IN THE COURT OF COMMON PLEAS
MONTGOMERY COUNTY, OHIO
CIVIL DIVISION

David Esrati *pro se* 113 Bonner St. Dayton, OH 45410 Plaintiff, vs. **Dayton City Commission** 101 W. Third St. Dayton, OH 45402 and **Jeffrey J. Mims, Jr.** **Member, Dayton City Commission** **Co-Chairman, School Facilities Task Force** 101 W. Third St. Dayton, OH 45402 and **Dayton Board of Education** 115 S. Ludlow St. Dayton, OH 45402 and **Mohamed Al-Hamdani** **Member, Dayton Board of Education** **Co-Chairman, School Facilities Task Force** 115 S. Ludlow St. Dayton, OH 45402 Defendants.	:	Civil Action No. 2018 CV00593 Judge Richard Skelton

MEMORANUM IN SUPPORT OF ORC 121.22

"Do the right thing. It *will* gratify some people and astonish the rest" ~ Mark Twain

“Our life is frittered away by detail. *Simplify*, *simplify*, *simplify*!” ~Henry David Thoreau

To the court, the basic premise of Ohio’s Sunshine Laws is that these laws protect the people by allowing them to watch and record the workings of our government. And, while many believe we live in a democracy, any student of politics or the law, know that that we really live in is a representative republic. In order for those who are chosen, either by vote, or by those we have elected, decision making for the people they represent, there never should be any question of the basic fundamental right to observe, record and sometimes contribute to the decision making process.

I am by far, not the first champion of open meetings, or the right to observe the workings of government or their appointed bodies:

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.” -- Louis D. Brandeis, "What Publicity Can Do," *Harper’s Weekly*, Dec. 20, 1913, reprinted in Louis D. Brandeis, *Other People’s Money and How The Bankers Use It*, 92 (1932).

"Excessive administration secrecy... feeds conspiracy theories and reduces the public's confidence in government." Sen. John McCain, candidate for US president, 2008.

The plaintiff, a common citizen, filed an injunction (which I thought was the only thing necessary after reading ORC 121.22) and then was told to file a Temporary Restraining Order by your honor to follow Rule 65, we have a situation where either the law is unclear, or that the system has evolved to serve lawyers.

That the defense chose, on short notice, to send four attorneys to respond to these two filings is the first indication that this case merits the court to err to the side of Ohio Revised Code 121.22 and not overly complicate matters by involving Rule 65.

That you, Judge Skelton, opened the hearing suggesting that ORC 121.22, which contains remedies, was all that was needed to decide this issue and allow us to proceed is what this Memorandum is provided to support.

In the handbook that is supplied by the State Attorney General, the very first statement speaks to this:

> “Dear Ohioans,
> My number one priority as Attorney General is to protect Ohio families. My office does this in a variety of ways, but one important way is by fostering a spirit of open government and by promoting Ohio’s Public Records Law and Open Meetings Law. Together, these laws are known as the “Ohio Sunshine Laws,” and they are among the most comprehensive open government laws in the nation.”

If these laws are in fact “among the most comprehensive open government laws in the nation” there would be a direct reference to Rule 65 in the statute, however, unfortunately for the defense, there is not.

As this law stands, there are already significant insufferable barriers built into the statute to preclude common citizens from seeking justice when those who have been given the public trust to conduct the publics business break the open meetings laws.

The first barrier is that remedy requires a court action, instead of turning to a state funded "Open Government Unit" that would expertly aide citizens who have legitimate question as to if the people they elect are doing the right thing. After much research, it turns out that an "Open Government Unit" does actually exist, but that I only found it via non-official documents on non-government sites:

> The Open Government Unit can be reached
> at: Ohio Auditor of State's Office, Open Government Unit
> 88 East Broad Street, 5th Floor, Columbus, Ohio 43215
> Phone: (800) 282-0370
> Website:http://www.auditor.state.oh.us/OGU/Default.htm
>
> "No state or local governmental official is authorized to bring legal action to enforce the Act in Ohio. However, if a suit by a member of the public results in an injunction against a public body, the Attorney General or prosecuting attorney is responsible for bringing an action against officials who violate the injunction." ~cite THE CITIZEN ADVOCACY CENTER'S GUIDE TO THE OHIO PUBLIC RECORDS LAW AND OHIO OPEN MEETINGS ACT (Issued 12/08) Citizen Advocacy Center pg 10-11 [ATTACHMENT 1]

The "Open Government Unit" is not mentioned in ORC 121.22 and only is listed as a supplier of *paper copies of this publication* on page iii of the Sunshine Laws Manual 2017 version.

