

March 3, 2005

Representative Scott Oelslager
Ohio House of Representatives
77 South High Street
Columbus, Ohio 43266-0603

Dear Representative Oelslager:

The OML is not opposed to a fair and workable Public Records Law. In the past we have been supportive of bills refining the public records law. Moreover, we believe there is a need for further enhancements to the current statutes. We are, however, opposed to a number of the changes proposed in the introduced version of HB 9.

Maintaining and providing public records is extremely important, but practically speaking municipalities have additional priorities that are equally, if not more, important - police protection, fire protection, safe streets, water and sewer, health services and other quality of life services. Local taxpayers and voters have definite ideas on how local officials should set priorities, especially since financial resources are increasingly limited. Local tax dollars are currently stretched to the limit and other municipal resources are currently being threatened by proposed state and federal actions.

On the pages that follow will be: I Objections to some of the changes proposed in HB 9, II Inconsistencies with other statutes, rules or practices and III Suggestions for enhancement to current law.

We will be willing to work with you and other members of the General Assembly to ensure that a fair balance is maintained as to access to public records, the protection of sensitive information and the appropriate and efficient use of tax dollars.

Thank you in advance for your consideration of this matter.

Sincerely,

Susan J. Cave
Executive Director

cc: Representative William J. Seitz
Chairman, House Civil & Commercial Law Committee

QUESTIONS ON OR OBJECTIONS TO SOME OF THE CHANGES PROPOSED IN HB 9.

1) The training requirement appears to apply only to elected officials. In most municipalities, the elected officials seldom receive the direct requests for public records.

Doesn't this program place the AG in a conflicting position of enforcement, while at the same time being responsible to advise officials on the law and defend them and the state in law suits? In other words, why not authorize a legislative office to provide oversight on the matters under discussion. The legislative office would need to have an advisory board consisting of representatives of the affected governmental units as well as a public citizen member to advise it on the matters covered in this section of the bill.

2) In Section 149.43 (B) (1) when a public record contains information that is exempt, the public offices shall make available all the information that is not exempt and redact any exempt information, and have the person making the request made aware of the redaction by notice or by making the redaction plainly visible. A redaction is deemed to be a denial of the request. Here is a clear instance of overkill since making a redaction a denial of the request can trigger the imposition of the overabundance of sanctions even though the redaction is made in good faith.

3) Section 149.43 (B) (3) requires the public office (probably a clerk or receptionist) to give a reason for denial, including legal authority. If the request is in writing, the response must be in writing. This provision presumes a lawyer or legally- informed person will always be available to give a snap answer and to be able to cite or describe the legal authority. This is obviously not possible.

4) Section 149.43 (B) (4) and (5) need to be better coordinated to ensure that the public office stands a chance to comply and that the requestor gets the information.

5) Section 149.43 (C) (2) (3) and (4) provide a system for recovering damages of \$200 per day of non-compliance up to a maximum of \$5,000, court costs, a punitive award of fees up to \$1,000. per day and attorneys fees if there is an illegal refusal to provide the record. This provision authorizes statutory damages and punitive civil forfeitures, or both for failure to provide the record. This violates the long standing policy of Ohio and Federal Courts and statutes since the civil forfeitures are really punitive damages. Why impose punitive damages on the innocent taxpayers who will provide the funds to pay them through taxes or fees?

Which is more important - costly legal fees, and compensating persons or organizations who have not received a timely record, or the provision of police, fire, streets, water, sewer and other vital services? Measures punishing the citizenry generally through their government only to and enrich persons or organizations which may have a claim under the public records law should be rejected. Ohio's small units of government (villages, counties and townships) and its larger cities already have a severe lack of funds. These provisions constitute overkill to obtain the goals of the bill.

6) Section 149.43 (F) requires all public offices to adopt a public records policy in compliance with RC 149.43 All employees are required to acknowledge receipt of the Policy. The Policy may not limit the number of public records to be made available to a single person; the number

of public records 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, unless that period is less than eight hours. Local governments are plagued with “gadflies” that make clearly abusive and harassing public record demands. This is especially true during the local election cycle. Some sanctions need to be established with respect to these types of requests or in the alternative public offices should be allowed to limit the number and frequency of such requests. It would be only fair to add a definition of when a person may be subject to restrictions, using the approach taken in RC 2323.52 which pertains to vexatious litigators that engage in vexatious conduct. Or as an alternative, just impose the same sanctions prescribed in the bill on persons or institutions when the public office is found not guilty of violating the law.

II

INCONSISTENCES WITH OTHER STATUTES OR PRACTICES

Section 121.22 or the open meetings law provides a limited number of instances when executive sessions may be held. Yet there is no exemption from the public records law of the work products or discussion drafts of items to be discussed at these executive sessions. This can be especially sensitive during labor negotiations or when price comparisons or the condition of land or structures are prepared for the consideration of purchase or sale of property by the municipality.

At the very least where the open meetings statute provides for executive sessions and confidentiality, documents created under such circumstances should be exempt from disclosure under the public records law until action is taken or acceptance is made at a public meeting.

There needs to be specific clarification that the attorney-client privilege extends to the documents or work products created as a result of such privilege.

III

SUGGESTIONS FOR ENHANCEMENTS TO CURRENT LAW

A) COMPETITIVE INFORMATION PROTECTION

1) Contents of Civil Service and other employment and promotional tests should not be public records until after they are given. The same would hold true for various certification testing mechanisms.

2) Working papers or discussion drafts that relate to discussions with developers, businesses, etc., relative to exploring potential economic development projects should be exempt from disclosure in order to retain a competitive edge and afford company officials some degree of confidentiality.

3) Certain personal information on all public employees needs to be protected in this era of identity theft, especially social security numbers and bank account numbers.

4) Audio copies of 911 recordings should not be subject to release. As Justice Pfeifer

commented after a recent court decision: “A person should be able to summon the help of police officers or firefighters without having his plea broadcast on the evening news.” “A transcript of a 911 call would convey the necessary information without transforming a personal tragedy into a public spectacle”