



Ohio Legislative Service Commission

122nd Final Bill Analysis

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Sub. S.B. 200

122nd General Assembly
(As Passed by the General Assembly)

Sens. Cupp, Watts, Herington, Hottinger, Mumper, Carnes, Blessing, Finan, Suhadolnik

Reps. Buchy, Kasputis, Callender, Salerno, Corbin, Reid, Grendell, Perz, Bender, Williams, Willamowski, Mottl, Tiberi

Effective date: ** The Legislative Service Commission had not received formal notification of the effective date at the time this analysis was prepared.

- Statutorily defines the "practice of public accounting" and makes other definitional revisions in the Accountancy Board Law.
- Allows nonaccountants to own a minority equity interest in a public accounting firm.
- Reduces the experience requirement for becoming a CPA.
- Allows CPAs from certain other states to practice accounting in Ohio without the need to obtain an Ohio CPA certificate or practice permit, but subjects persons who exercise this privilege to the jurisdiction and discipline of the Accountancy Board.
- Expands the registration requirements for a public accounting firm and modifies the disciplinary sanctions for violating those requirements and certain other provisions of the Accountancy Board Law.
- Authorizes the Accountancy Board to investigate violations of the Accountancy Board Law or Board rules before commencing disciplinary proceedings against an accountant or an accounting firm or before taking legal action against a person for the unauthorized practice of public accounting.
- Specifies that statements, records, schedules, working papers, and memoranda that a CPA or PA makes incident to or in the course of performing an audit of a public office or private entity and that are in the Auditor of State's possession are not public records.

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Definitions

CONTENT AND OPERATION

Definition of public accounting

Background "administrative" law

Formerly, the "practice of public accounting" was not defined in the Revised Code but was defined in Rule 4701-1-09 of the Accountancy Board as follows:

"Practice of (or practicing) public accountancy" means the performance or the offering to perform by a person or firm, holding itself out to the public as a licensee, for a client or potential client, of one or more kinds of services involving the use of accounting or auditing skills, including the issuance of reports on financial statements, or of one or more kinds of management advisory, financial advisory or consulting services, or the preparation of tax returns or the furnishing of advice on tax matters.

Changes made by the act

Definition of the practice. The act enacts the following *statutory* definition of the "practice of public accounting" in the Accountancy Board Law (sec. 4701.01(A)):

"Practice of public accounting" means performing or offering to perform any engagement that will result in the issuance of an attest report and, with respect to a person who holds a CPA certificate, PA registration, foreign certificate, or firm registration, any other services involving the use of accounting or auditing skills as established by rules adopted by the accountancy board.

Under the statutory definition, there are two ways to engage in the practice of public accounting. The first is to perform or offer to perform any engagement that will result in the issuance of an *attest report*--which the act defines as an opinion report, review report, compilation report, examination report, agreed-upon procedures report, or any similar report prepared in accordance with standards established by the American Institute of Certified Public Accountants with respect to a financial statement or other financial information (sec. 4701.01(S)). The most important attest report is the *opinion report* in which the accountant essentially attests to (i.e., provides assurance concerning) the fairness and dependability of the balance sheet, income statement, and other financial statements of the entity that the accountant has audited and whether the statements conform with generally accepted accounting principles. Generally similar to former law, the act prohibits any individual from issuing an opinion report or other type of attest report indicating that the individual is an accountant or auditor, has expert knowledge in accounting or auditing, or has expert knowledge regarding compliance with conditions established by law or contract unless the individual holds an Ohio permit issued by the Accountancy Board (see below), but the act excludes from that prohibition (1) an officer, employee, partner, or principal of an organization who signs in a specified manner any statement or report referring to the financial affairs of that organization and (2) a public official or employee who performs his or her duties (sec. 4701.14(D)).

