



H.B. 95

123rd General Assembly
(As Passed by the House)

**Reps. Terwilleger, Callender, Taylor, Schuck, Haines, Barnes, Perry, Vesper,
Mottley, Logan, Perz, Roman, Grendell**

BILL SUMMARY

- Requires the court in a taxpayer's suit commenced under the Municipal Corporation Law to award a taxpayer who prevails in the suit the taxpayer's reasonable attorney's fees, court costs, and other reasonable expenses incurred in connection with the suit.
- Authorizes the court involved in a mandamus action under the Public Records Law to award to a prevailing person who was aggrieved under that Law the court costs and reasonable expenses incurred by that person in enforcing the public inspection or copying provisions of that Law; that award is in addition to existing law's authority to award a prevailing aggrieved person reasonable attorney's fees incurred in connection with the action.

CONTENT AND OPERATION

Background: mandamus actions: in general

A mandamus action is a civil action that a citizen commences under Chapter 2731. to compel a state or political subdivision official or entity to perform a function that the official or entity is responsible for performing. The plaintiff in the action (who is denoted "the relator") may commence the action only in the Ohio Supreme Court, a court of appeals, or a court of common pleas and generally must establish each of the following before the court may issue an "extraordinary" writ of mandamus compelling the governmental official or entity (denoted "the respondent") to perform the function involved: (1) that the relator has a clear legal right to the relief requested, (2) that the respondent is under a

clear legal duty to perform the requested act, and (3) that the relator does not have a plain and adequate remedy at law.¹

If the relator prevails in a mandamus action, the court must grant a peremptory writ of mandamus without delay, and the relator may recover the "costs" that the relator incurred in the action and the damages that the relator sustained as a result of the respondent's failure to perform the particular function. Those damages are determined by "the court or a jury, or by a referee or master, as in a civil action." If the respondent prevails in a mandamus action, the court must assess "all costs" against the relator. (Sec. 2731.11 and sec. 2731.12--not in the bill.)² (See **COMMENT 1**.)

Taxpayer's suits under Municipal Corporation Law

Existing law

Under existing law, a village solicitor or city director of law is required to apply, in the name of the municipal corporation involved, to the appropriate court for an *injunction* to restrain the misapplication of funds of the municipal corporation, the abuse of its corporate powers, or the execution or performance of a contract that is made on behalf of the municipal corporation and that is in contravention of the laws or ordinance governing the contract or was procured by fraud or corruption. A village solicitor or city director of law also similarly must apply to an appropriate court for the *forfeiture* or *specific performance* of an obligation or contract that was made on behalf of the municipal corporation involved and that granted a right or easement or created a public duty, if that obligation or contract is being evaded or violated. In addition, if an officer or

¹ *The Ohio Supreme Court has firmly established these criteria in a long series of decisions that includes State, ex rel. Plain Dealer Pub. Co., v. Lesak (1984), 9 Ohio St.3d 1; State, ex rel. Fostoria Daily Review Co., v. Fostoria Hosp. Ass'n. (1988), 40 Ohio St.3d 10; State, ex rel. Wright, v. Ohio Adult Parole Auth. (1996), 75 Ohio St.3d 82; and State, ex rel. Toledo Edison Co., v. Clyde (1996), 76 Ohio St.3d 508. See also sections 2731.01, 2731.02, and 2731.05 of the Revised Code (not in the bill).*

