



Ohio Legislative Service Commission

Bill Analysis

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(As Reported by H. Government Accountability and Oversight)

Sens. Faber, Burke, Eklund, Jordan, LaRose, Peterson, Seitz, Obhof, Skindell, Bacon, Balderson, Beagle, Brown, Coley, Gardner, Hackett, Hite, Hottinger, Hughes, Jones, Lehner, Manning, Oelslager, Patton, Sawyer, Schiavoni, Thomas, Uecker, Yuko

BILL SUMMARY

- Creates a procedure within the Court of Claims to hear complaints alleging a denial of access to public records.
- Requires a court to award court costs to a person who files a mandamus action to obtain a judgment that orders the public office or person responsible for the records to comply with the Public Records Law if the public office or person responsible acted in bad faith.
- Permits the awarding of attorney's fees in a mandamus action if the court determines that the public office or person responsible acted in bad faith, and precludes discovery on the issue of bad faith.
- Specifies the circumstances when a court is prohibited from awarding attorney's fees.
- Establishes that an infrastructure record of a private entity may be exempt from release or disclosure under Public Records Law.
- Allows a public office that provides public records for free on a website to limit the number of digital format public records the office will provide to any requestor to ten per month, unless the records requested are not provided on the website, or the

* This analysis was prepared before the report of the House Government Accountability and Oversight Committee appeared in the House Journal. Note that the list of co-sponsors and the legislative history may be incomplete.

requestor certifies that they do not intend to use or forward the requests for commercial purposes.

- Protects private, nonprofit institutions of higher education from any claims, including breach of confidentiality claims, that arise from the institution disclosing information in response to a public records request.

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CONTENT AND OPERATION

Ohio Public Records Law – generally

Ohio law requires generally that upon request, all public records responsive to that request must be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. A public office or person responsible for public records must also, generally upon request, make copies of the requested public record available at cost and within a reasonable period of time. If a public record contains information that is exempt from the duty to permit public



inspection or to copy the public record, the public office or person responsible must make available all of the information within the public record that is not exempt.¹

Mandamus action or action with Court of Claims if public office fails to provide public records

The bill modifies existing law by providing that if a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and make it available to the person for inspection as required by law or by any other failure of a public office or the person responsible to comply with the requirement under Public Records Law, the person allegedly aggrieved may do one of the following, and not both:²

- File a complaint with the clerk of the Court of Claims or the clerk of the common pleas court, as provided under "**Action in the Court of Claims.**"
- Commence, as is permitted under existing law, a mandamus action to obtain a judgment that orders the public office or the person responsible for the public records to comply with the Public Records Law, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action and, if applicable, that includes an order fixing statutory damages.

Mandamus action

Awarding of court costs

The bill continues to require the awarding of court costs in a mandamus action to the relator, which are to be construed as remedial and not punitive, if the court orders the public office or the person responsible for the public record to comply with the Public Records Law.³ The bill also provides that if the court in a mandamus action makes a determination that the public office or person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action, but before the court issued any order concluding whether or not the public office or person was required to comply with the Public Records Law, the court must

¹ R.C. 149.43(B).

² R.C. 149.43(C)(1).

³ R.C. 149.43(C)(3)(a)(i).



determine and award to the relator all court costs, which are to be construed as remedial and not punitive.⁴

Awarding of reasonable attorney's fees

The bill allows the court to award reasonable attorney's fees to the relator if the court renders a judgment ordering the public office or person responsible for the public record to comply with the Public Records Law as in current law, or determines that either (1) the public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under the Public Records Law, or (2) the public office or the person responsible promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that period of time.⁵ Under current law, the court must award reasonable attorney's fees when either (1) or (2) above applies. The bill also permits the awarding of reasonable attorney's fees if the court determines that the public office or the person responsible for the public records acted in bad faith as described under "**Awarding of court costs**," above.⁶ The bill precludes any discovery from being conducted on the issue of that alleged bad faith. The bill's provisions on the alleged bad faith are not to be construed to create a presumption that the public office or person responsible for the public records acted in bad faith when the office or person voluntarily made the public records available to the relator for the first time after the relator commenced the mandamus action but before the court issued any order on whether or not the public office or person was required to comply with the Public Records Law.⁷

All of the following apply to any award of reasonable attorney's fees awarded as described above:⁸

- The fees must be construed as remedial and not punitive.
- The fees awarded cannot exceed the total of the reasonable attorney's fees incurred before the public record was made available to the relator and the fees described in the next bullet point.

⁴ R.C. 149.43(C)(3)(a)(ii) and (b)(iii).

⁵ R.C. 149.43(C)(3)(b)(i) and (ii).

⁶ R.C. 149.43(C)(3)(b)(iii).

