IN THE COURT OF APPEALS OF OHIO
SECOND APPELLATE DISTRICT
MONTGOMERY COUNTY

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| **DAVID ESRATI, *PRO SE*** | * | Case No. CA 028062 |
| 113 Bonner Street | | Trial Ct. No. 2018 CV 00593 |
| Dayton OH 45410 | * | Docket ID: 32388458 |
| Plaintiff-Appellant, | * | |
| vs. | * | |
| **DAYTON CITY COMMISSION** | * | |
| 101 W. Third Street | | |
| Dayton, OH 45402 | * | |
| and | * | |
| **JEFFREY J. MIMS, JR.** | * | |
| Member, Dayton City Commission | | |
| Co-Chairman, School Facilities Task Force | * | |
| 101 W. Third Street | | |
| Dayton, OH 45402 | * | |
| and | * | |
| **DAYTON BOARD OF EDUCATION** | * | |
| 115 S. Ludlow Street | | |
| Dayton, OH 45402 | * | |

and *

**MOHAMED AL-HAMDANI** * **APPELLANT BRIEF**
Member, Dayton Board of Education
Co-Chairman, School Facilities Task Force *
115 S. Ludlow Street
Dayton, OH 45402 *

Defendants et. al.- Appellees.

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## STATEMENT OF THE CASE

This appeal is before this Court from the Montgomery County Common Pleas Court, ("trial court") from a decision and summary judgment entry made by the trial court on motion for the defendants/appellees against the plaintiff/appellant David Esràti. A complaint and a motion for preliminary injunction was filed by the plaintiff/appellant David Esrati on February 5, 2018. A temporary restraining order and preliminary injunction and memorandum in support was filed on

February 6, 2018. On February 7, 2018, the trial court held an evidentiary hearing on plaintiff/appellant's Motion for a Preliminary Injunction in which the court made a decision and entry denying motion for preliminary injunction. On March 15, 2018 the trial court held a second evidentiary hearing. On March 19, 2018 the trial court ruled that the task force was a public body subject to R.C. 121.22. On March 20, 2018 the plaintiff repeated the request for injunctive relief. On July 11, 2018, the Court made a decision and judgment entry granting the motion for summary judgment and dismissed the action. Plaintiff/appellant timely appealed the trial court's decision on July 16, 2018.

## STATEMENT OF FACTS

David Esrati, the plaintiff/appellant, ("Esrati," "plaintiff," "appellant," "plaintiff/appellant") has been a regular attendee of the Dayton Public School Board of Education ("Board") meetings where he has acted as a citizen journalist; video-recording and reporting on the business of public education in Dayton on his blog Esrati.com. He is on the email distribution list for meeting notices of the Board, in the same manner as other public media outlets such as *Dayton Daily News* and local television stations. In a December 2017 Board meeting, it was announced there would be a special task force consisting of three members of the Dayton School Board, one member of the Dayton City Commission Office, the Dayton City Manager, former city employees, county officials, a former county administrator- all who should be very familiar with the Open Meetings Act ("OMA"). The purpose of the task force was to determine future plans for Dayton Public Schools building closings. On January 8, 2018, Esrati had contacted via email, the Executive Secretary of the Dayton Public School Board Denise Gum; copied Marsha Bonhart, the Media Relations person; and Board attorney Jyllian Bradshaw. Esrati specified in the email, "I would like notification of all meetings of the "Task force" that was announced last Thursday.

For clarification- what time is the meeting tomorrow- and is there an agenda?

Could I please have those asap."

Despite the meeting being scheduled at the Board District headquarters the next morning, and Bonhart being in attendance, a response was sent to Esrati that violated the OMA requirements:

"David-

Again, please address your public records requests to DPS legal counsel Jyllian Bradshaw and/or the public information office; do not approach other DPS employees to obtain public records. They can't help you.

FYI - district offices are closed today, January 8th.

Thank you

Marsha Bonhart"

When the Board meeting was held the morning of January 9, 2018, the task force leadership tried to close the meeting to the public and asked the media to leave. Esrati remained after *Dayton Daily News* and WHIO Channel 7 complied with the Boards' request and left the meeting. After Esrati refused to shut his camera off, the meeting was cancelled. These actions encompass multiple violations of OMA.

At the next meeting, on January 24, 2018, the task force had their first official meeting and opened it to the public. However, Task force co-chair, Dayton City Commissioner Jeffrey Mims went out of his way to say they did not have to have the meeting open. This is a violation of the OMA. At this meeting they announced a bus tour of buildings at risk of potential closure.

Esrati asked to be on the bus tour and was rebuffed, and was told he could take an alternate tour. This is violation of the OMA. Agendas and meeting notices were not provided.

