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CLIENT ALERT

JULY 2011

PUBLIC RECORDS CUSTODIANS GET RELIEF: SUPREME COURT OF OHIO AND OHIO GENERAL ASSEMBLY LIMIT AVAILABILITY AND AMOUNT OF CIVIL FORFEITURE FOR DESTRUCTION OF PUBLIC RECORDS

If you represent the city of Bucyrus or Akron, Ohio, you are most likely familiar with lawsuits seeking a civil forfeiture award for improper destruction of public records. If you represent a different city, political subdivision, public institution, or state agency in Ohio, you should be aware that particular individuals are making a cottage industry of filing these types of suits. For example, a plaintiff recently filed suit against the City of Akron seeking records regarding the city's traffic camera program. Plaintiffs have also filed lawsuits against several cities including Bucyrus for recording over 9-1-1 tapes from the 1990s.

In response to lawsuits for civil forfeiture awards, in the last two weeks the Supreme Court of Ohio clarified who may recover a civil forfeiture from a public office that improperly destroys public records and the Ohio General Assembly revised Ohio law to cap forfeiture amounts and impose a five-year statute of limitations for civil forfeiture actions.

Public servants are reminded that these new laws clarify but do not eliminate the public entities' duties to properly maintain, retain, and disclose public records. Compliance with Ohio law is a must, and now courts will look with greater scrutiny upon persons seeking simply to profit from public record missteps.

SUPREME COURT OF OHIO DETERMINES THAT ONLY "AGGRIEVED" PERSONS MAY RECOVER

Ohio Revised Code § 149.351(B) permits "[a]ny person who is aggrieved" by the destruction of a public record to recover a civil forfeiture of \$1,000 from a public office for each violation, but the Ohio Revised Code – as it existed before the Ohio General Assembly's recent revisions as described below – contained no definition for the term "aggrieved." On July 7, 2011, in *Rhodes v. New Philadelphia*, Slip Opinion No. 2011-Ohio-3279 (McGee Brown, J.), the Supreme Court of Ohio unanimously determined that a party is not "aggrieved" by the destruction of a record if the public office can show that the requester's actual intent was to seek forfeiture awards rather than to access the public records.

The Supreme Court stressed that public offices are obligated to honor public-record requests regardless of the requester's objectives in requesting the records. But the Court determined that a requester may not obtain a civil forfeiture when he merely feigns intent to access the public records for the purpose of obtaining the civil forfeiture.

The Court also stated that the presumption is that a request for public records is made to access the records. Therefore, the public office carries the burden of showing that the requester has no actual interest in accessing

the records. As in *Rhodes*, the determination of whether the requester is “aggrieved” depends upon the requester’s intent and will likely be an issue tried to the jury.

OHIO GENERAL ASSEMBLY LIMITS AVAILABILITY AND AMOUNT OF CIVIL FORFEITURE FOR DESTRUCTION OF PUBLIC RECORDS

Prompted by lawsuits like *Rhodes*, the Ohio General Assembly recently limited the availability and amount of civil forfeiture for destruction of public records in Ohio’s budget bill, Amended Substitute House Bill Number 153 (signed into law by Governor Kasich on June 30, 2011).

There are three new and significant provisions:

1. “Aggrieved” Persons Do Not Include Persons Merely Seeking Civil Forfeiture

The *Rhodes* decision regarding “aggrieved” persons coincides and harmonizes with the General Assembly’s recent and explicit qualification regarding who is “aggrieved” by the unlawful destruction of a public record.

Under newly drafted Ohio Revised Code § 149.351(C)(1), a person is not “aggrieved” if “clear and convincing evidence shows that the request for a record was contrived as a pretext to create potential liability under this section.” As *Rhodes* indicates, a person is not aggrieved under the statute if he requests records to obtain a civil forfeiture award. As *Rhodes* also indicates, the burden of proof is on the public office to demonstrate pretext.

The new statutory provision also creates a disincentive for persons merely fishing for a civil forfeiture: if the public office shows that the request was a pretext by clear and

convincing evidence, it may recover reasonable attorney’s fees. Ohio Revised Code § 149.351(C)(2).

2. The Amount of Civil Forfeiture And Attorney’s Fees Are Each Capped At \$10,000

Before the General Assembly’s recent revisions, an aggrieved person could obtain a \$1,000 civil forfeiture for each record improperly disposed, with no maximum, as well as reasonable attorney’s fees.

Under newly revised Ohio Revised Code § 149.351(B)(2), a civil forfeiture may not “exceed a cumulative total of ten thousand dollars, regardless of the number of violations” and the reasonable attorney’s fees may not “exceed the forfeiture amount recovered.”

Ohio Revised Code § 149.351(D) also protects a public office from multiple actions regarding the same documents: “Once a person recovers a forfeiture in a civil action . . . no other person may recover a forfeiture . . . involving the same record, regardless of the number of persons aggrieved . . . or the number of civil actions commenced under this section.”

3. A Five-Year Statute of Limitations Applies To Civil Forfeiture Actions

Before the General Assembly’s recent revisions, there was no statute of limitations for a civil forfeiture action. An aggrieved person could obtain a civil forfeiture for public records improperly disposed decades ago.

Under newly revised Ohio Revised Code § 149.351(E), an action for civil forfeiture “shall be commenced within five years after the day in which division (A) of this section was allegedly violated or was threatened to be violated.”

IMPLICATIONS

Some opponents of the new law argue that it will encourage sloppy record-keeping, or even worse, public employees may be more likely to destroy evidence of public corruption if faced with only a \$10,000 fine. Supporters of the new cap reply that public officials could still be criminally prosecuted if they destroyed records to cover up corruption.

Any city or other political subdivision, public institution, or state agency may avoid civil forfeiture actions altogether by ensuring that the public office comply with its duties under Ohio law to (1) provide access to public records regardless of the requester's motivation and (2) properly dispose of public records.

Undoubtedly, some plaintiffs merely seeking a civil forfeiture award will not be deterred by *Rhodes* and the General Assembly's recent statutory provisions and will test the parameters and applicability of the provisions. For example, a plaintiff may attempt to skirt the \$10,000 civil forfeiture cap by filing separate lawsuits concerning different sets of documents. A plaintiff may also become more adept at feigning intent to access records, making it more difficult for a public office to show pretext.

In light of the new law, public entities should review their current insurance coverage to ensure they have proper and full coverage, to the extent available. Insurance carriers may want to review coverage in place as well as potential changes to that coverage in light of this new law.

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