MEMORANDUM IN SUPPORT

"Once in executive session for an acceptable personnel topic, in order to comply with the Ohio Open Meetings Law, public bodies must still refrain from making decisions. At times operating under these restraints may seem to run contrary to normal interpersonal communications or seem unnatural. However, the purpose of the law is to encourage public bodies to operate in the open and any decision-making must be done in open session."

– Ohio Attorney General instructional video on Open Meetings Act

1. INTRODUCTION

The Granville Board of Education admitted publicly that it reached a consensus twice in executive session: first, when it chose four finalists from ten candidates to replace a board member who resigned and, second, when it picked the winning candidate. The school board argues these consensus decisions did not violate the Open Meetings Act because the board waited until a public meeting to formally ratify its final decision in a pre-arranged, unanimous vote. This board's claim is in error. Consensus decisions are considered decision-making acts under Ohio open meetings law.

Under the Open Meetings Act, decision-making occurs when the public body actually reaches its decision, not when the formal vote occurs. As made clear in the Ohio Attorney General's instructional video on executive sessions concerning personnel decisions (quoted above), public bodies must conduct "any decision-making" on appointments in open session, even if it "seems unnatural" or "contrary to normal interpersonal communications."[1]

This memorandum summarizes well-established law on the issue and details the overwhelming evidence that the Granville school board made – as evidenced by its own admission, actions, emails, memos and texts – two decisions by consensus in executive

[1] "Executive Sessions to Discuss Personnel Matters." (Video) Ohio Attorney General. http://www.ohioattorneygeneral.gov/Media/Videos/Sunshine-Law-Videos/Executive-Sessions-to-Discuss-Personnel-Matters?feed=Videos

session. In an open meetings challenge, trial courts are tasked with establishing when the actual decision was made and whether it violated the Open Meetings Act by, for example, taking place during executive session.

In this case, the Granville school board president Russ Ginise announced publicly on three occasions that the board had reached a consensus in two closed executive sessions. The school board president further telephoned the winning and losing candidates after the executive sessions to inform winning and losing candidates of the board's decisions.

The board was fully aware that its behavior risked violating the Open Meetings Act. The school district's superintendent and treasurer explained this in a March 9, 2018, memo to the board. (Exhibit A.) The superintendent and treasurer (who is the district's Sunshine Law officer) stated in their memo that the Columbus school board was in hot water at that very moment for making consensus decisions in executive session in a search for a superintendent. When making its appointment, the Granville school administration recommended that the board "come out of executive session on March 15 *and in open forum discuss and make the decision*." (Emphasis added.)

The Granville school board did not follow its own staff's advice…thus, this lawsuit.

2. FACTS OF CASE

On March 5 and March 15, 2018, the Granville school board interviewed ten candidates in executive sessions for a vacant school board seat. At the end of interviews on March 15, the board continued in executive session and chose "by consensus" four finalists. On the morning of March 19, the board met again in executive session and selected Fred Wolf to join the board. That evening, at the beginning of its regularly scheduled public meeting, the board confirmed

Wolf by 4-0 vote. Neither before nor after the unanimous vote did the board discuss the candidates or a rationale for the appointment of one candidate over nine others.

No public discussion of decision. The most common evidence courts use to confirm that an open meetings violation has occurred is noting that elected officials hold formal votes on difficult or contentious matters with little or no discussion. In *Piekutowski*, the court upheld a trial court ruling of an open meetings violation based in part on "the absence of public discussion about the proposal on the part of the ESC." In *Tobacco Use Prevention & Control Found. Bd. of Trustees v. Boyce,* 127 Ohio St.3d 511, 2010-Ohio-6207 (2009), the court ruled that evidence showed a decision to transfer funds had been made in executive session, notwithstanding the formal vote occurring in public. "The record indicates that there was absolutely no discussion by the board about the transfer resolution in public session…Given the absence of any public discussion by the board about the specifics of the transfer resolution, it is reasonable to conclude that the board's discussion regarding the amount and potential recipients of the transferred funds occurred during the executive session," the appeals court said.

