



H.B. 9

126th General Assembly
(As Introduced)

Reps. Oelslager, Flowers, Buehrer, White, Trakas

BILL SUMMARY

- Expands the definition of "public record" to include a record that documents the depletion, expenditure, or depreciation of the resources of the public office, even if unauthorized by that office.
- Requires a public office, when making a public record available that includes information exempt from public inspection or copying, to notify the person seeking to inspect or copy the record regarding any redaction or to make the redaction plainly visible and specifies that a redaction is a denial of a request to inspect or copy the redacted information.
- Requires a public office to adopt a public records policy for responding to public records requests and to keep a copy of its records retention schedule available at the location readily available to the public.
- Requires a public office that denies a request for public records when the requester makes an ambiguous request or the public office cannot reasonably identify the public records being requested to provide the requester an opportunity to revise the request and, if a request for public records is ultimately denied, requires a public office to provide the requester an explanation of the reasons for the denial.
- Generally precludes a public office from limiting or conditioning the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested record.
- Allows a public office to ask that a request be made in writing, ask for the requester's identity, and ask about the intended use of the

requested information only if the public office discloses to the requester that compliance is not required and only when a written request or the requested information would enhance the ability to comply with the request.

- Provides that no provision of the Open Records Law or of law creating an exception to that Law may be construed to limit or abrogate the public's qualified right under the common law and the Ohio and United States Constitutions to inspect or copy judicial records or other constitutionally protected records or the availability of extraordinary relief to compel public inspection or copying of such records.
- Provides that an aggrieved person who files a mandamus action against a public office may recover statutory damages, upon certain findings made by the court, and court costs for failure to comply with the Open Records Law.
- Permits a court that finds an egregious violation of the Open Records Law to award to the aggrieved person a punitive civil forfeiture.
- Specifies the circumstances in which a court may reduce or deny an award of attorney's fees to an aggrieved person.
- Requires the Attorney General to develop, provide, and certify, and requires elected public officials biennially to attend, training programs and seminars about the Open Records Law.
- Makes other changes in the Open Records Law.

CONTENT AND OPERATION

Overview of the Open Records Law

The Open Records Law (R.C. 149.43) generally requires every public office to prepare promptly all public records and make them available for inspection at all reasonable times during regular business hours. Upon request and within a reasonable period of time, a public office or person responsible for public records generally must make copies available at cost. (R.C. 149.43(B)(1).)

"Public office" includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity

established by Ohio law for the exercise of any function of government (R.C. 149.011(A)). "Public record" means any record that is kept by any public office, including but not limited to, state, county, city, village, township, and school district units and any record pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for-profit entity operating the school (R.C. 149.43(A)(1)).

Note: R.C. 149.43 as contained in the bill does not reflect the amendments made to that section by Am. Sub. HB. 303, Am. Sub. H.B. 431, and Sub. S.B. 222, all passed by the 125th General Assembly. The references in this analysis to current law or existing law are to the version of R.C. 149.43 that existed prior to the amendments to that section made by those acts, which is the version contained in the bill. It appears that the amendments made by those acts to R.C. 149.43 do not relate to the subject matter of this bill. An amendment to the bill to update R.C. 149.43 will be needed when that section, as amended by the above specified acts, becomes available.

Definition of "records"

The current Public Records Law (R.C. Chapter 149.) defines "records" as including any document, device, or item, regardless of physical form or characteristic, *including an electronic record as defined in R.C. 1306.01*, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. The bill modifies the above definition of "records" by removing the clause *including an electronic record as defined in R.C. 1306.01*. The bill also expands the definition of "records" to include any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which documents the depletion, expenditure, or depreciation of the resources of a public office, even if unauthorized by that office. (R.C. 149.011(G).)

Redaction of public records

The bill provides that if a public record contains information exempt from the duty to permit public inspection or copying, the public office must make available all of the information within the public record that is not exempt. When making that information available for public inspection or copying, the public office must notify the requester of any redaction or make the redaction plainly visible. A redaction is deemed to be a denial of a request to inspect or copy the redacted information. (R.C. 149.43(B)(1).) The bill defines "redaction" to mean obscuring or deleting any information that is exempt from the duty to permit

public inspection or copying from an item that otherwise meets the definition of "record" contained in the Public Records Law (R.C. 149.43(A)(12)).

