

IN THE SUPREME COURT OF OHIO

THE STATE OF OHIO, *ex rel.*
THE TOLEDO BLADE CO.
541 North Superior Street
Toledo, OH 43660,

Relator,

- vs -

Case Number: 07-1694

SENECA COUNTY BOARD OF
COMMISSIONERS
111 Madison Street
Tiffin, OH 44883

ORIGINAL ACTION IN
MANDAMUS
(Public Records)

Respondent.

BRIEF OF RELATOR

Fritz Byers (0002337)
824 Spitzer Building
Toledo, Ohio 43604
Phone: 419-241-8013
Fax: 419-241-4215
e-mail: fbyers@accesstoleledo.com

Counsel for Relator

Mark Landes (27227)
Mark H. Troutman (76390)
ISAAC, BRANT, LEDMAN & TEETOR
250 East Broad Street
Columbus, OH 43215
Phone: 614-221-2121
Fax: 614-365-9526

Counsel for Respondent



TABLE OF CONTENTS

Table of Authorities.	iii
Statement of the Facts.	1
A. Summary.	1
B. Relator’s public-records request.	2
C. The present lawsuit.	6
Argument.	11

<u>Proposition of Law No. 1</u>	12
--	----

When a public office unlawfully destroys public records but the contents of the records can be recovered or restored, the public office’s obligation to maintain the records includes an obligation, enforceable in mandamus, to take the necessary steps to restore the records and to make them available for inspection and copying upon request under the Public Records Act, R.C. 149.43, *construed*; *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Dept.*, 82 Ohio St. 3d 37, 1998-Ohio-597, *followed*.

<u>Proposition of Law no. 2</u>	15
--	----

When a public office, without lawful excuse, delays the production of public records for inspection and copying under the Public Records Act, R.C. 149.43, producing the records only after the filing of a mandamus action to compel production, and when that behavior is part of a pattern of non-responsiveness to public-records requests, a writ of mandamus will issue to compel future compliance by the office with the Act’s requirement that records be made “promptly” available for inspection. R.C. 149.43, *construed*; *State ex rel. Consumer News Service, Inc. v. Worthington City Bd. of Ed.*, 97 Ohio St. 3d 58, 2002-Ohio-5311, and *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 1998-Ohio-444, *applied and followed*.

<u>Proposition of Law no. 3</u>	17
--	----

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

records only after the mandamus action is filed, even though the claim for a writ of mandamus is thereby rendered moot in whole or in part. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, syllabus, 1996-Ohio-161, *approved and followed*.

Conclusion.	22
Certificate of Service.	23
Appendix: Texts of Cited Statutes	

TABLE OF AUTHORITIES

Cases

<i>Cal-Amound, Inc. v. United States Dept. of Agriculture</i> (9th Cir. 1992), 960 F.2d 105	13
<i>State ex rel. Burgess v. Crabbe</i> (1926), 114 Ohio St. 517	13
<i>State ex rel. Consumer News Service, Inc. v. Worthington City Bd. of Ed.</i> , 97 Ohio St. 3d 58, 2002-Ohio-5311	2, 15, 16
<i>State ex rel. Gannett Satellite Info. Network v. Shirey</i> , 78 Ohio St.3d 400, 1997-Ohio-206	17
<i>State ex rel. Pennington v. Gundler</i> , 75 Ohio St.3d 171, 1996-Ohio-161	17, 18, 20
<i>State ex rel. The Toledo Blade Co. v. Northwood</i> (1991), 58 Ohio St. 3d 213	18
<i>State ex rel. Wadd v. City of Cleveland</i> , 81 Ohio St. 3d 50, 1998-Ohio-444	2, 15, 16
<i>State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.</i> , 82 Ohio St. 3d 37, 1998-Ohio-597	12, 13

Statutes

R.C. 121.22	1
R.C. 149.351	2, 8, 14
R.C. 149.38	2, 8, 14
R.C. 149.43	1, 11, 12, 13, 15, 16, 17, 18, 20, 21
R.C. 2731.16	11, 14

STATEMENT OF THE FACTS

A. Summary.

This is an action in mandamus. Relator is the publisher of a newspaper of general circulation; Respondent is the Seneca County Board of Commissioners. Relator seeks an order compelling Respondent's compliance with the requirements of the Public Records Act, R.C. 149.43 ("the Records Act"). In particular, Relator's complaint seeks a writ commanding Respondent to comply with Relator's request for inspection and copying pursuant to the Records Act of certain electronic-mail communications ("e-mails") sent, received, or deleted by members of the Board.

The e-mails in question relate to the Board's decision to order the demolition of the Seneca County Courthouse, a building having substantial historical and aesthetic significance. The available evidence strongly indicates that the Board's decision was reached in violation of the Open Meetings Act, R.C. 121.22 ("the Meetings Act"). The e-mails that Relator seeks are likely to confirm that conclusion.

Respondent's initial response to Relator's request was to produce a smattering of e-mails sent or received by the commissioners. This was belatedly followed by the production of an additional few e-mails, accompanied by an explanation that the failure to timely produce them was the result of "an oversight." The e-mails that were produced, together with Respondent's subsequent admissions and information from other sources, established that a large number of e-mails sent or received by the commissioners still had not been produced.

One group of such e-mails (amounting to about 700 pages of printed text) was belatedly produced by Respondent only after the present suit was filed. A second group consists of e-mails that have not been produced because, according to Respondent, they were deleted from one or more of the commissioners' e-mail accounts. The deletions were accomplished in violation of the County's record-retention-and-disposal rules and without prior notice to the Auditor of State and the Ohio Historical Society as required by R.C. 149.38.¹ The deletions therefore violated R.C. 149.351. In any event, it is likely that a substantial number, and perhaps all, of the deleted e-mails can be recovered. But Respondent has not taken any action to accomplish such a recovery.

In this action, Relator seeks a writ of mandamus and ancillary relief to enforce Respondent's compliance with the Records Act. As to the records that were produced after the filing of this action, Relator seeks an award of attorney fees and a writ of mandamus commanding Respondent's prompt production of similar records upon request in the future.² As to the records that were deleted in violation of the Records Act, Relator seeks a writ of mandamus commanding Respondent to take the steps necessary to restore them so that they can be produced in response to Relator's still-outstanding request. In addition, Relator seeks attorney fees as to this violation as well as ancillary injunctive relief to prevent its recurrence.

¹ Seneca County's Schedule for Records Retention and Disposition, as submitted to and approved by the Ohio Historical Society, is attached at Exhibit A to the Affidavit of Dave Murray.

² See *State ex rel. Consumer News Serv., Inc. v. Worthington City Bd. of Edn.*, 97 Ohio St. 3d 58, 2002-Ohio-5311, ¶¶ 48-51; *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 54, 1998-Ohio-444.

The facts regarding these claims are set out more fully below.