² *The terms "costs" and "damages" in existing section 2731.11 refer to court costs and compensatory damages and do not include attorney's fees and other reasonable expenses incurred by a prevailing relator. See, State, ex rel. Bosch, v. Indus. Comm. (1982), 1 Ohio St.3d 94; State, ex rel. Murphy v. Indus. Comm. (1980), 61 Ohio St.2d 312; and State, ex rel. Grosser, v. Boy (1976), 46 Ohio St.2d 184. Ohio follows the American Rule relative to an award of reasonable attorney's fees to a prevailing party in a civil action--generally, in the absence of a statutory authorization of an award of that nature, a prevailing party is not entitled to recover that party's reasonable attorney's fees.*

board of a municipal corporation fails to perform "any duty expressly enjoined by law or ordinance," a village solicitor or city director of law similarly must apply to the appropriate court for a *writ of mandamus* to compel the performance of the duty. If a village solicitor or city director of law fails, upon the written request of a taxpayer of the municipal corporation involved, to make any of these types of applications, the taxpayer may commence under specified circumstances a "taxpayer's suit" on behalf of the municipal corporation in the appropriate court. One of those circumstances is the provision of "security for the cost" of the judicial proceedings. (Secs. 733.56 to 733.59--not in the bill.)

If the court involved in a taxpayer's suit of the type described in the preceding paragraph is satisfied that the taxpayer had good cause to believe that the taxpayer's allegations were well-founded or if the court finds that the allegations are sufficient in law, the court must enter an order "as the equity of the case demands" and must allow the taxpayer the "costs" that the taxpayer incurred in the suit. If judgment is finally ordered in the taxpayer's favor, the court *may allow* the taxpayer, "as part of the costs, a reasonable compensation for his attorney." (Sec. 733.61.)³

Operation of the bill

The bill maintains the requirement of existing law that, in a taxpayer's suite of the type described above, a court must enter an order "that the equity of the case demands" if the court finds that the taxpayer had good cause to believe that the allegations made in the suit were well-founded or if the court finds that those allegations are sufficient in law. If either circumstance applies, the bill requires the court to grant the taxpayer the taxpayer's court costs (similar to existing law), and, if judgment is finally ordered in the taxpayer's favor, the bill *requires* the court (in contrast to existing law's discretionary court authority) to award the taxpayer the taxpayer's reasonable attorney's fees, court costs, and other reasonable expenses incurred in connection with the taxpayer's suit. (Sec. 733.61.)

³ *The Ohio Supreme Court has held that an award of attorney's fees under section 733.61 is entirely within the discretion of the court involved and generally will not be awarded unless there is demonstrated a sufficient tangible or intangible benefit that was bestowed upon the public as a result of a taxpayer's efforts in the taxpayer's suit. See Harrison v. Judge (1992), 63 Ohio St.3d 766; State, ex rel. Citizens for a Better Portsmouth, v. Sydnor (1991), 61 Ohio St.3d 49; and State, ex rel. Hirshler, v. Frazier (1980), 63 Ohio St.2d 333.*

Public Records Law enforcement

Existing law

Under the Public Records (PR) Law, all public records must be promptly prepared and made available for public inspection, and governmental units must maintain public records in a manner that facilitates their availability for inspection. The person responsible for a public record (1) must make it available for inspection by any person at all reasonable times during regular business hours and (2) must make copies of it available, upon request of any person, "at cost" within a reasonable period of time. (Sec. 149.43(B).)

The PR Law defines a "public record" to generally mean any "record" that is kept by any "public office" (see **COMMENT 2**), including, but not limited to, state, county, city, village, township, and school district units. The definition is subject to specified exceptions, such as medical records, trial preparation records, confidential law enforcement investigatory records, certain DNA records, and records the release of which is prohibited by state or federal law. If a record falls within an exception to the definition, it is not subject to the PR Law's inspection and copying provisions. However, an excepted record possibly may be subject to inspection or copying under another state or federal law (such as the Personal Information Systems Law--R.C. Chapter 1347.), or pursuant to rules of court or a judicial order. (Sec. 149.43(A) and (D).)

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 PR Law, 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 allegedly aggrieved person in accordance with the PR Law, the allegedly aggrieved person may commence a *mandamus action* in an appropriate court of common pleas or court of appeals or in the Ohio Supreme Court to obtain a judgment that orders the governmental unit or the person responsible for the public record to comply with the PR Law's applicable requirements. If the allegedly aggrieved person prevails in the mandamus action, the court is authorized to award reasonable attorney's fees to that person. (Sec. 149.43(C).) (See **COMMENT 3**.)