Organization and availability of public records

Current law generally requires that all public records be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. The bill generally requires that, *upon request*, all public records *responsive to the request* be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. (R.C. 149.43(B)(1).)

Current law provides that in order to facilitate broader access to public records, public offices must maintain public records in a manner so that they can be made available for inspection under the Open Records Law (R.C. 149.43(B)(1)). The bill provides that in order to facilitate broader access to public records, public offices must organize and maintain public records in a manner so that they can be made available for inspection *or copying* under the Open Records Law. The bill further requires a public office also to have available a copy of its current records retention schedule at a location readily available to the public. Under the bill, if a requester makes an ambiguous request or has difficulty in making a request for copies or inspection of public records such that the public office cannot reasonably identify what public records are being requested, the public office may deny the request but must provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's duties. (R.C. 149.43(B)(2).)

Under the bill, if a request is ultimately denied, in part or in whole, the public office must provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also must be provided to the requester in writing. The explanation does not preclude the public office from relying upon additional reasons or legal authority in defending an action for mandamus commenced under current law to require inspection or copying of the records in question. (R.C. 149.43(B)(3).)

The bill provides that unless specifically required by state or federal law or in accordance with the Open Records Law itself, no public office may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any such requirement constitutes a denial of the request. (R.C. 149.43(B)(4).)

On the other hand, the bill allows a public office or person responsible for public records to ask a requester to make the request in writing, to ask for the requester's identity, and to inquire about the intended use of the information requested, but only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use, and only when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester (R.C. 149.43(B)(5)).

Public access to judicial records or other constitutionally protected records

The bill provides that no provision of the Open Records Law or of law creating an exception to the Open Records Law may be construed to limit or abrogate (1) the public's qualified right under the common law, the Ohio Constitution, and the United States Constitution to inspect or copy judicial records or other constitutionally protected records or (2) the availability of extraordinary relief, including a writ of mandamus issued pursuant to the Open Records Law to compel a court or other public office to permit public inspection and copying of a judicial record or other constitutionally protected record. The bill defines "judicial records or other constitutionally protected records" to include all records presumed to be open for public inspection or copying under the common law, the First Amendment to the United States Constitution, or Sections 11 and 16 of Article I of the Ohio Constitution, including all records kept by or on behalf of a court acting in its adjudicative capacity or otherwise exercising judicial power as conferred by or derived from Article IV of the Ohio Constitution. (R.C. 149.43(E) and (A)(11).

Article 1, Section 11 of the Ohio Constitution grants to every citizen the right to freely speak, write, and publish the citizen's sentiments on all subjects, and prohibits any law from being passed to restrain or abridge the liberty of speech or of the press. Article I, Section 16 of the Ohio Constitution requires that all courts be open. Article IV of the Ohio Constitution is the article that sets forth the powers and duties of the courts.

Damages, court costs, and attorney's fees due for failure to comply with the Open Records Law

Current law authorizes a person allegedly aggrieved by a public office's failure to promptly prepare a public record and make it available for inspection in accordance with the Open Records Law or *a person who has requested a copy of a public record and is allegedly aggrieved by the failure of a public office or the person responsible for the public record to make a copy available to the allegedly aggrieved person in accordance with the Open Records Law*, to commence a mandamus action to obtain a judgment that orders the public office or person



responsible for the public record to comply with the Open Records Law and that awards reasonable attorney's fees to the person that instituted the mandamus action (R.C. 149.43(C)). The bill authorizes a person allegedly aggrieved by a public office's failure to promptly prepare a public record and make it available for inspection in accordance with the Open Records Law or *any other failure of a public office to comply with an obligation in accordance with the Open Records Law* (instead of the above italicized clause) to commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with the Open Records Law, that awards *court costs* (added by the bill), and reasonable attorney's fees to the person that instituted the mandamus action, *and, if applicable, that includes an order fixing statutory damages, an order awarding a punitive civil forfeiture, or both of those orders, as described below* (added by the bill) (R.C. 149.43(C)(1)).

