

**IN THE SUPREME COURT OF OHIO**

**ADAM J. WHITE,** : **CASE NO. 2014-1796**  
**Plaintiff/Appellant,** :  
**v.** : **Jurisdictional Appeal from the Delaware**  
: **County Court of Appeals, 5<sup>th</sup> Appellate**  
**DAVID E. KING, et al.,** : **Case No. 14 CAE 02-0010**  
**Defendants/Appellees.** :

---

**BRIEF OF APPELLEES**

---

**JOHN C. ALBERT (0024164)**  
**CRABBE BROWN & JAMES, LLP**  
**500 South Front St., Suite 1200**  
**Columbus, OH 43215-7631**

**Phone: 614-229-4528**  
**Fax: 614-229-4559**  
**Email: [Jalbert@cbjlawyers.com](mailto:Jalbert@cbjlawyers.com)**

**Attorney for Defendants/Appellees**  
**Olentangy Local School District Board of Education, David E. King,**  
**Julie Feasel, Kevin O'Brien and Stacy Dunbar**

TABLE OF CONTENTS

	<u>PAGE NUMBERS</u>	
I. TABLE OF AUTHORITIES .....	-ii-, -iii-	
II. STATEMENT OF FACTS .....	1 - 5	
III. ARGUMENT .....	5	
<u>Proposition of Law No. 1:</u>		
Ohio’s Sunshine Law, R.C. §121.22, does not apply to emails. ....		5 - 7
<u>Proposition of Law No. 2:</u>		
It is a cardinal rule that a Court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at an end, and the statute must be applied accordingly .....		7 - 9
<i>(Provident Bank v. Wood (1973), 36 Ohio St.2d 101 applied and followed.)</i>		
<u>Proposition of Law No. 3:</u>		
A public body’s use of emails between Board members and staff does not constitute a “meeting” as defined in R.C. §121.22(B)(2) when not involving a prearranged discussion of public business, or deliberations upon official business .....		10 - 15
<u>Proposition of Law No. 4:</u>		
A Board’s ratification of a six (6) month old opinion letter to a newspaper editor, said ratification done for the purpose of legal defense against a recently filed lawsuit, does not retroactively convert the substance and character of the letter from non-public business to public business .....		15 - 17
IV. CONCLUSION .....	17	
V. CERTIFICATE OF SERVICE .....	18	

**TABLE OF AUTHORITIES**

**PAGE NUMBERS**

**CASES:**

*Cincinnati Inquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011 - Ohio - 703 (1<sup>st</sup> Dist) ..... 9

*Covert v. Ohio Auditor of State*, 2006 - Ohio - 2896, 2006 WL 1570598 (4<sup>th</sup> Dist.) ..... 16

*DeRolph v. State of Ohio*, 89 Ohio St.3d 1, at 12, 2000 - Ohio - 437 ..... 8

*Grau v. Kleinschmidt*, (1987) 31 Ohio St.3d 84, 509 N.E.2d 399 ..... 13

*Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 995 N.E.2d 862, 2005 - Ohio - 3489 (1<sup>st</sup> App. Dist.) ..... 6, 7, 11, 13, 15

*Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105 - 106, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381 ..... -i-, 8,

*State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 1996 - Ohio - 372 . . . . 10, 11

*State ex rel. Fairfield Leader v. Ricketts*, (1990), 56 Ohio St.3d 97, 564 N.E. 2d 486 ..... 12

*State ex rel. Floyd v. Rockhill Local Bd. of Edn.* (Feb. 10, 1998, 4<sup>th</sup> Dist. No. 1862), 1988 WL 17190 ..... 11, 12

*The State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008 - Ohio - 4788 ..... 7

*State ex rel. Kittel v. Bigelow*, (1941), 138 Ohio St. 497, 502, 37 N.E.2d 41 ..... 8

*State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d 565 -570, 664 N.E.2d 931, 936 ..... 5

*State ex rel. Plain Dealer Publishing Co. v. Barnes* (1998), 38 Ohio St.3d 165, 527 N.E.2d 807 ..... 13

*State of Ohio, ex rel. Schuette v. Liberty Township Bd. of Trustees*, 2004 - Ohio - 4431 (5<sup>th</sup> Dist.) ..... 12

*Wilkins v. Village of Harrisburg, et al.*, 2013 - Ohio - 2751 (10<sup>th</sup> Dist.) ..... 9