B. Background.

The Seneca County Courthouse was built in 1884. It was designed by architect Elijah E. Myers, one of that century's premiere designers of public buildings. Among other buildings, Myers designed state capitol buildings in Michigan, Texas, and Colorado. The Tiffin County courthouse is one of Myers's few Ohio works. (*Complaint* ¶ 11.)³

On August 31, 2006, Respondent adopted, by a 3-0 vote of the member commissioners, a "Space Needs Master Plan" that expressly called for the demolition of "the 1884 Courthouse." The decision was, and remains, controversial, and the commissioners have faced significant opposition to the demolition plan. Nonetheless, since that time, Respondent has taken various steps to carry out the demolition decision. On June 25, 2007, by a 2-1 vote, the commissioners adopted a resolution authorizing contracts for the demolition in the Fall of 2007. These votes were taken at public meetings, but without significant discussion or debate among the commissioners. The absence of debate, especially with one commissioner dissenting, suggested that the decisions may have been in fact the product of prior non-public discussions conducted in violation of the Meetings Act.

(*Complaint* ¶ 12.)

A group of Seneca County citizens and taxpayers brought suit ("the Cook litigation") against Respondent and the individual commissioners in the summer of 2007, charging (among other things) that the commissioners' actions authorizing demolition of the

³ The *Complaint* in this action is accompanied by the Affidavit of Steven D. Eder attesting on personal knowledge (or historical research) to the truth of the Complaint's factual averments.

courthouse had been taken in violation of the Meetings Act.⁴ In overruling the plaintiffs' motion for a preliminary injunction in that case, the trial court relied specifically and centrally on the unequivocal testimony of the commissioners that they had *never* conducted any discussions or other exchange of "words, comments or ideas" regarding the demolition plan prior to their meetings.⁵

In fact, the commissioners' testimony upon which the Common Pleas Court relied is directly contradicted by the commissioners' own contemporaneous admissions. In particular, in conversations with Kendall Cable, then a reporter for the Tiffin Advertiser-Tribune, the commissioners expressly acknowledged that they had conducted extensive substantive private discussions among themselves prior to their formal action at the August, 2006, meeting. As they said at the time, they conducted regular and numerous discussions among themselves about the plan prior to the meeting, visiting one another's office to "talk things over" regarding the Space Needs Master Plan; they said also that they commonly exchanged emails, sending back and forth comments regarding the Master Plan.⁶ These statements were plainly and directly contrary to their testimony in the Cook litigation that no such discussions had ever taken place.

⁴ The Cook litigation is pending in the Court of Common Pleas for Seneca County. *State ex rel. Cook, et al., v. Seneca County Board of Commissioners, et al.* (Seneca C.P. no. 07 CV 0271). Copies of the relevant filings in that case were appended to Respondent's earlier *Motion to Dismiss*.

⁵ *Opinion and Judgment Entry*, p. 5 (Exhibit F to Relator's *Motion to Dismiss*). See also *Post-Preliminary Injunction Hearing Brief of All Respondents*, p. 4 (Exhibit D to Relator's *Motion to Dismiss*) (summarizing the commissioners' testimony that they had "never" discussed or deliberated the planned demolition outside of public meetings).

⁶ Affidavit of Kendall Cable, ¶ 11.

The apparent falsity of the commissioners' testimony in the Cook litigation is further evidenced by the text of the Space Needs Master Plan itself.⁷ That document reflects beyond question that the commissioners in fact regularly and repeatedly exchanged "words, comments and ideas" about the demolition plan before the August 31, 2006 meeting. In particular, as the document shows and as is reflected in the testimony of Kendall Cable, the Commissioners adopted the Master Plan only after a process – as the Master Plan itself says – in which they "evaluated the aforementioned information on an option by option basis," gave "consideration" to each of these options, and concluded through this deliberative process that "a variation of Option B would best serve the space needs of Seneca County."⁸

All of this work was done, not at the August 31, 2006 meeting, but before it, and, indeed, not in a public meeting of any kind. The official minutes of the August 31, 2006 meeting reflect no discussion of the subject; rather, they say only that a Resolution to approve the Master Plan was "presented" by the Commissioners, and that the resolution was then "motioned" for approval, seconded, and unanimously approved.⁹ There was no discussion, no deliberation.

The minutes contain further evidence contradicting the Commissioners' sworn testimony. During the public-comment phase of the August 31, 2006 meeting, Commissioner Nutter was asked to explain the rationale of the Commissioners' vote. In

⁷ The Space Needs Master Plan is attached as Exhibit B to the Affidavit of Dave Murray.

⁸ Space Needs Master Plan, at pp. 3-8; Affidavit of Kendall Cable, ¶¶ 7-9.

⁹ The minutes of the August 31, 2006 Board meeting are attached as Exhibit C to the Affidavit of Dave Murray.

response, Commissioner Nutter expressed his own views and then, notably, stated confidently that “the other two commissioners concur that taking all things into account, Option B is the best plan.” He goes on to identify a number of things that “we” – that is, the Commissioners as a group – “looked at.”¹⁰ Commissioner Nutter’s description of this collective work contradicts the claim that no “words, comments, ideas” were shared. To be sure, the collective work was not undertaken in a public meeting. But the evidence makes clear that it was undertaken.

And the apparent falsity of the commissioners’ testimony is evidenced yet further in the limited collection of e-mails that Respondent did produce prior to the filing of the present action. Several of these e-mails reference prior communications among the commissioners or call for further communications. (*Complaint* ¶ 15.) But no records have been produced that embody the referenced prior or follow-up communications.¹¹

Thus, one of two inferences – both of them damning – arises: either the emails reflecting these conversations are among those that were unlawfully destroyed or otherwise not produced, or the communications referred to were oral and took place in face-to-face discussions that were at least arguably governed by the Meetings Act.

B. Relator’s public-records request.

Pursuant to the Records Act, Relator requested that Respondent produce for inspection and copying all of the e-mails sent, received, or deleted by the commissioners during the period beginning January 1, 2006 and continuing to the date of the request. The

¹⁰ Affidavit of Dave Murray, Exhibit C, p. 2.

¹¹ Affidavit of Dave Murray.

request was made in the course of Relator's on-going news coverage of the controversy and litigation following Respondent's decision to demolish the courthouse. (*Complaint* ¶ 13.)

In response, Respondent (through counsel) produced some e-mails from the commissioners' accounts. Respondent withheld a handful on the stated ground that they were covered by the attorney-client privilege. Respondent made no other objection or claim of exemption from its disclosure obligations. (*Complaint* ¶¶ 15-18.)

The e-mails that Respondent did produce made clear the existence of other e-mails that had not been produced. Thus, Respondent produced *no* e-mails at all from Commissioner Michael Bridinger's inbox or from his sent-messages folder, notwithstanding evidence that he had sent and received e-mails during the period covered by the request. Similarly, Respondent produced *no* e-mails from Commissioner Ben Nutter's inbox for the period from January 1 to July 19, 2007, even though there was unequivocal evidence that e-mails had been received by Commissioner Nutter during that period. Likewise, there were substantial gaps in the e-mails produced from Commissioner David Sauber's account, including, for example a period of more than two months in 2006 (leading up to the August 1, 2006, demolition vote) for which *no* e-mails were produced. (*Complaint* ¶¶ 15-18.)