The initial filing on February 5, 2018 for an injunction by the plaintiff, acting *pro se*, was to put a stop to actions of the Dayton Public School Board of Education that were in violation of Ohio Revised Code 121.22 which is commonly referred to as either the OMA or the "Sunshine Laws" of the State of Ohio. After, the trial court recommended adding a temporary restraining order ("TRO") and utilizing Rule 65 to give the court the ability to act.

Esrati submitted a second filing the next day, the morning of the tour, to include a TRO and Rule 65 even though they are not stipulated in the OMA. The tour proceeded, although some members of the task force, upon hearing of the filing, chose to at least partially remove themselves from the proceedings. Plaintiff repeatedly tried to gain access to the meeting, filming multiple denials of entry, despite a series of offerings of not to video record, audio record, or record at all. Members of the press were allowed on the tour, but were not allowed to record. This constitutes viewpoint discrimination. The plaintiff has this entire process on video and it was entered into the trial court record but never viewed, discussed or addressed.

The task force claims the tour was stopped after they entered and toured Valerie Elementary school, yet the bus went to three other schools and back to Dayton Public Schools headquarters- and at each stop denied access to the plaintiff. This constitutes additional public meetings that were closed to the public.

The long series of hearings and filings that followed, were all on points of law outside of the OMA and the violations that indisputably took place. Never was the issue of actual violations discussed, however the trial court did find the task force was indeed a public body and subject to the OMA.

The case was granted summary judgement on the faulty assertion the plaintiff had to prove what happened in a meeting, that was closed to him, were deliberations. Deliberations are not a test of the validity of a meeting or a requirement per the OMA. Proving what happened in a meeting that was not open to the public is exactly why we have the Open Meetings Act, if it is not explicitly excluded as a matter for executive session, the meeting must be open.

The trial court erred to place the burden of proof of what happened in the meeting on the plaintiff. Plaintiff requests the case be remanded to the trial court for the substantive issues of OMA violations and the task forces practice of viewpoint discrimination by letting other media attend.

## ISSUE PRESENTED

**First issue presented for review:** There is genuine issue of material fact. The claims specifically related to the Open Meetings Act violations were never considered, rather only whether or not the body in question was a public body or how plaintiff was supposed to file for relief (Civil Rule 65, TRO, injunction, etc.). The case includes numerous threats to meet in private, not properly notifying the public, not keeping and posting minutes or agendas, denying video and audio recordings, denying access to a meeting.

**Second issue presented for review:** There are no provisions for a public body to meet in private outside of the clearly stated exceptions within Ohio Revised Code 121.22. The trial court suggested the plaintiff had a burden of proof that deliberations took place in a meeting in which he was denied access to is an impossibility. A citizen denied physical access to a public meeting cannot definitively determine whether or not deliberations took place; and as such, cannot possibly be a part of the Open Meetings Act. There are many meetings of public bodies where no deliberations take place at all, but that does not excuse them from public scrutiny.

**Third issue presented for review:** Proper Parties and Claims. The Open Meetings Act is the only law that comes along with a 250-page guidebook and asks common citizens to speak up and act when violations take place. Expecting a common citizen to shoulder the costs of attorneys, filing fees, and challenge their government which is funded with their tax dollars, should provide for greater latitude in the technicalities of the law- such as minutiae as to who are named parties in the header of the suit. It was assumed those who are elected and named as co-chairs to a public committee should be the ones held responsible for the committee's actions, and as representatives of those bodies, they would also be liable. If citizens cannot hold liable those who are given power by election, to uphold the law, then who is left to enforce it? The burden of properly adhering to the Open Meetings Act should rest upon the public officials to which the OMA applies. This is why they must attend mandatory training on it once elected.

## ARGUMENT

### I. THE TRIAL COURT ERRED IN GRANTING MOTIONS FOR SUMMARY JUDGMENT AND DISMISSING THE PLAINTIFF'S ACTION.

This Court should find the trial court was in error by granting the defendants-appellees Motion for Summary Judgment. The trial court erred because (1) there is a genuine issue of material fact from the Task Force violating the Open Meetings Act; (2) the defendant-appellees were not entitled to judgment as a matter of law under the Open Meetings Act; and (3) a reasonable mind should find the task force violated the Open Meetings Act in multiple instances. From *Doran v. Northmont Bd. of Edn.,* 147 Ohio App.3d 268, 770 NE 2d 92 (Ohio App., 2002), an appellate court's review of a summary judgment decision is de novo. *Nilavar v. Osborn* (1998), 127 Ohio App.3d 1, 10, 711 N.E.2d 726, citing *Grafton v. Ohio Edison Co.* (1996), 77 Ohio St.3d 102, 105, 671 N.E.2d 241. In reviewing