**STATUTES:**

Civ. R. 12(C) ..... 1

Ohio’s Sunshine Law, R.C. §121.22 ..... -i, 1, 5, 6, 7, 8, 9, 10, 15

R.C.§121.22(A) ..... 8, 9, 10

R.C. §121.22(B)(1) ..... 5

R.C. §121.22(B)(2) ..... -i, 8, 9, 10, 11

R.C. §121.22(C) ..... 9, 10

R.C. §340.04 ..... 16

**MISCELLANEOUS:**

2009 Ohio Op. Atty. Gen. 2-230 (Ohio A.G.), 2009 Ohio Op. Atty. Gen. No. 2009-034, 2009 WL 2979135, Sept. 15, 2009 ..... 9

NEOLA 2009 Policy ..... 4

## STATEMENT OF FACTS

Appellees disagree with Appellant's Statement of Facts as follows.

Contrary to any implication gleaned from the Briefs of Appellant and *Amici Curiae*, Appellees absolutely respect, support, and have always followed Ohio's Sunshine Law, R.C. §121.22 and its legislative intent. Indeed, Board Policy 0148.1 which is partially at issue in this case, had been in effect for eight (8) years, and states in pertinent part as follows in Section C:

...However, since individual Board members are not authorized to act on behalf of the Board unless in open public session or when specifically vested with such authority, it will be considered to be unacceptable conduct for Board members to discuss individual personalities, personal grievances, or other complaints with members of the staff.....

(Appendix Pages 45 - 46.)

While both the Trial Court and the Court of Appeals appropriately cited to, and relied upon the allegations in the Amended Complaint, in his Statement of Facts, Appellant seldom refers to numbered paragraphs of the Amended Complaint, but instead focuses on the attachments to the Amended Complaint, and at times, distorts or twists their content. For example, at Page 1 Appellant refers to "the undisputed facts... ." Appellant confuses a Motion for Judgment on the Pleadings with a Motion for Summary Judgment. This case has been decided upon the filing of a Motion for Judgment on the Pleadings pursuant to Civ. R. 12(C). In such a filing, the Court is required to construe the material allegations in the Complaint, with all reasonable inferences to be drawn therefrom, in favor of the non-moving party as true. As such, the use of the term "undisputed facts" is simply not accurate.

As an example of Appellant's over zealous representation of the facts, at Page 1 he claims Appellees collaborated with and used District employees to publish "official Board policy" as well as alleging President King "instructed" the others to collaborate on the response, citing Appendix

Page 53. However, when the Court reviews Appendix Page 53, it will see that there was no mention whatsoever of publishing official Board policy, and President King did not “instruct” anyone, but only “recommended,” and even stated “If you do not agree with this course of action, please let me know.” This email was not an instruction to publish official Board policy. It was only an idea to respond to The Dispatch editorial, which specifically stated its purpose was to:

“...express the view of The Dispatch Editorial Board, which is made up of the publisher, the President of The Dispatch, the editor and editorial/writing staff. As is the traditional newspaper practice, the editorials are unsigned and intended to be seen as the voice of the newspaper. Comments and questions should be directed to the editorial page editor.”

(Appendix at Page 49.)

The “official Board policy statement to the public...” had already been made at the regular Board meeting on September 25, 2012 after public readings of Board policy updates. (Appendix Page 48.) The public business on this issue had ended and was complete.

At Page 16 of Appellant’s Brief, he states that when Defendants were exchanging emails “...There was a pending rule or resolution before the Board that had recently sparked sharp public controversy and was thus still under active consideration, i.e. Board Policy No. 0148.1(B) issued on September 25, 2012... .” This is simply not true. As the Board’s minutes of September 25, 2012 clearly indicate, the changes to the Policy were adopted and the matter was closed. There was no further pending rule or resolution regarding this matter. Furthermore, the Amended Complaint does not set forth any allegation or reasonable interpretation of fact that this had resulted in “...sharp public controversy and was still under active consideration.” The response letter to the editor was nothing more than an expression of opinion and disagreement with the opinions of the editorial staff of The Columbus Dispatch. It in no way constituted official public policy, public business, or deliberations upon official business. Indeed, contrary to Appellant’s misrepresentation at Page 2,

paragraph 3, Dave King did not sign the letter as “President,” but simply “DAVE KING.” (Appendix Page 85.)

At Page 2, paragraph 5, Appellant refers to emails from Board member Feasel indicating that she contacted The Dispatch herself. (Appendix Page 51.) How ironic it is that Appellant has sued his fellow Board members because of a published letter to the editor in The Columbus Dispatch, claiming a violation of Ohio’s Sunshine Law, but nowhere has claimed that Board member Feasel’s email to The Columbus Dispatch of October 1, 2012 violated Ohio’s Sunshine Law. The reality is this lawsuit was filed by Appellant because the response letter to The Columbus Dispatch referenced Appellant’s failure to ask questions about the five (5) year financial forecast and to attend the audit and finance committee meetings, and his motivation to get his name in the paper. (Appendix page 85, last two (2) paragraphs.)

