

Ohio Auditor of State

2019 LGOC

**Township  
Legal Update**

Presented by:  
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Assistant Legal Counsel

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**AGENDA**

- Public Records Refresher
  - Case Law Update
- Legislative Update
  - Credit Cards
- Recent AG Opinions
- Ethics Refresher



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**Public Records Act**

Quick Overview

- Public Records Act = ORC 149.43
- General Obligations
  - Adopt public records policy
  - Promptly prepare records and make available for inspection
  - Make copies within a reasonable time
  - Follow an approved records retention schedule



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# Public Records Act

## Quick Overview

A "record" is:

1. Any document, device, or item, regardless of physical form or characteristic, including electronic records,
2. Created or received by or coming under the jurisdiction of any public office
3. Which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office

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## Public Records Maintained on a Website

- If a public office has some or all of its public records on a website, fully accessible to and free to the public at all times, then the public office may limit the number of records requested in digital format by a single person to ten per month.
- Limitation on number of requests does not apply if:
  - Requested records are not available on the website, or
  - Requester certifies, in writing, that he does not intend to use the information requested for commercial purposes.

ORC 149.43(B)(7)(c)(ii)

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# Public Records Act

## Time to Respond



- After receiving a request for public records, a public office or person responsible for public records is required to make copies "within a reasonable period of time."
  - There is no specific deadline by which a public office must respond
  - "Reasonable period of time" depends on the pertinent facts and circumstances of each request
    - Includes time to retrieve, review, redact, and obtain legal advice (when necessary)

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## Public Records Training Update

- Section 149.43 provides that elected officials or their designees must satisfy the three hour requirement of public records training each term of office.
- Elected official is defined as an official elected to a local or statewide office. Elected official does not include most judges and clerks of courts.
- In 2018, the addition of "future official" was defined to permit those who are elected but have not yet taken office the opportunity to satisfy their requirements early.

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## Public Records Act Case Law

### Time to Respond

*State ex rel. Cincinnati Enquirer v. Deters*, 148 Ohio St.3d 595 (2016)

#### Facts

- On July 19<sup>th</sup>, a police officer with the University of Cincinnati Police Department shot and killed Samuel DuBose during a traffic stop
  - The events of leading up to and immediately following the shooting were recorded on the officer's body camera.

#### Timeline:

- July 20 - Media made a request to the county prosecutor's office to obtain a copy of the body cam video
- July 21 - the prosecutor's office received the video
- July 27 - mandamus action was filed
- July 29 - body camera video was provided

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## Public Records Act



### Case Law

Did the prosecutor provide the records promptly?

- The prosecutor was entitled to review the video to determine if any redaction was necessary
- The prosecutor produced the video six business days after it was received by his office

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# Public Records Act

## Case Law



### Time to Respond

*State ex rel. Patituce & Assocs., L.L.C. v. Cleveland, 2017-Ohio-300*

- Law firm sent a public records request to Cleveland for:
  - Policies, manuals, and regulations relating to police body cams and videos in the City's possession; policies regarding search warrants, a list of officers in the Gang Impact Unit, personnel files, training certifications, disciplinary reports, continuing education classes for nine specific police department employees and officers in the Gang Impact Unit.
- Review and production of records took the City about 3 months

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# Public Records Act

## Case Law

- Prior to production of records, the law firm filed a mandamus action
- Law firm's argument
  - City did not respond within a reasonable time because:
    - Records were not produced until three months later and after the mandamus action was filed
    - The City did not respond to several of the Law Firm's requests for status updates
- City's argument
  - Responded within a reasonable time based on the voluminous nature of the request

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# Public Records Act

## Case Law



- Eighth District Court of Appeals determined:
  - The request included a large amount of information that needed reviewed and redacted
  - The City advised the requester that records would be compiled and produced after review
- Based on the size and nature of the request, the court held that the City provided records within a reasonable period of time.

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## Can Public Business Be Discussed Via Email?

*White v. King*, 147 Ohio St.3d 74 (2016)

The Open Meetings Act “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 email, text, tweet, or other form of communication.”