The second way to engage in the practice of public accounting under the statutory definition is for a person who holds a CPA certificate, PA registration, foreign certificate, or firm registration to perform or offer to perform any services (other than the attest function) that involve the use of accounting or auditing skills as established by rules adopted by the Accountancy Board. PAs (public accountants) are a dying class since, under continuing law, (1) a person cannot be registered as a PA unless the person applied on or before April 16, 1993, to be registered as a PA, and (2) any PA is eligible to receive a CPA certificate if the accountant has had a PA practice permit under Ohio law for at least ten years

and has completed and reported to the Accountancy Board the requisite continuing education hours, and if the firm that employs the accountant or in which the accountant has an interest is registered and meets the quality review (i.e., peer review) requirements of the Accountancy Board. Candidates for PA registration had to meet requirements similar to those that applied to candidates for CPA certification, except that PA candidates had to pass (1) only the accounting practice and auditing sections of the uniform CPA examination (rather than all four sections of the examination, as CPAs were and are required to do), (2) the uniform National Society of Public Accountants examination, or (3) a comparable examination approved by the public accountant members of the Accountancy Board. (Secs. 4701.061 and 4701.07.) As of April 16, 1993, CPAs are the only accountants who can be appointed to the Accountancy Board (sec. 4701.02, not in the act).

Definitions of "permits" and "registrations." A PA or CPA needs more than registration as a PA or certification as a CPA *to practice public accounting*. The accountant also needs a practice permit, formerly referred to as a "live permit," that is not suspended or revoked. The act replaces the term "live permit" with the term "Ohio permit," i.e., a permit to practice public accounting that is available to Ohio PAs and CPAs and to certain foreign country PAs and that is not revoked or suspended. A PA or CPA who is *not in the practice of public accounting* in Ohio is required by continuing law to register with the Accountancy Board, and under the act, an accountant of that nature is said to have an "Ohio registration" rather than an "Ohio permit." (Sec. 4701.01(A), (M), and (N); secs. 1111.01(G)(2), 2925.01(W)(2), 4701.04, 4701.06, 4701.061, 4701.07, 4701.10, 4701.11, 4701.12, 4701.13, 4701.14, and 4701.16.)

Discipline. The act authorizes the Accountancy Board, after notice and hearing, to discipline in specified manners *any person whose activities are regulated by the Board* in the same ways that it can discipline a person holding an Ohio permit, Ohio registration, firm registration, CPA certificate, or PA registration (sec. 4701.16(A)).

Requirements to become a CPA

Under continuing law, two of the requirements for becoming a CPA are (1) being of good moral character and (2) meeting the education and experience qualifications prescribed by law (sec. 4701.06(C) and (D)).

Good moral character: definition

The act adds a definition of "good moral character" to the Accountancy Board Law. The phrase means the combination of personal traits of honesty, integrity, attention to duty, forthrightness, and self-restraint that enables a person to discharge the duties of the accounting profession fully and faithfully. Under the act, a history of *dishonest acts or felonious acts or convictions* is sufficient to prove a lack of good moral character if that history demonstrates, by a preponderance of the evidence, that the person lacks one or more of the personal traits listed above.

A person who has a *felony conviction* related to one or more of those personal traits bears the burden of establishing the person's present good moral character, including the person's full and complete rehabilitation subsequent to the conviction. The act permits the Accountancy Board to delay a determination of the good moral character of a person of that nature until one year after completion of the person's sentence on the felony conviction, including any period under a community control sanction or post-release control. The act contains a list of factors that the Accountancy Board may consider in determining whether a person of that nature has met the burden of proving "good moral character." (Sec. 4701.01(V).)

Experience qualification

Under former law, if certain education requirements are satisfied, the experience qualification for becoming a CPA is (1) *two years* of public accounting experience that is satisfactory to the Accountancy Board (one year if the person has a master's degree in accounting or business administration and certain educational requirements are satisfied) in any state *in practice* as a PA or CPA or in any state *in employment* as a staff accountant practicing public accounting, (2) two-years (one year under the described exception) experience in private or governmental accounting that is, in the opinion of the Accountancy Board, the equivalent of the public accounting practice described in (1), above, or (3) any combination of the types of experience described in (1) and (2), above. The act substitutes for this requirement *one year* of experience, satisfactory to the Accountancy Board, in (1) a public accounting firm, (2) government, (3) business, or (4) academia. (Sec. 4701.06(D)(2)(a).)