As further evidence of Appellees’ support and recognition of Ohio’s Sunshine Law, Board member Feasel’s October 1, 2012 email to The Columbus Dispatch (Appendix Page 51) specifically states in the last paragraph as follows:

“Too many times board members think they have more power than they really do when in fact, as individual board members they have no power. The power comes during official board meetings when the group acts as a whole. The policy our board voted on last Tuesday reflects how our School board has been operating since at least 2004.”

Furthermore, Board member Feasel’s October 1, 2012 email concludes at the end as follows:

“Please note that e-mail communication to elected officials is public record and may be viewed by anyone who requests it.”

(Appendix Page 51.)

The verbiage in Board member Feasel’s email certainly reinforces the Boards complete and total respect for Ohio’s Public Records Act, as well as Ohio’s Sunshine Law, and the goal of transparency.

At Page 3, paragraph 9, Appellant alleges that the first draft of the response was signed by

the Board members "...in their official capacities as Board members." However, Appellant's citations to Appendix Pages 78, 81 and 83 do not indicate that the first draft was signed by the Board members "in their official capacities." Those emails only indicate that there were multiple signers. (Appendix Page 81.) Furthermore, contrary to Appellant's representation at Page 3, paragraph 10 that the final response was signed by "Dave King in his capacity as Board President...", the response letter itself disproves that allegation, as it was only signed by "DAVE KING." (Appendix Page 85.)

As a representation of "fact," at Page 3, paragraph 12, Appellant surprisingly claims that the letter to the editor response of October 13, 2012 "constituted a vote to affirm Board policy No. 0148.1(B)... ." While this representation may be wishful thinking and argument on behalf of Appellant, it certainly does not constitute "fact." The letter to the editor was only a rebuttal to the views of The Dispatch editorial board, and the "voice of the newspaper." (Appendix Page 49.) The affirmance of Board policy No. 0148.1(B) had already taken place on September 25, 2012 at the Board meeting. (Appendix Page 48.)<sup>1</sup>

At Page 3, paragraph 11, Appellant states that he was never consulted about the editorial response letter and was not given an opportunity to vote for or against it. Since it did not involve a "meeting" on public business, or deliberations upon official business, there was no requirement for Appellant to be included, or for there to be an official open public Board meeting. However, it should be noted that six (6) months later, when the Board, at an open public meeting attended by Appellant, moved to ratify the response letter to The Dispatch as a legal defense to the lawsuit

---

<sup>1</sup> Indeed, when the Court reviews Board Policy 0148.1 (Appendix Pages 45 - 46), it will become obvious that the changes the Board made to this Policy were expansive, not restricting communication, as the change allowed communication not only through the Superintendent, but also to the Board President and/or Treasurer. The Court will also note that this is a copyrighted NEOLA 2009 policy. NEOLA is a national commonly used source for standard school board bylaws and policies, and is currently working with more than 750 superintendents and school boards in Florida, Indiana, Illinois, Ohio, Michigan, Wisconsin and West Virginia. [www.neola.com](http://www.neola.com).

Appellant had just filed that morning, Appellant had the opportunity to comment and vote and abstained. (Appendix Page 87.)

At Page 4, paragraph 15, Appellant again misrepresents the facts beyond reasonable inference. He alleges “After voting against Mr. White’s motion, ...” the Board members voted to ratify the letter to the editor. However, the Board members did not vote against Appellant’s motion. There was no vote, the motion simply died for a lack of a second. (Appendix Page 87.)

At Pages 4 - 5, specifically paragraphs 17 and 18, Appellant refers to the Amended Complaint, paragraphs 22 and 27 thereof as if they were an allegation of “fact.” However, paragraphs 22 and 27 of the Amended Complaint constitute “argument,” not “fact.”

In summary, Appellant’s Statement of Facts, adopted by the *Amici Curiae*, goes beyond construing the material allegations in the Amended Complaint, and makes unreasonable inferences to be drawn from those material allegations in an effort to prove error on behalf of the Court of Appeals and the Trial Court. Both the Trial Court and the Fifth District Court of Appeals properly construed the material allegations in the Complaint, gave Appellant all reasonable inferences to be drawn therefrom as true, and correctly found that Appellant could not prove any facts which would entitle him to relief. *State ex rel. Midwest Pride IV, Inc. v. Pontious* (1996), 75 Ohio St.3d. 565 - 570, 664 N.E.2d 931, 936.