Operation of the bill

The bill authorizes the court involved in a mandamus action under the PR Law to grant to a prevailing allegedly aggrieved person an award of the *court costs* and other *reasonable expenses* incurred by that person in connection with the

action. That award is in addition to the reasonable attorney's fees award authorized by existing law. (Sec. 149.43(C).) (See **COMMENT 4.**)

COMMENT

1. The General Mandamus Action Law is Chapter 2731. of the Revised Code. Other sections throughout the Revised Code contain *special* provisions granting a remedy in the nature of a mandamus action to compel the performance of a specific act or acts that the particular statute imposes as a duty or responsibility of a governmental official or entity to perform. Examples of these special provisions are found in the statute in the Municipal Corporation Law authorizing taxpayer's suits and in the enforcement provisions of the Public Records Law. The scope of the bill covers only those sections pertaining to taxpayer's suits and the Public Records Law. The bill does *not* amend any section in Chapter 2731., the General Mandamus Action Law.

2. Section 149.011 of the Revised Code (not in the bill) defines the following terms that are used in the PR Law:

(a) "Public office" includes any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by Ohio laws 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 and Ohio laws for the exercise of any function of state government, including (among others) any court or judicial agency.

(c) "Records" includes any document, device, or item, regardless of physical form or characteristic, that is created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions and that serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

3. In *State ex rel. Pennington v. Gundler* (1996), 75 Ohio St.3d 171, the Ohio Supreme Court indicated that a reasonable attorney's fees award is not mandatory in a mandamus action under the PR Law. It stated in this regard as follows:

It is well established that "[i]n construing a statute, a court's paramount concern is the legislative intent in enacting the statute. * * * In determining legislative intent, the court first looks to the language

in the statute and the purpose to be accomplished." *State ex rel. Carter v. Wilkinson* (1994), 70 Ohio St. 3d 65, 66, 637 N.E.2d 1, 2, quoting *State v. S.R.* (1992), 63 Ohio St.3d 590, 594-595, 589 N.E.2d 1319, 1323. It is equally well settled that words used in a statute are to be taken in their usual, normal and customary meaning. R.C. 1.42. Further, absent ambiguity, the court must give effect to the plain meaning of a statute. *State v. Waddell* (1995), 71 Ohio St.3d 630, 631, 646 N.E.2d 821, 822.

In *State ex rel. Fox v. Cuyahoga Cty. Hosp. Sys.* (1988), 39 Ohio St.3d 108, 529 N.E.2d 443, we settled the issue of whether the awarding of attorney fees to a party who files a complaint pursuant to R.C. 149.43 is mandatory. Paragraph two of the syllabus states succinctly and clearly, "The award of attorney fees under R.C. 149.43(C) is not mandatory." We are not persuaded that the statute should now be interpreted differently.

75 Ohio St.3d at 173.

In its syllabus in *Pennington*, the Ohio Supreme Court held as follows:

A court may award attorney fees pursuant to R.C. 149.43 where (1) a person makes a proper request for public records pursuant to R.C. 149.43, (2) the custodian of the public records fails to comply with the person's request, (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records, and (4) the person receives the requested public records only after the mandamus action is filed, thereby rendering the claim for a writ of mandamus moot. . . .

75 Ohio St.3d at 171.

4. Courts currently are authorized to award "court costs" to a prevailing aggrieved person in a mandamus action under the existing PR Law despite the lack of an *express* reference to court costs in section 149.43(C). The reason is that

Civil Rule 54(D) states that "[e]xcept when express provision therefor is made either in a statute or in these rules, costs *shall be allowed* to the prevailing party unless the court otherwise directs" (emphasis added).

HISTORY

ACTION	DATE	JOURNAL ENTRY
Introduced	01-28-99	p. 118
Reported, H. Civil & Commercial Law	04-29-99	p. 498
Passed House (85-10)	05-11-99	pp. 621-622

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