July 31, 2003

The Honorable Richard M. Howell
Darke County Prosecuting Attorney
Courthouse
Greenville, Ohio 45331

SYLLABUS: 2003-025

1. Pursuant to R.C. 2953.321, R.C. 2953.54, and R.C. 2151.358, a county sheriff may not disclose to the public information in an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358, but the sheriff must disclose information in the report that relates to a defendant, suspect, or juvenile offender who has not had this information ordered sealed or expunged, unless one of the exceptions set forth in R.C. 149.43(A) applies to the information.

2. No provision in R.C. 2953.321, R.C. 2953.35, R.C. 2953.54, or R.C. 2953.55 prohibits a prosecuting attorney from disclosing to a defendant during discovery under Ohio R. Crim. P. 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to R.C. 2953.31-.61.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
JIM PETRO, ATTORNEY GENERAL

Opinions Section
30 E. Broad St., 15th Floor
Columbus, OH 43215-3428
Telephone: (614) 752-6417
Facsimile: (614) 466-0013
www.ag.state.oh.us

July 31, 2003

OPINION NO. 2003-025

The Honorable Richard M. Howell
Darke County Prosecuting Attorney
Courthouse
Greenville, Ohio 45331

Dear Prosecutor Howell:

You have requested an opinion concerning the duty of county sheriffs and prosecuting attorneys to provide access to records ordered sealed or expunged by a court pursuant to R.C. 2953.31-.61 or R.C. 2151.358.[1] Specifically, you wish to know the following:

1. What are the sheriff's duties pursuant to R.C. 2953.31 through 2953.61 and 2151.358 to seal or expunge "investigative work product" reports where such reports relate to multiple suspects/defendants?

2. If the prosecutor is aware of a prior, but sealed or expunged, conviction of a co-defendant or state's witness, the disclosure of which would ordinarily be required under criminal rule 16(B)(1)(e) or (B)(1)(f), or the sealed reports pertaining to such conviction contain statements or summaries the disclosure of which would ordinarily be required under criminal rule 16(B)(1)(a), does R.C. 2953.321, R.C. 2953.35 or R.C. 2953.55 prohibit such disclosure?

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[1] R.C. 2953.31-.61 and R.C. 2151.358 authorize courts to order records in cases sealed or expunged. *See* note two, *infra*. Records in a case that are ordered sealed must be separated from a public office's other records and secured in a manner that limits access to the records only to persons authorized by statute. *See* R.C. 2151.358(A); R.C. 2953.32(D); R.C. 2953.53(D); 1993 Op. Att'y Gen. No. 93-038; 1983 Op. Att'y Gen. No. 83-100. *See generally Black's Law Dictionary* 1351 (7th ed. 1999) ("**sealing records.** The act or practice of officially preventing access to particular … records, in the absence of a court order"). Records ordered expunged require the destruction or erasure of the records, or the deletion of particular information from the records. *See* R.C. 2151.358(F); 1983 Op. Att'y Gen. No. 83-100 at 2-384. *See generally Black's Law Dictionary* 603 ("**expungement of record.** The removal of a conviction … from a person's criminal record").

We will now consider your first question. Initially, we note that this question asks broadly about the duties of a county sheriff when an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged includes information relating to a defendant, suspect, or juvenile offender who has not had his records in the case ordered sealed or expunged. Additional information you have provided us indicates, however, that the essence of your first question is more specific. By way of background, you state:

> The facts underlying this request involve the Sheriff being served with court orders to seal "all official records pertaining to the case" and "all index references to the case" issued under the provisions of R.C. 2953.32, R.C. 2953.52 and R.C. 2151.358(C)(1).[2] *Generally, complying with such orders, and especially the deletion of index references, is of no particular problem.* However, often the Sheriff's records include, if not predominately consist of, investigation reports "pertaining" not only to the individual who is the subject of, and obtained, the order of expungement, but also to complicitors and/or co-conspirators of such person who have not applied for or been granted similar orders of expungement. *As to these complicitors and/or co-conspirators, the same records would appear to maintain their public record status under R.C. 149.43.* Strict compliance with the statute and order to seal "all official records pertaining to the case," would