The bill provides that if a person makes a written request to inspect or copy any public record in a manner that fairly describes the public record or class of public records requested, and the person does not request receipt of copies by mail, the person is entitled to recover the amount of statutory damages set forth below if a court determines all of the following (R.C. 149.43(C)(2)):

(1) The person filed a mandamus action authorized by the Open Records Law to compel compliance more than ten business days after transmitting the request by hand delivery or certified mail to the public office or person responsible for the requested public records, or the person filed the mandamus action after the expiration of any additional period of time for compliance consented to by that person.

(2) The request was not fulfilled before the date on which the mandamus action was filed.

(3) The public office or person responsible for the requested public records was reasonably capable of fulfilling the request before the person filed the mandamus action.

The amount of statutory damages must be fixed at \$250 for each business day during which the public office or person responsible for the requested public records failed to make one or more requested public records available, beginning with the first day on which this provision in the bill authorizes the requester to file a mandamus action to recover statutory damages, up to a maximum of \$5,000. These statutory damages may not be construed as penalties, but as compensation for injuries arising from lost use of the requested information; the existence of this injury must be conclusively presumed. The award of statutory damages is in addition to all other remedies authorized by the Open Records Law. (R.C. 149.43(C)(2).)

The bill requires that the court determine whether an egregious violation has occurred in the response to the request for a public record. If the court finds an egregious violation, the court, in its discretion, may award a punitive civil forfeiture of up to \$1,000 per day for any delay in providing access to the requested public records. An egregious violation must be found to have occurred upon a showing by the relator that the public office acted in bad faith, with malicious purpose, or in a wanton manner to cause a delay or denial of a public records request. (R.C. 149.43(C)(3).)

The bill requires the court to determine and award to the relator all court costs and, subject to the reduction described below, reasonable attorney's fees. The court costs and reasonable attorney's fees must be construed as remedial and not punitive. Reasonable attorney's fees must include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce or deny an award of attorney's fees to the relator only if the court determines that, based on the ordinary application of statutory and case law as it existed when the public office or person responsible for public records denied the relator's request to inspect or obtain a copy of the contested public record or otherwise comply with a duty imposed by the Open Records Law, the public office or person responsible for public records had substantial likelihood of prevailing on the merits of its denial. (R.C. 149.43(C)(4).)

Training for public officials and employees regarding the Open Records Law

The bill provides that to ensure that all employees of public offices are appropriately educated about a public office's obligations to make public records available for public inspection and copying, all state and local elected public officials must attend training approved by the Attorney General at least once every two years (R.C. 149.43(F)).

The bill requires the Attorney General to develop, provide, and certify training programs and seminars for all officials elected to a local or statewide office in order to enhance the officials' knowledge of the duty to provide access to public records as required by the Open Records Law. The training must provide elected officials with guidance in developing and updating their offices' policies as required by the bill (see below). An elected official's successful completion every two years of the training requirements the Attorney General establishes will satisfy the biennial education requirements the bill imposes on elected officials. (R.C. 109.43(A).)

The Attorney General may charge a reasonable fee for the actual and necessary expenses associated with training programs and seminars and may allow the attendance of any other interested persons to any of the training programs or

seminars that the Attorney General conducts, provided that the persons pay a registration fee to the Attorney General before attending the training program or seminar (R.C. 109.43(B)).

The Attorney General may provide any other appropriate training or educational programs about Ohio's "Sunshine Laws" (the Open Meetings and Open Records Laws), as may be developed and offered by the Attorney General or by the Attorney General in collaboration with one or more other state agencies, political subdivisions, or other public or private entities (R.C. 109.43(C)).

The Auditor of State, in the course of an annual or biennial audit of a public office as required by law, must audit the public office for compliance with the requirements described above in "Training for public officials and employees regarding the Open Records Law" and below in "Adoption of a public records policy by each public office" (R.C. 109.43(D)).

Adoption of a public records policy by each public office

The bill requires all public offices to adopt a public records policy in compliance with the Open Records Law for responding to public records requests. The public office must distribute this policy to all employees of the public office and require all employees to acknowledge receipt of the copy of the policy. Except as otherwise provided in the bill, the policy (1) may not limit the number of public records that the public office will make available to a single person, (2) may not limit the number of public records that it will make available during a fixed period of time, and (3) may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours. (R.C. 149.43(F).)

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-24-05	p. 79

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