Relator was aware that some of the non-produced e-mails existed because it was able to obtain them from other sources. When this fact was communicated to Respondent, the failure to produce was attributed to "an oversight." (*Complaint* ¶ 22.) This lapse apparently extended to e-mails consisting of more than 700 printed pages, which were not produced until *after* the filing of the present lawsuit.

Of even greater volume and significance are an untold number of e-mails that have still not been produced. Respondent attributes the non-production of these records to their having been deleted by the commissioners. Specifically, Commissioner Nutter has stated that he deleted *all* of his incoming e-mail for the period from January 1 to July 19, 2007. And Commissioner Bridinger has said that he deleted *all* of his e-mails – incoming and outgoing – for the period of Relator’s request, although he has recently begun saving those dealing with county business. (No explanation – not even a claim of deletion – has been offered as to the empty months in Commissioner Sauber’s e-mail folders.) (*Complaint* ¶¶ 15-18.)

Pursuant to R.C. 149.38, Seneca County has adopted a Schedule of Records Retention and Disposition. The Schedule provides that e-mail records are to be preserved if they have “a significant Administrative, Fiscal, Legal, or Historic Value.” (*Complaint* ¶ 19; Affidavit of Dave Murray, Exh. A.) In addition, of course, R.C. 149.38 itself requires that the destruction of any record – including destruction pursuant to a properly adopted retention-and-disposition schedule – be preceded by notice to the Auditor of State and to the Ohio Historical Society so that those entities may take steps to preserve the records. R.C. 149.38(C). In this instance, the commissioners’ deletion of the e-mails in question violated both the Schedule and the terms of R.C. 149.38. The deletions thus also violated R.C. 149.351(A).¹²

¹² R.C. 149.351(A) provides:

All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code or under the records programs
(continued...)

Notwithstanding their deletion, the missing e-mails are likely to exist in some form, and are likely to be recoverable. As set forth in the affidavit of Matthew A. Zuccarell, an expert specialist in forensic data-recovery services, deleted electronic documents – including e-mails – are often recoverable, albeit at times with some effort. Archive and backup files, especially if maintained on local servers, are commonly fruitful sources of such recovery. Even non-local archives may be accessible. And, regardless of the utility of these methods, forensic analysis of hard drives is a widely acknowledged and commonly used method of recovering electronic documents that have been deleted. As Mr. Zuccarell explains, “It is not possible to know whether deleted email messages or other data is recoverable until forensic recovery and analysis is attempted.”¹³ Yet, consistent with its indifference to its public-records obligations, Respondent has taken no known steps to accomplish the recovery of the e-mails that the commissioners unlawfully deleted.

C. The present lawsuit.

Based on Respondent’s failure to produce the requested e-mails, Relator filed the present action seeking a writ of mandamus to compel production. Shortly after the filing, as noted above, Respondent delivered copies of a large number of e-mails amounting to more than 700 pages of printed text. As to those specific records, Relator’s claim has been rendered moot in part. But even as to those records, Relator’s complaint still seeks an award

¹²(...continued)
established by the boards of trustees of state-supported institutions of higher education under section 149.33 of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

¹³Affidavit of Matthew A. Zuccarell, ¶17.

of attorney fees as well as relief for Respondent's pattern of dilatory disclosures, specifically by way of a writ commanding prompt disclosure in the future.

Moreover, the complaint seeks relief regarding the e-mails that have yet to be produced in any form, that is, those that Respondent claims were deleted. As to these, the complaint seeks a writ commanding Respondent to take the steps necessary to recover the deleted e-mails and then to make them promptly available to Relator for inspection and copying pursuant to the Records Act. In addition, the complaint seeks ancillary relief in the form of orders prohibiting Respondent from further destroying or deleting electronic records (or their backups) except in compliance with governing law.

As described above, production of the deleted records is likely to produce evidence that the decision to demolish the Seneca County Courthouse was arrived at by means that were at least arguably incompatible with the Meetings Act. Moreover, the deleted records may well add documentary proof to the already existing testimonial proof tending to show the falsity of the commissioners' Cook-litigation testimony that they had never discussed the demolition plan other than in public meetings.

Because the present action seeks relief only under the Records Act, the question whether Respondent has in fact also violated the Meetings Act is not before the Court. But Respondent's behavior regarding the Meetings Act is directly material to the present case. At a minimum, the commissioners' destruction of the e-mails at issue takes on a disturbing quality when the destruction is viewed in the light of the commissioners' other actions (including apparently false testimony) to cover up the non-public communications that preceded their formal public actions regarding the demolition of the courthouse. In addition,

to the extent that the deleted e-mails are recovered and made publicly available pursuant to this Court's writ, the e-mails will help to establish whether such non-public communications took place and, if so, whether the communications violated the Meetings Act. For that reason alone, the production of the e-mails would confer an undeniably substantial public benefit.

ARGUMENT

The Records Act requires public offices and persons responsible for public records to “promptly” prepare them and make them available for inspection and to provide copies of them at cost upon request. R.C. 149.43(B).¹⁴ In this case, there is no dispute that Respondent is the public office responsible for the e-mails requested by Relator. Nor can there be any dispute that the requested e-mails are public records. As to the 700 pages of e-mails produced after the filing of this action, Respondent’s act of production itself concedes that those items were and are subject to inspection under the Act. As to the deleted e-mails, Respondent has made absolutely no objection or claim of exemption on the ground that the e-mails are not within the Act. Respondent’s sole claim as to these records is, rather, that it can no longer produce them because they were (unlawfully) deleted.

With the case in that posture, Relator is entitled to the requested writ of mandamus. The propositions of law below demonstrate this. *First*, Relator is entitled to a writ commanding Respondent to take the steps necessary to recover the deleted e-mails and, when they are recovered, to then permit inspection and copying by Relator (Proposition of Law no. 1, below). As a part of that relief, of course, the Court may properly enter ancillary orders to assure that the requested records are in fact produced.¹⁵ *Second*, as to the e-mails

¹⁴ R.C. 149.43 was amended in various ways by 2006 HB 9, with an effective date of September 29, 2007. The changes are not material to those of Respondent’s substantive obligations that are at issue in this case, except to the extent that some subdivision citations may have changed. As described under Proposition of Law no. 3, *infra*, the amendment does significantly alter the rules governing an award of attorney fees in public-record cases.

¹⁵ *See* R.C. 2731.16 (Revised Code does not limit power of court to issue orders and decrees to carry mandamus judgment into effect).

produced only after the filing of the present action, Respondent's pattern of delay is sufficient to warrant a writ commanding Respondent to make such records promptly available in the future (Proposition of Law no. 2, below). Third, Relator is entitled to an award of its attorney fees in this proceeding (Proposition of Law no. 3, below).

Proposition of Law No. 1

When a public office unlawfully destroys public records but the contents of the records can be recovered or restored, the public office's obligation to maintain the records includes an obligation, enforceable in mandamus, to take the necessary steps to restore the records and to make them available for inspection and copying upon request under the Public Records Act. R.C. 149.43, construed; *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St. 3d 37, 1998-Ohio-597, followed.