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[2] Pursuant to R.C. 2953.31-.61, if certain specified conditions are met, a court may order a person's records in a case sealed. R.C. 2953.32(A)(1) authorizes, under certain prescribed circumstances, the sealing of the records of a person who has been convicted of an offense in this state or any other jurisdiction. R.C. 2953.32(A)(2) authorizes the sealing of the records of a person "who has been arrested for any misdemeanor offense and who has effected a bail forfeiture." In addition, a court may seal the records of a person "who is found not guilty of an offense … or who is the defendant named in a dismissed complaint, indictment, or information." R.C. 2953.52(A)(1). A court may also seal the records of "[a]ny person, against whom a no bill is entered by a grand jury." R.C. 2953.52(A)(2).

R.C. 2151.358 authorizes a court, under appropriate circumstances, to order the sealing of the records of a person who has been adjudicated a delinquent child or a juvenile traffic offender. R.C. 2151.358(C)(1)(a)(ii); R.C. 2151.358(D)(1). The records of a person "who has been arrested and charged with being a delinquent child or a juvenile traffic offender and who is adjudicated not guilty of the charges in the case or has the charges in the case dismissed" may also be expunged. R.C. 2151.358(F). In addition, if certain specified conditions are met, a court is required to seal the record of any person adjudicated an unruly child, R.C. 2151.358(C)(1)(a)(i), or charged with violating R.C. 4301.69(E), R.C. 2151.358(D)(3). The record of any person "who has been arrested and charged with being an unruly child and who is adjudicated not guilty of the charges in the case or has the charges in the case dismissed" may also be expunged. R.C. 2151.358(F).

> therefore necessarily affect other cases or individuals, conceivably expunging records of a co-defendant who could not legally have such done independently. (Footnote and emphasis added and footnotes omitted.)

In light of this additional information, it is readily apparent that your concern is not the manner in which a county sheriff must seal or expunge investigatory work product reports in the situation presented in your letter. *See generally* 1993 Op. Att'y Gen. No. 93-038 (syllabus, paragraph one) (the manner of sealing records is a matter for an administrative licensing agency's discretion). Rather, your specific concern is whether a county sheriff has a duty under R.C. 149.43, the public records law, to provide the public with access to information related to a defendant, suspect, or juvenile offender in a case when the information is in an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358 and the defendant, suspect, or juvenile offender has not had his records in the case ordered sealed or expunged.

R.C. 149.43(B)(1) provides that, subject to R.C. 149.43(B)(4),[3] "all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." The only records excepted from the definition of "public record" are those records falling within one or more of the categories set forth in R.C. 149.43(A)(1)(a) through (w). *State ex rel. The Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler*, 149 Ohio App. 3d 350, 2002-Ohio-4803, at ¶14, 777 N.E.2d 320.

As used in R.C. 149.43(B), "[p]ublic record" means "records kept by any public office." R.C. 149.43(A)(1). R.C. 149.011, in turn, defines the terms "[p]ublic office" and "[r]ecords," for purposes of R.C. 149.43, as follows:

> (A) "Public office" includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity

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[3] R.C. 149.43(B)(4) states:

> 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.

> established by the laws of this state for the exercise of any function of government.
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> ….
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> (G) "Records" includes any document, device, or item, regardless of physical form or characteristic, … created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

The office of county sheriff is established by R.C. 311.01, and the sheriff's duties include preserving the public peace, protecting persons and property, and enforcing the criminal laws of this state, R.C. 311.07; R.C. 311.08; R.C. 2935.03. *See* 1994 Op. Att'y Gen. No. 94-081 at 2-402 and 2-403. "It is clearly a governmental function to provide protection of the peace, morals, health and safety of the people." 1990 Op. Att'y Gen. No. 90-101 at 2-445. A county sheriff's office thus is a "public office" for purposes of R.C. 149.43(B). 1997 Op. Att'y Gen. No. 97-038 at 2-226; 1990 Op. Att'y Gen. No. 90-101 at 2-444 and 2-445.