### **III. ARGUMENT.**

#### **Proposition of Law No. 1:**

**Ohio’s Sunshine Law, R.C. §121.22, does not apply to emails.**

This case is about email communication between members and staff of a public body. It goes without saying, that most, if not all public bodies in the State of Ohio, as defined in R.C. §121.22(B)(1), have computers, smart phones, and regular email communication between their

members and staff. Email communication has replaced telephone calls, handwritten notes, paper letters, and personal conversations as an efficient and flexible form of communication between public servants, and their staff. Emails as a form of communication have become a routine and daily activity.

*Amici Curiae* agree, and state at Page 10 of their Brief:

*Amici* do not argue that - absent specific statutory authority, public officials are prohibited from communicating through email in administering their public offices. That is the sort of necessity in our world that is implied in their express powers to administer their offices.

However, a review of R.C. §121.22 reveals no mention whatsoever of electronic communications, or emails, texts, etc. It is equally significant that this statute has been amended several times by the legislature since its enactment in 1954, and at least ten (10) times in the past twenty (20) years, with the obvious knowledge that public bodies were using computers and emails.

In the case of *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 2005 - Ohio - 3489 (1<sup>st</sup> App. Dist. 2005) the First District Court of Appeals specifically held at paragraph 9 as follows:

“...Ohio’s law makes no mention of electronic communication as being subject to the law, and no Ohio case holds that it is. The statute was revised in 2002, and language about electronic communication was not included in the revision. Since the legislature chose not to include electronic communication in the statute, we hold that Ohio’s Sunshine Law does not cover email.”

Indeed, since the *Haverkos* decision dated July 8, 2005, the legislature has amended R.C. §121.22 at least four (4) times, which would seem to demonstrate that the legislature does not see a need to include emails in the statute, in any capacity.

Contrary to the alarm and cry for help by Appellant and *Amici Curiae*, and their exaggerated extension of the decisions of the Trial Court and Fifth District Court of Appeals below, there is simply no basis in law or in fact that this Court need clarify existing law and establish proper law

for the use of emails by the public bodies in the State of Ohio. Surprisingly neither Appellant nor *Amici Curiae* cite or attempt to distinguish the only Appellate case directly on point, *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 995 N.E.2d 862, 2005 - Ohio - 3489 (1<sup>st</sup> App. Dist.). Indeed, the *Haverkos* decision, has been pending for almost ten (10) years, and has not resulted in the public being deprived of full transparency. The *Haverkos* Court held that although Ohio's Sunshine Law statute had been amended as recently as 2002, no language regarding modern electronic communications was to be found. The *Haverkos* Court specifically held that Ohio's Sunshine Law does not cover emails. *Id.* at ¶ 9. If Appellant and *Amici Curiae* are correct, certainly such a ruling by the *Haverkos* Court would have resulted in chaos, as every public body would have conducted official public business and deliberations by email only. Such obviously did not occur, and neither Appellant nor *Amici Curiae* have cited any cases to prove otherwise. *Amici Curiae* cite no cases more recent than 2001. Appellant cites no cases decided after *Haverkos* that are on point. Appellant has placed no evidence throughout the pendency of this case that an exchange of "emails" by public bodies in the State of Ohio has resulted in a side-step of Ohio's Sunshine Law or has deprived the public of transparency. Furthermore, as this Court has acknowledged, under the Ohio Public Records Act, at times emails constitute public record, and are available to the public for review. See *The State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008 - Ohio - 4788 at ¶ 20.

The statutory language, and the only existing case law on point, the *Haverkos* decision, are clear. Ohio's Sunshine Law does not apply to the exchange of emails by public bodies.

**Proposition of Law No. 2:**

**It is a cardinal rule that a Court must first look to the language of the statute itself to determine the legislative intent. If that inquiry reveals that the statute conveys a meaning which is clear, unequivocal and definite, at that point the interpretive effort is at**

**an end, and the statute must be applied accordingly.  
(Provident Bank v. Wood (1973), 36 Ohio St.2d 101 applied and followed.)**

At Page 8, Appellant states:

The language of the Ohio Open Meeting Statute, R.C. §121.22 is not ambiguous, it is clear, unequivocal, and definite.

