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Bill Analysis
Legislative Service Commission

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(As Introduced)

Reps. Wagoner, Oelslager, Dyer, J. McGregor, Seitz, Bulp, R. McGregor, Combs, Fessler, Hite, Stebelton

BILL SUMMARY

- Authorizes a person aggrieved by a denial of a public records request under the Public Records Law or a denial of rights under the Open Meetings Law to file a formal or informal complaint with the Office of the Public Access Counselor created by the bill.
- Creates the Office of Public Access Counselor in the Court of Claims and sets forth the duties of the Public Access Counselor regarding the hearing of complaints, issuance of advisory opinions, submission of an annual report to the General Assembly, and other matters.
- Establishes procedures for the filing and hearing of complaints and requires the Public Access Counselor to try to help the parties reach an agreement following the filing of an informal complaint and to conduct an investigation following the filing of a formal complaint.
- Authorizes courts to enforce an agreement reached between a complainant and a public entity following the filing of a complaint.
- Requires the Public Access Counselor to issue an advisory opinion on a formal complaint, provides that the complainant may show the advisory opinion to the public office that denied the complainant's rights under the Open Meetings Law or Public Records Law, provides that an advisory opinion is not binding on a court, and provides that a court may not presume that the existence of an advisory opinion is evidence against or in favor of a reduction or denial of an award of reasonable attorney's fees to a litigant.

- Prohibits a person who commences a mandamus action in court under the Public Records Law regarding the denial of a public records request from thereafter filing a complaint with the Public Access Counselor with respect to the same public records request.
- Allows statutory damages in an action under the Public Records Law only if the court finds that the person filed a complaint with the Public Access Counselor and that the public office failed to meet its obligations.
- Allows an award of attorney's fees in an action under the Public Records Law only if the relator filed a formal complaint with the Public Access Counselor before filing the action and the Counselor issued an advisory opinion declaring that the relator has the right to inspect or copy the public records that are the subject of the formal complaint.
- Allows a person who files a complaint with the Public Access Counselor to withdraw the complaint and bring an action in court under the Open Meetings Law or Public Records Law.

CONTENT AND OPERATION

Open Meetings Law and Public Records Law

The Open Meetings Law and Public Records Law, referred to in the bill as the public access laws, are designed to give the public access to the activities and records of governmental agencies, boards, commissions, and other public bodies.

The Open Meetings Law requires boards, commissions, and other decision-making "public bodies" of state or local governmental agencies to adopt rules that establish reasonable methods by which any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. It prohibits a public body from holding a special meeting without at least 24 hours' advance notice to the news media that have requested notification, except in the event of an emergency requiring immediate official action. In the event of an emergency, the member or members calling the meeting must notify the news media that have requested notification immediately of the time, place, and purpose of the meeting. The rules must provide that any person, upon request and payment of a reasonable fee, may obtain reasonable advance notification of all meetings at which any specific type of public business is to be discussed. The statute exempts certain public bodies from these requirements under specified circumstances (for example, occupational licensing boards when considering disciplinary action against a licensee without a prior hearing), and it

establishes criteria for the holding of executive sessions (for example, a board may hold an executive session only upon a majority, roll-call vote conducted in public session and only to discuss confidential matters such as demotion of a public employee or impending legal actions). The Open Meetings Law authorizes any person to bring a lawsuit to enforce the statute by way of injunction. (R.C. 121.22.)

The Public Records Law¹ requires public offices to make public records available for inspection to any person at all reasonable times during regular business hours and to make copies of requested public records available at cost and within a reasonable period of time. A "public record" is a record kept by any public office, except records excluded from the definition for reasons of public policy (for example, medical records and trial preparation records). If a public office ultimately denies a request for records, in part or in whole, it must provide the requester with an explanation, including legal authority, setting forth why the request was denied. A person who claims to be aggrieved by the failure of a public office to comply with the requirements of the Public Records Law pertaining to the inspection and copying of public records may commence a mandamus action in the court of common pleas to compel compliance. The statute authorizes an award of damages of \$100 for each business day during which the public office failed to comply, up to a maximum of \$1,000, if the requestor transmitted a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office. The statute also authorizes an award of costs and, if the public office failed to respond in a timely manner or to abide by a promise to permit the relator² to inspect or receive copies of the public records requested within a specified period of time, reasonable attorney's fees. The court may reduce or refuse to award costs or attorney's fees if it finds that a well-informed public office could reasonably believe (1) that the acts or omissions that allegedly constituted noncompliance did not in fact constitute noncompliance under the law at that time and (2) that those acts or omissions served the public policy underlying authority that supposedly permitted the acts or omissions. (R.C. 149.43.)