Courts and the law, are generally things that normal citizens do their most to avoid. The closest they voluntarily get to courts and the law is television docudramas (showing my age here) like LA Law or The Good Wife, where everything gets neatly tied up in an hour (with commercial interruption) and the good guys win by their superior use of the tools of law.

There is no built in template to Microsoft word to draft a legal filing (although some are available online). There is no easy way to file the brief in Montgomery County online (the instructions run 35 pages) and the account setup takes over 24 hours and human intervention. The filing fee is $330.50, an amount that many of Dayton's citizens can't raise to post bond so their loved ones can get out of jail so they won't lose their jobs.

I can also, from personal experience, say that the prospect of sitting in court, facing 4 well trained lawyers (3 of which ostensibly work for the people) attacking you, is not an experience most would run toward with open arms.

Putting that all aside, it was made painfully clear as I attempted to file the original injunction in person at the Clerks desk, it was suggested that when I presented a case with

a prayer of only $500, that I file in Dayton Municipal Court, where the fee is considerably less, and would have caused a failure in process that would have further delayed my need for immediate injunctive relief. The system is rigged at every level against the common citizen it is supposed to protect.

The biggest problem with ORC 121.22 is not if Rule 65 or ORC 121.22 is applied, it is that the amount of the "civil forfeiture" $500, may have seemed like a lot of money in 1954 when it was adopted, but it has not kept up with inflation. According to the Bureau of Labor Statistics inflation calculator, this amount in Dec of 2017 should be $4,582.23 I would also claim that the use of the words ""That it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction" is obfuscation by the statute, using the archaic "enjoins" as well as the term "civil forfeiture" which is now synonymous with government seizing assets thought to be derived through illegal activity- instead of saying "The court shall order the public body to pay $500 for each infraction of the law to the plaintiff." I thank the judge for asking us to respond to his inquiry via a pen instead of a shovel. And while this filing may be longer than he expected, I consider the shovel as a tool to clear stables, and a pen, a tool to change the course of history. In my view, legalese is the enemy of clarity.

Mr. David Mellinkoff's (died Dec 31, 2000, age 85) fought a long battle against legalese. He once wrote, ""The most effective way of shortening law language is for judges and lawyers to stop writing." As a writer by profession, I agree (not concur).

The question of if we count each infraction, such as not posting public notice, an agenda, refusing to answer questions, refusing to notify, refusing cameras, refusing audio recording, refusing entrance, etc. counts as fineable isn't clear except in the previously cited Citizens Advocacy Centers Guide pg 11 [ATTACHMENT 1]:

> If the court finds a violation by the public body, the Act establishes that the court must order it to pay the plaintiff a $500 civil forfeiture fine. The public body defendant *must* pay a civil forfeiture for each violation.

The Secretary of State includes a legal glossary at the beginning of his handbook: "When learning about the Ohio Sunshine Laws, you may confront some legal terms that are unfamiliar to you. Below are the more common terms used in this handbook."

It does include the definition of Injunction-

> An injunction is a court order commanding that a person act or cease to act in a certain way. For instance, a person who believes a public body has violated the Open Meetings Act will file a complaint seeking injunctive relief. The court may then issue an order enjoining the public body from further violations of the act and requiring it to correct any damage caused by past violations.

And of Pro Se:

> "The term means "for oneself," and is used to refer to people who represent themselves in court, acting as their own legal counsel."

Missing is any mention of "Rule 65" – in the WHOLE 244 page manual.

Following the third paragraph, I came to this court to seek to stop actions of a committee tasked to close public school buildings all located in minority neighborhoods in Dayton. A city that was only recently released from a federal desegregation order that was blamed for "white flight" and a population loss of over 100,000. A normal person would believe that these instructions clearly state a course of action (emphasis added by me):

> If any person believes that a public body has violated the Open Meetings Act, that person ***may file an action in a common pleas court to compel the public body to obey the Act.*** If an injunction is issued, the public body must correct its actions and pay court costs, a fine of $500, and reasonable attorney fees subject to possible reduction by the court. If the court does not issue an injunction, and the court finds the lawsuit was frivolous, it may order the person who filed the suit to pay the public body's court costs and reasonable attorney fees. ***Any formal action of a public body that did not take place in an open meeting, or that resulted from deliberations in a meeting improperly closed to the public, or that was adopted at a meeting not properly noticed to the public, is invalid. A member of a public body who violates an injunction imposed for a violation of the Open Meetings Act may be subject to removal from office.***

The instructions say "File an action to compel" and asking for an "Injunction." No mention of a Temporary Restraining Order, or Rule 65.