The four-year experience requirement continues unchanged for persons who, on or after January 1, 2000, do not graduate with a B.A. or higher degree that includes the successful completion of 150 semester hours of undergraduate or graduate education and subjects that the Accountancy Board considers appropriate (sec. 4701.06(D)(1)(b) and (2)(b)).

Substantial equivalency of CPA "foreign certificates"

Under the act, any individual whose principal place of business is not in Ohio and who holds a valid "foreign certificate" as a CPA (i.e., a certificate as a CPA issued under *the laws of another state*) must be presumed to have qualifications substantially equivalent to Ohio's CPA requirements if the Accountancy Board has found and has specified in its rules that the CPA requirements of the state that issued the individual's foreign certificate are substantially equivalent to Ohio's CPA

requirements. The act grants an individual of that nature all of the privileges of a holder of an Ohio CPA certificate and an Ohio permit (including the right to practice public accounting in Ohio) without the need to obtain an Ohio CPA certificate and an Ohio permit. Under the act, any individual exercising this privilege consents and is subject to the following (secs. 4701.01(R) and 4701.14(I)(1) and (2)):

- (1) The personal and subject matter jurisdiction of the Accountancy Board;
- (2) All practice and disciplinary provisions of the Accountancy Board Law and the Board's rules;
- (3) The appointment of the board that issued the individual's foreign certificate as the individual's agent upon whom process (e.g., a summons) may be served in any action or proceeding by the Accountancy Board against the individual.

In addition, the act makes *any holder of an Ohio CPA certificate and an Ohio permit* who offers or renders attest services or uses the holder's CPA title *in another state* subject to disciplinary action in Ohio for an act that the person commits in the other state for which the holder of a foreign certificate issued in that state would be subject to discipline in that state (sec. 4701.14(I)(3)). Similarly, the act makes the *holder of a foreign certificate* who offers or renders attest services or uses a CPA title or designation in Ohio pursuant to the privilege described above subject to disciplinary action in Ohio for any act that would subject the holder of an Ohio certificate and an Ohio permit to disciplinary action in Ohio (sec. 4701.14(I)(4)).

Finally, the act permits the Accountancy Board to revoke or suspend the privileges of a foreign certificate holder to offer or render attest services in Ohio or to use a CPA title or designation in Ohio if the Accountancy Board finds, after notice and hearing, that the holder has engaged in any of several types of prohibited conduct listed in the Accountancy Board Law (sec. 4701.16(A) and (B)(7)).

Public accounting firms: business organization forms and "equity interests"

Former law

Under former law, a partnership could not indicate that it was composed of CPAs unless (1) at least one general partner, and every partner who was personally engaged in Ohio in the practice of public accounting as a member of the partnership, was *an Ohio CPA* in good standing, (2) each partner was a CPA of *some state* in good standing, *and* (3) each resident manager in charge of an office of the firm in Ohio was an *Ohio CPA* in good standing. Likewise, a partnership could not indicate that it was composed of PAs unless it had PAs or CPAs in good standing in these three respects. (Former sec. 4701.14(B) and (D).)

Similarly, a professional association or corporation-for-profit for the practice of public accounting could not assume or use the title "certified public accountant" unless all of its shareholders were CPAs in good standing under the laws of Ohio or another state. Additionally, the professional association or corporation could not assume or use the title "public accountant" unless all of its shareholders were PAs or CPAs in good standing under the Accountancy Board Law. (Former sec. 4701.14(F).)

Finally, a limited liability company formed in Ohio to render public accounting services could not assume and use (1) the title "certified public accountant" unless each member of the company and, if the management of the company was not reserved to its members, each manager of the company was a CPA in good standing under the laws of Ohio or some other state or (2) the title "public accountant" unless each member of the company and, if the management of the company was not reserved to its members, each manager of the company was a PA or CPA in good standing under the Accountancy Board Law. (Former sec. 4701.14(F).)

