

# “Ethucation” in the Age of Transparency:

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# Introductions/Overview

**“*Ethucation*” in the Age of Transparency: helping you “see through” ethical challenges in deal making.**

In this hour, our panel will explore several ethical considerations in the journey of retail development.

Topics will include Sunshine Laws, lobbying, confidentiality, conflicts of interest, gifts, anti-bribery, anti-corruption, OFAC checks, use of web-based applications, use of Artificial Intelligence, and the use of ***actual intelligence*** overall.

The panel will also share contract clauses to confirm transactional ethics and may spark some interesting responses from the deal makers!

We hope you will be well “ethucated.”

# Considerations in Dealing with Governmental Agencies: Glass Houses

**Elissa Wilson**



## The Basics – What is a Public Record?

Public records laws generally require **every public office** to provide copies of public records to any requestor within **a reasonable period of time.**

*\*What is a public record?*

## The Basics – What is a Public Record? (cont'd)

- A public record can also include documents coming under the jurisdiction of a public office.
- A public office can be any agency, office or entity exercising government function.

**Key Take Away:** If you are interacting with a public office or agent for a public office, anything you send to that office could become a public record.

# The Basics – Requesting Public Records

Who can request a public record?

SHORT ANSWER: In most states, anyone.

This includes members of public, journalists, or even a competitor.

- Generally, no specific format is required.
- The requester's identity and intended use often need not be disclosed.

## The Basics – Requesting Public Records (cont'd)

- Typically, the public office must respond within reasonable timeframe.

What happens if a public office does not produce a public record within a reasonable period of time after receiving a public record request?

# The Basics – Limitations

- A request must be for the public office's existing records.
  - Public records laws do not require the creation of records.
- Public offices are not typically required to answer questions about public records.
- A request must not be ambiguous or overly broad.
- Information exempt from disclosure can be withheld/redacted.



## Poll Question – Which Records are Most Typically Exempt from Disclosure under Most States' Public Records Laws?

- A. Trade secrets
- B. Records subject to a non-disclosure agreement executed by an executive agency official or by the equivalent of the political subdivision's chief executive officer
- C. Both A and B
- D. Neither A or B

# The Basics – Relevant Public Records Exemptions

- Trade secrets – usually, but there is a high standard.
- Confidential business/financial information – sometimes, and sometimes of limited duration.
- Infrastructure records (post 9/11) – sometimes.
- Pursuit of potential site/deal before commitment – sometimes.

# The Basics – Trade Secrets

**Trade Secrets**. Most states' laws exempt records the release of which is prohibited by state or federal law. Included within that category are trade secrets.

Trade secrets encompass a variety of information (including scientific or technical information, or any business information, plans or financial information) that satisfy both of the following criteria:

- (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use; and
- (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

# Public Records Best Practices

Is there anything I can do to protect confidential information when I interact with a public office?

SHORT ANSWER: Yes. Use best practices.

Key Best Practice: Plan for the expected.

- Identify early your confidentiality pressure points.
- Anticipate the information likely to be sought via public records requests, based on the circumstances of the transaction. Use that knowledge to carefully plan the types of information disclosed and manner of disclosure.

## Public Records Best Practices (cont'd)

- Limit the disclosure of documents to a public office to only those documents that are required or otherwise necessary
  - If a public office has not specifically requested a document, consider why it is being produced
  - Don't volunteer confidential or sensitive information

## Public Records Best Practices (cont'd)

Identify alternatives to disclosing confidential information.

- Use less sensitive documents
- Consider alternative types of information

## Public Records Best Practices (cont'd)

- Avoid the unnecessary creation of public records
  - Do not send unnecessary written communication or email to a public office
  - Use verbal communication with a public office where appropriate
  - Consider allowing the public office to visually inspect records (in lieu of taking possession of them)

## Public Records Best Practices (cont'd)

Consider whether documents need to be marked in some fashion as “confidential” or redacted before being provided to a public office.

A document may need to be marked either pursuant to:

- a Nondisclosure Agreement, or
- a recognized exception to the applicable public records act.