A county sheriff has jurisdiction over criminal investigations and juvenile law enforcement investigations implicitly as part of his police powers and as specifically provided by the General Assembly. *See, e.g.*, R.C. 311.07; R.C. 311.08; R.C. 2151.31(A); R.C. 2151.40; 1994 Op. Att'y Gen. No. 94-081 at 2-402 and 2-403; 1990 Op. Att'y Gen. No. 90-101 at 2-445. When exercising his jurisdiction in such matters, the county sheriff routinely prepares investigatory work product reports that may contain a variety of information, including the names of suspects or witnesses, the particulars of a crime, and other relevant details the sheriff discovers during the course of an investigation. These reports thus serve to document the activities of the county sheriff, and are "records" for purposes of R.C. 149.43(B). *See* 1990 Op. Att'y Gen. No. 90-101 at 2-445; *see also* 1997 Op. Att'y Gen. No. 97-038 at 2-226.

Because investigatory work product reports in the custody of a county sheriff are records kept by a public office, such reports are "public records" for purposes of R.C. 149.43(B). Accordingly, R.C. 149.43(B) permits the public to inspect investigatory work product reports kept by the county sheriff unless one of the exceptions set forth in R.C. 149.43(A)(1)(a) through (w) applies. *See State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 526 N.E.2d 786 (1988); 1990 Op. Att'y Gen. No. 90-101 at 2-445; *see also* 1997 Op. Att'y Gen. No. 97-038 at 2-226.

With respect to your first question, the only pertinent exception is set forth in R.C. 149.43(A)(1)(v).[4] Pursuant to R.C. 149.43(A)(1)(v), "[r]ecords the release of which is prohibited

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[4] Pursuant to R.C. 149.43(A)(1)(h), "[c]onfidential law enforcement investigatory records" are not public records for purposes of R.C. 149.43. *See generally* R.C. 149.43(A)(2) (defining the phrase "[c]onfidential law enforcement investigatory record"). You have stated in your letter, however, that the investigatory work product reports in question "have lost any exemption

by state or federal law" are not public records that must be disclosed to the public under R.C. 149.43(B). Thus, any information in an investigatory work product report that satisfies the requirements of this exception is not a public record and may not be disclosed by a county sheriff in response to a public records request. *See* 1999 Op. Att'y Gen. No. 99-006 at 2-38. Any remaining information in the report is a public record and must be disclosed. *See id.*

There are three statutes that prohibit a county sheriff from disseminating or releasing investigatory work product that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358. First, R.C. 2953.321(C)(1) provides that, except as provided in R.C. 2953.321(B)(3),[5] when a court issues an order pursuant to R.C. 2953.32(C)(2) directing that all official records[6] pertaining to a case be sealed, "no law

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from public record status as confidential law enforcement investigatory records as defined in R.C. 149.43(A)(2)."

[5] R.C. 2953.321(B)(3) authorizes a county sheriff, under certain circumstances, to disclose to another law enforcement agency investigatory work product that pertains to a case the records of which have been ordered sealed pursuant to R.C. 2953.32(C)(2).

[6] As used in R.C. 2953.31-.36 and R.C. 2953.51-.55, "[o]fficial records" means the following:

> [A]ll records that are possessed by any public office or agency that relate to a criminal case, including, but not limited to: the notation to the case in the criminal docket; all subpoenas issued in the case; all papers and documents filed by the defendant or the prosecutor in the case; all records of all testimony and evidence presented in all proceedings in the case; all court files, papers, documents, folders, entries, affidavits, or writs that pertain to the case; all computer, microfilm, microfiche, or microdot records, indices, or references to the case; all index references to the case; all fingerprints and photographs; all records and investigative reports pertaining to the case that are possessed by any law enforcement officer or agency, *except that any records or reports that are the specific investigatory work product of a law enforcement officer or agency are not and shall not be considered to be official records when they are in the possession of that officer or agency;* and all investigative records and reports other than those possessed by a law enforcement officer or agency pertaining to the case. "Official records" does not include records or reports maintained pursuant to [R.C. 2151.421] by a public children services agency or the department of job and family services. (Emphasis added.)

