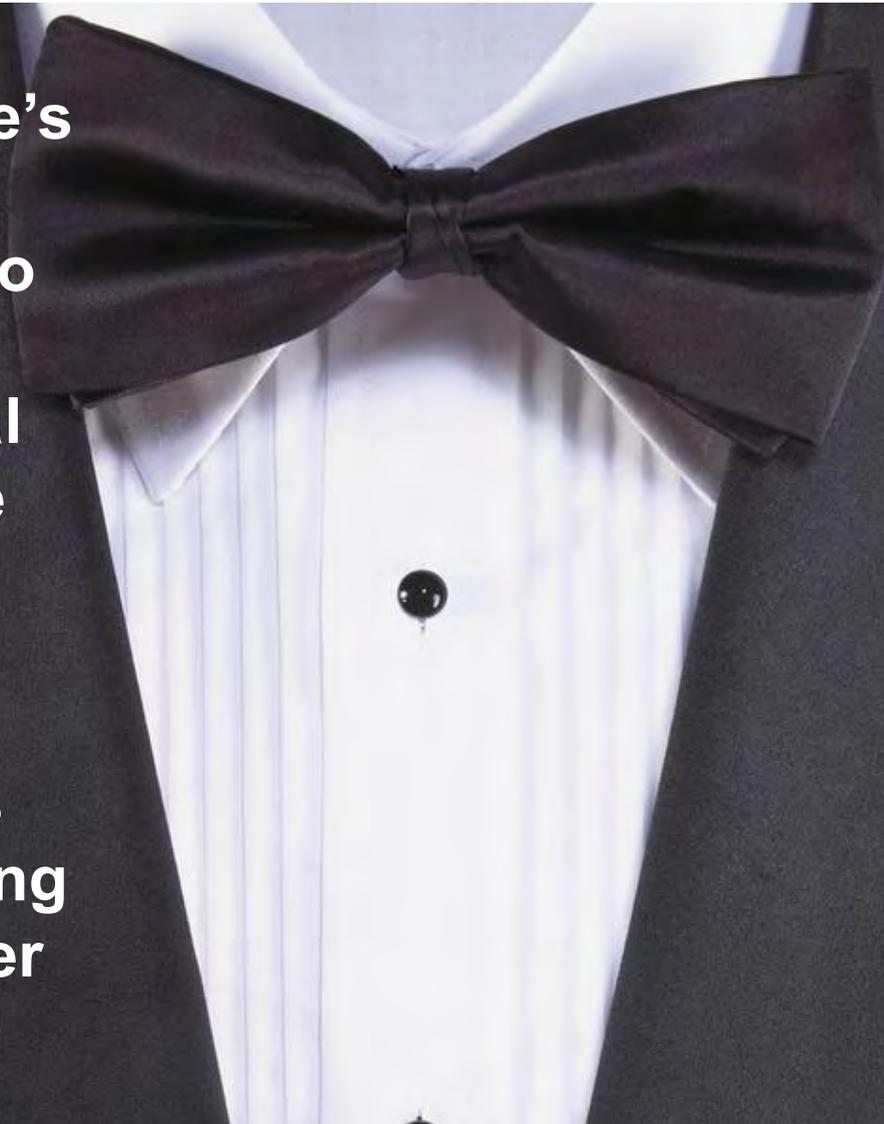
A state employee must decline a birthday gift from her brother who is vice-president of a lawn equipment company seeking to sell commercial riding lawnmowers to the state employee's department.

A large, vibrant red ribbon bow is centered on the right side of the image. A red ribbon extends horizontally across the middle of the frame, passing through the center of the bow. A red tag is attached to the left side of the bow, hanging down. The tag is rectangular with rounded corners and a small hole at the top left corner. The background is plain white.

Even if he normally gives her sweaters, but this year gives her a Louis Vuitton purse?



A public employee's husband receives front row tickets to a traveling Broadway musical from his job . The employee may accompany her husband to the theatre even if his company is seeking a contract from her department.





A member of a state board, who is also an architect, must abstain from the board's consideration of a matter affecting a client of her firm, even if she did not perform any services on the matter.



A snowplowing company who contracts to plow corrections facilities may plow the ODRC director's driveway as long as the contract negotiations are complete.



State employees who travel for state business can take along their spouses provided that the state would not incur any additional cost as a result of their spouses' travel.



Image: Rawich / FreeDigitalPhotos.net



PUBLIC CONTRACTS



Image: jscreationzs / FreeDigitalPhotos.net



RESTRICTIONS: 2921.42(A)(1)



- Authorization or use of authority for official, family member or business associate

Image: photostock / FreeDigitalPhotos.net



RESTRICTIONS: 2921.42(A)(4)



- Having an interest in profits/benefits of public contract with “connected” agency



RESTRICTIONS: 2921.42(A)(3)



- Profiting from approval of contract



NEPOTISM



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“FAMILY MEMBER”



- Spouse
- Sibling
- Parent/Step-parent
- Grandparent
- Child/Step-children
- Grandchild
- Anyone else related by blood or marriage and residing in the same household



CALL BEFORE YOU ACT!



The Ohio Ethics Commission
30 West Spring Street, L3
Columbus, Ohio 43215

Phone: (614) 466-7090

Fax: (614) 466-8368

Website: www.ethics.ohio.gov



The Ohio Dept. of Veterans Services



Questions?

Sean McCarthy

sean.mccarthy@dvs.ohio.gov

(614)728-2142