Appellees agree. As such, this Court must first look to the language of the statute itself to determine the legislative intent. As required by *Provident Bank v. Wood* (1973), 36 Ohio St.2d 101, 105 - 106, 65 O.O.2d 296, 298, 304 N.E.2d 378, 381, if a statute conveys a meaning which is clear, unequivocal, and definite, there is no interpretive effort necessary, and the statute must be applied accordingly.

R.C. §121.22(A) makes it clear that public officials may take official action and conduct all deliberations upon official business only in open meetings. Pursuant to R.C. §121.22(B)(2) a “meeting” is defined as any “prearranged discussion of the public business of the public body by a majority of its members.” Furthermore, R.C. §121.22(C) states that for a meeting of a public body, any member shall be present “in person” to be considered present or to vote at said meeting or for determining the purposes of whether a quorum exists. These requirements are not ambiguous, are clear, unequivocal, and definite as Appellant recognizes.

Obviously, an exchange of emails cannot possibly constitute a “meeting” as defined in R.C. §121.22(B)(2) since R.C. §121.22(C) requires a member to be present “in-person” at any such meeting. It necessarily follows that exchanging emails cannot constitute being present “in-person,” and as such cannot constitute a “meeting” as defined in the statute. As indicated above, the legislature had numerous opportunities to further define a “meeting” to include an exchange of emails, but in its wisdom has not done so. This Court has always frowned on legislation by judicial decision. See *State ex rel. Kittel v. Bigelow*, (1941), 138 Ohio St. 497, 502, 37 N.E.2d 41, and *DeRolph v. State of Ohio*, 89 Ohio St.3d 1, at 12, 2000 - Ohio - 437.

In the case of *Wilkins v. Village of Harrisburg, et al.*, 2013 - Ohio - 2751 (10<sup>th</sup> Dist.) the Court found that there must be deliberations or discussions by the public bodies' members and even information gathering sessions are not a "meeting" as defined by R.C. §121.22, citing *Cincinnati Inquirer v. Cincinnati Bd. of Edn.*, 192 Ohio App.3d 566, 2011 - Ohio - 703 (1<sup>st</sup> Dist.), ¶ 2 of the syllabus, discretionary appeal not allowed, 128 Ohio St.3d 1557, 2011 - Ohio - 2905. *Id.* at ¶ 19. In addition, the Court stated at ¶ 20:

R.C. §121.22 seeks to prevent public bodies from engaging in secret deliberations with no accountability to the public...as previously stated, to violate R.C. §121.22, a public body must simultaneously conduct a "meeting" and "deliberate" over public business. (Citations omitted.)

See also 2009 Ohio Op. Atty. Gen. 2-230 (Ohio A.G.), 2009 Ohio Op. Atty. Gen. No. 2009 - 034, 2009 WL 2979135, Sept. 15, 2009 which addressed the issue of whether or not R.C. §121.22(C) required that a member of the public body be present in person at a public meeting. This Opinion held that a township public body does not have the right to hold their meetings by teleconference or any other means which would prevent the public from attending in person. The requirements of R.C. §121.22(C) preclude the possibility of a public body conducting a meeting by teleconference or other means that prevent the public from attending the meeting in person. Thus, this Opinion of the Ohio Attorney General further supports the conclusion that the statute is clear, unequivocal and definite. It requires for any alleged "meeting" to take place, it must have been in person. As such, the Trial Court and Fifth District Court of Appeals herein were correct in their analysis.

Herein, the Court is respectfully urged to find that R.C. §121.22 is not ambiguous and must be applied accordingly, to result in affirmance of the Fifth District Court of Appeals and the Trial Court below.

**Proposition of Law No. 3:**

**A public body's use of emails between Board members and staff does not constitute a "meeting" as defined in R.C. §121.22(B)(2) when not involving a prearranged discussion of public business, or deliberations upon official business.**

Even if it is assumed that R.C. §121.22 applies to emails, neither the Trial Court nor the Fifth District Court of Appeals erred in finding in favor of Appellees and dismissing Appellant's complaint. R.C. §121.22(A) clearly requires public officials "to take official action and to conduct all deliberations upon official business only in open meetings..." Appellees have always agreed with and supported this requirement. The Briefs of Appellant and *Amici Curiae* set forth this obvious requirement, which is not in contention, and never has been. The Brief of *Amici Curiae* sets forth titled arguments of "The Olentangy School Board has no authority to depart from the Sunshine Law in conducting public business," "The Sunshine Law does not authorize public bodies to deliberate and decide issues of public policy except by open meetings," and Ohio's Sunshine Law requires public officials to debate and shape policy in open meetings." These statements, as they mimic R.C. §121.22 are not in dispute. Appellees agree, and have always agreed with these premises of law.