## Public Records Best Practices (cont'd)

Limit the use of confidential information at public meetings

- If confidential information must be used, consider presenting the information verbally or in executive session as permitted by law
- Documents presented before a public body at a public meeting will generally be treated as a public record

# Public Records Law: What to Expect

## Risk and Opportunity

- Always anticipate the possibility that any document received by a public office may ultimately become a public record subject to disclosure.
- Use the “front page of the newspaper” rule

# Open Meetings Laws

- Require all meetings of a public body be open to the public
- Public body means any board, commission, committee, council or similar decision-making body of a state agency or authority, and similar entities at the local level, including a legislative authority
- A meeting means any prearranged discussion of the public business of the public body by a majority of the members
- A public body must use a reasonable method to notify the public in advance of the time and place of a meeting

# Poll Question: Which are possible consequences of noncompliance with public meetings requirements?

- A. Misdemeanor offense for public officials.
- B. Actions taken in violation of public meetings requirements are void.
- C. Both A and B.
- D. Neither A or B.



# Executive Sessions

- Typically, the allowance is narrow
  - Example: marketing plans, specific business strategy, production techniques, trade secrets, or personal financial statements of an applicant for economic development assistance
- Strict adherence to procedural requirements
- There are also some open meetings exceptions for particular bodies
- Potentially drastic consequences for failing to comply with rules

# Sunshine Law Mistakes – Vorys' Top Ten



- No worries, we have an NDA.
- No one will request the NDA, right?
- It's just an NDA; any generic form will do.
- Email addresses are invisible.
- It contains confidential business information, so it must not be public.

## Sunshine Law Mistakes – Vorys' Top Ten (cont'd)

- The document was provided in executive session, so it can't be public.
- The more information, the better.
- Project Golden Arches.
- The boy who cried trade secret.
- The magical attorney-client privilege.

## Lobbying Facts

- Every state prohibits contingency fee lobbying
- What is lobbying varies greatly by state/locality
- Registered lobbyists must file regular reports on lobbying activities and are restricted from certain activities
- Violations of lobbying laws can bring civil or criminal penalties



## Municipal Lobbying Ordinance

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Los Angeles Municipal Code §§ 48.01 *et seq.*

*Effective June 13, 2019*

**“Attempting to influence”** means promoting, supporting, opposing or seeking to modify or delay any action on municipal legislation by any means, including but not limited to providing or using persuasion, information, statistics, analyses or studies. A person attempts to influence municipal legislation when he or she engages in lobbying activities for the purpose of influencing a decision.

**“Lobbying activities”** includes the following and similar compensated conduct when that conduct is related to a direct communication to influence any municipal legislation:

1. engaging in, either personally or through an agent, written or oral direct communication with a City official;
2. drafting ordinances, resolutions or regulations;
3. providing advice or recommending strategy to a client or others;
4. research, investigation and information gathering;
5. seeking to influence the position of a third party on municipal legislation or an issue related to municipal legislation by any means, including but not limited to engaging in community, public or press relations activities; and
6. attending or monitoring City meetings, hearings or other events.

## Safety Valves

- Look at the definition of executive agencies
  - Does the state have an economic development non-profit that administers incentives?
  - But, be careful. In Ohio, the definition of “executive agency” expressly includes JobsOhio.
- Direct communication requirements
- Reportable persons limitations
- Lobbying activity thresholds
- Compensation and expenditure thresholds
- Specific activity exceptions

# Lobbying and Lawyering

## "Lawyering" vs. Lobbying

Attorneys often represent clients before state agencies. Attorneys do not register as a Lobbyist where the outcome of their representation results in an agency decision that is only applicable to their client or certain named individuals.

*Attorney represents ABC in an administrative hearing before ODJFS regarding whether a former ABC employee is entitled to unemployment compensation benefits. ODJFS's determination will only be applicable to ABC and the former employee. Attorney will not register as a lobbyist.*

Attorneys must register as a Lobbyist where their communications with state agencies (other than testimony at a public hearing) may affect Legislation or Executive Agency Decisions that are universally applicable.

