Public Records Act nuances to be aware of

September 13, 2021

While seasons change, many things remain the same. While many modifications were made to a public office's responsibilities because of the COVID-19 pandemic, the Public Records Act remained the same. Throughout the pandemic, public offices received, acknowledged and responded to public records requests as normal (even when physical mail delivery became a hit-or-miss or untimely excursion). Some courts cut public offices a break on the response time to a request, but the obligation to respond never wavered.

A few recent cases from the Supreme Court of Ohio reinforce two enduring principles of the Public Records Act. First, courts liberally construe the Public Records Act in favor of disclosure. Second, any exemptions to the Public Records Act are to be narrowly interpreted to encourage disclosure of the public's records.

In *State ex rel. Hicks v. Fraley*, Slip Opinion No. 2021-Ohio-2724, the Supreme Court considered whether a public records requestor was entitled to an opinion letter a county auditor received from the county prosecutor. On its face, this screams attorney-client privilege, which would ordinarily not be subject to disclosure. However, the court took a different approach based upon the facts of the case. The county auditor's opponent in the 2018 primary election filed a private-citizen affidavit alleging that the auditor had committed a crime. *Id.* at ¶ 3. The municipal court held a hearing on the affidavit and ultimately concluded there was no probable cause for the charges. *Id.* at ¶ 4. At the hearing, a special prosecutor referenced a 2004 opinion letter from the county prosecutor to the county auditor. *Id.* The political opponent requested a copy of the letter, and the county prosecutor denied the request indicating that it was attorney-client privilege. *Id.* at ¶ 6.

The court ultimately concluded that the county auditor *voluntarily* disclosed the letter to the special prosecutor. *Id.* at ¶ 17-23.

And, even though the special prosecutor was standing in the place of the county prosecutor (who was counsel to the auditor and all other county officers), the court found that the special prosecutor "did *not* step into that advisory role [to the county auditor] by virtue of his appointment. Rather, the special prosecutor's relationship to [the county auditor] was adversarial." *Id.* at ¶ 17. Therefore, the disclosure of the letter was a voluntary disclosure of a previously-privileged document and waived any attorney-client privilege.

This acts an important reminder for two reasons. First, you must be extremely careful with *whom* you share any advice from your attorney. Any communication between you and your attorney, where legal advice is sought or given, is privileged. The moment a communication is forwarded to a party who is neither the client nor an agent of the client waives the privilege of the document and it becomes subject to release. Second, even if you hire special outside counsel, be mindful of the role that they are playing. If they are not stepping in as your legal counsel, even though they are an attorney, their communication and work may not be privileged (this is particularly important in the context of hiring an attorney to conduct an employment investigation).

A second case, *State ex rel. Summers v. Fox*, 163 Ohio St.3d 217, 2020-Ohio-5585, 169 N.E.3d 625, considered whether certain types of records related to a sexual-battery case were exempt from disclosure. While much of this case is not likely relevant to you and your office, there is one takeaway worth mentioning. One exemption sometimes relied upon by public offices is the "right to privacy." While this is typically a very limited exception, many public offices have used it for information that is particularly sensitive and would "gratuitously and unnecessarily" involve the release of records that could cause harm or suffering to a victim. *See Bloch v. Ribar*, 156 F.3d 673, 686 (6th Cir.1998).

However, the Supreme Court of Ohio limited a public office's use of *Bloch* and the "right to privacy" exemption. "*Bloch* is not a public-records case, and it did not create the categorical exception to disclosure under federal law required by R.C. 149.43(A)(1)(v)." *State ex rel. Summers v. Fox* at ¶ 41.

This reinforces that the Supreme Court is extremely reluctant to expand exemptions to the Public Records Act. While your public office may not often utilize the "right to privacy" exemption, exemptions generally should be narrowly construed in favor of disclosure.

If you have any questions regarding the Public Records Act—including what constitutes a "reasonable period of time" or whether an exemption applies to a certain request—consult with your legal counsel. Failure to timely respond to a public records request or withholding a record that shouldn't be withheld can have significant consequences to your organization, from statutory damages to paying for a requester's attorney's fees.

Authors

Brodi J. Conover

Partner

Lebanon
513.870.6693
bconover@bricker.com