⁷ R.C. 149.43(C)(3)(b)(iii).

⁸ R.C. 149.43(C)(4).



- Reasonable attorney's fees must include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees.
- The court may reduce the amount of fees awarded if the court determines that, given the factual circumstances involved with the specific public records request, an alternative means should have been pursued to more effectively and efficiently resolve the dispute that was subject to the mandamus action.

The bill prohibits, rather than permits as under existing law, a court from awarding attorney's fees to the relator if the court determines both of the following:⁹

- That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with the Public Records Law and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible did not constitute a failure to comply with an obligation in accordance with the Public Records Law.
- That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

If the court does not issue a writ of mandamus and the court determines at that time that the mandamus action was frivolous conduct, the court may award to the public office all court costs, expenses, and reasonable attorney's fees, as determined by the court.¹⁰

Public records accessible on website

The bill allows public offices that provide public records on a free and accessible public website to limit the number of digital format public records the office will provide to any requestor to ten per month, unless the records requested are not

⁹ R.C. 149.43(C)(3)(c).

¹⁰ R.C. 149.43(C)(5).



provided on the website, or the requestor certifies that they do not intend to use or forward the requests for commercial purposes.¹¹

Public records in a criminal action

The bill provides that a request by a defendant, counsel of a defendant, or any agent of a defendant in a criminal action that public records related to that action be made available must be considered a demand for discovery pursuant to the Criminal Rules, except to the extent that the Criminal Rules plainly indicate a contrary intent. The defendant or counsel or agent of the defendant making that request must serve a copy of the request on the prosecuting attorney, director of law, or other chief legal officer responsible for prosecuting the action.¹²

Action in the Court of Claims

Powers of Court of Claims

Under the bill, in order to provide for an expeditious and economical procedure that attempts to resolve disputes alleging a denial of access to public records in violation of the Public Records Law, except for a court that hears a mandamus action, the Court of Claims is the sole and exclusive authority in Ohio that adjudicates or resolves complaints based on alleged violations of the Public Records Law. The clerk of the Court of Claims must designate one or more current employees or hire one or more individuals to serve as special masters to hear complaints. All special masters must have been engaged in the practice of law in Ohio for at least four years and be in good standing with Ohio Supreme Court at the time of designation or hiring. The clerk may assign administrative and clerical work associated with complaints to current employees or may hire such additional employees as may be necessary to perform such work.¹³

The bill also provides that the powers of the Court of Claims prescribed in Ohio law under R.C. 2743.05 apply to proceedings in that court under the provisions of the bill.¹⁴

The bill modifies existing law by providing that, in addition to its exclusive, original jurisdiction, the Court of Claims has exclusive, original jurisdiction to hear

¹¹ R.C. 149.43(B)(7).

¹² R.C. 149.43(G).

¹³ R.C. 2743.75(A).

¹⁴ R.C. 2743.75(H).



complaints alleging a denial of access to public records in violation of the Public Records Law, regardless of whether the public office or person responsible for public records is an office or employee of the state or of a political subdivision.¹⁵

Clerk of common pleas court

The clerk of the common pleas court in each county acts as the clerk of the Court of Claims for purposes of accepting complaints alleging a denial of access to public records in violation of the Public Records Law, accepting filing fees for those complaints, and serving those complaints.¹⁶

Person aggrieved may seek relief

A person allegedly aggrieved by a denial of access to public records in violation of the Public Records Law may seek relief under the Public Records Law or pursuant to the provisions described above, provided that if the allegedly aggrieved person files a complaint under either provision, that person may not seek relief that pertains to the same request for records in a complaint filed under the other provision. If the allegedly aggrieved person files a complaint and the Court of Claims determines that the complaint constitutes a case of first impression that involves an issue of substantial public interest, the court may dismiss the complaint without prejudice and direct the allegedly aggrieved person to commence a mandamus action in the court of appeals as provided in R.C. 149.43(C)(1) (discussed above, at "**Mandamus action or action with Court of Claims if public office fails to provide public records**").¹⁷

Filing of complaint

The bill provides that an allegedly aggrieved person who chooses to file a complaint with the Court of Claims must file that complaint, on a form prescribed by the clerk of the Court of Claims, with the clerk or with the clerk of the common pleas court of the county in which the public office from which the records are requested is located. The person must attach to the complaint copies of the original records request and any written responses or other communications relating to the request from the public office or the person responsible for public records and pay a \$25 filing fee made payable to the clerk of the court with whom the complaint is filed. The clerk must serve a copy of the complaint on the public office or person responsible for the particular public office in accordance with Civil Rule 4.1 and, if the complaint is filed with the clerk of the common pleas court, must forward the complaint to the clerk of the Court

¹⁵ R.C. 2743.03(A)(3)(b).

