Ohio’s Public Records Act

FOREWORD

Public records have a long history in Ohio. The Ordinance of 1787, which Congress passed in 1787, governed Ohio before it became a state. The Ordinance required Congress to appoint a secretary for the Northwest Territory, which included Ohio. The secretary's duties included keeping and preserving "the public records" of the territory.

Long before 1963, when Ohio's General Assembly enacted the public records statute, Ohio courts recognized a common law right of the public to inspect and copy governmental records. At about the turn of the century, an Ohio court in Cincinnati recognized that unrestricted public access to governmental records was one of the elements distinguishing American government from the government of England. The court stated:

> In England the fountainhead of justice is the king. . . . The courts are his courts, and the government is his government. Whatever power the people have he has granted to them; and if no grant has been made to them to examine the public records, it may well have been in England that they have no such power.

But in this country . . . the people are the fountainhead of justice. The courts are their courts, and the government is their government. Whatever power they have not granted to their officials remains with them. . . .

As public records are but the people's records, it would seem necessarily to follow that unless forbidden by a constitution or statute, the right of the people to examine their own records must remain.

Wells v. Lewis, 12 Ohio N.P. 170 (Superior Ct. of Cincinnati 1901).

The *Wells* case evidences a colorful history of the public right of access to records, and shows that times have not changed as much in the passing century as one might think. Two men, Mr. Wells and Mr. Schroeder, sought to inspect and make copies of the Hamilton County "fair books" for a particular ward within the county. The "fair books" listed the name and address of each owner of real estate, and the assessed value of each real estate parcel as made by the county. The Hamilton County Auditor, Mr. Lewis, maintained the "fair books" as one of the duties of his office. Lewis was in the midst of running for re-election, and Wells was a democrat running against Lewis. Wells lived in Hamilton County, and was a taxpayer. Schroeder, also a democrat, was a resident of Hamilton County, but not a taxpayer.

Wells and Schroeder alleged that public statements about a reduction in the property tax rate had created a misimpression among the citizenry that property taxes would in fact go down. Wells and Schroeder wanted to see the "fair books" to try to show that the county had increased the valuation of real estate and, thus, a reduction in the tax rate would not mean an actual reduction in taxes.

When Wells and Schroeder went to Lewis' office to inspect the "fair books," the books were absent from their customary shelves. Lewis said that one of his clerks was in the process of duplicating the books, and they would not be available to Wells or Schroeder. In the subsequent suit by Wells and Schroeder against Lewis, the court rejected Lewis' argument that the English rule of public access should apply. The English rule asserted that no one had a right to inspect the records of a public officeholder unless the person seeking inspection had an interest in seeing the records that was peculiar to that person and distinct from the community at large. Lewis argued that Wells and Schroeder could inspect records about their own properties, but not about any other properties.

In rejecting the English rule, the court stated that all citizens "have a right to as full knowledge of all the official acts of their officers as the officers themselves have, so as to enable them to ascertain whether their officers have performed their duty in such manner as is acceptable to them with a view to determine whether they will continue them in office or not." The court added:

> [T]he records in the auditor's office are the public records of the people of Hamilton county, bought with their money, kept in a public place built with their money, and in the charge of public officials paid by their money and selected by them. The officials in charge of these books, therefore, can be no other than trustees in possession of property belonging to the people of Hamilton county.

If then the auditor holds these books in trust for the people of Hamilton county, it is but an elementary proposition of law that the beneficiaries of the trust may inspect such property, subject only to the limitation that such inspection does not endanger the safety of the books or interfere with the discharge by the auditor of his official duties.

Wells, Ohio N.P. at 176.

Today's public records statute codifies Ohio's common law, and incorporates the common law philosophy that "public records are the people's records, and officials in whose custody they happen to be are merely trustees for the people." *E.g., State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994).

The history of open meetings in Ohio lacks the color and legal precedent of the history of open records in Ohio. Although it cited no authoritative history, the Ohio Supreme Court has opined that there was no common law right of public access to governmental meetings in Ohio. *Beacon Journal Publishing Co. v. City of Akron*, 3 Ohio St. 2d 191, 209 N.E.2d 399 (1965).