*Attorney is engaged by ABC to oppose an administrative rule proposed by ODJFS that will affect how unemployment compensation claims are adjudicated. The rule will be applicable to all persons and entities subject to ODJFS's jurisdiction. Attorney must register as an Executive Agency Lobbyist.*

[R.C. 121.60(G),  
Adm.Code 101-11-  
01(C)]

# Lobbying Definitions (example)

What the statute says:

An “Executive agency lobbyist” is “any person engaged to influence executive agency decisions.”

An "Executive agency decision" is *either*

- a decision of an executive agency regarding the expenditure of funds ... with respect to the award of a contract, grant, lease, or other financial arrangement under which such funds are distributed or allocated, or
- a regulatory decision of an executive agency or any board or commission of the state.

Ohio Revised Code Section 121.60

## Lobbying Definitions (cont'd)

“A regulatory decision” is a decision ... which has broad, universal application to all persons under the jurisdiction of such agency, board or commission.

Regulatory decisions do not include the decision of an executive agency or board or commission which is made solely with respect to one or more persons named in a particular case or similar matter.

[Ohio Administrative Code 101-11-01(C)]

- There is no similar limitation for procurement or expenditure decisions

# Considerations in Dealing with Public and Private Entities



**Susan Willeke**



# Private & Public Entity Interactions: What to Know!

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- Conflicts of Interest
- Gifts
- Bribery/Corruption
- Omissions
- Council on Governmental Ethics Laws



# Retail Clauses Pertaining to Ethics





- Anti-bribery, anti-corruption
- OFAC
- Codes of Conduct
- Fair employment practices
- Diversity, Equity, and Inclusion
- Notice clauses
- What duty do clients have in vetting investors?  
What is the exposure for example if funds  
utilized are from illegal operations?
- Drafting software

Sample lease provisions:

**1. Ethics**

- Lessee shall not advertise the business, profession or activities of Lessee in any manner which violates the letter or spirit of any code of ethics adopted by any recognized association or organization pertaining thereto or use the name of the Building for any purpose other than that of the business address of Lessee.
- Lessee shall not advertise the business, profession, or activities of Lessee conducted in the Building in any manner which violates the letter or spirit of any code of ethics adopted by any recognized association or organization pertaining to such business of Lessee and shall never use any picture or likeness of the Building in any circulars, notices, advertisements or correspondence without Lessor's prior written consent.

## **2. Anti-bribery, anti-corruption/OFAC**

### **1. Without limitation of any other term or provision of this lease:**

(a) Landlord warrants, represents, covenants and agrees that: (1) it shall comply with all applicable anti-bribery and anti-corruption laws, including the U.S. Foreign Corrupt Practices Act, the U.K. Bribery Act, the Canadian Corruption of Foreign Public Officials Act, and all other similar applicable laws ("Anti-Corruption Laws") in connection with the performance of Landlord's Construction Work or any other service or work for the benefit of Tenant (the "Services"); (2) no payments of money, gifts or anything of value have been or shall be offered, promised or paid, directly or indirectly, to any person or entity to corruptly influence the acts of such person or entity, or to influence the acts of any Government Official (as hereinafter defined) or member of their family with or without corrupt intent, or to obtain or receive an improper advantage in connection with the performance of the Services otherwise for the benefit of Tenant; (3) no payments of money, gifts or anything of value have been or shall be requested, received or accepted, directly or indirectly through any agent or intermediary, from any person or entity to corruptly influence the acts of such person or entity, or to influence the acts of any Government Official or member of their family with or without corrupt intent, or to obtain or receive an improper advantage in connection with the Services or otherwise for the benefit of Tenant; (4) it has no direct or indirect legal, financial or other relationship(s) with any Government Official (or member of their family) involved with or affecting the Services; (5) it has not been charged with or convicted of bribery, corruption or fraud; and (6) if Landlord acts on behalf of Tenant during the performance of the Services, it has complied and shall comply with Tenant's Global Anti-Bribery Policy. Landlord shall promptly notify Tenant in writing of any change regarding any of the representations made above.