a summary judgment decision, the appellate court, like the trial court, must apply the standard found in Civ.R. 56. According to Civ.R. 56, a trial court should grant summary judgment only when the following tripartite test has been satisfied: (1) there is no genuine issue as to any material fact, (2) the moving party is entitled to judgment as a matter of law, and (3) reasonable minds can come to but one conclusion, and that conclusion is adverse to the party against whom the motion for summary judgment is made, who is entitled to have the evidence construed most strongly in his favor. *Harless v. Willis Day Warehousing Co.* (1978), 54 Ohio St.2d 64, 66, 8 O.O.3d 73, 375 N.E.2d 46.

**A. <u>The trial court erred because the Open Meetings Act violations were never considered</u>**

The trial never decided the plaintiff/appellant's action in regard to the defendant's violations of the OMA, but instead focused on procedural legal technicalities. However, the trial court did clearly find the task force was a public body, and the OMA did apply to the task force. Skelton; DECISION AND ENTRY DENYING MOTION FOR PRELIMINARY INJUNCTION, March 19, 2018. Plaintiff had asserted correctly the task force is a "public body" because it is a committee or subcommittee of a decision-making body described in R.C. 121.22(B)(1)(a), namely, the Board of Education. The trial court did agree and found as a matter of law the task force consisting of three Board members and others suggested by the Mayor of Dayton is a committee or sub-committee of the decision-making body, the Board of Education. The trial court rejected the argument of Dayton Public Schools that the task force was only an advisory group for the Superintendent and was not a "public body" itself. The purpose and membership of the task force demonstrated it was a committee of the Board. Pretending that the Task Force, including three members of the Board, was only for the Board's employee would allow a simple subterfuge to avoid the OMA. *See Cincinnati Enquirer v. City of Cincinnati,* 145 Ohio App.3d 335, 338, 762 N.E.2d 1057 (1st Dist. Hamilton County 2001). It would

not be consistent with the legislative mandate to liberally construe the statute to favor open public meetings on public business.

According to the trial court, its analysis hinged on whether or not the "resolution, rule, or formal action" stated in R.C. 121.22 (H) results from alleged "deliberations" in a meeting not open to the public. In other words, did deliberations occur on the bus tour which resulted in any formal action, resolution or rule as stated hereinabove. "The intent of the Sunshine Law is to require governmental bodies to deliberate public issues in public." *Berner v. Woods,* 9th Dist. Lorain No. 7CA9132, 2007-Ohio-6207 (Nov. 26, 2007), ¶ 15 (emphasis added), cited in *ACLU,* supra. "However, 'deliberations' involve more than information-gathering, investigation, or fact-finding. *Holeski v. Lawrence* (1993) 85 Ohio App.3d 824, 829, 621 N.E.2d 802." *Id.* Deliberation is the act of weighing and examining the reasons for and against a choice or measure. *Berner,* supra, citing *Webster*'s. "In this context, a 'discussion' entails an 'exchange of words, comments or ideas by the [committee]." *Id.* If the bus tour of the task force was engaged solely in information gathering and fact-finding, it is not a meeting where deliberation is occurring. *Berner,* supra, ¶18.

Ultimately, the trial court issued the summary judgement based on the plaintiff/appellant's inability to prove if any actual deliberations took place in a meeting that was closed to the public is impossible logic. If no recordings were allowed, and entrance was barred, how would anyone know what happened? The Ohio Supreme Court has held "public access" is a defense to a claim of noncompliance with the open-meeting requirement. *State ex rel. Randles v. Hill* (1993), 66 Ohio St.3d 32, 35, 607 N.E.2d 458, 461. In *Randles*, the court considered physical access to a meeting.

The plaintiff has video of repeated examples of denying access to the school being toured and the bus with closed doors at the other buildings. Therefore, violations of ORC 121.22 took place

and the trial court erred in granting summary judgment and dismissing the plaintiff's action. The attempt to label the bus tour as an "information session" and exempt from the OMA is a dangerous precedent if allowed, would totally undermine the OMA rendering it impotent.