¹ An amended version of R.C. 149.43 (Public Records) is scheduled to take effect on September 29, 2007. This is the version that the bill amends and that this analysis refers to as existing law.

² "Mandamus is a writ, issued in the name of the state to an inferior tribunal, a corporation, board, or person, commanding the performance of an act which the law specially enjoins as a duty resulting from an office, trust, or station" (R.C. 2731.01). The relator in a mandamus action is the person who claims to be aggrieved by the failure of a person or body to perform a duty.

Additional relief for violations of the Open Meetings Law or Public Records Law

The bill provides another form of relief for a violation of the Open Meetings Law, in addition to that provided under existing law, by allowing any person that is denied any of the person's rights under the statute to file a formal or informal complaint with the Public Access Counselor (see "**Public Access Counselor**" and "**Complaints**," below). With respect to a denial of a request for public records, the bill provides that if a request is ultimately denied, in part or in whole, the public office may provide the requester information on how to contact the office of the Public Access Counselor and on the procedures for filing a formal or informal complaint with the Counselor. (R.C. 121.22(K) and 149.43(B)(3)(b).)

The bill permits a person allegedly aggrieved by a denial of a request for public records to file either an informal or formal complaint with the Public Access Counselor, but it specifies that a person who commences a mandamus action in court may not thereafter file an informal or formal complaint with the Counselor with respect to the same public records request. Under the bill, a person is eligible for statutory damages in a mandamus action under the Public Records Law as described above (see "**Open Meetings Law and Public Records Law**") only if the court finds that the person filed an informal or formal complaint with the Counselor--regardless of whether or not the parties reached an agreement or the Counselor issued an advisory opinion (see "**Complaints**" and "**Advisory opinions on formal complaints**," below)--and that the public office failed to comply with an obligation under the Public Records Law. The court may award attorney's fees only if the relator filed a formal complaint with the Counselor before filing the mandamus action and the Counselor issued an advisory opinion declaring that the relator has the right to inspect or copy the public records that are the subject of the formal complaint. (R.C. 149.43(C).)

Public Access Counselor

Creation of the office

The bill creates the office of Public Access Counselor in the Court of Claims to handle complaints pertaining to alleged violations of the Open Meetings Law and the Public Records Law. The Chief Justice of the Supreme Court appoints the Counselor, who must be an attorney engaged in the practice of law in Ohio, to a four-year term and may remove the Counselor for cause. If a vacancy occurs, the Chief Justice appoints a successor to serve out the remainder of the term. The Counselor may not engage in any profession, occupation, practice, or business that may conflict with the Counselor's duties under the bill and may appoint any employees necessary to carry out the duties and functions of the office. (R.C. 2743.31(B), (C), and (D).)

Duties

The bill requires the Public Access Counselor to do all of the following (R.C. 2743.32):

(1) Assist the Attorney General in developing and providing training programs and seminars relating to access to public records and to open meetings of public bodies under R.C. 109.43;

(2) Receive informal complaints filed under R.C. 2743.33 alleging a public entity's denial of the person's rights under the public access laws and engage in dispute resolution to encourage the parties to the informal complaint to reach an agreement;

(3) Receive any formal complaint filed under R.C. 2743.33 alleging a public entity's denial of the person's rights under the public access laws, investigate the allegations in the complaint, and issue an advisory opinion regarding any of the person's rights that are the subject of the formal complaint;

(4) Make recommendations to the General Assembly and the Supreme Court concerning ways to improve public access to public records and to ensure public attendance at public meetings.