Among the central obligations of a public office regarding public records is the obligation to "maintain [the] records in a manner that they can be made available for inspection in accordance with" the Records Act. R.C. 149.43(B)(2) (formerly R.C. 149.43(B)(1)). The destruction of public records runs diametrically contrary to this obligation and is therefore a violation of public records. Ohio law does provide a process by which a public office can destroy records, but that process is clearly defined in state law and destruction of public records is lawful only if done in accordance with that process. When, as here, the destruction is accomplished in violation of the approved process, the destruction violates public-records law.

This Court has articulated and applied these simple principles with considerable clarity and force, holding that a public office will not ordinarily be ordered to re-create records that no longer exist because they have been *lawfully* destroyed. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St. 3d 37, 42-43, 1998-Ohio-597. Yet, as this

Court was careful to point out in *Wilson-Simmons*, these principles apply only if the destruction was lawful – if, that is, there is “no evidence or assertion that the [public office] violated any applicable records retention provision” when it destroyed the records. 82 Ohio St. 3d at 42. When, by contrast, the destruction is unlawful, as it undeniably was in the present case, the public office’s obligation to “maintain” the record cannot be discharged nor its failure to produce the record excused by the office’s own wrongful conduct.¹⁶

To be sure, a writ of mandamus will not issue to command the performance of an impossible act.¹⁷ Thus, when a record has been destroyed beyond any possibility of recovery or re-creation, mandamus is not an appropriate remedy. In that event, a person aggrieved by the public office’s failure to maintain the record (and the office’s consequent inability to produce it) may well be left to the forfeiture remedies provided by R.C. 149.351. But if the unlawfully destroyed record is recoverable, the public office’s continuing obligation to “maintain” the record necessarily includes its recovery as part of the obligation to hold records “in a manner that they can be made available for inspection in accordance with” the Records Act. R.C. 149.43(B)(2).¹⁸

¹⁶ *Wilson-Simmons*, *supra*, 82 Ohio St. 3d at 42, quoting *Cal-Amond, Inc. v. United States Dept. of Agriculture* (9th Cir. 1992), 960 F.2d 105, 109 (“[a]bsent a showing that the government has improperly destroyed ‘agency records,’ there is no obligation to re-create the records).

¹⁷ *State ex rel. Burgess v. Crabbe* (1926), 114 Ohio St. 517, 522 (mandamus does not lie “if performance of the act prayed for is impossible”).

¹⁸ In any case in which a deleted computer file can be recovered, there is likely to be some electronic record that is the source of the recovery. That source record is itself a public record, subject to production for inspection and copying. If the source record is inaccessible or unreadable without expert aid in recovering it, the public office is bound to perform the recovery as part of its obligation to maintain records in a manner that facilitates inspection. R.C. 149.43(B)(2).

The application of these principles to the present case is plain. There can be no dispute that the deletion of the e-mails at issue here violated both the county's statutorily required record-retention schedule and the provisions of R.C. 149.351 and R.C. 149.38. Here, there is not only "evidence or assertion" of unlawful destruction, *Wilson-Simmons, supra*. The unlawfulness is, rather, conclusively established. Nor can there be any genuine dispute that the contents of the e-mails are probably recoverable notwithstanding their deletion. The routine recovery of deleted computer records is a matter of common experience, and the likelihood of recovery here is attested to by the expert testimony of Matthew A. Zuccarell. *Affidavit of Matthew A. Zuccarell*, ¶¶ 11-16.

Having unlawfully destroyed the records, Respondent is bound to take the necessary steps to restore them to a condition in which they will be available for inspection and copying pursuant to the Records Act, and Relator is entitled to a writ of mandamus commanding that Respondent do so. And, ancillary to the issuance of that writ, this Court may properly exercise its inherent and statutory powers to assure that Respondent carries out the terms of the Court's decree. *See* R.C. 2731.16. In particular, this Court should, as part of the decree, require that Respondent report to the Court regarding the recovery efforts it undertakes and the efficacy of those efforts.

The facts before the Court, and the inferences that arise unmistakably from those facts, create a deeply troubling picture of Seneca County governance. The destruction of crucial emails and the failure to produce other emails until after this action was filed are of a piece with the scofflaw decision-making that produced the Commissioners' vote to destroy the courthouse. Under the circumstances the likelihood is high that additional emails, if

recovered, will reveal even more about this pattern of law-breaking. It is a long-settled equitable principle that a wrong-doer, especially one in an official position of public trust, cannot be permitted to reap the benefits of the wrongful acts. In view of that principle, it would be an appropriate application of this Court's inherent powers for the Court to enjoin Respondent from proceeding with the destruction of the Seneca County Courthouse until Respondent has fully discharged its obligations under the writ petitioner seeks.

Proposition of Law no. 2

When a public office, without lawful excuse, delays the production of public records for inspection and copying under the Public Records Act, R.C. 149.43, producing the records only after the filing of a mandamus action to compel production, and when that behavior is part of a pattern of non-responsiveness to public-records requests, a writ of mandamus will issue to compel future compliance by the office with the Act's requirement that records be made "*promptly*" available for inspection. R.C. 149.43, *construed*; *State ex rel. Consumer News Service, Inc. v. Worthington City Bd. of Ed.*, 97 Ohio St. 3d 58, 2002-Ohio-5311, and *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 1998-Ohio-444, *applied and followed*.

In this case, not all of the requested e-mails were deleted. Rather, with respect to a significant number of the requested emails, Respondent simply did not produce them. Instead, purporting to make full production, Respondent initially delivered only a small collection of the extant, non-deleted e-mails. As described above, the internal evidence from the produced e-mails together with information derived from other sources made it clear that the supposedly full production was in truth materially deficient. In fact, Respondent withheld more than 700 pages of e-mails until *after* the filing of the present action. Respondent's only explanation for the failure to promptly produce these e-mails was that there had been an "oversight."

Respondent's production of these non-deleted e-mails, grossly belated though it was, renders moot Relator's prayer for a writ of mandamus commanding their production. But as this Court has repeatedly held, the belated production does *not* moot a prayer for a writ commanding future compliance by a public office with the Records Act's specific requirement that records be "*promptly*" prepared and made available for inspection. R.C. 149.43(B)(1).¹⁹ Especially when there is a pattern or history of unreasonable or unexplained delay in complying with public-records requests, a writ commanding future compliance is an essential part of assuring that the Act's requirement of prompt production has actual meaning.

In this case, Respondent delayed production of a substantial mass of requested records, offering no explanation other than "an oversight." It tests credulity to suggest that a diligent effort to find and produce e-mails in the accounts of three people could have inadvertently missed more than 700 pages of documents. If the non-production was indeed the product of "an oversight," that fact alone demonstrates a grievous failure by Respondent to maintain the records in a manner that facilitates access to and the availability of the records. R.C. 149.43(B)(1). Nor is there any reason to believe that Respondent has changed its systems for maintaining its e-mail records to assure that such "oversights" do not occur in the future.