**B. The trial court erred due to there not being any provisions for a public body to meet in private outside of the stated exceptions in Ohio Revised Code 121.22.**

Summary judgment should not have been granted to the defendants due to the trial court not as a matter of law considering Ohio Revised Code 121.22. Within Ohio Revised Code 121.22, the Open Meetings Act (OMA), there are enumerated provisions in regards to public meetings and specific items for "executive sessions" making the public body able to meet privately for official business. The question of deliberations or even if it is a decision making body has been dealt with in *Thomas v. White* (1992), 85 Ohio App.3d 410, 41, which was cited in *Wheeling Corp. v. Columbus & Ohio River RR. Co.,* 147 Ohio App.3d 460, 2001-Ohio-8751: In *Thomas v. White* (1992), 85 Ohio App.3d 410, 411, the court of appeals dealt with an appeal from a trial court's determination that a citizens' advisory committee of a county children services board was not a public body. The court of appeals concluded that the committee was a public body. The board had argued that the committee was not a public body because it was not a decision-making body. *Id.* The court of appeals stated that a strict reading of R.C. 121.22(B) indicated that a committee No. 00AP-1224 12 need not be a decision-making body in order to be a public body. *Id.* at 412. The court of appeals stated that, even if the statute required that a committee be a decision-making body, the committee at issue was such a body. *Id.* For example, the committee made recommendations to the board, and its enabling statute called for the committee to advise the board on policies. *Id.* Such tasks involved decision-making. *Id.*

Further, the subject matter of the committee's operations was the public business of the board, and each of the committee's duties involved decisions as to what would be done. *Id.*

Since the task force had three members of the Dayton Board of Education on it, anything done by this task force constituted influence of any official action the full board would later take. Secondly, since the task force did allow some journalists on the bus, and not the plaintiff, the task force did engage in viewpoint discrimination.

Under Ohio Revised Code 121.22, the task force was a public body as determined by the trial court. Also, by the task force having a meeting and not allowing a citizen attend it was a violation of the OMA without the public providing an enumerated reason under Ohio Revised Code 121.22. The task force did not take a vote or make a decision in regards to having an executive season to discuss any of the enumerated reasons in the statute. Therefore, the task force violated the OMA. The trial court granted summary judgment to the defendants without determining if deliberations took place behind closed doors.

**C. As a matter of policy, expecting common citizen to enforce Open Meetings Act is unconscionable**

This Court should understand any law requiring a 250-page handbook to explain it to the public in "common language" serves as enough proof the OMA is a rule of law meant for lay practitioners to be able to enforce without the help of high-priced legal help and undue expense. The handbook itself states "the Open Meetings Act is intended to be read broadly in favor of openness."

The fact there are no public offices to assist, or to enforce any initial violation of OMA puts the burden squarely on the general public. The average citizen should not have to bear the burden of meeting the letter of the law when faced with an organization comprised of two public bodies, who

have the bully pulpit of power, and continue to state that they are within the law. If laws are only for lawyers, and for those in power, then they really are not the laws of the land. The Ohio Attorney General's Handbook on the Ohio Sunshine Law states:

> 62. Because the law can be difficult for common citizens to apply, the State of Ohio has provided a handbook in common language expressing the intent of the law and before they jump into legalistic lingo, quote the founders of our country who used clearer language: *"The liberties of a people never were, nor ever will be, secure, when rulers may be concealed from them... [T}o cover with the veil of secrecy the common routines of business, is an abomination in the eyes of every intelligent man."* Patrick Henry http://www.ohioattorneygeneral.gov/Files/Publications-Files/Publications-for-Legal/Sunshine-Law-Publications/Sunshine-Laws-Manual.aspx

As a matter of public policy, the trial court should have gave leniency for the appellant/defendant in proving violations of the OMA. As a result, the trial court erred in granting summary judgment to the defendants and dismissing the appellant/defendant's action.

## CONCLUSION

The plaintiff has an abundance of proof via video evidence the task force attempted to initially meet in violation of the Open Meetings Act, then proceeded to meet in accordance with it- yet declared they weren't bound by it, and then went ahead and proceeded to tour in private, practicing viewpoint discrimination by allowing some journalists in, but excluding others, while excluding ALL the public in this issue. The case should be remanded to the trial court for a proper trial on the basis of the violations of OMA.

Respectfully submitted,

/s/ David Esrati

David Esrati
100 Bonner Street
Dayton, OH 45410

## CERTIFICATE OF SERVICE

I hereby certify that on September 17, 2018, I hand filed the foregoing appellate brief with the Clerk of Court in person, and mailed copies to:

MARTIN W. GEHRES
(937) 333-4109
Attorney for Defendants, Dayton City Commission & Jeffrey J Mims, Jr.

JOHN C. MUSTO
(937) 333-4116
Attorney for Defendant, Dayton City Commission & Jeffrey J Mims, Jr.

BRIAN L. WILDERMUTH
(937) 427-8800
Attorney for Defendants, Dayton Board of Education & Mohamed Al Hamdani
Attorneys for Defendant-Respondents.

/s/David Esrati
David Esrati
100 Bonner Street
Dayton OH 45410