Changes made by the act

The act generally repeals the restrictions described under "***Former law***," above, substitutes new restrictions, and permits a person who has neither an Ohio permit nor a foreign certificate to directly or indirectly own an *equity interest* in an Ohio public accounting firm. The act specifically provides in these respects as follows (secs. 4701.04(D) and (E) and 4701.14(C)):

- (1) Generally, no partnership, professional association, corporation-for-profit, limited liability company, or other business organization that is practicing public accounting in Ohio may assume or use the title or designation "certified public accountant," "public accountant," or a related title or designation except as specified in this paragraph. A partnership that is a *registered firm* may assume or use the title or designation "certified public accountant" or a related title or designation if a majority of its partners who are individuals hold a *CPA certificate* or a *foreign certificate* and if a majority of the owners of any *qualified firm* that is a partner hold a CPA certificate or a foreign certificate. (The act defines a "qualified firm" as a sole proprietorship, partnership, professional association, corporation-for-profit, limited liability company, or other business organization in which the individuals who own a majority of the business organization interests in the business organization and *control* it hold an Ohio permit or a foreign certificate.) Similar requirements apply with respect

to a partnership that is a registered firm and that assumes or uses the title or designation "public accountant" (PAs or CPAs must constitute the required majorities). In addition, the act sets forth similar requirements for professional associations, corporations-for-profit, and limited liability companies that are registered firms, except that for them the requirements apply to a majority of the shareholders or owners of a shareholder-qualified firm (in the case of professional associations and corporations-for-profit) and to a majority of the members or owners of a member-qualified firm (in the case of limited liability companies). (Secs. 4701.01(I) and 4701.14(C)(1) to (4).)

(2) A person who does not hold an Ohio permit or a foreign certificate may own an equity interest in an Ohio public accounting firm if all of the following are satisfied (sec. 4701.04(D)):

(a) All individuals *who have an Ohio permit or a foreign certificate* and who own equity interests in the public accounting firm, and all qualified firms that own equity interests in the firm, must directly or indirectly own, in the aggregate, a *majority of the equity interests* in the firm and *must control it*. (A person who owns a *voting equity interest* in the firm may not delegate by proxy or otherwise the duty to exercise any voting rights to a person that does not hold an Ohio permit or a foreign certificate or that is not a qualified firm (sec. 4701.04(E)).)

(b) The person does not assume or use any title or designation that tends to indicate or is likely to be confused with "certified public accountant" or "CPA."

(c) The person is not in violation of any character or conduct standard that the Accountancy Board has established by rule.

(d) The person does not participate in the business of the public accounting firm solely or predominantly as a passive investor. Rather, the person's participation is the person's principal occupation and consists of providing services to or on behalf of the firm.

(e) The person has at least a bachelor's degree from a college or university approved by the Accountancy Board.

(f) The person meets or exceeds the continuing education requirements established by rule of the Accountancy Board.

(g) The person complies with the requirements of any professional license, registration, or certification that the person holds.

(h) The person abides by the Code of Conduct of the American Institute of Certified Public Accountants or a comparable code of professional conduct that the Accountancy Board adopts by rule.

(i) The person complies with all applicable provisions of the Accountancy Board Law and rules adopted by the Board.

Registration of public accounting firms

When

Former law required *a new* public accounting firm to apply for initial registration within 90 days of formation and *all* public accounting firms to renew their registration triennially. The act does not affect the triennial "firm registration" renewals but requires public accounting firms to apply for *initial registration* within 90 days after formation or within 90 days of the commencement of practicing public accounting in Ohio. (Sec. 4701.04(B).)

Information and reviews

Under former law, to register, a public accounting firm had to submit to the Accountancy Board information on all license holders employed by it and generally had to undergo a *quality review* (renamed *peer review* in the act) to determine the firm's degree of compliance with generally accepted accounting principles, generally accepted auditing standards, and other generally accepted technical standards. The Accountancy Board designated the quality review committees (renamed *peer review committees* in the act) that advised it on whether the Board's guidelines were being followed, and the Board was required to establish fair and reasonable compensation for the committee members.