In view of Respondent's complete and continuing insouciance about its Records-Act obligations regarding its e-mails, it is wholly appropriate for this Court to include in its decree

¹⁹ See, e.g., *State ex rel. Consumer News Service, Inc. v. Worthington City Bd. of Ed.*, 97 Ohio St. 3d 58, 2002-Ohio-5311, ¶ 51; *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 54, 1998-Ohio-444.

provisions commanding Respondent to comply specifically with its obligation to make requested e-mails and other public records *promptly* available in the future.

Proposition of Law no. 3

A court may award attorney fees pursuant to R.C. 149.43 where (1) a person makes a proper request for public records pursuant to R.C. 149.43, (2) the custodian of the public records fails to comply with the person's request, (3) the requesting person files a mandamus action pursuant to R.C. 149.43 to obtain copies of the records, and (4) the person receives the requested public records only after the mandamus action is filed, even though the claim for a writ of mandamus is thereby rendered moot in whole or in part. *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, syllabus, 1996-Ohio-161, *approved and followed*.

The Records Act expressly provides for the recovery of attorney fees by a relator who prevails in a mandamus action for the production of public records. R.C. 149.43(C). Under this provision, Relator is entitled to recover its attorney fees because it has established not merely a violation, but indeed multiple violations, of public-records law and because, since filing this action, Relator has obtained access to Respondent's public records (even if the court-ordered efforts to recover the deleted emails are unavailing). This is so, regardless of whether the Court applies the attorneys-fee law as it existed at the time of filing, or as it exists under the amendment that took effect on September 29, 2007.

Before September 29, 2007, R.C. 149.43(C) provided that an aggrieved party "may" commence an action for a decree that, among other things, "awards reasonable attorney's fees to the person that instituted the mandamus action." In the past, this Court has construed that provision as permitting an award of fees in a mandamus action only when the

relator's action produced a "public benefit" and the respondent's failure to produce was unjustified or unreasonable.²⁰

Effective September 29, 2007, however, R.C. 149.43 has been amended by 2006 HB 9. As amended, R.C. 149.43(C) continues to provide for an award of "a reasonable attorney's fee" in mandamus actions. R.C. 149.43(C)(1). Contrary to this Court's prior interpretations, the amended statute designates such an award as remedial, rather than punitive. R.C. 149.43(C)(2)(c). Further, the amended statute *requires* such an award if the public office failed to respond, either affirmatively or negatively, to a records request within a reasonable time after the request was made, or if the office promised to give access within a specified time but failed to do so. R.C. 149.43(C)(2)(b). At the same time, the amended statute also permits the court to reduce the amount of the award (or to forego an award entirely) if a "well-informed" public office would have believed that its acts were lawful and consonant with the policies underlying the Act and its exemptions. R.C. 149.43(C)(2)(c).

The amendment raises the obvious question whether the pre-amendment or post-amendment version of R.C. 149.43(C) applies to cases such as the present one that are pending on the amendment's effective date. The Court need not address the question, however, since it is clear that under either version, Relator is entitled to an award of its reasonable attorney fees.

Under either version, of course, this Court's settled precedents establish that Respondent's belated production of some documents (as described under Proposition of

²⁰ See, e.g., *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 404, 1997-Ohio-206.

Law no. 2, *supra*) cannot obviate its liability for attorney fees, even though the production has mooted a part of Relator's prayer for a writ of mandamus. See *State ex rel. Pennington v. Gundler*, 75 Ohio St.3d 171, syllabus, 1996-Ohio-161 (overruling *State ex rel The Toledo Blade Co. v. Northwood* (1991), 58 Ohio St. 3d 213; the Court noted "the proclivity of some custodians of public records to force the filing of a mandamus action by a citizen to gain access to records that are obviously public" and the injustice of denying relator's an award of attorney fees in such circumstances).

If the pre-amendment version of the statute applies in this action, there can be no doubt that Relator's prevailing in this action has produced a substantial public benefit, and that Respondent's failure to produce the requested records was unjustified and unreasonable. Indeed, as to the deleted e-mails, Respondent's conduct was not merely unreasonable: it was positively and undeniably unlawful.

Specifically, as described above, a writ in this case commanding Respondent to take steps to recover the unlawfully destroyed e-mails is likely to produce a significant documentary record directly material to the question whether Respondent's decisions regarding the Seneca County Courthouse were reached in accordance with the Meetings Act. If, as is likely, the records demonstrate a failure to comply with the Meetings Act, the public exposure of such lawlessness will undoubtedly benefit the public. And if the records instead demonstrate that the decisions were reached in conformity with the Meetings Act, the records will help to reduce currently existing public doubts about Respondent's compliance with legal requirements.

Moreover, quite apart from considerations involving the Meetings Act, the very exposure of Respondent's lawless failure to adhere to legal requirements regarding the preservation of public records will itself constitute a benefit to the public. Such exposure obviously creates an incentive – highly beneficial to the public – for any office to conform its requirements to the law. And the incentive, with its corresponding public benefit, will be all the greater if this Court's decree includes, as it should, provisions commanding future compliance with the Act.

At the same time, Respondent cannot suggest that its behavior was reasonable or justified. The destruction of the deleted e-mails violated the county's own records-retention schedule, as well as the Revised Code provisions governing records retention and disposal. Similarly, Respondent's failure to produce more than 700 pages of non-deleted e-mails was not the product of a considered judgment or even "legitimate questions" about the status of those records.²¹ It was, rather, the result of a failure to take seriously the statutory obligation to maintain records in a fashion that facilitates their identification and production in response to public-records requests.

Under the pre-amendment version of R.C. 149.43(C), in short, an award of attorney fees is not merely permissible: it is fully warranted. The same conclusion follows if the fee-award question is governed by the post-amendment version of the statute.

To the extent that the post-amendment version continues to permit, rather than require, an award in some cases, it may be taken as preserving to some degree the standards established by this Court under the pre-amendment text. To that extent, then, an award to

²¹ Compare *State ex rel Pennington v. Gundler*, *supra*, 75 Ohio St. 3d at 174.

Relator is obviously proper in terms of this Court's public-benefit and unreasonable-grounds tests.

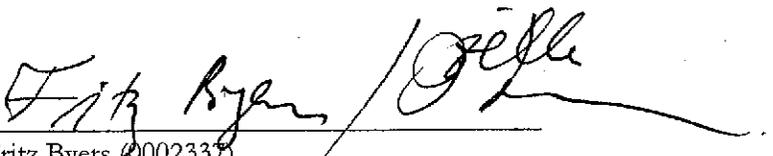
The amended version plainly does not, however, simply codify this Court's prior decisions on the subject. Certainly, the express declaration that a fee award should be treated as remedial, rather than punitive, suggests little if any reason to insist on the creation of a public benefit as a condition precedent to such an award. A similar conclusion is implied by the *mandatory* character of the award whenever an office fails to respond to a records request within a reasonable time, again without regard to any supposed public benefit independent of compelling compliance with the law. And the amendment's codification of specific rules permitting reduction of an award only when a "well-informed" public office would have thought its conduct lawful likewise suggests not only the immateriality of a public-benefit test, but also the limited significance of the public office's actual justifications. Unless those justifications would have persuaded a "well-informed" office that it need not comply with a records request, they do not warrant a reduction in the amount of fees awarded.