¹⁶ R.C. 2743.75(B).

¹⁷ R.C. 2743.75(C).



of Claims, and to no other court, within three business days after service is complete. Upon receipt of a filed complaint, the clerk of the Court of Claims must assign a case number for the action and a special master to examine the complaint. Notwithstanding any provision to the contrary in this section, upon the recommendation of the special master, the Court of Claims on its own motion may dismiss the complaint at any time. The allegedly aggrieved person may voluntarily dismiss the complaint filed by that person.¹⁸

Special master referral to mediation

Upon service of a complaint, the special master assigned by the clerk of the Court of Claims immediately must refer the case to mediation services that the court of claims makes available to persons. If, in the interest of justice considering the circumstances of the case or the parties, the special master determines that the case should not be referred to mediation, the special master must notify the court that the case was not referred to mediation, and the case proceeds in accordance with the procedures described under "**Special master's report and recommendation**," below. If the case is referred to mediation, any further proceeding must be stayed until the conclusion of the mediation. The mediation proceedings may be conducted by teleconference, telephone, or other electronic means. If an agreement is reached during mediation, the court will dismiss the complaint. If an agreement is not reached, the special master must notify the court that the case was not resolved and that the mediation has been terminated.¹⁹

Within ten business days after the termination of the mediation or the notification to the court that the case was not referred to mediation, the public office or person responsible for public records must file a response, and if applicable, a motion to dismiss the complaint, with the clerk of the Court of Claims and transmit copies of the pleadings to the allegedly aggrieved party. No further motions or pleadings will be accepted by the clerk of the Court of Claims or by the special master unless the special master directs in writing that a further motion or pleading be filed.²⁰

All of the following apply prior to the submission of the special master's report and recommendation to the court of claims:²¹

- The special master cannot permit any discovery.

¹⁸ R.C. 2743.75(D).

¹⁹ R.C. 2743.75(E)(1).

²⁰ R.C. 2743.75(E)(2).

²¹ R.C. 2743.75(E)(3).

- The parties may attach supporting affidavits to their respective pleadings.
- The special master may require either or both of the parties to submit additional information or documentation supported by affidavits.

Special master's report and recommendation

Not later than seven business days after receiving the response, or motion to dismiss the complaint, if applicable, of the public office or person responsible for public records, the special master must submit to the Court of Claims a report and recommendation based on the ordinary application of statutory law and case law as they existed at the time of the filing of the complaint. For good cause shown, the special master may extend the seven-business-day period for the submission of the report and recommendation to the Court of Claims by an additional seven business days.²²

Upon submission of the special master's report and recommendation to the Court of Claims, the clerk must send copies of the report and recommendation to each party by certified mail, return receipt requested, not later than three business days after the filing of the report and recommendation. Either party may object to the report and recommendation within seven business days after receiving the report and recommendation by filing a written objection with the clerk and sending a copy to the other party by certified mail, return receipt requested. Any objection to the report and recommendation must be specific and state with particularity all grounds for the objection. If neither party timely objects, the Court of Claims must promptly issue a final order adopting the report and recommendation, unless the Court determines that there is an error of law or other defect evident on the face of the report and recommendation. If either party timely objects, the other party may file with the clerk a response within seven business days after receiving the objection and send a copy of the response to the objecting party by certified mail, return receipt requested. The court, within seven business days after the response to the objection is filed, must issue a final order that adopts, modifies, or rejects the report and recommendation.²³

Court of Claims determines denial of access

Under the bill, if the Court of Claims determines that the public office or person responsible for the public records denied the aggrieved person access to the public

²² R.C. 2743.75(F)(1).

²³ R.C. 2743.75(F)(2).



records in violation of the Public Records Law and if no appeal from the court's final order is taken, both of the following apply:²⁴

- The public office or the person responsible must permit the aggrieved person to inspect or receive copies of the public records that the court requires to be disclosed in its order.
- The aggrieved person is entitled to recover from the public office or the person responsible the \$25 filing fee and any other costs associated with the action that the aggrieved person incurred, but is not entitled to recover attorney's fees, unless certain circumstances regarding an appeal apply, as described under "**Court of appeals may award attorney's fees**," below.

