Bill Analysis

David M. Gold *Legislative Service Commission*

S.B. 78

123rd General Assembly
(As Passed by the Senate)

Sens. Oelslager, Cupp, DiDonato, Mumper, Watts, Hottinger, Brady

BILL SUMMARY

- Generally 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 and to require advance payment.
- Conforms certain terminology in the Public Records Law with the definition of "public record."

CONTENT AND OPERATION

Existing law

General right of access to public records

The existing Public Records Law is contained in section 149.43 of the Revised Code. It imposes the following duties upon entities that exercise governmental functions 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* (see **COMMENT** 3) 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 provisions described above. (R.C. 149.43(B).)

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 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 in accordance with the 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 the general right of access and that awards reasonable attorney's fees to the person (R.C. 149.43(C)).

Operation of the bill

Conformance of terminology

In the existing provisions that require *governmental units* to maintain public records in a manner that they can be made available for inspection in accordance with the Public Records Law and that provide a remedy to a person allegedly aggrieved by a *governmental unit's* failure to promptly prepare a public record and make it available for inspection in accordance with the Law, the bill replaces the references to *governmental units* with references to *public offices* (R.C. 149.43(B)(1) and (C)).

Also, the bill expands the existing provisions that require a *person responsible for public records*, upon request, to make copies available at cost within a reasonable period of time and that provide a remedy to a person allegedly aggrieved by the failure of a *person responsible for public records* to make a copy available in accordance with the requirement, so that, in addition to applying to the person responsible for the public records, the provisions also impose the duty on *public offices* and also make the remedy available to a person allegedly aggrieved by a *public office's* failure to comply with the duty (R.C. 149.43(B)(1) and (C)).

The above-described changes make the provisions affected parallel the existing definition of public record, which generally includes *any record that is kept by any public office* (see **COMMENT** 1) and with the existing provision that requires all *public records* to be made available (*presumably by the public office that maintains them*) for inspection to any person at all reasonable times during regular business hours.

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, the public office or person responsible for the record must permit that person to choose to have the record 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 public office or person responsible determines that the record reasonably can be duplicated as an integral part of normal operations. 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)(2).) (See **COMMENT** 4.)

Mailing of copy of public record

The bill provides that, upon request, 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 the copy. The public office or person responsible may require the person making the request to pay in advance the cost of postage and other supplies used in the mailing. The bill permits any public office to adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail and specifies that a public office that adopts such a policy and procedures must comply with them in performing its duties. (R.C. 149.43(B)(3).) (See **COMMENT** 5.)

COMMENT

1. Existing law defines "public record" as 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: medical records; records pertaining to probation and parole proceedings; records pertaining to "judicial bypass" proceedings under the existing Abortion Notification Law, or the existing Abortion Informed Consent Law and to related appeals; records pertaining to adoption proceedings, including the contents of an adoption file maintained by the Department of Health; information in a record contained in the putative father registry; certain other adoption-related records; trial preparation records; confidential law enforcement investigatory records; mediation-related or Civil Rights Commission-related records containing information that is confidential; DNA records stored in the DNA database; inmate records released by the Department of Rehabilitation and Correction (DRC) to the

Department of Youth Services (DYS) or a court of record; records maintained by DYS pertaining to children in its custody released by DYS to DRC; intellectual property records; donor profile records; child support-related records maintained by the Department of Human Services; or records the release of which is prohibited by state or federal law.

2. Existing R.C. 149.011 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 or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

3. Currently, the Revised Code does not define "person who is responsible for public records." The Ohio Supreme Court has stated that, when statutes impose a duty on a particular official to oversee records, that official is the "person responsible" for the records under the Public Records Law. *State, ex rel. Mothers Against Drunk Drivers v. Gosser* (1985), 20 Ohio St.3d 30. It also has held that the Public Records Law applies when a private entity prepares records in order to carry out a public office's responsibilities, the public office can monitor the preparation, and the public office has access to the records for that purpose, and that the public office can be compelled to make the records available. *State, ex rel. Mazzaro v. Ferguson* (1989), 49 Ohio St.3d 37.

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, store records in a particular medium, or "reprogram" a computer to produce a particular compilation of information. *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; *State ex rel. Kerner v. State Teachers Retirement Bd.* (1998), 82 Ohio St.3d 273; 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, existing section 9.01 of the Revised Code provides that (a) any officer, office, court, commission, board, institution, department, agent, 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 requires 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.

HISTORY

ACTION	DATE	JOURNAL ENTRY	
Introduced	02-18-99	p.	141
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