Applying those principles to this case, it is clear that Respondent's behavior here fails to meet the amended statute's criteria for avoiding a fee award. Respondent has *no* cognizable justification, either for its lawless destruction of the deleted e-mails or for its complete failure to permit timely access to the e-mails that were not deleted. No "well-informed" public office would have thought that it was complying with the law by destroying documents in violation of the law. No "well-informed" public office would have thought that it had maintained records in a manner facilitating production when it had completely failed to produce more than 700 pages of records for no other reason than "an oversight."

Under either version of R.C. 149.43(C), then, Relator is entitled to an award of its reasonable attorney's fees expended in pursuit of this action. This Court's final decree must include such an award.

CONCLUSION

For the foregoing reasons, this Court must issue a writ of mandamus commanding Respondent to take the steps necessary to recover the unlawfully deleted e-mail records, to report to this Court regarding the steps Respondent has taken and their efficacy, to promptly produce for inspection and copying in the future any requested e-mails that constitute public records, and to pay Relator's costs including a reasonable attorney's fee.


Fritz Byers (0002337)
824 Spitzer Building
Toledo, Ohio 43604
Phone: 419-241-8013
Fax: 419-241-4215
e-mail: fbyers@accesstoledo.com

Counsel for Relator

CERTIFICATE OF SERVICE ^{and evidence}

This will certify that a true and correct copy of the foregoing Brief of Relator was served by email and by ordinary U.S. Mail, postage prepaid, on the following counsel of record this 9th day of October 2007:

Mark Landes
Mark H. Troutman
ISAAC, BRANT, LEDMAN & TEETOR
250 East Broad Street
Columbus, OH 43215

Fitz Byers ^{Welle}

APPENDIX: Texts of Cited Statutes

121.22 Public meetings - exceptions.

(A) This section shall be liberally construed to require public officials to take official action and to conduct all deliberations upon official business only in open meetings unless the subject matter is specifically excepted by law.

(B) As used in this section:

(1) "Public body" means 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 division (B)(1)(a) of this section;

(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 section 6115.10 of the Revised Code, if applicable, or for any other matter related to such a district other than litigation involving the district. As used in division (B)(1)(c) of this section, "court of jurisdiction" has the same meaning as "court" in section 6115.01 of the Revised Code.

(2) "Meeting" means any prearranged discussion of the public business of the public body by a majority of its members.

(3) "Regulated individual" means either of the following:

(a) A student in a state or local public educational institution;

(b) A person who is, voluntarily or involuntarily, an inmate, patient, or resident of a state or local institution because of criminal behavior, mental illness or retardation, disease, disability, age, or other condition requiring custodial care.

(4) "Public office" has the same meaning as in section 149.011 of the Revised Code.

(C) All meetings of any public body are declared to be public meetings open to the public at all times. A member of a public body shall be present in person at a meeting open to the public to be considered present or to vote at the meeting and for purposes of determining whether a quorum is present at the meeting.

The minutes of a regular or special meeting of any public body shall be promptly prepared, filed, and maintained and shall be open to public inspection. The minutes need only reflect the general subject matter of discussions in executive sessions authorized under division (G) or (J) of this section.

(D) This section does not apply to any of the following:

(1) A grand jury;

(2) An audit conference conducted by the auditor of state or independent certified public accountants with officials of the public office that is the subject of the audit;

(3) The adult parole authority when its hearings are conducted at a correctional institution for the sole purpose of interviewing inmates to determine parole or pardon;

(4) The organized crime investigations commission established under section 177.01 of the Revised Code;

(5) Meetings of a child fatality review board established under section 307.621 of the Revised Code and meetings conducted pursuant to sections 5153.171 to 5153.173 of the Revised Code;

(6) The state medical board when determining whether to suspend a certificate without a prior hearing pursuant to division (G) of either section 4730.25 or 4731.22 of the Revised Code;

(7) The board of nursing when determining whether to suspend a license or certificate without a prior hearing pursuant to division (B) of section 4723.281 of the Revised Code;

(8) The state board of pharmacy when determining whether to suspend a license without a prior hearing pursuant to division (D) of section 4729.16 of the Revised Code;

(9) The state chiropractic board when determining whether to suspend a license without a hearing pursuant to section 4734.37 of the Revised Code.

(10) The executive committee of the emergency response commission when determining whether to issue an enforcement order or request that a civil action, civil penalty action, or criminal action be brought to enforce Chapter 3750. of the Revised Code.

(E) The controlling board, the development financing advisory council, the industrial technology and enterprise advisory council, the tax credit authority, or the minority development financing advisory board, when meeting to consider granting assistance pursuant to Chapter 122. or 166. of the Revised Code, in order to protect the interest of the applicant or the possible investment of public funds, by unanimous vote of all board, council, or authority members present, may close the meeting during consideration of the following information confidentially received by the authority, council, or board from the applicant:

(1) Marketing plans;

(2) Specific business strategy;

(3) Production techniques and trade secrets;

(4) Financial projections;

(5) Personal financial statements of the applicant or members of the applicant's immediate family, including, but not limited to, tax records or other similar information not open to public inspection.

The vote by the authority, council, or board to accept or reject the application, as well as all proceedings of the authority, council, or board not subject to this division, shall be open to the public and governed by this section.

(F) Every public body, by rule, shall establish a reasonable method whereby any person may determine the time and place of all regularly scheduled meetings and the time, place, and purpose of all special meetings. A public body shall not hold a special meeting unless it gives at least twenty-four 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 shall notify the news media that have requested notification immediately of the time, place, and purpose of the meeting.

The rule shall 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. Provisions for advance notification may include, but are not limited to, mailing the agenda of meetings to all subscribers on a mailing list or mailing notices in self-addressed, stamped envelopes provided by the person.

(G) Except as provided in division (J) of this section, the members of a public body may hold an executive session only after a majority of a quorum of the public body determines, by a roll call vote, to hold an executive session and only at a regular or special meeting for the sole purpose of the consideration of any of the following matters:

(1) To consider the appointment, employment, dismissal, discipline, promotion, demotion, or compensation of a public employee or official, or the investigation of charges or complaints against a public employee, official, licensee, or regulated individual, unless the public employee, official, licensee, or regulated individual requests a public hearing. Except as otherwise provided by law, no public body shall hold an executive session for the discipline of an elected official for conduct related to the performance of the elected official's official duties or for the elected official's removal from office. If a public body holds an executive session pursuant to division (G)(1) of this section, the motion and vote to hold that executive session shall state which one or more of the approved purposes listed in division (G)(1) of this section are the purposes for which the executive session is to be held, but need not include the name of any person to be considered at the meeting.