Appeal from a final order

Any appeal from a final order of the Court of Claims or from an order of the Court of Claims dismissing the complaint must be taken to the court of appeals of the appellate district where the principal place of business of the public office from which the public record is requested is located. However, no appeal may be taken from a final order of the Court of Claims that adopts the special master's report and recommendation unless a timely objection to that report and recommendation was filed. If the Court of Claims materially modifies the special master's report and recommendation, either party may take an appeal to the court of appeals of the appellate district of the principal place of business where that public office is located but the appeal must be limited to the issue in the report and recommendation that is materially modified by the Court of Claims. In order to facilitate the expeditious resolution of disputes over alleged denials of access to public records in violation of the Public Records Law, the appeal must be given such precedence over other pending matters as will ensure that the court will reach a decision promptly.²⁵

Court of appeals may award attorney's fees

If a court of appeals in any appeal by the public office or person responsible for public records determines that the public office or person responsible denied the aggrieved person access to the public records in violation of the Public Records Law and obviously filed the appeal with the intent to either delay compliance with the Court of Claims' order from which the appeal is taken for no reasonable cause or unduly harass the aggrieved person, the court of appeals may award reasonable attorney's fees to the aggrieved person in accordance with R.C. 149.43(C). No discovery may be

²⁴ R.C. 2743.75(F)(3).

²⁵ R.C. 2743.75(G)(1).



conducted on the issue of the public office or person responsible for the public record filing the appeal with the alleged intent to delay compliance with the Court of Claims' order for no reasonable cause or to unduly harass the aggrieved person. The above provisions are not to be construed as creating a presumption that the public office or person filed the appeal with either such intent.²⁶

Filing fees

All filing fees collected by a clerk of the common pleas court are to be paid to the county treasurer for deposit into the county general revenue fund. All such money collected during a month must be transmitted on or before the 20th day of the following month by the clerk of the common pleas court to the county treasurer.²⁷

All filing fees collected by the clerk of the Court of Claims are to be kept by the Court of Claims to assist in paying for its costs to implement the provisions of this bill. Not later than February 1 of each year, the clerk of the Court of Claims must prepare a report that is accessible to the public that details the fees collected during the preceding calendar year by the clerk of the Court of Claims and the clerks of the common pleas courts under the provisions of the bill.²⁸

The bill requires that a common pleas court must tax as costs or otherwise require the payment of fees the filing fee in a case filed with the Court of Claims that alleges a denial of access to public records in violation of the Public Records Law.²⁹

Authority of State Auditor

The bill provides that nothing in the provisions regarding the action with the Court of Claims is to be construed to limit the authority of the State Auditor under the Public Records Law.³⁰

Civil action in definition of "vexatious litigator"

The bill specifies that a civil action within the definition of "vexatious litigator" includes the proceedings in the Court of Claims created in the bill.³¹

²⁶ R.C. 2743.75(G)(2).

²⁷ R.C. 2743.75(I)(1).

²⁸ R.C. 2743.75(I)(2).

²⁹ R.C. 2746.04(O).

³⁰ R.C. 2743.75(J).

³¹ R.C. 2323.52(A)(3).



Infrastructure records

The bill extends the Public Records Law disclosure exemption related to infrastructure records by establishing that a record kept by a public office that is an infrastructure record of a private entity may be exempt from release or disclosure. The exemption for an infrastructure record of a private entity applies if the record is accompanied by an express statement. The statement must be in writing, and be substantially similar to the following: "This information is voluntarily submitted to a public office in the expectation of protection from disclosure as provided. . . [under Public Records Law]."

The bill specifically sets forth that a record prepared by, submitted to, or kept by a public office that is an infrastructure record of a private entity, which is submitted to the public office for use by the public office, when accompanied by an express statement, is exempt from release or disclosure under Public Records Law for 25 years after its creation, if it is retained by the public office for that length of time.

Under continuing law, an infrastructure record means any record that discloses the configuration of critical systems, including, but not limited to, communication, computer, electrical, mechanical, ventilation, water, and plumbing systems, security codes, or the infrastructure or structural configuration of a building. Continuing law exempts an infrastructure record of a public office's and a chartered nonpublic school's critical systems from release and disclosure under Public Records Law. The bill specifies that an infrastructure record also includes a risk assessment of infrastructure performed by a state or local law enforcement agency at the request of a property owner or manager.³²

Liability protection for certain higher education institutions responding to public record requests

The bill provides liability protection to private, nonprofit institutions of higher education when these institutions respond to public record requests. Under the bill, these institutions are exempt from any claims that result from the institution's disclosure of information as part of a public records request, including breach of confidentiality claims.³³ The bill only applies to private, nonprofit institutions of higher education that have been certified by the Chancellor of Higher Education.³⁴ However,

³² R.C. 149.433.

³³ R.C. 3333.0412(B).

³⁴ R.C. Chapter 1713., not in the bill.



these institutions are still liable for claims that result from the institution's failure to disclose public records as required by the Public Records Law.³⁵

HISTORY

ACTION	DATE
Introduced	05-02-16
Reported, S. Gov't Oversight & Reform	05-11-16
Passed Senate (33-0)	05-11-16
Reported, H. Gov't Accountability & Oversight	---

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³⁵ R.C. 149.43.