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## Public Records Act



Case Law Update

***Parks v. Webb*, 2018-Ohio-1578**

**Facts:**

On December 6, 2017, Michael Parks made a public records request to Pickaway County Board of Commissioners' Clerk, Patricia Webb for the following:

- Minutes from yesterday's commissioners' meeting(s)
- Send them in whatever format they are in at the time of this email, 3:45 PM.
  - Handwritten
  - Draft Word Doc
  - Draft PDF
  - And/or
  - Audio

**Timeline:**

- December 11–Webb sent him a copy of the minutes in PDF format
- December 13–Parks responded that the record sent was not what he requested
- December 18–County Administrator, Brad Lutz, emailed Parks that the requested records had been provided as required by law, and it is not appropriate nor required by sunshine law to send a document that can be edited.
- December 20–Parks filed a complaint under Rev. Code Section 2743.75 for denial of timely access to public records in violation of Rev. Code Section 149.43(B)

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## Public Records Act

Case Law Update

***Parks v. Webb*, 2018-Ohio-1578 (continued)**

**Timeline:**

- December 29, 2017–Court referred case to mediation
- January 8, 2018–Webb filed motion to dismiss
- March 5, 2018–Court advised case was not resolved in mediation
- March 14, 2018–Webb filed a supplemental motion to dismiss

Rev. Code Section 149.43(B)(6) provides in relevant part,

[t]he public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it....

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## Public Records Act

Case Law Update



### Lasting effects of *Parks v. Webb*

- Existing record may mean additional duty of converting files if capabilities exist to comply with specific request for a different format
- Concerns of manipulation of files
- Security concerns of metadata
  - Requesters are not entitled to metadata unless he properly requests it  
– *State ex rel. McCaffrey v. Mahoning County Prosecutor's Office*
- Altering public records with purpose to defraud is a criminal offense. Rev. Code Section 2913.42

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## Effective March 8, 2019 – H.B. 425 (132<sup>nd</sup> G.A.)

- Restricts portions of a body-worn camera or dashboard camera recording from the definition of a public record; and
- Restricts infrastructure records of a public school from the definition of public record under Rev. Code Section 149.433;
- Replaces expungement with sealing of ex parte protection orders and records;
- Clarifies appellate process for court's refusal to grant certain protection orders; and
- Repeals the pilot program regarding removal of sealed or expunged records from certain databases.

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## H.B. 425 and Public Records

- Body-worn camera – a visual and audio recording device worn on the person of a peace officer while the peace officer is engaged in the performance of the peace officer's duties.



- Dashboard camera – a visual and audio recording device mounted on a peace officer's vehicle or vessel that is used while the peace officer is engaged in the performance of the peace officer's duties.

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## Body and Dashboard Camera Restrictions (17)

Restricted portions include those that show, communicate, or disclose:  
(Exception = Consent from Executor)

- 1.) Image or identity of a child who is a subject of the recording;
- 2.) Death of a person or deceased person's body unless death caused by peace officer;
- 3.) Death of a peace officer, firefighter, first responder, etc. who dies in line of duty;
- 4.) Grievous bodily harm unless injury by peace officer;
- 5.) Act of severe violence that results in serious physical harm, unless caused by officer;
- 6.) Grievous bodily harm to peace officer, firefighter, etc. while in the line of duty;
- 7.) Act of severe violence resulting in serious physical harm against a peace officer, firefighter, etc. while engaged in line of duty;
- 8.) Person's nude body;
- 9.) Protected health information, identity of a person in health care facility not subject to law enforcement encounter or any other information in a health care facility that could identify a person not subject to encounter;

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## Body and Dashboard Camera Restrictions (continued)

- 10.) Information that could identify alleged victim of a sex offense, stalking, or DM;
- 11.) Information that doesn't qualify as CLEIRS but could identify a person who provides similar information;
- 12.) Personal information of a person who does not receive any written warnings, citations, etc.;
- 13.) Proprietary police contingency plans intended to prevent crime and maintain order and safety;
- 14.) Personal conversations unrelated to work between peace officers and other law enforcement;
- 15.) Conversations between peace officer and public that does not concern legal matter;
- 16.) Interior of a residence unless it concerns adversarial encounter with a peace officer; and
- 17.) Interior of a private, unless it concerns an adversarial encounter with a peace officer.