The act expands the types of information that a firm must submit to the Accountancy Board with its initial and renewal registration applications, partly to take note of persons who might own equity interests in the firm but who do not hold an Ohio permit or a foreign certificate. The act also authorizes, rather than requires as under former law, the Accountancy Board to establish compensation for members of the renamed peer review committees. (Secs. 4701.01(D) and 4701.04(B) and (G)(1).)

Other new registration requirements

The act also requires a public accounting firm to satisfy the following requirements in order to register (sec. 4701.04(C)):

(1) Each partner, shareholder, member, or other person owning an equity interest in a public accounting firm must hold an Ohio permit or a foreign certificate or satisfy the conditions set forth in the act for those persons.

(2) The chief executive of any office of a public accounting firm located in or doing business in Ohio must hold an Ohio permit or a foreign certificate.

(3) The holder of an Ohio permit or a foreign certificate who owns an equity interest in or is employed by a public accounting firm, or a qualified firm that owns an equity interest in the public accounting firm, must assume *ultimate responsibility* for any attest report issued from an office of the firm located in Ohio. Relatedly, each individual in a public accounting firm who *signs* any attest report issued from that type of office must hold an Ohio permit.

(4) A public accounting firm must provide for the *transfer* (i.e., purchase) of the equity interest of a person who does *not* hold an Ohio permit or a foreign certificate to either the firm itself or to a person who owns an equity interest in the firm if the person who does not hold an Ohio permit or a foreign certificate withdraws from or ceases to be employed by the firm.

Noncompliance sanctions

The act makes a public accounting firm or other person that fails to comply with the firm registration requirements, with Accountancy Board standards and practices guidelines as shown by a peer review committee report, or with the conditions under which a person who does not hold an Ohio permit or a foreign certificate may own an equity interest in a public accounting firm *subject to the same disciplinary sanctions* as apply under former law to the failure of a PA, CPA, or public accounting firm to obtain a live permit from or to register with the Accountancy Board (secs. 4701.04(H)(1)(a) (iv) and 4701.16(A)(9) and (11)). These disciplinary sanctions formerly included the following sanctions generally continued by the act (sec. 4701.16(B)(1) to (6)):

(1) Revocation or suspension of a CPA certificate or of a PA or public accounting firm registration;

(2) Revocation, suspension, or refusal to renew a permit to practice public accounting;

(3) Public censure of a registrant or certificate holder;

(4) Levying of a reasonable fine (as a penalty) not to exceed \$1,000 for each offense;

(5) In the case of dishonesty, fraud, or gross negligence in the practice of public accounting or in the case of a violation of an Accountancy Board rule of professional conduct, either or both (a) completion of remedial continuing education programs or (b) submission to quality (peer) review by a professional committee designated by the Accountancy Board.

The act enacts two other previously unmentioned sanctions that the Accountancy Board may impose as a disciplinary sanction (sec. 4701.16(B)(1) and (2)):

(1) *Refusal to renew* a CPA certificate, a PA registration, an Ohio permit, an Ohio registration, or a firm registration;

(2) Disqualification of a person who is not a holder of an Ohio permit or a foreign certificate from owning an equity interest in a public accounting firm or qualified firm.

Accountancy Board investigations

The act authorizes the Accountancy Board to investigate whether a person has violated any provision of the Accountancy Board Law, or any rule the Board has adopted under it, before commencing a disciplinary proceeding against an accountant or an accounting firm for an infraction of the law or rules or before taking legal action against a person for the unauthorized practice of public accountancy. An investigation of that nature is not subject to the Administrative Procedure Act. The Board may appoint a committee of its members or staff employees to conduct an investigation, and any Board member who participates in an investigation may participate actively in any hearing or proceeding to the same extent as a Board member who did not participate in the investigation. (Sec. 4701.29(A).)

During an investigation, the Board may administer oaths, order the taking of depositions, issue subpoenas, compel the attendance and testimony of a person at a deposition, and compel the production of any form of documentary evidence or record. Subpoenas and orders to compel issued by the Board during an investigation may be served by a Board designee or by certified mail, return receipt requested, to the residence or place of business of the individual, professional association, firm, corporation, partnership, sole proprietorship, limited liability company, or other business organization named in the subpoena or order. If a person fails to comply with a subpoena or order issued by the Board in connection with an investigation, the Board may apply to the Franklin County Court of Common Pleas for an order compelling compliance. Upon the application of the Board and upon evidence of the person's failure to comply, the Court of Common Pleas must compel compliance and may issue any contempt citation and sanction that it considers appropriate. (Sec. 4701.29(B) and (C)(2).)