(2) To consider the purchase of property for public purposes, or for the sale of property at competitive bidding, if premature disclosure of information would give an unfair competitive or bargaining advantage to a person whose personal, private interest is adverse to the general public interest. No member of a public body shall use division (G)(2) of this section as a subterfuge for providing covert information to prospective buyers or sellers. A purchase or sale of public property is void if the seller or buyer of the public property has received covert information from a member of a public body that has not been disclosed to the general public in sufficient time for other prospective buyers and sellers to prepare and submit offers.

If the minutes of the public body show that all meetings and deliberations of the public body have been conducted in compliance with this section, any instrument executed by the public body purporting to convey, lease, or otherwise dispose of any right, title, or interest in any public property shall be conclusively presumed to have been executed in compliance with this section insofar as title or other interest of any bona fide purchasers, lessees, or transferees of the property is concerned.

(3) Conferences with an attorney for the public body concerning disputes involving the public body that are the subject of pending or imminent court action;

(4) Preparing for, conducting, or reviewing negotiations or bargaining sessions with public employees concerning their compensation or other terms and conditions of their employment;

(5) Matters required to be kept confidential by federal law or regulations or state statutes;

(6) Details relative to the security arrangements and emergency response protocols for a public body or a public office, if disclosure of the matters discussed could reasonably be expected to jeopardize the security of the public body or public office;

(7) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, to consider trade secrets, as defined in section 1333.61 of the Revised Code.

If a public body holds an executive session to consider any of the matters listed in divisions (G)(2) to (7) of this section, the motion and vote to hold that executive session shall state which one or more of the approved matters listed in those divisions are to be considered at the executive session.

A public body specified in division (B)(1)(c) of this section shall not hold an executive session when meeting for the purposes specified in that division.

(H) A resolution, rule, or formal action of any kind is invalid unless adopted in an open meeting of the public body. A resolution, rule, or formal action adopted in an open meeting that results from deliberations in a meeting not open to the public is invalid unless the deliberations were for a purpose specifically authorized in division (G) or (J) of this section and conducted at an executive session held in compliance with this section. A resolution, rule, or formal action adopted in an open meeting is invalid if the public body that adopted the resolution, rule, or formal action violated division (F) of this section.

(I)(1) Any person may bring an action to enforce this section. An action under division (I)(1) of this section shall be brought within two years after the date of the alleged violation or threatened violation. Upon proof of a violation or threatened violation of this section in an action brought by any person, the court of common pleas shall issue an injunction to compel the members of the public body to comply with its provisions.

(2)(a) If the court of common pleas issues an injunction pursuant to division (I)(1) of this section, the court shall order the public body that it enjoins to pay a civil forfeiture of five hundred dollars to the party that sought the injunction and shall award to that party all court costs and, subject to reduction as described in division (I)(2) of this section, reasonable attorney's fees. The court, in its

discretion, may reduce an award of attorney's fees to the party that sought the injunction or not award attorney's fees to that party if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of violation or threatened violation that was the basis of the injunction, a well-informed public body reasonably would believe that the public body was not violating or threatening to violate this section;

(ii) That a well-informed public body reasonably would believe that the conduct or threatened conduct that was the basis of the injunction would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(b) If the court of common pleas does not issue an injunction pursuant to division (I)(1) of this section and the court determines at that time that the bringing of the action was frivolous conduct, as defined in division (A) of section 2323.51 of the Revised Code, the court shall award to the public body all court costs and reasonable attorney's fees, as determined by the court.

(3) Irreparable harm and prejudice to the party that sought the injunction shall be conclusively and irrebuttably presumed upon proof of a violation or threatened violation of this section.

(4) A member of a public body who knowingly violates an injunction issued pursuant to division (I)(1) of this section may be removed from office by an action brought in the court of common pleas for that purpose by the prosecuting attorney or the attorney general.

(J)(1) Pursuant to division (C) of section 5901.09 of the Revised Code, a veterans service commission shall hold an executive session for one or more of the following purposes unless an applicant requests a public hearing:

(a) Interviewing an applicant for financial assistance under sections 5901.01 to 5901.15 of the Revised Code;

(b) Discussing applications, statements, and other documents described in division (B) of section 5901.09 of the Revised Code;

(c) Reviewing matters relating to an applicant's request for financial assistance under sections 5901.01 to 5901.15 of the Revised Code.

(2) A veterans service commission shall not exclude an applicant for, recipient of, or former recipient of financial assistance under sections 5901.01 to 5901.15 of the Revised Code, and shall not exclude representatives selected by the applicant, recipient, or former recipient, from a meeting that the commission conducts as an executive session that pertains to the applicant's, recipient's, or former recipient's application for financial assistance.

(3) A veterans service commission shall vote on the grant or denial of financial assistance under sections 5901.01 to 5901.15 of the Revised Code only in an open meeting of the commission. The minutes of the meeting shall indicate the name, address, and occupation of the applicant, whether the assistance was granted or denied, the amount of the assistance if assistance is granted, and the votes for and against the granting of assistance.

149.351 Prohibiting destruction or damage of records.

(A) All records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42 of the Revised Code or under the records programs established by the boards of trustees of state-supported institutions of higher education under section 149.33 of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

(B) Any person who is aggrieved by the removal, destruction, mutilation, or transfer of, or by other damage to or disposition of a record in violation of division (A) of this section, or by threat of such removal, destruction, mutilation, transfer, or other damage to or disposition of such a record, may commence either or both of the following in the court of common pleas of the county in which division (A) of this section allegedly was violated or is threatened to be violated:

(1) A civil action for injunctive relief to compel compliance with division (A) of this section, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action;

(2) A civil action to recover a forfeiture in the amount of one thousand dollars for each violation, and to obtain an award of the reasonable attorney's fees incurred by the person in the civil action.

149.38 County records commission.

[Text in effect prior to September 29, 2007.]

(A) There is hereby created in each county a county records commission, composed of the president of the board of county commissioners as chairperson, the prosecuting attorney, the auditor, the recorder, and the clerk of the court of common pleas. The commission shall appoint a secretary, who may or may not be a member of the commission and who shall serve at the pleasure of the commission. The commission may employ an archivist to serve under its direction. The commission shall meet at least once every six months, and upon call of the chairperson.

(B) The functions of the county records commission shall be to provide rules for retention and disposal of records of the county and to review applications for one-time records disposal and schedules of records retention and disposal submitted by county offices. Records may be disposed of by the commission pursuant to the procedure outlined in this section. The commission, at any time, may review any schedule it has previously approved and, for good cause shown, may revise that schedule, subject to division (D) of this section.

(C) When the county records commission has approved county records for disposal, a copy of a list of those records shall be sent to the auditor of state. If the auditor of state disapproves the action by the commission in whole or in part, the auditor of state shall so inform the commission within a period of sixty days, and those records shall not be destroyed. Before public records are to be disposed of, the commission shall inform the Ohio historical society and give the society the opportunity for a period of sixty days to select for its custody such records as it considers to be of continuing historical value. When the Ohio historical society is so informed that public records are to be disposed of, the county records commission also shall notify the county historical society, and any public or quasi-public institutions, agencies, or corporations in the county that have provided the commission with their name and address for these notification purposes, that the Ohio historical society has been so informed and may select records of continuing historical value, including records that may be distributed to any of the notified entities under section 149.31 of the Revised Code.