In the case of the Granville school board, the selection of a new school board member involved more than seven hours of closed sessions, three brief public sessions and a formal show vote. In the open sessions, the board engaged in no decision-making behavior, such as discussing candidates or the criteria used to make its decision.[2]

First violation: March 15, 2018

The school board itself admitted its first violation after it selected four finalists during an executive session on March 15. When the board returned to open session, board members

[2] The complete, unedited audio of the public sessions (which totaled 9 minutes, 12 seconds) are posted here: https://vimeo.com/261028369

announced their decision. Board member Jen Cornman said: "*We came to a consensus* on four we thought were the top, rose to the top four for a number of reasons." (Emphasis added.)

Board President Russ Ginise said: "I'll identify the four candidates that I think are still under consideration. I'm going to identify them not in any rank order but, frankly, just in the order with which they interviewed with us, and those persons are Fred Wolf, Ceciel Shaw, Mark Bruce and Don Haven."[3]

Ginise continued: "Our plan is to meet again on Monday, the 19th, in executive session and further consider these applicants, further discuss them, and then to be able to make…to put ourselves in a position where we can vote on the person to take the board slot in the regularly scheduled board meeting on Monday, the 19th at 6:30 p.m."

Ginise then personally phoned all ten candidates to inform them of who had and had not been chosen as finalists for the vacant board position.[4]

"Almost everyone was gracious" when told of the board's decision, Ginise texted board member Cornman on March 16 at 1:52 p.m. Cornman responded, "I shouldn't need to know but can I ask who was not gracious or in what way were they not gracious?" (Exhibit B.) No further texts in the exchange were provided in the records requested.

Nothing in post-executive-session communications between board members themselves or with school district administrators provides even a hint that the board considered its consensus decision anything but final.

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[3] All board member comments from audio supplied by school district and uploaded here: https://vimeo.com/261028369

[4] Source: School district treasurer Michael Sobul in an email and texts and e-mails provided by school district in response to public records request.

Second violation: March 19, 2018, morning meeting

The school superintendent and treasurer sent a pre-meeting planning memo to the school board on March 16, 2018, in advance of the board's two scheduled meetings on March 19 (morning executive session, evening public meeting). The administrators wrote of the public meeting scheduled for the evening: "First order of business will be to appoint the new Board member and administer the Oath of Office. I assume the Board will determine who will make the motion and second in executive session earlier in the day." (Exhibit C.)

The choice of the new board member in the morning's executive session followed by a scripted public meeting in the evening went exactly as planned. The school board returned to executive session at 9 a.m. on March 19 and spent 90 minutes reaching a consensus on who it would approve in a formal vote at the 6:30 p.m. public meeting. The executive session was followed by a return to open session that lasted less than three minutes.

At the brief open session, Ginise said: "The board has concluded over five hours of interviews, three hours of discussions and contemplations with respect to candidates for the open board position. I believe we've reached a consensus, and, at the meeting this evening at 6:30 p.m., we will accept a motion to nominate that consensus candidate for a vote for approval and appointment to the school board."

After the meeting, Ginise phoned the four finalists to inform them of the board's decision. "I have now spoken with each of the four finalists. I did not share the identity of the nominee with the other finalists," he wrote in a 12:31 p.m. e-mail on March 19 to Superintendent Jeff Brown. (Exhibit D.)

Third violation: March 19, 2018, evening meeting

The scripted formal vote occurred in the manner Board President Ginise and Superintendent Brown said it would. Ginise asked for a motion. Board member Amy Deeds nominated Fred Wolf. Before the vote occurred, Ginise told the audience the board had met that morning in executive session: "We arrived at what I believe is a consensus on the nominee to the board and that person is, as Ms. Deeds has indicated, is Fred Wolf."[5]

The board approved Wolf in a 4-0 vote with no substantive discussion. The only school board applicant in attendance was the one who'd been chosen in executive session and informed by the board president in a telephone call that he'd be formally approved at the evening public meeting. After the 4-0 vote, the newly appointed board member walked to the board table, was given the Oath of Office, provided a name plate (prepared prior to the meeting) to set in front of him at the table and had his photograph taken with other board members to post on the district's web site. The public meeting resumed with a five-member board.