R.C. 2953.51(D); *see also* R.C. 2953.31(D) (for purposes of R.C. 2953.31-.36, "'[o]fficial records' has the same meaning as in [R.C. 2953.51(D)]"). Accordingly, when a court issues an order pursuant to R.C. 2953.31-.61 directing that all "official records" pertaining to a case be

enforcement officer or other person employed by a law enforcement agency shall knowingly release, disseminate, or otherwise make the investigatory work product[7] or any information contained in that work product available to, or discuss any information contained in it with, any person not employed by the employing law enforcement agency." (Footnote added.)

Second, R.C. 2953.54 provides that, except as provided in R.C. 2953.54(A)(3),[8] when a court issues an order pursuant to R.C. 2953.52(B) directing that all official records pertaining to a case be sealed, no law enforcement officer shall knowingly release, disseminate, or otherwise make the investigatory work product in the case or any information contained in that work product "available to, or discuss any information contained in [the report] with, any person not employed by the officer's employing law enforcement agency." R.C. 2953.321 and R.C. 2953.54 thus prohibit county sheriffs[9] from disclosing to the public investigatory work product that pertains to a case the records of which have been ordered sealed pursuant to R.C. 2953.31-.61.[10] *See generally Shifflet v. Thomson Newspapers (Ohio), Inc.*, 69 Ohio St. 2d 179, 185, 431 N.E.2d 1014 (1982) (the objective of R.C. 2953.35, which prohibits public officials from divulging information in sealed records, is to prevent public officials from disseminating records which the court has ordered sealed); *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 14, 663 N.E.2d 1376 (Lakewood Mun. Ct. 1995) ("[w]hen a court has complied with all of the procedural requirements for the expungement of a criminal record, the record is no longer available to the general public").

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sealed, the order does not require any specific investigatory work product of a law enforcement officer or agency in the case to be sealed.

[7] As used in R.C. 2953.321, "'investigatory work product' means any records or reports of a law enforcement officer or agency that are excepted from the definition of 'official records' contained in [R.C. 2953.51] and that pertain to a case the records of which have been ordered sealed pursuant to [R.C. 2953.32(C)(2)]." R.C. 2953.321(A). *See generally* note six, *supra* (setting forth the definition of "[o]fficial records" prescribed in R.C. 2953.51).

[8] R.C. 2953.54(A)(3) authorizes a county sheriff, under certain circumstances, to disclose to another law enforcement agency investigatory work product that pertains to a case the records of which have been ordered sealed pursuant to R.C. 2953.52(B).

[9] For purposes of R.C. 2953.321 and R.C. 2953.54, a county sheriff is a "law enforcement officer." R.C. 2901.01(A)(11)(a).

[10] Although a county sheriff may not disclose to the public investigatory work product that pertains to a case the records of which have been ordered sealed pursuant to R.C. 2953.31-.61, the sheriff may, under certain circumstances, disclose the investigatory work product to other law enforcement agencies. R.C. 2953.321(B)(3); R.C. 2953.54(A)(3).

Third, R.C. 2151.358 explicitly authorizes a court to issue an order sealing or expunging the records of a person who has been brought within the juvenile formal adjudication process. As used in R.C. 2151.358, "seal a record" means:

> to remove a record from the main file of similar records and to secure it in a separate file that contains only sealed records and *that is accessible only to the juvenile court*. *A record that is sealed shall be destroyed by all persons and governmental bodies except the juvenile court*. (Emphasis added.)