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## Amendments to Section 149.43(C)

- Section 149.43(C)(2) was amended by H.B. 312 to add "electronic submission" of a public records request entitles the requester to damages if the public office fails to comply with the Public Records Act.
  
- Statutory Damages
  - \$100 per each business day during with the public office fails to comply with obligation;
  - Begins the day the requester files a mandamus action; and
  - Maximum of \$1,000.

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## Credit Cards

### CREDIT-CARD DANGERS:



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## House Bill 312

### Credit Cards

- Requires the implementation of a Credit Card Policy by February 2, 2019
- Enacts baseline controls and procedures regarding credit cards for all government entities throughout the State of Ohio
- Eliminates the use of debit cards by most government entities
- Promotes enforcement of credit card policies and procedures



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## House Bill 312

- Ohio Rev. Code § 505.64 – Authorizing Use of Township Credit Card
  - Not later than three months after the effective date of this amendment, the board of township trustees of any township that holds a credit card account on the effective date of this amendment shall adopt a written policy for the use of credit card accounts. Otherwise, a board shall adopt a written policy before first holding a credit card account.
- This section of the revised code was amended by House Bill 312.

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## House Bill 312

- No later than February 2, 2019, the legislative authority of a political subdivision that holds a credit card account must adopt a written policy for the use of credit card accounts.
- For entities that do not currently have a credit card policy, a policy is required to be adopted prior to obtaining a credit card.

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## Credit Card Definition

- Credit Card Account means:
  - Any bank issued credit card account, store issued credit card account, financial institution-issued credit card account, financial depository-issued credit card, or any other card or credit account allowing the holder to purchase goods or services on credit or to transact with the account, and any debit or gift card account related to the receipt of grant moneys.
  - This definition does not include the following:
    - Procurement Card (P-Card) Accounts
    - Gasoline and Telephone Cards
    - Any other card account similar to gasoline/telephone card
  - Auditor of State Bulletin 2018-003 (Issued November 30, 2018) provides additional detail concerning this definition.

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## Written Policy Requirements

Policy must include the following provisions:

- The appointment of a compliance officer, where applicable;
- The officers or positions authorized to use a credit card account;
- The types of expenses for which a credit card account may be used;
- The procedures for acquisition, use, and management of a credit card account and presentation instruments related to the account including cards and checks;

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## Written Policy Requirements

- The procedures for credit card issuance, credit card reissuance, credit card cancellation and the process for reporting lost or stolen cards;
- The political subdivision's credit card account's maximum credit card limit or limits;
- The actions or omissions by an officer or employee that qualify as misuse of a credit card account.

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## Internal Control Models

- House Bill 312 establishes two separate internal control models for credit card usage by political subdivisions:
  - Custody and Control Model
  - Compliance Officer Model



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## Custody and Control Model

Entities using this control model should include the following items in their written policies:

- Who the authorized, designated users are;
- A reasonable length of time the card is allowed to be out of the control of the treasurer or fiscal officer for the transaction(s) to be completed;
- The procedures that should be followed to submit itemized receipts, as well as any other entity specific requirements that would fit the need of a political subdivision;
- An officer or employee is liable in person and upon any official bond the officer or employee has given to the political subdivision to reimburse the treasury for the amount for which the officer or employee does not provide itemized receipts in accordance with the credit card policy.

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## Compliance Officer Model

- The treasurer or fiscal officer does not maintain physical control of the credit cards.
- The political subdivision must appoint a compliance officer.
  - Should not be the treasurer or fiscal officer.
  - Should not be an authorized user of the credit card.
  - Should not have the authority to authorize use of the credit card.
- If the appointed compliance officer is an authorized user, the credit card statement must be reviewed by the executive or legislative body of the entity.

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## Township Specific Requirements

No Fiscal Officer control or retention of CC = Compliance Officer Model

Limited home rule governments:

The compliance officer may not use a credit card account and may not authorize an officer, employee, or appointee to use a credit card account.

One exception: A Board of Township Trustee serving in the role of compliance officer.