The bill also requires the Public Access Counselor to submit an annual report to the General Assembly and the Supreme Court by June 30 of each year that includes all of the following information for the preceding calendar year:

(1) The total numbers of formal and informal complaints received by the office;

(2) The numbers of formal and informal complaints received from the media and from the public in general;

(3) The total numbers of formal and informal complaints that resulted in an agreement reached by the parties to the complaint;

(4) The numbers of formal and informal complaints received in regard to the performance of duties by the applicable public entity under the Open Meetings Law or the Public Records Law by each of the following:

(a) Public entities, other than political subdivisions or agencies of political subdivisions;

(b) Offices and agencies of counties;

- (c) Offices and agencies of municipal corporations;
- (d) Offices and agencies of townships;
- (e) Boards of education;
- (f) Offices and agencies of other political subdivisions.

(5) The total number of advisory opinions issued by the Public Access Counselor.

Complaints

General

A person may, but is not required to, file a formal or informal complaint with the Public Access Counselor before commencing an action in court under the public access laws. The filing of a complaint is not an "alternative remedy in the ordinary course of the law" for purposes of seeking any judicial remedy authorized by the Revised Code or a rule of court. A public entity must cooperate with the Public Access Counselor in any proceeding regarding a complaint. Any person who alleges that the person's right to inspect or copy a public record under the Public Records Law or that the person's rights under the Open Meetings Law have been denied may file a formal or informal complaint with the Counselor. However, a person may not file both an informal complaint and a formal complaint that are based on the same facts and allege a denial of rights under the same section of the Revised Code. The Counselor is required to prescribe forms for formal and informal complaints. (R.C. 2743.33(A), (B), and (C).)

A complaint must be filed within 30 days after the date of the alleged denial of a person's right to inspect or copy a public record under the Public Records Law or a person's rights under the Open Meetings Law. A complaint is considered filed on the date the complaint is received by the Counselor or, if the complainant mails the complaint and the Counselor receives it more than 30 days after the alleged denial of rights, on the postmark date. Upon receiving a complaint, the Counselor must immediately forward a copy to the public entity that is the subject of that complaint. (R.C. 2743.33(D) and (E).)

Informal complaint

Upon receiving an informal complaint, the Counselor must engage in early intervention, mediation, conciliation, or any other form of dispute resolution or facilitate discussion between the parties in order to encourage them to reach an agreement on the issues raised in the complaint as soon as practicable. If the parties reach an agreement, the Counselor must require that the agreement be

written and signed by both parties within seven days. The agreement is then enforceable in a court. If a court determines that a party has violated the agreement, it must order that party to pay the reasonable attorney's fees of the other party. If a court determines that a public office violated an agreement based on an alleged denial of the complainant's right to inspect or copy a public record under the Public Records Law, it must order the public office to pay statutory damages to the complainant. If a court determines that a public office violated an agreement based on an alleged denial of any of the complainant's rights under the Open Meetings Law, the court must order the public body to pay the same civil forfeiture of \$500 to the complainant as provided in existing law when the court issues an injunction in an action to enforce the Open Meetings Law. (R.C. 121.22(I)(2)(a)--not amended by the bill, and 2743.33(F)(1) and (2).)

If any early intervention, mediation, conciliation, or other form of dispute resolution in which the Counselor engages or any discussion between the parties does not result in any agreement within 14 days after the complaint was filed, the complainant may bring an action in court pursuant to the Open Meetings Law or the Public Records Law (R.C. 2743.33(F)(3)).

Formal complaint

Upon receiving a formal complaint, the Counselor must investigate the facts alleged in the complaint. If the parties reach an agreement regarding the issues raised in the complaint, either before or after the Counselor issues an advisory opinion, the Counselor must require that the agreement be written and signed by both parties within seven days after they reach the agreement. The agreement is then enforceable in a court. If a court determines that a party has violated the agreement, it must order that party to pay the reasonable attorney's fees of the other party. If a court determines that a public office violated an agreement based on an alleged denial of the complainant's right to inspect or copy a public record under the Public Records Law, it must order the public office to pay statutory damages to the complainant. If a court determines that a public office violated an agreement based on an alleged denial of any of the complainant's rights under the Open Meetings Law, the court must order the public body to pay the civil forfeiture to the complainant in the amount specified in R.C. 121.22(I)(2)(a). The foregoing provisions do not apply in cases in which the Counselor participated in or facilitated any discussion between the parties in reaching the agreement (R.C. 121.22(I)(2)(a)--not amended by the bill, and 2743.33(G)(1) and (2).)