(b) Landlord covenants and agrees to maintain for a period of at least five (5) years from the last performance of the Services, accurate books and records with respect to all expenditures, payments, fees incurred, paid or received in connection with performance of the Services, including invoices, receipts, statements of account and other supporting documentation. Tenant shall have the right to conduct a review of all relevant records of Landlord for the purpose of evaluating compliance with all applicable Anti-Corruption Laws and this Section. Landlord shall make relevant books and records available to Tenant promptly upon request and shall reasonably cooperate with any request or inquiry relative to any possible violation of this Section.

(c) Violation of the foregoing shall be deemed a material breach of this lease, and notwithstanding anything to the contrary contained in this lease, shall entitle Tenant to immediately terminate this lease upon written notice to Landlord.

(d) As used herein, the term "Government Official" means any person exercising a public function and/or acting in an official capacity on behalf of a government agency, department, or instrumentality, political party, or candidate for political office, and includes officials or employees of federal, state, provincial, county or municipal governments or any department or agency thereof; any officers or employees of a company or business owned in whole or in part by a government; any officers or employees of a public international organization; any political party or official thereof; or any candidate for political office. Government Officials include officials at every level of government, regardless of rank or position.

2. For purposes hereof, (i) "Anti-Corruption Laws" shall mean all laws applicable to a pertinent party from time to time concerning or relating to bribery or anti-corruption; (ii) "Sanctions" shall mean all applicable economic or financial sanctions or trade embargoes imposed, administered, or enforced from time to time by (a) the U.S. federal government, including those administered by the Office of Foreign Assets Control of the United States Department of Treasury ("OFAC") or the U.S. Department of State, or (b) the United Nations Security Council, the European Union, or any European Union member state in which a pertinent party or any of its subsidiaries conducts operations; and (iii) "Sanctioned Person" shall mean, at any time, (a) any person or entity listed in any Sanctions-related list of designated persons or entities maintained by OFAC, the U.S. Department of State, or by the United Nations Security Council, the European Union, or any European Union member state in which the pertinent party or any of its subsidiaries conducts operations, (b) unless otherwise authorized by OFAC, any person or entity operating, organized, or resident in any country or territory which is itself the subject or target of any full-scope (non-list based) Sanctions, or (c) any ownership of fifty percent (50%) or more of an entity by persons or entities described in the foregoing clauses (a) or (b). Each of Landlord and Tenant represents and warrants that neither it nor any of its subsidiaries, nor to its knowledge, their respective officers, directors, employees, managers, agents, contractors, or invitees, is a Sanctioned Person. Each of Landlord and Tenant further represents that it and its subsidiaries, and to its knowledge, their respective officers, directors, employees, managers, agents, contractors, and invitees, complies, and shall continue to comply, in all material respects, with all Sanctions and with all Anti-Corruption Laws. Each party will use reasonable efforts to notify the other in writing if any of the foregoing representations and warranties are no longer true or have been breached or if such party has a reasonable basis to believe that they may no longer be true or have been breached. In the event of any violation of this Paragraph by Tenant, Landlord will be entitled to immediately terminate this Lease and take such other actions as are permitted or required to be taken under law or in equity.

### 3. Code of Conduct

- Tenant acknowledges that it has received a copy of Landlord's Code of Business Conduct and agrees to comply with such Code of Business Conduct, as amended or supplemented by Landlord from time to time.
- A sample code of conduct for a retail lease would include principles like acting in good faith, transparent communication, fair negotiation, respecting property, maintaining business standards, prompt rent payments, timely notification of issues, and a commitment to resolving disputes constructively, with both landlord and tenant adhering to these standards throughout the lease term; ensuring proper use of the premises, compliance with local regulations, and a clear process for addressing maintenance concerns.
- Key Elements of a Retail Lease Code of Conduct:
  - ↳ Good Faith Negotiation: Both parties will engage in honest and transparent negotiations, acting with integrity and considering the legitimate interests of the other party.
  - ↳ Fair Dealing: Avoid taking unfair advantage of the other party's knowledge or situation, and strive to reach mutually agreeable terms.