**A. There was no pre-arranged meeting.**

Appellant's First Proposition of Law misrepresents what occurred herein, and attempts to inappropriately extend the meaning of R.C. §121.22. There is no dispute that R.C. §121.22(A) requires public officials to take official action and to conduct "all deliberations upon official business" only in open meetings. *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540, 542, 1996 - Ohio - 372.

First, there was no pre-arranged meeting in person. Pursuant to §121.22(C) "...A member of a public body 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.” In this case, there is no allegation that the four (4) Board members met “in person.” In fact, Exhibits 3 - 1 through 3 - 36, attached to the Amended Complaint (Appendix Pages 51 - 86) established that there were merely a series of emails exchanged in the drafting of an opinion letter in response to an editorial previously printed by The Columbus Dispatch. There was no pre-arranged meeting of a quorum of Board members, as required by §121.22(B)(2). There was no “in-person” meeting. Appellant’s reliance upon *State ex rel. Cincinnati Post*, supra, is misplaced, as therein, there were actually closed door meetings in person wherein members of city council discussed the county’s proposal to construct new facilities.

As cited above, almost directly on point is the decision from the First Appellate District in *Haverkos v. Northwest Local School Dist. Bd. of Edn.*, 2005 - Ohio - 3489 (1<sup>st</sup> Dist. 2005). In a strikingly similar case, the Court of Appeals of the First Appellate District, Hamilton County, Ohio specifically held that Ohio’s Sunshine Law does not cover emails. See *Haverkos v. Northwest Local School Dist. Bd. Of Edn.*, 2005 - Ohio - 3489 (1<sup>st</sup> Dist. 2005). In *Haverkos*, the plaintiff sued the Northwest School Board and four (4) of its members alleging violations of the Sunshine Law because an email was exchanged between three (3) Board members with regard to the publishing of a guest column in the Northwest Press. One Board member wrote the column, criticizing the past actions of the Board and asking residents to support the candidacy of two (2) non-incumbents in the next election. The remaining Board members exchanged an email, a telephone call, drafted a proposed response letter which was distributed to the other Board members all of which agreed to sign it. The Court of Appeals granted summary judgment for the Defendants, finding that there was no pre-arranged meeting, and at no time was there a meeting of the majority of the Board. “One-on-one conversations between individual Board members do not constitute a “meeting” under the Sunshine Law.” *State ex rel. Floyd v. Rockhill Local Bd. of Edn.* (Feb. 10, 1998, 4<sup>th</sup> Dist. No. 1862),

1988 WL 17190, at \*4 (reversed on other grounds). Next, the Court addressed the issue of whether or not an email can be considered a discussion under Ohio's Sunshine Law. *Id.* at ¶ 9. The Court found that Ohio's law makes no mention of electronic communication as being subject to the law and no Ohio case holds otherwise. Despite the statutory revisions in 2002, there was no language including electronic communications. The First District Court of Appeals held as a matter of law that Ohio's Sunshine Law does not cover emails. *Id.* at ¶ 9.

Second, there was no "meeting" under the statute. Appellant relies upon the case of *State of Ohio, ex rel Schuette v. Liberty Township Bd. of Trustees*, 2004 - Ohio - 4431 (5<sup>th</sup> Dist.). However, the *Schuette* case involved the scheduling of a meeting by the Board of Trustees through the issuance of letters to the public, certain residents, and business interests. The general public and press were excluded from the meeting. The meeting included some members of the public and business interests, and excluded others. In the case at bar, no such notice was sent, and no in-person meeting was held. There was simply an exchange of emails to draft a response to a Columbus Dispatch editorial, which did not involve any pending rule, resolution, or pending business before the Board.

Appellant relies upon the case of *State ex rel. Cincinnati Post*, *supra*, however, the facts therein did involve face-to-face meetings of city council members, and did not involve emails at all. As such, the *Cincinnati Post* case is distinguishable on its facts and has no applicability.

Likewise with regard to Appellant's citation of *State ex rel. Fairfield Leader v. Ricketts*, (1990), 56 Ohio St.3d 97, 564 N.E.2d 486. The *Ricketts* holding has no applicability whatsoever as it involved actual face-to-face meetings in a dispute over whether or not minutes had been prepared for which the public would have access. Emails regarding opinion letters to an editor were not part of the facts, making the *Ricketts* case totally distinguishable herein. Likewise with regard to

Appellant's reliance upon *State ex rel. Plain Dealer Publishing Co. v. Barnes* (1988), 38 Ohio St.3d 165, 527 N.E.2d 807, which also involved a face-to-face meeting of substantially all of the members of council with members of the press and public being barred from the meeting. In fact, the *Barnes* case does not even mention R.C. §121.22, but involved an interpretation of the Charter of the City of Cleveland with regard to "meetings." As such, it has no application whatsoever herein.