Advisory opinions on formal complaints

The Counselor must issue an advisory opinion on a formal complaint not later than 14 days after the complaint is filed or not later than seven days after the

complaint is filed if the Counselor determines that a formal complaint has priority under rules adopted by the Counselor that establish criteria for priority complaints. (The bill also directs the Counselor to adopt any other rules necessary to implement the bill's provisions dealing with the filing and determination of complaints.) (R.C. 2743.33(G)(3) and (4).)

If the Counselor issues an advisory opinion that declares that the complainant has the right to inspect or copy the public records or the right under the Open Meetings Law that is the subject of the formal complaint, unless the parties involved in the formal complaint reach an agreement as described above, the complainant may present the advisory opinion to the public office involved in the formal complaint and request the public office to make the records available for inspection or copying or to comply with the Open Meetings Law. If the public body does not make the records available or comply with the Open Meetings Law, the complainant may bring an action in court pursuant to the Public Records Law or the Open Meetings Law. (R.C. 2743.33(G)(5).)

An advisory opinion issued by the Counselor must state the date of issuance of the opinion, name the parties to the formal complaint, summarize the factual and legal issues involved, and set forth a reasoned rationale for the Counselor's conclusion, including citation to legal authority supporting that conclusion. Advisory opinions are public records under the Public Records Law. The Public Access Counselor may rely on past advisory opinions as precedent. Advisory opinions do not bind any court in interpreting or applying the Open Meetings Law or the Public Records Law, and no court may presume that the existence of an advisory opinion issued by the Counselor is evidence against or in favor of a reduction or denial of an award of reasonable attorney's fees to a litigant. (R.C. 2743.33(G)(6) and (7).)

Withdrawal of complaint

The bill authorizes a person who files an informal or formal complaint with the Counselor to withdraw the complaint at any time by giving the Counselor written notice of withdrawal. Upon withdrawing the complaint, that person may bring an action in court as authorized by the applicable public access law based upon the same facts that are the subject matter of the withdrawn complaint. The filing of a complaint with the Counselor does not toll the running of the period of limitations for bringing an action under the public access laws concerning the subject matter of the complaint. (R.C. 2743.34.)

Definitions

The bill sets forth the following definitions as used in the Revised Code sections that involve the office of Public Access Counselor (R.C. 2734.31(A)):

(1) "Counselor" and "Public Access Counselor" mean the Public Access Counselor appointed under R.C. 2734.31(B).

(2) "Meeting" and "public body" have the same meanings as R.C. 121.22. Under that section, a meeting is "any prearranged discussion of the public business of the public body by a majority of its members," and a "public body" is any of the following:

(a) Any board, commission, committee, council, or similar decision-making body of a state agency, institution, or authority, and any legislative authority or board, commission, committee, council, agency, authority, or similar decision-making body of any county, township, municipal corporation, school district, or other political subdivision or local public institution;

(b) Any committee or subcommittee of a body described in paragraph (a);

(c) A court of jurisdiction of a sanitary district organized wholly for the purpose of providing a water supply for domestic, municipal, and public use when meeting for the purpose of the appointment, removal, or reappointment of a member of the board of directors of such a district pursuant to R.C. 6115.10, if applicable, or for any other matter related to such a district other than litigation involving the district.

(3) "Public access laws" means the Open Meetings Law and the Public Records Law.

(4) "Public entity" means a public body for purposes of matters concerning the Open Meetings Law or a public office for purposes of matters concerning the Public Records Law.

(5) "Public office" has the same meaning as in R.C. 149.011 (a "state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government").

(6) "Public meeting" means a meeting that is open to the public under the Open Meetings Law.

(7) "Public records" has the same meaning as in the Public Records Law.

HISTORY

ACTION

DATE

Introduced

06-05-07

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