The Ohio Supreme Court is probably mistaken. Ohio has a long history of open meetings of public bodies. In 1795, the legislature of the Northwest Territory, which included Ohio, held its first recorded session. The Territory's only newspaper at that time, *The Centinel of the Northwest Territory*, announced the time and place of the meeting. The territorial legislative sessions were open to the public. C.B. Galbreath, "Legislature of The Northwestern Territory, 1795," Ohio Archaeological and Historical Society Publications 14, 18 (1921).

In 1802, Ohioians held a constitutional convention to adopt a state constitution. All citizens had a right to address that body "openly or in writing." C.B. Galbreath, "Legislature of The Northwestern Territory, 1795," Ohio Archaeological and Historical Society Publications 203 (1921).

The product of the constitutional convention was the Ohio Constitution of 1802, which provided that "[t]he doors of each house, and of committees of the whole, shall be kept open." Ohio Const. of 1802, Art. I, § 15.

The primary organ of local governmental authority in the Northwest Territory was the court of Quarter Sessions, the forerunner of the board of county commissioners. The courts of Quarter Sessions operated in a combination of legislative, executive, and judicial capacities. The proceedings of the courts of Quarter Sessions were open community affairs. R. Ireland, "Politics of County Government," *Kentucky: Its History and Heritage* 75 (1978).

At the municipal level, open town meetings were the norm. W. Rose, *Cleveland: The Making Of A City* 115-116 (1950).

Ohio's open meetings statute was first passed in 1954.

Open Records

I. Statute — Basic Application

A. Who can request records?

1. Status of requestor.

"Any person" is entitled to inspect or receive a copy of a public record; the right is not limited to U.S., state, or community citizens. Ohio Rev. Code § 149.43(B).

The term "any person" is "broad and permits *anyone*, including any recognized business entity (defendants, newspapers, researchers, designees and/or nondesignees) to obtain records." *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994). However, Ohio Rev. Code § 149.43(B)[(8)] requires an inmate to obtain a judge's consent to obtain access to records of a criminal investigation or prosecution. *State ex rel. Sevayega v. Reis*, 88 Ohio St. 3d 458, 727 N.E.2d 910 (2000).

2. Purpose of request.

The requester's purpose cannot affect his right to receive public records. *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994). However, Ohio Rev. Code § 149.43(B)(8) creates an exception

where the purpose of an incarcerated person is dispositive. *State ex rel. Barb v. Cuyahoga Cty. Jury Comm'r*, 124 Ohio St.3d 238, 921 N.E.2d 236 (2010).

Where the requester is seeking access to records of the Bureau of Motor Vehicles, a commercial purpose other than newsgathering may increase the cost. Ohio Rev. Code § 149.43(F).

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3. Use of records.

The statute places no restrictions on subsequent use of the records provided.

Where the requester is seeking access to records of the Bureau of Motor Vehicles, a commercial purpose other than newsgathering may increase the cost. A commercial purpose includes those who themselves may not intend a commercial use, but who intend to forward the records to someone else who will put them to a commercial use. Ohio Rev. Code § 149.43(F).

B. Whose records are and are not subject to the act?

1. Executive branch.

a. Records of the executives themselves.

The statute's language is broad enough to literally apply to the executives themselves, such as a governor or other chief executive officer. However, the Ohio Supreme Court has recognized that the constitutional doctrine of separation of powers may inhibit the statute's application to the Governor, Lieutenant Governor, Secretary of State, State Auditor, State Treasurer, and Attorney General. That doctrine does not inhibit the law's application to mayors or other chief executives of political subdivisions. *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 75 Ohio St.3d 31, 661 N.E.2d 187 (1996). The separation of powers limitation creates a qualified privilege that may be overcome where a requester demonstrates a particularized need to review the communications which outweighs the benefits of according confidentiality to communications. *State ex. Re. Dann v. Taft*, 109 Ohio St.3d 364, 848 N.E.2d 472 (2006).

b. Records of certain but not all functions.

The statute does not distinguish among the functions of an executive officer, or any other official, in determining whether the public has a right of access to records.

2. Legislative bodies.

The language of the statute is broad enough to encompass all legislative bodies. The Ohio Supreme Court has not yet applied the statute to Ohio's General Assembly. The court's recognition that the constitutional doctrine of separation of powers may inhibit the statute's application could mean that separation of powers bars the statute from applying to certain internal records of state legislators. *See State ex rel. Plain Dealer Publishing Co. v. City of Cleveland,* 75 Ohio St.3d 31, 661 N.E.2d 187 (1996).