The act declares these Board investigative proceedings to be confidential, not a public record, and not subject to discovery in a civil or administrative action or proceeding. Any witness who appears in response to a Board subpoena may request and is entitled to receive within a reasonable time after making a request the same fees and mileage as a witness receives in a civil case in a court of common pleas. (Sec. 4701.29(C)(1) and (D).)

Non-public records

Background law

Under continuing law, all statements, records, schedules, working papers, and memoranda (hereafter "listed accounting items") made by a CPA or PA *incident to or in the course of professional service* to clients, except reports submitted to a client, generally must be and must remain the *CPA's or PA's property*. This general rule does not apply if an express agreement between the CPA or PA and the client provides to the contrary. In addition, under continuing law, the CPA or PA apparently generally cannot sell, transfer, or bequeath any of the listed accounting items to any person (apparently other than the client) without the client's consent or the consent of the client's personal representative or assignee. An exception to that general rule exists for transfers, etc. to the CPA's or PA's surviving or new partners.

Finally, under continuing law, if a CPA or PA makes any of the listed accounting items *incident to or in the course of performing an audit of a public office or private entity*, the general statutory rule is that the involved items *are not public records* subject to inspection or copying under the Public Records Law (sec. 149-43--not in the act). A statutory exception to that general rule exists for reports that the CPA or PA has submitted to the client involved. (Sec. 4701.19.) (See **COMMENT**.)

Changes made by the act

The act additionally specifies in the Accountancy Board Law's "non-public records provisions" that statements, records, schedules, working papers, and memoranda that a CPA or PA makes *incident to or in the course of performing an audit of a public office or private entity* and that *are in the possession of the Auditor of State* also are not a public record subject to inspection or copying under the Public Records Law (sec. 4701.19(B)).

Definitions

The act defines the following additional terms for use in the Accountancy Board Law (sec. 4701.01(J), (K), (L), (O), (P), and (Q)):

- (1) "Own" means any direct or indirect ownership of an equity interest in a public accounting firm or qualified firm.
- (2) "Control" or "controlled" means the right to exercise the majority of the voting equity interests in a public accounting firm or qualified firm with respect to any matter.
- (3) "Equity interest" means any capital interest or profit interest in a sole proprietorship, partnership, professional association, corporation-for-profit, limited liability company, or other business organization.
- (4) "Firm registration" or "registered firm" means registration as a public accounting firm under section 4701.04 of the Revised Code.
- (5) "PA registration" means registration as a public accountant under section 4701.07 of the Revised Code that is not revoked or suspended.
- (6) "CPA certificate" means a certificate issued under section 4701.06 or 4701.061 of the Revised Code that is not revoked or suspended.

COMMENT

In *State, ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St. 3d 37, the Ohio Supreme Court construed section 4701.19(B)'s "non-public record provisions" to not prohibit the Auditor of State from complying with a public records request made pursuant to the Public Records Law *under specified circumstances*. The act's proposed addition to section 4701.19(B) relative to "non-public records of CPAs and PAs" in the Auditor of State's *possession* may have some implications for the *Mazzaro* holding.

In *Mazzaro*, the relevant facts were that the relator had sought a writ of mandamus compelling the Auditor of State to produce records from a city audit (Euclid) that the Auditor of State had commenced and that was completed by a private auditor (Deloitte, Haskins & Sells). The Court of Appeals for Cuyahoga County had granted a peremptory writ of mandamus and awarded the relator costs and attorney's fees. The Auditor of State appealed.

The Supreme Court's decision in *Mazzaro* was a per curiam decision. With respect to the scope of the Public Records

Law, its interaction with section 4701.19's "non-public record provisions," and their combined effect upon the Auditor of State's general responsibility to comply with public records requests, the Supreme Court held as follows:

This appeal raises three questions for our review: (1) Did the court of appeals err in deciding that R.C. 149.43(B) required the Auditor to produce for inspection the Euclid audit records *he had access to, but did not actually possess?* . . .