**B. There were no deliberations.**

Herein, there was no "deliberation" over public business. There was no public business pending before the Board. Most likely every week throughout the State of Ohio, letters to the editor in Ohio's newspapers can be found written by employees and/or officials of public bodies, defending, or debating issues of public concern. Dave King's letter of October 27, 2012 was nothing more than an opinion response to the opinions of the editorial staff of The Dispatch. That opinion letter did not, and could not change any policy of the Board, did not establish new Board precedent, and was not even signed officially by Dave King as "President." This Court has recognized the exercise of freedom of speech rights of persons by sending letters to the editor. In the case of *Grau v. Kleinschmidt*, (1987), 31 Ohio St.3d 84, 509 N.E.2d 399 at page 94 the Court states as follows:

"A "letters to the editor" column provides an important outlet for the promulgation of information and ideas by persons who do not themselves have access to publishing facilities but who wish to exercise their freedom of speech even though they are not members of the press. ..."

In addition, the *Haverkos* Court found that mere discussion of an issue of public concern does not mean that there were deliberations under the statute. *Id.* at ¶ 10. Thus, even if Appellant's allegations are taken as true that his four fellow Board Members were discussing issues of public concern in their editorial response letter, the issuance of said letter does not constitute "deliberations." There was nothing to decide. The policy referenced in The Dispatch editorial had

already been finally adopted at an open public meeting.

**C. There was no public business.**

Herein there was no discussion of official public business by a public body. On this issue, the Trial Court stated "...When Defendants were exchanging the emails to develop the response letter, there was no pending rule or resolution before the Board. It was nearly six (6) months after the letter was published when the Board decided to ratify the letter. Accordingly, at the time the emails were exchanged there was no public business discussed." (Appendix Page 38.)

As the allegations in the Amended Complaint demonstrate, even if reasonable inferences are drawn, there was no pending rule or resolution before the Board. In fact, as the Amended Complaint specifically alleges, in ¶¶ 23 - 25, the Board did not ratify the letter to the editor at issue until after Appellant filed his civil action in this case, which was six (6) months after the response letter was published in the Dispatch. If the response letter to the editor constituted official public business, then why would it have needed to be ratified six (6) months later. Furthermore, Appellant himself was present at the April 25, 2013 regular meeting of the Board, and had the opportunity to vote on the ratification of the letter to the editor at issue, and chose to abstain. It is certainly not unusual for public officials, and members of boards and commissions, to submit opinion letters, and response letters to the editorial departments of newspapers throughout the State of Ohio. Just as in this case, such letters address various topics, including procedures, complaints of the public, and opinions. Appellant and *Amici Curiae* would have this Court conclude that such letters cannot be submitted to a newspaper unless an official board meeting has been previously held, and all board members have voted to allow such a letter to be sent, despite the fact that there is no pending rule or resolution or specific business on that issue before the Board. As can be seen from the October 27, 2012 letter to the editor at issue, there was no mention of any "pending rule or resolution before the Board."

Mere discussion of an issue of public concern does not mean there were deliberations. See *Haverkos*, supra, at ¶ 10.

When this statute is applied to the case at bar, no further interpretation is necessary. The exchange of emails by Appellees, the drafting and submission of the editorial response letter did not involve the taking of 1) official action, 2) did not involve official business, 3) there was no vote taken, 4) there was no prearranged in-person meeting, and 5) there were no deliberations.

Neither Appellant or *Amici Curiae* cite one case directly on point in support of the interpretation they urge this Court to apply to R.C. §121.22. Even if it is assumed that R.C. §121.22 applies to emails, herein there was no prearranged meeting for the purpose of private deliberations concerning official public business, and as such, there was no violation of R.C. §121.22.