In the meantime, the General Assembly has immunized certain classes of its internal legislative records from the Public Records Act, specifically records that arise out of the relationship between legislative staff and a member of the General Assembly but are not filed with the clerk of the General Assembly, presented at a committee hearing or floor session (for amendments to bills or resolution or a substitute bill or resolution), or released/authorized to be released to the public by the member of the general assembly. Ohio Rev. Code § 101.30.

3. Courts.

The Ohio Supreme Court has applied the statute to court records. *State ex rel. Scripps Howard Broad. Co. v. Cuyahoga County Court of Common Pleas, Juv. Div.*, 73 Ohio St. 3d 19, 652 N.E.2d 179 (1995); *State ex rel, MADD v. Gosser,* 20 Ohio St. 3d 30, 485 N.E.2d 706 (1985); *State ex rel, Harmon v. Bender*, 25 Ohio St. 3d 15, 494 N.E.2d 1135 (1986).

"[A]ny record used by a court to render a decision is a record subject to R.C. 149.43." *State ex rel. WBNS TV Inc. v. Dues,* 101 Ohio St. 3d 406, 805 N.E.2d 1116 (2004).

When a party to an action requests a transcript from that action, the party must pay the fees designated by Ohio Rev. Code § 2301.24, and cannot take advantage of the lower "at cost" fees imposed under the Public Records Act. *State ex rel. Slagle v. Rogers,* 103 Ohio St. 3d 89, 814 N.E.2d 55 (2004).

However, the court has ruled that the statute does not require trial judges to release personal notes taken about cases over which they are presiding, and recognized that the constitutional doctrine of separation of powers probably would inhibit the statute's application to at least those judicial notes. *State ex rel. Steffen v. Kraft,* 67 Ohio St. 3d 439, 619 N.E.2d 688 (1993).

The court relied on *Kraft* to adopt a "judicial mental process" privilege to exempt from disclosure an attorney-examiner's report to a county Board of

Tax Appeals (BTA). The court reasoned that the BTA is a quasi-judicial body when discharging its adjudication duties and, therefore, requires the privacy to deliberate granted the courts. *TBC Westlake Inc. v. Hamilton County Board of Revision*, 81 Ohio St.3d 58, 689 N.E.2d 32 (1998).

4. Nongovernmental bodies.

a. Bodies receiving public funds or benefits.

The Ohio Supreme Court has applied the statute to require public disclosure of records possessed, received, or created by private entities to which public offices had delegated the performance of public functions. *State ex rel. Fostoria Daily Review Co. v. Fostoria Hospital Ass'n*, 40 Ohio St. 3d 10, 531 N.E.2d 313 (1988) (minutes of meetings of board of trustees of a nonprofit corporation operating a municipal hospital pursuant to a rent-free lease); *State ex rel. Plain Dealer Publishing Co. v. City of Cleveland*, 75 Ohio St. 3d 31, 661 N.E.2d 187 (1996) (resumes received by private executive search firm hired by city to find candidates for post of city police chief); *State ex rel. Toledo Blade Co. v. Univ. of Toledo Foundation*, 65 Ohio St. 3d 258, 602 N.E.2d 1159 (1992) (records of donors to private corporation that functioned as alter-ego of state university); *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St. 3d 37, 550 N.E.2d 464 (1990) (workpapers of a private accounting firm generated in the course of auditing the finances of a municipality); *State ex rel. Findlay Publishing Company v. Hancock County Board of Commissioners*, 80 Ohio St. 3d 134, 684 N.E.2d 1222 (1997) (settlement agreement prepared by the attorney for the county's insurer); *State ex rel. Freedom Communications Inc. v. Elida Community Fire Company*, 82 Ohio St. 3d 578, 697 N.E.2d 210 (1998) (investigative report prepared by private, nonprofit corporation that contracted with townships to provide fire-fighting services). But see *State ex rel. Farely v. McIntosh*, 134 Ohio App. 3d 531, 731 N.E.2d 726 (Montgomery App. 1998) (records compiled by court-appointed psychologist are personal, not public, records), *State ex rel. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. Of Comm's*, 128 Ohio St.3d 256, 943 N.E.2d 553 (2011) (a relator must demonstrate by clear and convincing evidence that an entity is the functional equivalent of a public office).