- ‖ Compliance with Laws: Adhere to all applicable local laws and regulations regarding retail operations and property management.
- ‖ Landlord Responsibilities: Maintain the leased premises in a safe and habitable condition, addressing necessary repairs promptly.
- ‖ Access and Notice: Provide reasonable access to the premises for inspections and repairs, with proper notice to the tenant.
- ‖ Tenant Support: Offer assistance in obtaining necessary permits and licenses where applicable.
- ‖ Accurate Information: Provide accurate details regarding the property's condition and specifications during lease negotiations.
- ‖ Tenant Responsibilities: Make timely rent payments according to the lease agreement.
- ‖ Proper Use of Premises: Use the premises only for the intended retail purpose as outlined in the lease, adhering to all operational guidelines.

- ┌ Maintenance and Care: Maintain the premises in a clean and orderly condition, reporting any damage or potential hazards promptly.
- ┌ Compliance with Regulations: Comply with all applicable health, safety, and business regulations within the premises.
- ┌ Dispute Resolution: Attempt to resolve any disputes through open communication and dialogue before escalating further.
- ┌ Mediation: Consider using a neutral third party mediator to facilitate a resolution if necessary.
- ┌ Legal Remedies: If mediation fails, both parties reserve the right to pursue legal remedies as per the lease agreement.

→ Specific Considerations for Retail Leases:

- ┌ Signage and Marketing: Clear guidelines regarding signage, advertising, and promotional activities on the premises.





Age discrimination is another issue in commercial real estate, particularly when older entrepreneurs face challenges in securing leases or financing due to perceived risks associated with their age. Disability discrimination can manifest in the failure to provide reasonable accommodations in commercial spaces, limiting access for business owners or employees with disabilities.

**Discriminatory Practices in Leasing:** Leasing practices in commercial real estate are often marred by discrimination. Landlords and property managers may engage in discriminatory practices by steering potential tenants or buyers towards certain areas based on race, ethnicity, or other protected characteristics. In some cases, landlords may impose stricter leasing requirements on minority-owned businesses, such as demanding higher security deposits or shorter lease terms. Additionally, minority business owners may find it more challenging to negotiate favorable lease terms, resulting in higher operational costs and reduced profitability.

**Legal Protections and Challenges:** While there are legal protections in place to combat discrimination in commercial real estate, such as the Fair Housing Act and the Civil Rights Act, enforcement remains a challenge. Many victims of discrimination are unaware of their rights or lack the resources to pursue legal action. Additionally, proving discrimination in commercial real estate can be difficult, as these practices are often subtle and concealed.

## **5. Diversity, Equity, and Inclusion**

Reporting by Tenants of adoption/implementation of DEI policies.

## **6. Notice clauses**

Notices. Whenever notice shall or may be given to either of the parties by the other, each such notice shall be by nationally recognized overnight mail service (e.g., Federal Express or UPS Next Day Air) at the respective addresses of the parties as contained in Section 1.1(h), or to such other party or address as either party may from time to time designate in writing to the other. Any notice under this Lease shall be deemed to have been given at the time it is placed in the mails with sufficient postage prepaid and shall be deemed received three (3) days after depositing thereof in the mail with sufficient postage prepaid, or one (1) day after giving thereof to a nationally recognized overnight carrier. Notwithstanding the foregoing, notices hereunder to or from either party may be given by electronic mail if the electronic mail notice is provided to the individual and the individual email address designated by a party in writing to the other party or designated pursuant to this Lease.

Notices and Payments. Any payments of Fixed Minimum Rent or other amounts payable hereunder (other than amounts paid by Tenant via ACH) shall be delivered to the party entitled thereto at the addresses hereinafter set forth. Whenever notice is required or permitted in this Lease, it shall be in writing and shall be deemed to be properly given: (i) upon receipt or refusal if sent by U. S. Postal Service, postage prepaid, by certified or registered mail, return receipt requested; (ii) on the date of hand delivery if personally delivered by hand; or (iii) on the next business day following deposit with an overnight delivery service with instructions to deliver on the next day or on the next business day if sent by nationally recognized overnight courier service. For purposes of this Paragraph, delivery of a payment or notice to an address from which the recipient has moved but failed to notify the other party of modification of such address as hereinafter provided shall be deemed to constitute refusal of such payment or notice by the intended recipient. All payments and notices required or permitted in this Lease shall be delivered to the party entitled thereto at the following addresses:

**7. What duty do clients have in vetting investors? What is the exposure, for example, if funds utilized are from illegal operations?**

General duty of due diligence; e.g., potential investors must be legally compliant and not involved in illicit activities.