**Proposition of Law No. 4:**

**A Board's ratification of a six (6) month old opinion letter to a newspaper editor, said ratification done for the purpose of legal defense against a recently filed lawsuit, does not retroactively convert the substance and character of the letter from non-public business to public business.**

While the letter to the editor did not involve any public business, deliberations on any pending issue or matter, the April 25, 2013 vote of the Board ratifying the letter to the editor was on the agenda at an open public meeting and did involve new official public business and deliberations: The Board had just been sued. The Board had just been sued several hours earlier, and as such, the matter was placed on the Agenda in an open and public meeting, and addressed. The public business being addressed was the acknowledgment and defense of the lawsuit. Such action did not retroactively convert the substance and character of the six (6) month old opinion letter to The Dispatch into one of a prearranged meeting/deliberations on public business at the time it was written. Indeed, there was no allegation of fact in the Amended Complaint that after the October 27,

2012 response letter of Dave King was printed by The Dispatch there was any further discussion or mention of the editorial, the response letter, or any issues surrounding either of them. Six (6) months quietly passed until Appellant chose to file his lawsuit. The new public business of the lawsuit is separate and distinct from the editorial response letter of "DAVE KING," six (6) months earlier.

The letter to the editor from Dave King dated October 27, 2012 was not ratified by the Board until six (6) months later, on April 25, 2013 after the Board was placed on notice that Appellant had sued the Board earlier that day, filed on April 25, 2013 at 1:28 p.m. The Board's action to ratify the letter to the editor did not "magically" convert the content and substance of the opinion letter to the editor into "public business." Appellant has not cited one case directly on point or applicable to support his argument. Appellant cites *Covert v. Ohio Auditor of State*, 2006 - Ohio - 2896, 2006 WL 1570598 (4<sup>th</sup> Dist.) which has no applicability whatsoever. First, it does not even involve Ohio's Sunshine Law. Secondly, it involved the Court's interpretation of R.C. §340.04 with regard to whether or not the executive board was required to give prior approval for the termination of an employee. The Court found that the director had authority to hire and fire employees as the need arises, and as such, the termination was effective when done. The fact that the board met later to approve the director's decision was not inappropriate. This case has no relevance whatsoever to the case at bar.

Appellant argues that the distinguishing fact is that the Board actually later voted to ratify the published letter to the Dispatch, treating it as official school business. However, that argument does not further Appellant's cause. First, the April 25, 2013 vote was done to respond to a new issue: Appellant had just sued his fellow Board members.

Second, the Amended Complaint indicates, specifically ¶¶ 24, 25 and 26, that Appellant himself was present at the April 25, 2013 regular Board meeting. He had the opportunity to

participate and vote with regard to the alleged ratification of the letter to the editor. Appellant chose to abstain from that vote. This occurred in an open, regularly scheduled public Board meeting, and as such cannot constitute any violation of Ohio's Sunshine Law. As such, Appellant had an opportunity to participate in any discussions concerning the ratification of the letter to the Editor at issue, and to vote, and chose not to do so. Appellant was present, and had the opportunity to participate. There can exist no violation of Ohio's Sunshine Law at that point. Until that time, there was no "in person" meeting as required by the statute, at that time Appellant was present and had the opportunity to participate. However, that vote, taken on the same day Appellant filed this lawsuit, done as a legal defense, did not retroactively convert the letter to the editor or the emails from six (6) months earlier, into a prearranged meeting with deliberations on public business which violated the Sunshine Law.

#### **IV. CONCLUSION.**

Based upon the foregoing, Appellees respectfully urge this Court to affirm the Decision and Judgment Entry of the Fifth District Court of Appeals in all respects.

Respectfully submitted,

/s/ JOHN C. ALBERT

JOHN C. ALBERT (0024164)  
CRABBE, BROWN & JAMES, LLP  
500 South Front Street, Suite 1200  
Columbus, OH 43215  
614-229-4528 FAX: 614-229-4559  
Email: [jalbert@cbjlawyers.com](mailto:jalbert@cbjlawyers.com)

*Attorney for Defendants/Appellees  
Olentangy Local School District Board of Education,  
David E. King, Julie Feasel, Kevin O'Brien and  
Stacy Dunbar*

V.

**CERTIFICATE OF SERVICE**

I hereby certify that on this 22<sup>nd</sup> day of July, 2015, a copy of the foregoing was duly served,  
via U.S. Regular Mail, postage prepaid, upon the following:

Phillip L. Harmon, Esq.  
Phillip L. Harmon, Attorney at Law, LLC  
6649 North High Street, Suite 105  
Worthington, OH 43085-4004

*Attorney for Plaintiff/Appellant,  
Adam J. White*

David Marburger, Esq.  
Baker & Hostetler, LLP  
1900 Est 9<sup>th</sup> Street, PNC Center  
Suite 3200  
Cleveland, OH 44114

*Attorney for amici curiae Ohio Coalition for  
Open Government, Common Cause Ohio and  
the League of Women Voters of Ohio*

          /s          **JOHN C. ALBERT**  
JOHN C. ALBERT (0024164)