R.C. 2151.358(A). Further, R.C. 2151.358(E)(1) also requires the court ordering the record sealed under R.C. 2151.358(C) or (D) to order "that the proceedings in the case in which the person was adjudicated a juvenile traffic offender, a delinquent child, or an unruly child, or in which the person was the subject of a complaint alleging the person to have violated [R.C. 4301.69(E)(1)], *be deemed never to have occurred*." (Emphasis added.)

"Expungement," as used in R.C. 2151.358, operates to require:

> *the appropriate persons and governmental agencies to delete all index references to the case; destroy or delete all court records of the case; destroy all copies of any pictures and fingerprints taken of the person pursuant to the expunged arrest; and destroy, erase, or delete any reference to the arrest that is maintained by the state or any political subdivision of the state*, except a record of the arrest that is maintained for compiling statistical data and that does not contain any reference to the person. (Emphasis added.)

R.C. 2151.358(F). Additionally, except as provided in R.C. 2151.358(G), upon receipt of a copy of the order to expunge, "a public office or agency shall destroy its record of the prior adjudication or arrest." R.C. 2151.358(G)(1). Moreover, public officials are subject to criminal liability for disclosing the record of a person who has had his record sealed or expunged pursuant to R.C. 2151.358.[11] R.C. 2151.358(J). Accordingly, a county sheriff is prohibited from

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[11] R.C. 2151.358(J) provides:

> An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state or of any of its political subdivisions any information or other data concerning any arrest, complaint, indictment, information, trial, hearing, adjudication, or correctional supervision, the records of which have been expunged or sealed pursuant to this section and the release, dissemination, or making available of which is not expressly permitted by this section, is guilty of divulging confidential information, a misdemeanor of the fourth degree.

disclosing to the public investigatory work product[12] that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2151.358.[13] *See* 1990 Op. Att'y Gen. No. 90-101 (to the extent that R.C. 2151.358 prohibits the release of a record of the adjudication or arrest of a juvenile that has been ordered sealed or expunged pursuant to R.C. 2151.358, local law enforcement agency records pertaining to that adjudication or arrest are not public records and the public does not have a right to inspect and receive copies of such records under R.C. 149.43). *See generally Shifflet v. Thomson Newspapers (Ohio), Inc.*, 69 Ohio St. 2d 179, 185, 431 N.E.2d 1014; *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 14, 663 N.E.2d 1376.

In light of the foregoing, it is clear that R.C. 2953.321, R.C. 2953.54, and R.C. 2151.358 prohibit a county sheriff from disclosing to the public investigatory work product that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358. These statutes thus prohibit the disclosure of investigatory work product for purposes of the "catch-all" exception of R.C. 149.43(A)(1)(v), which exempts from the definition of "public record" those "[r]ecords the release of which is prohibited by state or federal law." Therefore, when the record of a person in a case has been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358, investigatory work product that pertains to the case is not a public record that is subject to public disclosure under R.C. 149.43(B). *See* R.C. 149.43(A)(1)(v); *State ex rel. The Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler*, 149 Ohio App. 3d 350, 2002-Ohio-4803, at ¶25, 777 N.E.2d 320 ("we agree that a properly sealed record is not a public record under the exemption found in R.C. 149.43(A)(1)(v)"); *State ex rel. Beacon Journal Publishing Co. v. Radel*, 82 Ohio App. 3d 193, 198, 611 N.E.2d 520 (Stark County 1993) ("R.C. 2953.52 provides an exception to

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[12] The phrase "investigatory work product" does not appear in R.C. 2151.358. Instead, this statute uses the term "record" when referring to the information that is to be sealed or expunged. As used in R.C. 2151.358, the term "record" includes records and reports that are the investigatory work product of law enforcement officers and agencies. Under R.C. 2151.358, when a public office or agency receives an order to seal or expunge a record in a case, the office or agency is required to seal or expunge any adjudication or *arrest* record that is the subject of the order. In addition, R.C. 2151.358(J) states, in part, that no officer or employee of the state or any of its political subdivisions may release, disseminate, or make available "*any information or other data concerning any arrest, complaint, indictment, information*, trial, hearing, adjudication, or correctional supervision, the records of which have been expunged or sealed pursuant to this section and the release, dissemination, or making available of which is not expressly permitted by this section." (Emphasis added.)

