Ohio Public Records Laws — New Caps to Damages and Defense to Damage Claims

For more information, please contact:

Lisa Pierce Reisz
614.464.8353
lpreisz@vorys.com

Rodney A. Holaday
614.464.8356
raholaday@vorys.com

Ohio's so-called "Sunshine Laws" include the Ohio Public Records Act. A purpose of the Ohio Public Records Act is to formally continue the American legal tradition that records of the government, including public institutions, are "the people's records." The Act supplies a framework for the public to request records from any public office in Ohio, and excepts out certain types of records from release. It also provides a private cause of action to enforce compliance when a person or entity believes that a public office has violated the Act, and includes an explanation of damages that may be sought.

The Ohio Legislature and the Ohio Supreme Court recently provided new caps to damages and a new defense to damage claims made in connection with alleged violations to the Ohio Public Records Act, outlined below:

Capped Damages

On June 30, 2011, Governor Kasich signed Ohio's 2012-2013 budget bill, Am. Sub. H.B. 53. This budget included language that caps statutory damages to $10,000 regardless of the number of records at issue, and caps recoverable attorney's fees to the amount of statutory damages awarded – effectively not more than $10,000 – in lawsuits that allege the unlawful removal, destruction, mutilation or transfer of public records.

Statutory Damages Cap of $10,000

Previously, Ohio law permitted statutory damages of $100 per record per business day of non-production of a requested public record in contravention of the law up to $1000 per record, with no maximum cap on damages based on the volume of records at issue. The amended law caps the total recoverable statutory damages at $10,000, regardless of the number of records at issue. For illustration, if 1,000 public records turned up missing when requested and were not produced for 10 or more business days, the mandatory statutory damages would have been $1,000,000 under the old law, but capped at $10,000 under the new law. *See* Ohio Revised Code 149.351(B)(2), as amended.

Additionally, once one person recovers in a civil action under the Ohio Public Records Act, no other person may recover for a violation involving the same record, regardless of the number of persons who claim to be aggrieved by the loss of that public record. *See* Ohio Revised Code 149.351(D), as amended.

Attorney's Fees Cap of Statutory Damages or $10,000, Whichever is Less

Though not mandatory, Ohio law previously permitted recovery of reasonable attorney's fees for violations of this law. While a party may still seek reasonable attorney's fees for violations of the Ohio Public Records Act, the fees that may be sought are capped at the underlying statutory damages amount or $10,000, whichever is lower. See Ohio Revised Code 149.351(B)(2), as amended.

Caps on mandatory statutory damages and caps on possible attorney's fees severely limits, but does not eliminate, the financial exposure of public institutions concerning public records requests. Public institutions still must work to provide "prompt" production of records for inspection, and to make copies available in a "reasonable amount of time." Ohio

Revised Code 149.43(B)(2). But the unlimited potential statutory damages amount has been curtailed.

New Defense to Damage Claims in Public Records Lawsuits

The Supreme Court of Ohio recently issued a decision that forbids the collection of damages for violation of the Ohio Public Records Act where the requesting party seeks the records to obtain damages, not to actually obtain the requested records.

In *Rhodes v. New Philadelphia*, Slip Opinion No. 2011-Ohio-3279, decided July 7, 2011, the Court considered whether a person who requests a public record is "aggrieved" by the unlawful destruction of the requested record where the person's objective in requesting the record is not to obtain the record but to seek damages for the destruction of the record. The Court answered no. In *Rhodes*, it was clear that the plaintiff who sought outdated reel-to-reel 911 tape recordings from various local governments from 1975-1995 did not actually wish to review the tapes, but sought them with the goal of identifying public institutions that had destroyed their outdated tapes without a valid public records retention schedule or policy, to then obtain large damage amounts.

Under the Ohio Public Records Act, the destruction of a public record in violation of Ohio Revised Code 149.351(A) gives rise to damages to persons "aggrieved" by the destruction. Ohio Revised Code 149.43(B)(5) of the Act forbids a public office from requiring requesting parties ("any person") to put their request in writing, disclosing their identities, and stating their intended use of the information requested. Some plaintiffs in Ohio had argued in favor of reading these provisions together to urge that their intent – whether to be rewarded with statutory damages or to actually review records – was immaterial.

The Supreme Court of Ohio disagreed finding that there is a distinction between "aggrieved" persons in 149.351(A) and "any person" under 149.43(B)(5), such that an aggrieved person can only recover damages if their objective is to actually obtain the requested record.

As a practical matter, this should not affect how public institutions respond to public records requests. The Supreme Court of Ohio noted in the *Rhodes* decision that "[t]he duty imposed on public offices by R.C. 149.43(B) may sometimes result in wasted public funds because it obligates public offices to promptly reply to all requests, even frivolous requests." However, where public institutions can identify requesting parties who truly seek only to identify unlawfully removed, destroyed, mutilated or transferred public records with the goal of obtaining damages in court rather than review of the requested records, the public institution can assess its own risk of being able to demonstrate, at trial, the requesting party's true goal, with the public institution's willingness to litigate a records dispute in the face of a substantial pre-lawsuit financial threat or demand. Where a public institution cannot identify the true intent of a requesting party pre-response or pre-lawsuit, this new defense should permit additional inquiries of discovery in litigation to try to identify so-called "professional plaintiffs" who seek to financially benefit from Ohio's Sunshine Laws rather than for legitimate access to records as a check on the conduct of public institutions to ensure that their business is performed in the open.