"In determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public Records Act, R.C. 149.43, a court shall apply the functional-equivalency test. Under this test, the court must analyze all pertinent factors, including (1) whether the entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the entity was created by the government or to

avoid the requirements of the Public Records Act." *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 854 N.E.2d 193 (2006).

Ohio Rev. Code § 149.431 requires nonprofit corporations receiving public funds to make available to the public financial statements and the contracts pursuant to which the corporations receive the public funds.

Ohio Rev. Code § 9.92 exempts from the public records statute private organizations receiving public funds and named as official county organs to reward citizens who provide tips leading to the solving of crimes (citizen reward programs).

b. Bodies whose members include governmental officials.

The statute does not expressly address such groups, but if such a group possesses records generated in the course of performing a duty delegated by a public office and such records may be subject to some degree of control by the office, it is likely that the records would be available to the public under the public records statute. *See State ex rel. Mazzaro v. Ferguson*, 49 Ohio St. 3d 37, 550 N.E.2d 464 (1990). But see *State ex rel. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. Of Comm's*, 128 Ohio St.3d 256, 943 N.E.2d 553 (2011) (workgroups which included "county employees" did not have to disclose minutes and other records as the workgroups were not the functional equivalent of a public office).

A hospital run by an eighteen-member board of trustees is not a "public office," notwithstanding that sixteen of the members were direct appointees of six different mayors. *State ex rel. Stys v. Parma Cmty. Gen. Hosp.*, 93 Ohio St. 3d 438, 755 N.E.2d 874 (2001).

5. Multi-state or regional bodies.

The statute does not expressly address such bodies, but to the extent that the membership of such bodies includes a majority of the members of a public body of Ohio or a political subdivision, it is likely that records generated by the multistate or regional board that pertain to the business of the Ohio body would be available to the public. *State ex rel. The Fairfield Leader v. Ricketts*, 56 Ohio St. 3d 97, 564 N.E.2d 486 (1990).

6. Advisory boards and commissions, quasi-governmental entities.

The statute does not address such bodies, but if such a board or commission possesses records generated in the course of performing a duty delegated by a public office and such records may be subject to some degree of control by the office, it is likely that the records would be available to the public under the public records statute. *See State ex rel.*

Mazzaro v. Ferguson, 49 Ohio St. 3d 37, 550 N.E.2d 464 (1990). *But see State ex rel. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. Of Comm's*, 128 Ohio St.3d 256 (where an entity only produces recommendations for a public office, the records used to produce those recommendations are not public records).

7. Others.

Records kept by any "public office" are public records and subject to mandatory disclosure. Ohio Rev. Code § 149.43(A)(1). "Public office" is defined as including "any 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." Ohio Rev. Code § 149.011(A).

Where an organization or entity is not obviously a "public office," the key to determining whether any of its records must be released is whether it performs an obvious governmental function, the level of public funding it receives, the extent of government involvement or regulation, and whether it was created to circumvent the requirements of the Public Records Act. *State ex rel. Oriana House, Inc. v.* Montgomery, 110 Ohio St.3d 456, 854 N.E.3d 193.

C. What records are and are not subject to the act?

1. What kind of records are covered?

All "public records" are available for public inspection and copying. A "public record" is any record that is "kept by any public office." Ohio Rev. Code § 149.43(A),(B). A "record" is "any document, device, or item . . . which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." Ohio Rev. Code § 149.011(G).

The statute used to define "public record" as those records required by law to be kept by a public office, but the Ohio General Assembly amended the statute to delete that language. The statute now defines "public record" as simply "records kept by any public office," which broadens the scope of what kinds of records qualify as public records.

Notwithstanding that legislative amendment, the Ohio Supreme Court has ruled that a variety of recorded information kept by a public office fails to qualify as a "record" under Ohio Rev. Code § 149.011 (G), and therefore cannot be a "public record." The court ruled that unsolicited letters received and read by a judge in which the authors advocated leniency in the sentencing of a convicted rapist did not count as "records" because the

judge testified that she did not base her subsequent sentencing decision on anything in the letters. *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St. 3d 61 (1998). *See also State ex rel. Sensel v. Leone*, 85 Ohio St. 3d 152, 707 N.E.2d 496 (1999) (reinstating trial court's judgment that unsolicited letters from parents received and read by public school superintendent and high school principal, which criticized and praised controversial high school basketball coach, were not "records" and could be thrown away at the sole discretion of the public school officials).