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## Township Specific Requirements

When not adopting a limited home rule government under Chapter 504:

- The Fiscal Officer must present credit card account transaction detail from the month previous, monthly to the Board.
- The Board must review the credit card transaction detail and the chairperson of the board must sign an attestation stating the board reviewed the credit card account transaction detail.
- The compliance officer, if applicable, and the board, at least once every six months, must review the number of cards and accounts issued, the number of active cards, and accounts issued the cards' and accounts' expiration dates, and the cards' and accounts' credit limits.
- The fiscal officer or the fiscal officer's designee annually must file a report with the Board detailing all rewards received based on the use of the township's credit card account.

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## Additional Requirements



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## Debit Cards

- House Bill 312 now prohibits a political subdivision from obtaining and using a **debit card** account.
- Possession and use of a debit card account is still allowable for law enforcement purpose only.
- Possession and use of a debit card for purposes other than law enforcement is now a violation of section 2913.21 of the Ohio Revised Code



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## Credit Card Rewards

### Types of Rewards:

1. Airline Miles
2. % off
3. Cash Back
4. Points for Free Items



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## Credit Card Misuse

- The use of any card or account for expenses beyond those which are authorized by the board, constitute misuse of a credit card.
- A violation of such starts at a 1<sup>st</sup> degree misdemeanor, and can rise to a felony under Rev. Code Section 2913.21.

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## What can I do as a Trustee?

Here are some best practices for reviewing credit card use:

- Update the policy to comply with House Bill 312.
- Know the policy you approved. Clarify the policy as necessary.
- Request the Fiscal Officer supply detailed credit card statements and supporting documentation.
- Ensure the Fiscal Officer is following the established policy and procedure.
- Require a log for checking out the Township credit card. Review these logs to ensure they are being used.
- Perform reviews of activity outside of monthly Board meetings.
- Ensure all officials and employees of the Township are familiar with the Credit Card Policy.

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## Why the change?

- Since 2011, findings for recovery issued totaling more than \$1.2 million
- Out of control issuance – 20 or more cards issued
- Out of control spending limits – many entities with limits going from \$50,000 to \$500,000
- No policies – no internal controls – lack of physical access controls
- Ownership – some without the entity name on card
- No uniform standard for allowable expenditures



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## Findings for Recovery

Under Ohio law, any public official who either authorizes an illegal expenditure of public funds or supervises the accounts of a public office from which an illegal expenditure is discovered, is strictly liable for the amount of the expenditure. *Seward v. National Surety Corp.*, 120 Ohio St. 47 (1929); 1980 Op. Att’y Gen. No. 80-074; Ohio Rev. Code § 9.39; *State ex rel. Village of Linndale v. Masten*, 18 Ohio St.3d 228 (1985). Public officials controlling public funds or property are liable for the loss incurred should such funds or property be fraudulently obtained by another, converted, misappropriated, lost or stolen.

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## Additional Sources for Review

- Ohio House Bill 312 <https://www.legislature.ohio.gov/legislation/legislation-summary?id=GA132-HB-312>
- Ohio Auditor of State Best Practices: How to Minimize the Risk of Credit-card Abuse <https://ohioauditor.gov/publications/bestpractices/best%20practices%20dec%2001/FINAL.pdf>
- Ohio Auditor of State Bulletin 2018-003: House Bill 312 Amendments to Regulate the Usage of Credit and Debit Cards <https://ohioauditor.gov/publications/bulletins/2018/Bulletin%202018-003%20HB312%20credit%20card%20bulletin%20final.pdf>
- Ohio Rev. Code § 505.64 – Authorizing Use of Township Credit Card <http://codes.ohio.gov/orc/505.64>

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“Fraud is a crime of opportunity,  
more likely to occur when  
financial controls and  
oversight are lax.”

(Best Practices, December 2017)

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### Fiscal Officer Cybersecurity Training (Rev. Code Section 507.12)

Cybersecurity included as a topic for mandatory continuing education for township fiscal officers.



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### Transfer Approval Rev. Code Section 5705.16

- Removes requirement to petition Court of Common Pleas for approval before transferring revenue between certain funds.
- Maintains requirement to receive approval of the Tax Commissioner upon finding that transfer is justified or necessary and that no injury will result.

