June 10, 2015

To: **Members of the Ohio Senate**

From: **Dennis Hetzel, Executive Director of the Ohio Newspaper Association**

Sunshine Law Issues and HB 64

We seek your consideration of three Sunshine Law matters in HB 64 now under consideration in Senate Finance. Two of the items are simple to explain and are positive changes summarized at the end of this memorandum.

The other matter – elimination of the already-limited access to concealed carry permits – would represent a serious setback in access to information and is contrary to sound open records policy.

For that reason, we urge the Senate to restore the language that is being stricken in Lines 35393 through 35430 of the pending bill.

The ONA has no position on whether Ohio should have concealed carry permits. However, once government decides to create a record, the law in Ohio couldn't be clearer that it is an open record unless there is a compelling reason to close it.

There is no convincing reason as to why county sheriffs should be allowed to maintain secret files of permit holders – or revoked permit holders -- available only to government officials with no transparency or meaningful outside scrutiny of how they're operating the program. Supporters of gun rights and the journalist community should be on the same page on this subject – at least that's how it seems to us.

The Ohio Supreme Court just ruled in a case out of Strongsville in Cuyahoga County that there must be real evidence to support the closure of a public record, not vague concerns. This new language runs completely afoul of that decision.

As a practical matter, it also should be noted that the existing law is so restrictive that it is impossible for any journalist in Ohio to do what has sparked controversy at times when media outlets have published lists of permit holders. This is because the law allows a journalist – who meets that specific definition and certifies that his purpose is in the public interest – only to view the record. The journalist can neither copy nor take notes.

Our elected leaders have made a policy decision that Ohio citizens should register before they can carry a concealed weapon. The Ohio Legislature in enacting Ohio's concealed carry permit law has placed eligibility conditions and training requirements for those wishing to have a concealed carry permit. Applicants must pass a criminal background check, complete a training course and register with law

enforcement before being issued a permit. In essence, the State has decided to regulate CCW permits. Some would argue that regulation is bad policy, and CCW permits should not be regulated at all. Again, our issue is not whether CCW permits should be required and regulated. We do take a position, however, that once regulated, CCW permit records, procedures, policies and enforcement should be treated as any other government regulatory function and subject to public records laws.

Journalists around the country have done important stories based on access to this information. For example, the Indianapolis Star found 450 felons in 2009 who were improperly issued gun permits. The reporter for the story later remarked that he was pleasantly surprised by the reaction of many gun owners to his stories. They felt the coverage was, as the cliché goes, fair and balanced. That didn't stop the Indiana Legislature, unfortunately, from enacting new restrictions on access instead of dealing with the law enforcement problem exposed by the coverage. In 2011, the New York Times found that roughly 10 percent of concealed-carry licensees in North Carolina had criminal convictions, and local authorities had failed to revoke the permits as they should have in about half the cases. In Tennessee, some permits reportedly were given out as political favors and not based on qualifications.

These are legitimate stories. Journalists in Ohio should be able to do meaningful stories based on questions like these: What does the government do with this information? How well is the law being followed? If someone commits a heinous crime with a weapon, did the perpetrator have a valid permit? Is the local sheriff following correct procedures?

Supporters of this measure genuinely believe that letting journalists see these records is bad public policy. However, as these battles have flared around the country, we would note that not all gun advocates are of the same mind. For example, Ron Ramsey, the Republican lieutenant governor of Tennessee who has received high marks from the NRA, told the Associated Press in 2013 that "having the handgun carry records open actually helps the cause of the Second Amendment, because people can go look at those and realize that they are truly law-abiding citizens."

There is zero evidence of which we are aware that any citizen has ever been harmed by the access journalists have had to this information in Ohio. The "consequences game" can work in the other direction, too. If I'm a bad guy, and I know you have a permit, I am less likely to attack you and your family. This is why the Supreme Court has ruled that real evidence is necessary before a public record should be closed. Without this presumption, government operates in the shadows with no scrutiny or accountability – a topic that should concern us all.

Eliminating what little access journalists have in Ohio is bad public policy. It's a solution looking for a problem, and we urge you to restore the language that HB 64 would remove.

We are working with several senators on these next two items and ask for your support in placing these improvements into the omnibus bill. Both involve revisions to Revised Code 149.43, Ohio's open records law.

Attorney fees in public records cases

This is a technical correction to address a language problem flagged by the Supreme Court in its 2014 decision in the case DiFranco v. South Euclid. The Court said attorney fees cannot be collected by plaintiffs in public records cases – even in an egregious situation in which the plaintiff is correct – unless the court has issued an actual writ or order. This gives governmental bodies a tremendous advantage in that they can wait until the last minute to make records available, knowing they will not be liable for such fees and many citizens lack capacity to litigate or continue litigation. These costs can be considerable in records cases. Please note that the relief sought in a legitimate public records case is not monetary but the production of the record. However, a citizen who prevails must have a reasonable expectation of cost recovery. The law would still allow the court to determine appropriate and reasonable fees.

ONA has discussed this with Sen. Oelslager and former Sen. Wagoner, who were involved in the original language, and both confirm our interpretation of the legislative intent at that time is correct.

Child fatality review boards

The Division of Health sought modified language to an existing public records exemption on investigations. The new language was overly broad as it covered general activity beyond that which is case-specific and should remain confidential. ODH officials agreed that it was their intent to only provide confidentiality related to specific cases. Our language proposal is acceptable to ODH and reflects their suggested wording.

Thank you as always for your consideration, and please let us know if we can provide any other information or answer questions.