A city employee's personal handwritten notes were not "records" because they were taken for his own convenience, were not kept as part of the city's official records, and no other city officials had access to or used the notes. *State ex rel. Cranford v. Cleveland*, 103 Ohio St. 3d 196, 814 N.E.2d 1218 (2004).

Jury questionnaire questions are "records," but the responses are not "records" because the court does not use the answers "in rendering its decision, but rather collect[s] the questionnaires for the benefit of litigants." *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 781 N.E.2d 180 (2002) (ordering disclosure of the questionnaire responses, juror names, and juror addresses on constitutional grounds).

State employee home addresses are not "records" because they do not "document the organization, functions, policies, decisions, procedures, operations, or other activities" of the state agencies and are kept by the state only as an administrative convenience. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 833 N.E.2d 274 (2005).

The court also ruled that a roster of names and addresses of minors who signed up for a municipal recreation department's voluntary identification-badge program was not a "record." *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000). *But see State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 190 Ohio App.3d 218, 941 n.E.2d 807 (questionnaires and releases which identify children suspected of having been exposed to lead are public records, as they "do not contain the comprehensive personal, family, and medical information described in the records at issues in *McCleary*.")

Internal e-mails generated by county employees on county time using county computer systems, which allegedly contained racist epithets, did not qualify as "records" because the e-mails did not document the activities of that county agency. *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dept.*, 82 Ohio St. 3d 37, 693, N.E.2d 789 (1998).

The court has not adopted a clear doctrinal interpretation of the threshold statutory term, "record." To qualify as a "record," the court seems to

require that the recorded information be clearly linked to functions of a public office that state or local law requires the office to undertake.

A "record" does not lose its status as a "public record" though its possession is transferred to a private party. The statute allows a mandamus action against either the public office or the person responsible for a public record. Ohio Rev. Code § 149.43(C). "[T]he 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." *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St. 3d 37, 550 N.E.2d 464 (1990); *State ex rel. The Cincinnati Enquirer v. Krings*, 2000 Ohio App. LEXIS 5854 (Hamilton App. Dec. 15, 2000) (No. C-000408) ("The respondents in this case cannot play a shell game with public records. The public has a right of access to the records, regardless of where they are physically located, or in whose possession they may be."); *State ex rel. Findlay Publ'g Co. v. Hancock Cty. Bd. of Comm'rs*, 80 Ohio St. 3d 134, 684 N.E.2d 1222 (1997) (ordering disclosure of settlement agreement when county's attorney possessed the agreement).

2. What physical form of records are covered?

A "record" includes "any document, device, or item, regardless of physical form or characteristic." Ohio Rev. Code § 149.011(G).

A public record includes a video or audio tape. *State ex rel. Harmon v. Bender*, 25 Ohio St. 3d 15, 494 N.E.2d 1135 (1986); *State ex rel. Multimedia Inc. v. Whalen*, 48 Ohio St. 3d 41, 549 N.E.2d 167 (1990); *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 814 N.E.2d 55 (2004) (Ohio's Public Record Act entitles public to audiotapes of a suppression hearing).

A public record includes microfilm. *Lorain County Title Co. v. Essex*, 53 Ohio App. 2d 274, 373 N.E.2d 1261 (1976).

Where a public record is recorded electronically or on some medium other than paper, a requester has a right to choose to receive a copy of the record on paper, upon the same medium on which it is kept by the public office, or on some other medium upon which the public office can reasonably duplicate the record. Ohio Rev. Code § 149.43(B)(6); *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Office*, 105 Ohio St. 3d 172, 824 N.E.2d 64 (2005) (public entitled to 911 audiotape, not just a transcript).

Recorded public information is supposed to be disclosed even if not organized in the format requested. *State ex rel. Cater v. City of N. Olmsted*, 69 Ohio St. 3d 315, 631 N.E.2d 1048 (1994).