(D) The rules of the county records commission shall include a rule that requires any receipts, checks, vouchers, or other similar records pertaining to expenditures from the delinquent tax and assessment collection fund created in section 321.261 of the Revised Code, from the real estate assessment fund created in section 325.31 of the Revised Code, or from amounts allocated for the furtherance of justice to the county sheriff under section 325.071 of the Revised Code or to the prosecuting attorney under section 325.12 of the Revised Code to be retained for at least four years.

(E) No person shall knowingly violate the rule adopted under division (D) of this section. Whoever violates that rule is guilty of a misdemeanor of the first degree.

149.38 County records commission.

[Text in effect beginning September 29, 2007.]

(A) There is hereby created in each county a county records commission, composed of a member of the board of county commissioners as chairperson, the prosecuting attorney, the auditor, the recorder, and the clerk of the court of common pleas. The commission shall appoint a secretary, who may or may not be a member of the commission and who shall serve at the pleasure of the commission. The commission may employ an archivist or records manager to serve under its direction. The commission shall meet at least once every six months and upon call of the chairperson.

(B) The functions of the county records commission shall be to provide rules for retention and disposal of records of the county and to review applications for one-time disposal of obsolete records and schedules of records retention and disposition submitted by county offices. The commission may dispose of records pursuant to the procedure outlined in this section. The commission, at any time, may review any schedule it has previously approved and, for good cause shown, may revise that schedule, subject to division (D) of this section.

(C) When the county records commission has approved any county application for one-time disposal of obsolete records or any schedule of records retention and disposition, the commission shall send that application or schedule to the Ohio historical society for its review. The Ohio historical society shall review the application or schedule within a period of not more than sixty days after its receipt of it. Upon completion of its review, the Ohio historical society shall forward the application for one-time disposal of obsolete records or the schedule of records retention and disposition to the auditor of state for the auditor's approval or disapproval. The auditor shall approve or disapprove the application or schedule within a period of not more than sixty days after receipt of it. Before public records are to be disposed of, the commission shall inform the Ohio historical society of the disposal through the submission of a certificate of records disposal and shall give the society the opportunity for a period of fifteen business days to select for its custody those records that it considers to be of continuing historical value. Upon the expiration of the fifteen-business-day period, the county records commission also shall notify the public libraries, county historical society, state universities, and other public or quasi-public institutions, agencies, or corporations in the county that have provided the commission with their name and address for these notification purposes, that the commission has informed the Ohio historical society of the records disposal and that the notified entities, upon written agreement with the Ohio historical society pursuant to section 149.31 of the Revised Code, may select records of continuing historical value, including records that may be distributed to any of the notified entities under section 149.31 of the Revised Code.

(D) The rules of the county records commission shall include a rule that requires any receipts, checks, vouchers, or other similar records pertaining to expenditures from the delinquent tax and assessment collection fund created in section 321.261 of the Revised Code, from the real estate assessment fund created in section 325.31 of the Revised Code, or from amounts allocated for the furtherance of justice to the county sheriff under section 325.071 of the Revised Code or to the prosecuting attorney under section 325.12 of the Revised Code to be retained for at least four years.

(E) No person shall knowingly violate the rule adopted under division (D) of this section. Whoever violates that rule is guilty of a misdemeanor of the first degree.

149.43 Availability of public records for inspection and copying.

[Text in effect prior to September 29, 2007.]

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

- (m) Intellectual property records;
 - (n) Donor profile records;
 - (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
 - (p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;
 - (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
 - (r) Information pertaining to the recreational activities of a person under the age of eighteen;
 - (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 of the Revised Code;
 - (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
 - (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
 - (v) Records the release of which is prohibited by state or federal law;
 - (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;
 - (x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;
 - (y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency.
- (2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(5) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(5) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(5) of this section, "EMT" means EMT's-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

- (a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;
- (b) The social security number, birth date, or photographic image of a person under the age of eighteen;
- (c) Any medical record, history, or information pertaining to a person under the age of eighteen;
- (d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(B)(1) Subject to division (B)(4) of this section, all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

(2) If any person chooses to obtain a copy of a public record in accordance with division (B)(1) of this section, the public office or person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy.

(3) Upon a request made in accordance with division (B)(1) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States

mail within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage and other supplies used in the mailing.

Any public office may 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 pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and 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.

(4) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(5) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in division (B)(5) of this section, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C) If a person allegedly is aggrieved by the failure of a public office to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section, or if a person who has requested a copy of a public record allegedly is aggrieved by the failure of a public office or the person responsible for the public record to make a copy available to the person allegedly aggrieved in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section and that awards reasonable attorney's fees to the person that instituted the mandamus action. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in divisions (B)(3) and (E)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (E)(1) and (2) of this section, “commercial surveys, marketing, solicitation, or resale” shall be narrowly construed and 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.

149.43 Availability of public records for inspection and copying.

[Text in effect beginning September 29, 2007.]

(A) As used in this section:

(1) "Public record" means records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

(l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;

- (m) Intellectual property records;
 - (n) Donor profile records;
 - (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
 - (p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information;
 - (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
 - (r) Information pertaining to the recreational activities of a person under the age of eighteen;
 - (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, other than the report prepared pursuant to section 307.626 of the Revised Code;
 - (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
 - (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
 - (v) Records the release of which is prohibited by state or federal law;
 - (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;
 - (x) Information reported and evaluations conducted pursuant to section 3701.072 of the Revised Code;
 - (y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency.
- (2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

- (a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;
 - (b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;
 - (c) Specific confidential investigatory techniques or procedures or specific investigatory work product;
 - (d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.
- (3) "Medical record" means any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment.
- (4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.
- (5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.
- (6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.
- (7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT:
- (a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT resides;
 - (b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

(8) "Information pertaining to the recreational activities of a person under the age of eighteen" means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person's parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) "Community control sanction" has the same meaning as in section 2929.01 of the Revised Code.

(10) "Post-release control sanction" has the same meaning as in section 2967.01 of the Revised Code.

(11) "Redaction" means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a "record" in section 149.011 of the Revised Code.

(12) "Designee" and "elected official" have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon request, a public office or person responsible for public records shall 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 the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records shall transmit a copy of a public record to any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may 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 or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and 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.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, or EMT and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, or EMT's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) 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 to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, 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 under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits 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 or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

(a) 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 division (B) of this section 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 for the requested public

records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(b) 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 for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) 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 division (B) of this section.

(ii) The public office or the person responsible for the public records 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 specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall 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 an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) 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 division (B) of this section 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 for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) 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 for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction request" does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) "Commercial" means profit-seeking production, buying, or selling of any good, service, or other product.

(d) "Special extraction costs" means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. "Special extraction costs" include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, "surveys, marketing, solicitation, or resale for commercial purposes" shall be narrowly construed and 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.