3. THE LAW

R.C. 121.22 (the "Open Meetings Act") requires public bodies "to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law." The appointment of a public official is a permitted exception under R.C. 121.22(G)(1). The Granville school board followed required procedures for entering executive sessions. The board interviewed candidates in executive session, also allowed by law.

However, the Open Meetings Act limits what public bodies may do in executive sessions and requires the law be liberally construed in favor of openness. During an executive session on an

[5] The public board meeting is posted on the Village's YouTube page. The approval of the new board member starts at 1:42. https://www.youtube.com/watch?v=Kss34TYGf2c

appointment, a public body may "discuss" or "deliberate" but may not conduct "any decision-making."

The Ohio School Boards Association's guide for school boards defines "discuss" as follows: "'Discussion' suggests an exchange of words, comments or ideas between members of the public body (*Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp.*, Local 530, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist.1995))."[6]

The defendant's Memorandum accurately describes how courts define "deliberating." "'Deliberations' involve more than information-gathering, or fact-finding, they involve the weighing or examining of reasons for and against a course of action. *Springfield Local School Dist. Bd. of Edn. v. Ohio Assn. of Pub. School Emp.*, Local 530, 106 Ohio App.3d 855, 667 N.E.2d 458 (9th Dist.1995)."[7]

In this case, the Granville school board went beyond "weighing or examining of reasons for and against a course of action" and actually took "official action," as defined under open meetings law. The Ohio School Boards Association's Sunshine Law guide for school boards succinctly describes where the line is drawn.

> **What can we do in executive session?**
> Executive sessions are for the purpose of deliberations of permitted subjects. No action of any kind may be taken during an executive session.[8]

Ohio courts make evidence-based determinations to establish when actual decision-making occurs. The defendant's case rests entirely on its delaying a formal vote until an open meeting

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[6] "Understanding Ohio's Sunshine Laws: The Open Meetings Act," Ohio School Boards Association. (2016) https://www.ohioschoolboards.org/sites/default/files/OSBASunshineLaw.pdf

[7] Defendant's Memorandum of Support, p. 4.

[8] "Fact Sheet: Understanding Ohio's Sunshine Laws: The Open Meetings Act" https://www.ohioschoolboards.org/sites/default/files/OSBASunshineLaw.pdf

and an implicit claim that a consensus decision is not a decision for purposes of the Open Meetings Act.

Court decisions on the Open Meetings Act have time and again rejected the many ways public officials have tried to circumvent open meetings law by making decisions in private, whether it be in executive session, via e-mail or in round robin one-on-one meetings. Courts have consistently rejected efforts to circumvent the requirement that decisions be made at open meetings. The Open Meetings Act would mean little if decisions could be made privately because all that mattered was a formal vote to ratify pre-arranged decisions.

The Ohio Attorney General Sunshine Law Manual goes over the many court decisions rejecting attempts of governmental boards to use formal "show" votes as cover for making decisions in private. Citing a long string of cases, the Attorney General summarizes the crucial point: "Finally, a public body may not take any formal action, such as voting or *otherwise reaching a collective decision*, in an executive session – any formal action taken in an executive session is invalid." [9] (Emphasis added.)

"Reaching a consensus" is "reaching a collective decision." You don't "reach a deliberation" by consensus, you "reach a decision" by consensus. Under the Open Meetings Act, an "official action" occurs when the decision is actually made and a consensus decision is a decision.