3. Are certain records available for inspection but not copying?

The statute provides that every record available for public inspection is also available for copying. Ohio Rev. Code § 149.43(B).

D. Fee provisions or practices.

1. Levels or limitations on fees.

The statute provides that copies are available "at cost." Ohio Rev. Code § 149.43(B).

The statute does not define "cost," but the Ohio Supreme Court has ruled that "cost" does not include any labor expenses for public employee time. In effect, "cost" is limited to the "actual cost" of depleted supplies, such as toner and paper, used in making copies. *State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994). *See S/O, ex rel. Strothers v. Murphy*, 132 Ohio App. 3d 645, 725 N.E.2d 1185 (Cuyahoga App. 1999) (police department required to charge no more than five cents per page for copying public records).

The right to inspect, rather than copy, records cannot be conditioned on the payment of any fee, even if officials have to redact information exempt from disclosure before allowing the inspection. *State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994).

The Ohio Supreme Court held that a county had to pay for the cost of retrieving improperly deleted e-mails where the relator asked to inspect, not to copy, the records. *State ex rel. Toledo Blade Co. v. Seneca County Bd. of Comm'rs*, 120 Ohio St. 3d 372, 382, 899 N.E.2d 961 (2008).

For computer-stored records, the cost charged should generally be the cost of copying the electronic records. *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992) (holding that copying computer tapes creates an "increased financial burden" on the public office so the cost can be passed on to the requester). Generally speaking, though, the cost cannot exceed the amount charged for copying paper records. *State ex rel. Recodat v. Buchanan*, 46 Ohio St. 3d 163, 546 N.E.2d 203 (1989).

Public offices may arrange with outside contractors to copy computer tapes, and pass the cost of that service directly to the requester. *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992).

The statute authorizes the Bureau of Motor Vehicles to charge additional fees, including a net profit, for responding to a special kind of request. That special kind of request has the following elements: (1) it seeks copies of a record or information in a format other than the format already available, or information that cannot be extracted without examining all items in a database or class of records and (2) the requester intends to use or forward the copies for surveys, marketing, solicitation or resale for commercial purposes. Ohio Rev. Code § 149.43(F).

Under the special provision for Bureau of Motor Vehicles records, commercial purposes does not include newsgathering, nonprofit educational research, and gathering information to assist citizen oversight or understanding of the activities of government. For responding to those bulk commercial requests, the bureau may charge its actual costs (depleted supplies, mailing costs, and the like) plus labor plus 10 percent. The bureau also may charge for redacting information the release of which is prohibited by law. A requester need not specify his intended purpose. If the requester has a noncommercial purpose, he need only assure the bureau that he "does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes." Ohio Rev. Code § 149.43(F).

2. Particular fee specifications or provisions.

a. Search.

The statute does not authorize charging the requester for employee time to search for requested records. The Ohio Supreme Court has ruled that the right to inspect records cannot be conditioned on the payment of any fee, even if officials have to redact information exempt from disclosure before allowing the inspection. Also, even where "cost" can be charged for the making of copies, no fee for public employee time can be charged. *State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994). Consequently, public offices cannot charge fees based on public employee labor to search for requested records.

A provision of the statute allows the Bureau of Motor Vehicles to include labor charges under limited circumstances related to requests for commercial purposes. The statute excepts news reporting and gathering as a commercial purpose. Although unclear, the statute may allow the bureau to charge commercial requesters for search time. Ohio Rev. Code § 149.43(F).

b. Duplication.

The statute provides that copies are available "at cost." Ohio Rev. Code § 149.43(B).

The statute does not define "cost," but the Ohio Supreme Court has ruled that "cost" does not include any labor expenses for public employee time. In effect, "cost" is limited to the "actual cost" of depleted supplies, such as toner and paper, used in making copies. *State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994). *See S/O, ex rel. Strothers v. Murphy*, 132 Ohio App. 3d 645, 725 N.E.2d 1185 (Cuyahoga App. 1999) (police department required to charge no more than five cents per page for copying public records).

For computer-stored records, the cost charged should generally be the cost of copying the electronic records. *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992) (holding that copying computer tapes creates an "increased financial burden" on the public office so the cost can be passed on to the requester). Generally speaking, though, the cost cannot exceed the amount charged for copying paper records. *State ex rel. Recodat v. Buchanan*, 46 Ohio St. 3d 163, 546 N.E.2d 203 (1989).