Note the clarity of the handbook vs ORC 121.11 where it's called a fine, not a civil forfeiture. Also note, the inclusion in this clear language of the "removal from office" remedy. Unfortunately, despite it being clearly stated in the ORC, as well as a remedy in four other states it appears as of 2003, to be rare:

> Only a handful of state laws enable a politician who wrongly closes a public meeting to be removed from office or for a recall election to be held… Arizona, Georgia, Hawaii, Minnesota and Ohio -- openness advocates in only one state can recall the law ever being used successfully, and then only once. The Minnesota Supreme Court in 1994 ordered that the mayor of Hibbing and two city council members be removed from office for at least three separate and intentional violations of the open meetings law. A district court and an appeals court had refused to apply the law that said after a third violation an official "shall forfeit any further right to serve." *(Claude v. Collins)*
> https://www.rcfp.org/browse-media-law-resources/news-media-law/news-media-and-law-summer-2003/violating-government-access
> Violating government-access laws rarely results in punishment for the offenders. From the Summer 2003 issue of The News Media & The Law, page 22. [ATTACHMENT 2]

The very next line in the Handbook:

> Like the Public Records Act, ***the Open Meetings Act is intended to be read broadly in favor of openness.***

To be read broadly, means that not only are the instructions in ORC 121.22 specific in nature, making no mention of Rule 65, it means that the injunctive powers of the court are to be, in essence, to do the right thing, without getting contorted by other rules or law.

Remember the Attorney Generals first words in the handbook:

> "one important way is by fostering a spirit of open government"

– using the words "spirit of open government" instead of the word "rules or laws" puts the responsibility of enforcing these laws at a higher plane than arguing language - it speaks to the overriding importance, above even the written law, as if ordered by yet a higher power, as in the way we back our money with "In God we trust" despite the Establishment Clause of the First Amendment.

It is clear, that the attempt by the defense to use Rule 65, (and citing rule 12, instead of just saying "motion to dismiss") are done to incur additional costs, time, effort and to add complexity to what should be a simple action by the plaintiff. It is this very abuse of the law that stops most common citizens from filing injunctions to enforce the Sunshine laws in the first place.

The defendant additionally stacked the deck against the plaintiff by showing up in court with four attorneys, knowing that the courts could;

> "order the person who filed the suit to pay the public body's court costs and reasonable attorney fees."

Once again, the law favors the politicians who break the law with the unlimited resources of a tax-dollar funded defense. It is inherently unfair that the pro se plaintiff, is not entitled to reasonable attorney fees to be paid to them, since they assume the risk of being charged back for the defenses services of 4 attorneys, and court costs.

I humbly and respectfully ask that the judge not only rule that ORC 121.22 is in fact all that the citizen should have to read and follow to enter into this litigation, that the defense be forced to endure the same burdens of the plaintiff if they are found to be using the tax payers good will and money, to unfairly burden the plaintiff with frivolous requests.

This has been tested before in *Doran v. Northmont Board of Education*, 2003-Ohio-4084 which again, uses a bunch of legalese instead of simple language to say that the General Assembly didn't make up 121.22 for giggles, or to be questioned on it's legitimacy as a standalone law:

> {¶14} It has long been established in Ohio that "when a statute grants a specific injunctive remedy to an individual or to the state, the party requesting the injunction 'need not aver and show, as under ordinary rules in equity, that great or irreparable injury is about to be done for which he has no ad equate remedy at law.'" Ackerman v. Tri-City Geriatric & Health Care, Inc. (1978), 55 Ohio St.2d 51, 56, 378 N.E.2d 145, quoting Stephan v. Daniels (1875), 27 Ohio St. 527, 536. See, also, Mid-America Tire, Inc. v. PTZ Trading Ltd., 95 Ohio St.3d 367, 2002-Ohio-2427, 768 N.E.2d 619, ¶ 75. In Ackerman, the Supreme Court of Ohio held

> that a balancing of equities was neither necessary nor permissible where an injunction was provided for by statute.
> Ackerman, supra, at 58. In so holding, the court stated: "Unlike equitable-injunction actions which were developed in response to a rigid and often inadequate common-law system for redressing non-violent wrongs suffered by one individual at the hands of another, [the statute at issue] was designed by the General Assembly to benefit society by proscribing behavior * * * which the General Assembly has determined not to be in the public interest. It would, therefore, be redundant to require the [person seeking an injunction] to show irreparable damage or lack of an adequate legal remedy once he has already proved that the conditions which the General Assembly has deemed worthy of injunctive relief exist." Id. at 57. …
> It would seem to follow, therefore, that the General Assembly does not overstep its authority by simply stating that the trial court shall issue an injunction where the statutory conditions are met, even though such a provision does not allow the trial court to engage in a balancing of equitable considerations.

