



Ohio Legislative Service Commission

122nd Senate Bill Analysis



S.B. 184

122nd General Assembly
(As Introduced)

Sens. Oelslager, Schafrath

- Grants a person who requests a copy of a public record the option of choosing the medium upon which the copy is to be provided.
- Requires a public office or person responsible for public records, upon request, to transmit a copy of a public record by mail and permits the public office or person to charge the person making the request with the cost of postage and other mailing supplies.
- Specifies that any award or order authorized under the Public Records Law is a remedy for the enforcement of a public duty and is not punitive.

CONTENT AND OPERATION

Existing law

General right of access to public records

The existing Public Records Law is contained in R.C. 149.43. It imposes the following duties upon public bodies regarding their records: (1) all "public records" (see **COMMENT 1** and 2) must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours, (2) upon request, a person responsible for public records must make copies available at cost, within a reasonable period of time, and (3) in order to facilitate broader access to public records, governmental units must maintain public records in a manner that they can be made available for inspection in accordance with the provision described in clauses (1) and (2). The Law states that its provisions are not limited by the existing Personal Information Systems Law contained in R.C. Chapter 1347. (R.C. 149.43(B) and (D).)

Remedy for violation of the general right of access to public records

Under existing law, if a person allegedly is aggrieved by the failure of a governmental unit to promptly prepare a public record and to make it available to the person for inspection in accordance with the above-described general right of access to public records, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a person responsible for the public record to make a copy available to the person allegedly aggrieved in accordance with that general right of access, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the governmental unit or the person responsible for the public record to comply with that general right of access and that awards reasonable attorney's fees to the person that instituted the mandamus action. The mandamus action may be commenced in the court of common pleas of the county in which the governmental unit or responsible person allegedly did not comply with the general right of access, in the Supreme Court pursuant to its original jurisdiction under Section 2 of Article IV of the Ohio Constitution, or in the court of appeals for the appellate district in which the governmental unit or responsible person allegedly did not comply with the general right of access pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution. (R.C. 149.43(C).)

Limited exception provided for certain Bureau of Motor Vehicles records

Existing law authorizes the Bureau of Motor Vehicles (BMV) to adopt rules under the Administrative Procedure Act to reasonably limit the number of "bulk commercial special extraction requests" (see **COMMENT 3**) made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for BMV's "actual cost" (see **COMMENT 3**), plus "special extraction costs" (see **COMMENT 3**), plus 10%. BMV may charge for expenses for redacting information, the release of which is prohibited by law. (R.C. 149.43(E)(1).)

Operation of the bill

Choice of medium for copy of public record to be provided

The bill provides that, if any person chooses to obtain a copy of a public record under the Public Records Law, the public office or person responsible for the public record must permit that person to choose that the public record be duplicated upon paper, upon the same medium upon which the public office or person responsible keeps the record, or upon any other medium upon which the record reasonably can be duplicated by the public office or person responsible, if the public office or person responsible has the technology, as an integral part of its normal operations, for duplicating the public record upon that other medium. When the person seeking the copy makes a choice under this provision, the public office or person responsible must provide a copy of the public record in accordance with the choice made by the person seeking the copy. (R.C. 149.43(B), second paragraph.) (See **COMMENT 4**.)

Mailing of copy of public record

The bill provides that, upon request under the Public Records Law, a public office or person responsible for public records must transmit a copy of a public record to any person by United States mail within a reasonable time after receiving a request for a copy. The public office or person responsible may require the person making the request to pay the cost of postage and other supplies used in the mailing. (R.C. 149.43(C), third paragraph.) (See **COMMENT 5**.)

Statement of intent regarding awards and orders under the Law

The bill states that any award or order authorized under the Public Records Law must be construed as a remedy for the enforcement of a public duty and not as punitive (R.C. 149.43(C), last paragraph). (See **COMMENT 6**.)

COMMENT

1. Existing law defines the following terms for purposes of the Public Records Law (R.C. 149.43(A)):

(a) "Public record" means any "record" (see **COMMENT 2**, below) that is kept by any "public office" (see **COMMENT 2**, below), including, but not limited to, state, county, city, village, township, and school district units, except that "public record" does not mean any of the following: (i) medical records (see below), (ii) records pertaining to probation and parole proceedings, (iii) records pertaining to "judicial bypass" proceedings regarding the existing Abortion Notification Law brought under existing R.C. 2151.85 and to appeals of actions arising under that section, (iv) records pertaining to adoption proceedings, including the contents of an adoption file maintained by the Department of Health under existing R.C. 3705.12, (v) information in a record contained in the putative father registry established by existing R.C. 3107.062, regardless of whether the information is held by the Department of Human Services (DHS) or, pursuant to existing R.C. 5101.313, DHS's Division of Child Support or a child support enforcement agency, (vi) records listed in existing R.C. 3107.42(A) or specified in existing R.C. 3107.52(A), (vii) trial preparation records (see below), (viii) confidential law enforcement investigatory records (see below), (ix) records containing information that is confidential under existing R.C. 2317.023 or 4112.05, (x) DNA records stored in the DNA database pursuant to existing R.C. 109.573, (xi) inmate records released by the Department of Rehabilitation and Correction (DRC) to the Department of Youth Services (DYS) or a court of record pursuant to existing R.C. 5120.031(E), (xii) records maintained by DHS pertaining to children in its custody released by DHS to DRC pursuant to existing R.C. 5139.05, (xiii) intellectual property records (see below), (xiv) donor profile records (see below), (xv) as of January 1, 1998, records maintained by DHS pursuant to existing R.C. 5101.312 (this provision is not in the bill; it was enacted in Am. Sub. H.B. 352 of the 122nd General Assembly, effective January 1, 1998), or (xvi) records the release of which is prohibited by state or federal law.