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### Township Insurance

#### ▪ TOWNSHIP INSURANCE FOR OFFICERS/EMPLOYEES

Ohio Revised Code Section 505.60 (Insuring Townships)

- Hospitalization
- Surgical care
- Major medical care
- Disability
- Dental care
- Hearing aids
- Prescription
- Sickness



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## Township Insurance Rev. Code Section 505.601

Allows a township board of trustees which chooses not to procure an insurance policy or group health care services to reimburse any township officer or employee for out-of-pocket premiums attributable to coverage provided for under Rev. Code Section 505.60 that officers or employees obtain.

### Resolution Requirements:

- Must state that the township has chosen not to procure a health care plan under section 505.60 of the Revised Code and has chosen to reimburse its officers and employees; and
- Must provide a uniform maximum monthly or yearly payment.

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## Commercial Advertising on Township Website (Rev. Code Section 503.70)

- Trustees may authorize, by resolution, the use of commercial advertising on township's web site.
- Must comply with state and federal law, including ORC 9.03, and federal regulations on the use of commercial advertising on a .gov domain.



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## OHIO ATTORNEY GENERAL OPINIONS



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## 2017 OAG 026

- Article II, § 20 prohibits in-term compensation changes
- Townships that suspended insurance reimbursements because of ACA but have resumed cash payments or reimbursements do not violate prohibition against in-term changes in public officer's compensation
- Boards must adopt a new resolution authorizing resumption of payments and reimbursements if resolution was adopted to discontinue because of ACA
- Boards should adopt a new resolution authorizing resumption if no resolution was adopted to discontinue because of ACA



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## 2018 OAG 002

- A township tax approved by the electors prior to detachment of a village from the township may be levied upon real property located within the village for the limited purpose of paying legal or just claims contracted prior to the change in the boundaries
- Legal and just claims:
  - contracts,
  - engagements, and
  - liabilities contracted by the Township prior to the change in the township's boundaries, of legislative amendment.



Township FO shall conduct an accounting to determine what amount of tax revenue is necessary to pay the claims contracted by the township prior to the village's detachment.

- Includes the proportion of that revenue shall be paid from real property taxes imposed in the village

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## 2018 OAG 020

- A person appointed as a city's representative to the board of trustees of a joint ambulance district is not required to abstain from any discussions, deliberations, negotiations, or votes of the board of trustees solely because of the contemplated withdrawal of the city from the district.



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## 2018 OAG 023

### Compatibility of Township Trustee & Village Fiscal Officer



**Compatible** given the following:

- 1.) The Village cannot be located within or contiguous to the Township;
- 2.) Holding both positions is not prohibited by charter or ordinance;
- 3.) There are no contracts between both entities; and
- 4.) The person cannot appear before the county budget commission.

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## 2018 OAG 032

- Township Trustees currently receiving the maximum salary authorized in Rev. Code Section 505.24 may accept cash payments authorized in Rev. Code Section 505.603 without violating in-term compensation changes so long as benefits existed prior to commencement of term



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**OBSOLETE**



## 2019 OAG 002

- A Board of County Commissioners has discretion in disposing of personal property of the county valued at \$2,5000 or less if it has been determined that it is not needed for public use or is obsolete or unfit the purpose for which it was acquired.
- Various sale options:
  - Internet Auction
  - Private Sale (without advertising and notification)
- Statutorily authorized (Rev. Code Section 307.12)

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## OHIO ETHICS COMMISSION OPINIONS



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### Compatibility of Positions

- 1.) Is either of the positions a classified employment within the terms of Rev. Code Section 124.57?
- 2.) Do the empowering statutes of either position limit employment in another public position or the holding of another public office?
- 3.) Is one office subordinate to, or in any way a check upon, the other?
- 4.) Is it physically impossible for one person to discharge the duties of both positions?
- 5.) Is there a conflict of interest between the two positions?
- 6.) Are there local charter provisions, resolutions or ordinances that are controlling?
- 7.) Is there a federal, state, or local departmental regulation applicable?

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### Ethics Opinion 2013-01

- Section 2921.42(A)(1) of the Rev. Code prohibits a Fire Chief, who teaches part-time at an educational institution, from taking any action as Fire Chief, to authorize or use the Fire Chief's position to secure tuition payments from the fire department to the education institution employing the Fire Chief.
- Fire Chief cannot sign-off on or otherwise approve payments of tuition invoices, and cannot assign this duty to an individual subordinate to him.

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# Questions

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