For the following reasons, we hold that R.C. 149.43(B) requires the Auditor to produce the pertinent records, and further, that the court of appeals had a sufficient basis for so holding. . . . Accordingly, we affirm.

. . .

R.C. 149.43(B) requires a governmental unit to promptly prepare and allow inspection of all public records, and to provide copies at cost within a reasonable time. With some exceptions, R.C. 149.43(A)(1) defines a "public record" as any record kept by a public office. Under R.C. 149.011(G), a public office's "records" include:

"[A]ny 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 serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."

. . .

. . . First, we believe that R.C. 149.011(G) is broad enough to encompass "anything a governmental unit utilizes to carry out its duties and responsibilities. . . . Here, the Auditor either did or could have used Deloitte's records in furtherance of its responsibility to complete the Euclid biennial audit. Thus, *we hold that the records are within the Auditor's jurisdiction and that he is subject to a writ of mandamus ordering him to make them available for inspection.*

Second, although *amicus curiae*, the Ohio Society of Certified Public Accountants, and Mazzaro also argue that an agency relationship is necessary for us to find these records within the Auditor's jurisdiction, we are not so convinced. Rather, we believe, as did the court of appeals, that the operative inquiry is whether Deloitte prepared the relevant records by reason of authority delegated by the Auditor. . . . Thus, *we hold that where (1) a private entity prepares records in order to carry out a public office's responsibilities, (2) the public office is able to monitor the private entity's performance, and (3) the public office has access to the records for this purpose*, a relator in an R.C. 149.43(C) mandamus action is entitled to relief regardless of whether he also shows that the private entity is acting as the public office's agent.

We come to these conclusions because they are consistent with R.C. 149.43(C), which allows a mandamus action against either the governmental unit or the person responsible for a public record. In our view, the disjunctive used in R.C. 149.43(C) manifests an intent to afford access to public records, even when a private entity is responsible for the records. . . .

Our conclusions also result from the broad construction of the definition of "public records" that our earlier decisions require. . . . Moreover, by construing R.C. 149.011(G) to include any material on which a public office could or did rely, our decision preserves the *public's right of access to public records, regardless of where they are physically located, or in whose possession they may be.*

R.C. 4701.19, however, makes all statements, records, schedules, working papers, and memoranda incident to an audit the property of the certified public accountant who performed the audit. Thus, although the Auditor must be afforded access to these materials under R.C. 117.21, R.C. 4701.19 establishes that they belong to the ICPA performing the audit of a public office. Amicus argues that this property interest prevents us from holding such incidental materials also accessible to the public per R.C. 149.43(B).

Here again we disagree. *Records owned or possessed by private entities, like those belonging to public offices, are subject to statutory disclosure requirements.* R.C. 117.21 exemplifies one type of disclosure requirement--that an ICPA disclose the papers underlying an audit to the Auditor. It applies even though those papers belong to the ICPA. *Similarly, R.C. 149.43(B) requires the*

disclosure of public records and also applies despite any ownership interest. . . .

Accordingly, we hold that when a private entity carries out the duties or responsibilities of a public office and the public office has a right of access to records documenting this, the records are within the public office's jurisdiction and the public office must make them available for public inspection per R.C. 149.43(B). We therefore find that the Auditor had a duty to produce for inspection all the records Mazzaro asked to see.

49 Ohio St. 3d at 38-40 (emphasis added).

HISTORY

ACTION DATE JOURNAL ENTRY

Introduced 11-25-97 p. 1404

Reported, S. Finance &

Financial Institutions 03-25-98 p. 1791

Passed Senate (32-0) 04-01-98 pp. 1821-1822

Reported, H. Civil &

Commercial Law 12-02-98 p. 2865

Passed House (93-0) 12-08-98 pp. 2892-2893

Concurrence by Senate in

House amendments (25-1) 12-16-98 p. 2463

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