**8. Drafting software**

→ LeasePilot

# Digital Considerations in Practicing Law

**A conversation.  
Ethically, of course.**



# Generative Artificial Intelligence (GAI) Lurks Everywhere

- Uninvited or unidentified AI guests in conference calls
- ChatGBT and other aids
- CLM (contract lifecycle management)
- Call/meeting recording

## Rules for Context

On **July 29, 2024**, the American Bar Association Standing Committee on Ethics and Professional Responsibility released its first formal opinion concerning the use of generative artificial intelligence (GIA).

See **Formal Opinion 512**:

[https://www.americanbar.org/content/dam/aba/administrative/professional\\_responsibility/ethics-opinions/aba-formal-opinion-512.pdf](https://www.americanbar.org/content/dam/aba/administrative/professional_responsibility/ethics-opinions/aba-formal-opinion-512.pdf)



# Part 5. Digital Considerations in Practicing Law

## FROM THE ABA WEBSITE

<https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/>

“The 15-page opinion specifically outlined that lawyers should be mindful of a host of model rules in the [ABA Model Rules of Professional Conduct](#), including:

Model Rule 1.1 (Competence). This obligates lawyers to provide competent representation to clients and requires they exercise the “**legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation.**” In addition, the model rule states lawyers should understand “the **benefits and risks associated**” with the technologies used to deliver legal services to clients. [emphasis added]

Model Rule 1.6 (Confidentiality of Information). Under this model rule, a lawyer using GAI must be cognizant of the duty to keep confidential all information relating to the representation of a client, regardless of its source, unless the client gives informed consent. Other model rules require lawyers to extend similar protections to former and prospective clients’ information.”

# Part 5. Digital Considerations in Practicing Law

FROM THE ABA WEBSITE

“The 15-page opinion specifically outlined that lawyers should be mindful of a host of model rules in the [ABA Model Rules of Professional Conduct](#), including:

...Model Rule 1.4 (Communications). This model rule addresses lawyers’ duty to communicate with their clients and builds on lawyers’ legal obligations as fiduciaries, which include “the duty of an attorney to advise the client promptly whenever he has any information to give which it is important the client should receive.” ***Of particular relevance to GAI, Model Rule 1.4(a)(2) states that a lawyer shall “reasonably consult” with the client about the means by which the client’s objectives are to be accomplished.*** [emphasis added]

Model Rule 1.5 (Fees). This rule requires a lawyer’s fees and expenses to be reasonable and includes criteria for evaluating whether a fee or expense is reasonable. The formal opinion notes that if a lawyer uses a GAI tool to draft a pleading and expends 15 minutes to input the relevant information into the program, the lawyer may charge for that time as well as for the time necessary to review the resulting draft for accuracy and completeness. ***But, in most circumstances, the lawyer cannot charge a client for learning how to work a GAI tool.*** [emphasis added]

<https://www.americanbar.org/news/abanews/aba-news-archives/2024/07/aba-issues-first-ethics-guidance-ai-tools/>

## Part 5. Digital Considerations in Practicing Law

Watch out for vendor engagements with IT aspects.

Engage proper professional assistance to understand the software and processing of your data:

- Security

- Virus protection

- Is data is being collected, shared, sold?

- GAI involvement

  - Manipulation/alteration?

  - Training: is your content or interaction training something else?

## Part 5. Digital Considerations in Practicing Law

### **Keeping Privileged Communications Privileged**

Activities in public places like coffee shops, airport terminals, on planes, etc.

open laptops, phone calls, phone screen visibility

E-mails, meeting invites, texts, documents being shared.

Reply all: who was on the original e-mail.

Should your advice be shared with them?

Are you about to give privileged advice on an open line?

Are your clients forwarding your privileged communications?

Consider both the text of the communication but attachments (you may have attached a document with privileged margin comments).

Encrypt communications and documents whenever possible.