(b) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following: (i) the identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised, (ii) information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity, (iii) specific confidential investigatory techniques or procedures or specific investigatory work product, or (iv) information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(c) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(d) "Trial preparation record" means any record that contains information specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(e) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(f) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

2. Existing law also defines several terms for use in R.C. Chapter 149., including the Public Records Law:

(a) "Public office" includes any "state agency" (see below), public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by Ohio law for the exercise of any function of government.

(b) "State agency" includes every department, bureau, board, commission, office, or other organized body established by the Ohio Constitution or Ohio law for the exercise of any function of state government, including any state-supported institution of higher education, the General Assembly, or any legislative agency, any court or judicial agency, or any political subdivision or agency thereof.

(c) "Records" includes 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 of Ohio or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

3. As used in the existing BMV-related exception to the Public Records Law described above in "***Limited exception provided for certain Bureau of Motor Vehicles records***" (R.C. 149.43(E)(2)):

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes; the term does not include a request by a person who gives assurance to BMV that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by BMV, or the actual cost incurred to create computer programs to make the special extraction; the term includes any charges paid to a public agency for computer or records services.

(e) "Commercial surveys, marketing, solicitation, or resale" must be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

4. In interpreting the Public Records Law, the Ohio Supreme Court has held that, if a requested public record is kept on computer tapes (or, presumably, in another form that "adds value" to the utility of the record by organization or compression), and the person who submits the request presents a legitimate reason why a paper copy is insufficient or impracticable and assumes the expense of copying, the public office must allow the person to copy the computerized form. *State ex rel. Margolius v. City of Cleveland, et al.* (1992), 62 Ohio St. 3d 456; *State ex rel. The Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St. 3d 619; also, *A.C.P.O.A. v. City of Athens* (Ct. App., Athens Cty., 1992), 85 Ohio App. 3d 129. However, a person who submits a request for a copy of a public record cannot force the public office to create new information, create a new analysis of existing information, or store records in a particular medium. *Margolius, supra*; *State ex rel. Fant v. Mengel* (1992), 61 Ohio St. 3d 455; *State ex rel. Scanlon v. Deters* (1989), 45 Ohio St. 3d 376; also, *State ex rel. Kinsley v. Berea Bd. of Education* (Ct. App., Cuyahoga Cty., 1990), 64 Ohio App. 3d 659.

Related to this portion of the bill, under existing R.C. 9.01: (a) an officer, office, court, commission, board, institution, department, agency or employee of the state or a political subdivision of the state is authorized to use photostatic, photographic, miniature photographic, film, microfilm, or microphotographic process, or perforated tape, magnetic tape, other magnetic means, electronic data processing, machine readable means, graphic or video display, or any combination thereof to keep records and information, (b) any such photographs, microphotographs, microfilms, or films so used must

be placed and kept in conveniently accessible, fireproof, and insulated files, cabinets, or containers, and provisions must be made for preserving, safekeeping, using, examining, exhibiting, projecting, and enlarging the same whenever requested during office hours, and (c) all persons who utilize any of the specified methods for keeping records and information *must keep and make readily available to the public the machines and equipment necessary to reproduce the records and information in a readable form.*

5. In interpreting the Public Records Law, the Ohio Supreme Court has held that a public office that receives a request for a copy of a public record is under no duty to mail the requested records to the person who submitted the request. *State ex rel Fenley v. Ohio Historical Society* (1992), 64 Ohio St. 3d 509; *Nelson v. Fuerst* (1993), 66 Ohio St. 3d 47; *State ex rel. Johnson v. Slaby* (1993) 67 Ohio St. 3d 572. It also has held that the provision in the law that specifies that copies be furnished *at cost* means that they must be furnished for the actual cost involved in making the copy and cannot include any charge for the time that employees of the public office spend making the copies. *Hutson, supra*. In the cited case, the Court held that the policy of a public office to charge \$5 for the first page of copying for each separate file in response to a public records request was invalid, because there was no evidence that the \$5 charge was tied to the actual costs of copying the record.

6. In interpreting the Public Records Law, the Ohio Supreme Court has held that, since attorney's fees are regarded as punitive, a person who requests public records under that Law and who commences an action to enforce the provisions of that Law must demonstrate a sufficient benefit to the public to warrant an award of attorney's fees, and that the court also may consider the reasonableness of the respondent's refusal to comply with the person's request. *Hutson, supra*; *State ex rel. Beacon Journal Publishing v. Ohio Dept. of Health* (1990), 51 Ohio St. 3d 1.

HISTORY

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