Public offices may arrange with outside contractors to copy computer tapes, and pass the cost of that service directly to the requester. *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992).

The only exception is the Bureau of Motor Vehicles, which may charge the following: (1) actual cost (depleted supplies, storage costs, delivery costs, direct equipment operating and maintenance costs, (2) the cost of the time spent by the lowest paid employee competent to perform the task of responding to the request and/or to create a computer program to respond to the request, (3) plus 10 percent. This exception does not apply to requesters who give assurance that they do not "intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes." "Surveys, marketing, solicitation, or resale for commercial purposes" does not include "reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research." Ohio Rev. Code § 149.43(E).

c. Other.

Copies of public records through the mail: public offices must comply with a request that copies of records be transmitted to a

requester by mail; but may charge a fee in advance before transmitting copies of public records by mail. The fee is limited to the cost of postage and related depleted supplies. Ohio Rev. Code § 149.43(B)(7).

An indigent criminal defendant is only entitled to one free copy of his criminal trial transcript. Additional requests, under the Public Records Act, require him to pay "cost" for additional copies and for postage and mailing supplies. *State ex rel. Call v. Fragale*, 104 Ohio St. 3d 276, 819 N.E.2d 294 (2004).

3. Provisions for fee waivers.

The statute contains no provision for fee waivers, and no case law addresses the matter. As a practical matter, on an ad hoc basis related to convenience and the small number of pages copied, public offices occasionally charge no fees for copying public records.

The exception is special requests for records of the Bureau of Motor Vehicles, which is allowed to charge the cost of depleted supplies and similar operating costs, labor, plus 10 percent when providing bulk volumes of information in formats not already available and for commercial marketing purposes. Commercial marketing purposes does not include "reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research." A requester who gives written assurance that he "does not intend to use or forward the requested records, or the information contained in them, for commercial purposes" is treated as having a noncommercial purpose. Ohio Rev. Code § 149.43(F).

4. Requirements or prohibitions regarding advance payment.

The statute allows the public office or person responsible for the public record to require advance payment for the cost involved in producing and mailing or transmitting the copy. Ohio Rev. Code § 149.43(B)(6),(7); *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 939 N.E.2d 831 (2010). As a practical matter, public offices usually do not require advance payment.

5. Have agencies imposed prohibitive fees to discourage requesters?

Yes. Since the Ohio Supreme Court ruled in 1994 that labor charges could not be included as "cost" and that no fees can be charged for inspection, the imposition of prohibitive fees has diminished somewhat, but not vanished. *See State ex rel. Warren Newspapers Inc. v. Hutson*, 70 Ohio St. 3d 619, 640 N.E.2d 174 (1994).

E. Who enforces the act?

The Public Records Act can only be enforced by a person aggrieved by the public office's failure to disclose the records. The appropriate mechanism for compelling compliance with the act is a mandamus action. Ohio Rev. Code § 149.43(C).

1. Attorney General's role.

There is no statutory or case law addressing this issue.

2. Availability of an ombudsman.

There is no statutory or case law addressing this issue.

3. Commission or agency enforcement.

There is no statutory or case law addressing this issue.

F. Are there sanctions for noncompliance?

Awards of attorneys' fees are allowed where there is a violation of the Act, and are mandatory in certain instances. Ohio Rev. Code § 149.43(C)(2)(b).

Attorneys' fees are mandatory where the public office ignores a request without responding to it or where the office breaks a promise to comply within a specified period of time. Ohio Rev. Code § 149.43(C)(2)(b).

In addition, the act sanctions statutory damages of one hundred dollars per business day. Ohio Rev. Code § 149.43(C). However, "stacking" of statutory damages for "essentially the same records request" is not allowed, as "no windfall is conferred by the statute." *State ex rel. Dehler v. Kelly*, 127 Ohio St.3d 309, 939 N.E.2d 828 (2010).

The Ohio Supreme Court has held that a successful litigant is not entitled to attorney fees when the work is done by in-house counsel who did not receive any compensation beyond counsel's regular salary. *State ex rel. Beacon Journal Publ'g Co. v. Akron*, 104 Ohio St. 3d 399, 819 N.E.2d 1087 (2004).