It is also abundantly clear that the defenses attorney's knew before the bus tour began, that there were indeed possible violations, enough so that the City Attorney recommended that no city employees enter the buildings (Jeff Mims and John Gower didn't enter), and that the School attorney warned at least one board member, Mohamed Al-Hamdani, (an attorney) and he chose to exit the bus en-route to the tours first destination. That the rest continued on, construes a violation worthy of the sought injunction.

That the defense claims that this issue of a Rule 65 TRO is now moot, since the violations have already taken place, and believe that this case has no merit, and that a promise to proceed according to ORC 121.22 will somehow make things right, is incredulous.

The law clearly states that a violation can be challenged up to TWO YEARS after the fact:

> "An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation ***or threatened violation*** of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions." ~section I, 1.

Note that even the threat of violation, allows a plaintiff to bring action.

And, in Gannett Network, Inc. v. Bd. of Edn., 534 N.E.2d 1239 (Ohio Ct. App. 1988) the ruling was:

> A violation of the Sunshine Law cannot be "cured" by subsequent open meetings if the public body initially discussed matters in executive session that should have been discussed before the public.

The defenses request to set aside both the TRO and injunctive relief is moot.

The court should also know that both Mims and Walker who have been in office for multiple terms, should have completed training according to the Ohio Auditors website:

> Ohio Revised Code §109.43(B) and 149.43(E)(1) require that officials elected to statewide or local office receive three hours of Public Records training for each term of office….
>
> We offer seminars on the topics of Record Retention Basics, Ohio's Public Records Act, and Ohio's Open Meetings Act. Additionally, we offer the Certified Public Records Training established by House Bill 9, which covers all three of the aforementioned topics.
>
> Cite: https://www.ohioauditor.gov/open/trainings.html

Yet they willfully and knowingly continue with meetings, and the secret tour, despite my steadfast objection to any meeting in private. I've always been told that "ignorance of the law is not a defense" and I would suggest their actions not only showed ignorance, but that they intentionally and willfully broke the law and are due the injunction that 121.22 requires.

All that is left, is to issue an injunction, and for the plaintiff to present the arguments in court, at the earliest time possible, to demonstrate all the times that these individuals broke the Sunshine laws to determine the number of times to award $500. I have video of all the meetings available on YouTube, which I expended considerable time, effort and money to create.

The facts will show that after I stopped the initial illegal meeting on January 9, 2018, the defendants had access to legal advice, and should have fully studied the Sunshine laws before meeting once again on January, 24th 2018 where they still felt the need to say that these meetings didn't have to be held in public. Since this meeting was held without posted public notice and agenda, it was also not in compliance.
Despite my multiple attempts to notify the board that the private bus tour was illegal, they then proceeded, where information was given in a rolling conference room, outside of the view of the public and without cameras.

I have attached the documents that were distributed for discussion in the moving conference room (bus) meeting, that I acquired through a public records request. This is irrefutable evidence that the tour was indeed a meeting where issues of public importance were distributed and discussed. [ATTACHMENT 3, Public Records Request of Feb 6, 2018, ATTACHMENT 4, Public Records delivered Feb 8, 2018, Documents from the tour, not made available to the public without intervention]
ORC 121.22

> (3) Irreparable harm and prejudice to the party that sought the injunction shall be ***conclusively and irrebuttably presumed upon proof of a violation or threatened violation of this section.***

Which leads to ORC 121.22 clearly stating:

(H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid

Therefore, I ask that the judge order the task force disbanded and all participants, including the School Superintendent, Treasurer and Associate Superintendent, must not participate in the future in any discussions or deliberations of school closing by court order, with prejudice.

Having presented irrefutable proof that the bus tour constituted an illegal secret meeting, the court must issue an injunction, that is the first step to asking for fines and a return of court costs. It is also required to request intervention of the Open Government Unit to begin the process of removal from office of the violating public officials.

It should also be clear to the judge that the defense, seems willing to pull out all stops, since the plaintiffs pro se action only puts the plaintiff at great financial risk, since a penalty of attorney costs paid by the defendant can't be awarded here, but the plaintiff could be liable to pay for the defenses services of four attorneys. These laws were written to protect the publics right to know, not to provide a publicly funded charity to members of the bar.

The only question left to decide in a hearing is how many times the $500 fine can be applied and awarded to the plaintiff.

To which I humbly say that the defense invoking rule 65 is nothing but a way to waste time, money, delay and tick off a judge, who clearly stated his belief that ORC 121.22 trumps Rule 65 because it is fully formed and offers remedies for violations.

ORC 121.22 is as clear as anything written by lawyers and politicians can be. It is the law that applies to this issue, and it offers everything necessary for the judge to decide this issue. Bringing anything else up other than ORC 121.22, including Rule 65, should be met with a ruling on principle and the specific law with prejudice.

Humbly, for the people,

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