In its defense, the school board cites *Kauffman v. Tiffin City Council* (3rd District) (1985) to support "the act of eliminating candidates in executive session without a public vote" as not in violation of R.C. 121.22. The case is of limited value to the defendant. *Kauffman v. Tiffin* upheld

[9] Attorney General Sunshine Manual, p. 104. http://www.ohioattorneygeneral.gov/YellowBook. As an example, the Attorney General cites *Piekutowski v. S. Cent. Ohio Edn. Serv. Ctr. Governing Bd*., 161 Ohio App.3d 372, 2005-Ohio-2868, ¶ 19 (4th Dist.), "finding that, in an executive session, board members gave personal opinions and indicated how they would vote on a proposal to create new school district and resolution to adopt proposal was invalid, though it was also later adopted in open session."

narrowing a pool of candidates in executive session on the grounds that filling the council seat was the "final" decision subject to open meetings requirements. The court said the Tiffin City Council complied with open meetings law because its final decision-making (from three candidates) had been done in open session. The Granville school board cannot make the same claim. It winnowed and selected the winning candidate in executive sessions. At most, *Kauffman v. Tiffin* supports the board's winnowing. The decision provides no support for the board making its final choice in executive session.

Further, *Kauffman v. Tiffin* is out of step with the last 30-plus years of open meeting law. It is not mentioned in the Attorney General's 236-page Sunshine Law Manual or any recent appeals court decisions. Today, the established interpretation of open meetings law is that any decision – including winnowing – is an "action" that must be done in open session. The Columbus Board of Education case, which worried the Granville's school superintendent, is an example.

On March 6, 2018, the Ohio Auditor of State opened an investigation into whether the Columbus school board violated the Open Meetings Act. In a March 19, 2018, preliminary finding, the state Auditor told the Columbus board that it violated the Open Meetings Act by winnowing superintendent candidates during executive session.[10] The Columbus school board, while not admitting a violation, began its selection process anew to comply with the state's warning.[11]

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[10] The Auditor of State's March 18, 2018, letter stated:

> "I write today to inform you that, while our investigation is still ongoing, our preliminary investigative work has confirmed that the Board of Education acted in violation of ORC 121.22, the open Meetings Law, and any decisions made are void *ab initio* as a matter of law.
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> "Having been advised that the Board violated the Open Meetings Law with regard to this selection and appointment, be aware that any actions taken based on those meetings could result in the issuance of noncompliance citations and finings for recovery by this office against the District, the appointed individual and Board members."

[11] http://radio.wosu.org/post/columbus-school-board-will-restart-superintendent-search#stream/0

The defendant offers no case law supporting its claim that, for the purposes of open meetings law, liberally construed in favor of openness, a "formal vote" in public is all that's needed to make a decision compliant.

4. CONCLUSION

The Duck Test is applicable: If it walks like a decision, talks like a decision and quacks like a decision, it is a decision.

The Granville school board decided on a new board member in executive session. It made a sham of the decision-making importance of the formal vote and confirmed why courts cannot and do not take formal "show" votes as incontrovertible evidence that decision-making occurred in an open meeting. The board's own words, actions and admissions provide incontrovertible evidence that no decision-making at all was done in public – not even after the district's superintendent and Sunshine Law officer advised the board to conduct decision-making in open session! The board's belief that making decisions in private and announcing them in public somehow satisfies the Open Meetings Act defies both law and common sense.

The board's overt admissions to making consensus decisions during executive sessions suggest the board sincerely thought it was complying with the open meetings law. But, whether it intended to or not, the board crossed the line from discussing and deliberating to actually deciding. The board may not like, agree, understand or feel comfortable with where the legislature and courts have drawn the line on what can and cannot be done in executive session, but it is the law.

The plaintiff, a retired journalist, does not care who is on the school board. But he does care that the board and other local governments not violate the Open Meetings Act in ways that

undermine public trust and lead to conspiracy theories among members of the public who are not insiders.

The Ohio Supreme Court explained the law's purpose well in an important open meetings case, *State ex rel. Cincinnati Post v. Cincinnati*, 76 Ohio St.3d 540 (1996): "One of the strengths of American government is the right of the public to know and understand the actions of their elected representatives. This includes not merely the right to know a government body's final decision on a matter, but the ways and means by which those decisions were reached."

This is a friendly lawsuit. The plaintiff asks the court to invalidate the illegally made appointment and compel the Granville school board to redo the process in compliance with the Open Meetings Act for its own good and that of its community.

Respectfully submitted,

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