[13] Although a county sheriff may not disclose to the public investigatory work product that pertains to a case the records of which have been ordered sealed pursuant to R.C. 2151.358, the sheriff may, under certain circumstances, disclose the investigatory work product to other law enforcement agencies or any person authorized by the person who is the subject of the sealed records. R.C. 2151.358(E)(2).

the public records law by permitting a court to seal official court records in cases where a criminal defendant had been acquitted or charges had been dismissed"); *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 14, 663 N.E.2d 1376; 1990 Op. Att'y Gen. No. 90-101 (syllabus, paragraph four) ("[w]hen a record of the adjudication or arrest of a juvenile has been ordered sealed or expunged pursuant to R.C. 2151.358, such record is not a public record").

Although R.C. 2953.321, R.C. 2953.54, and R.C. 2151.358 prohibit the public disclosure of investigatory work product that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358, none of these statutes prohibits public disclosure of investigatory work product that relates to a defendant, suspect, or juvenile offender who has not had his records ordered sealed or expunged. These statutes thus do not prohibit a county sheriff from disclosing to the public under R.C. 149.43(B) investigatory work product that relates to a defendant, suspect, or juvenile offender who has not had his records ordered sealed or expunged. *See generally* 1987 Op. Att'y Gen. No. 87-010 at 2-59 ("[b]ecause R.C. 2151.313(D)(3) protects from disclosure only fingerprints and photographs, copies of fingerprints and photographs, and 'records of [an] arrest or custody that was the basis of the taking of any … fingerprints or photographs,' I find that the statute does not forbid the disclosure of records of an arrest or custody that was *not* the basis of the taking of any fingerprints and photographs"). In fact, unless one of the exceptions set forth in R.C. 149.43(A) applies, a county sheriff is required under R.C. 149.43(B) to disclose to the public investigatory work product that relates to a defendant, suspect, or juvenile offender who has not had his records ordered sealed or expunged.[14] *See State ex rel. Nat'l Broadcasting Co. v. City of*

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[14] As stated in note four, *supra*, a "[c]onfidential law enforcement investigatory record" is excepted from mandatory public disclosure under R.C. 149.43. R.C. 149.43(A)(1)(h). For purposes of R.C. 149.43, "[c]onfidential law enforcement investigatory record" includes the following:

> 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:
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> (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.

Cleveland (syllabus, paragraph one); 1990 Op. Att'y Gen. No. 90-101 at 2-444 and 2-445; *see also* 1997 Op. Att'y Gen. No. 97-038 at 2-226. *See generally* 1999 Op. Att'y Gen. No. 99-006 at 2-44 ("information that it not subject to an exception from the definition of public record under [R.C. 149.43(A)(1)(a)-(w)] is information that *must* be released" (emphasis in original)).

With these general principles in mind, we will now consider the situation presented in your first question. In this situation, the investigatory work product report includes investigatory work product that is excepted from public disclosure and investigatory work product that is required to be released to the public.

It is well settled that, if a record contains both excepted and non-excepted information, the excepted information "must be redacted and any remaining information must be released."[15] *State ex rel. Nat'l Broadcasting Co. v. City of Cleveland* (syllabus, paragraph four); *accord State ex rel. Master v. City of Cleveland*, 75 Ohio St. 3d 23, 31, 661 N.E.2d 180 (1996); 2002 Op. Att'y Gen. No. 2002-040 at 2-258 n.6; 1999 Op. Att'y Gen. No. 99-006 at 2-38; 1997 Op. Att'y Gen. No. 97-038 at 2-226 and 2-227; 1990 Op. Att'y Gen. No. 90-101 at 2-446. *See generally State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 51-52, 689 N.E.2d 25 (1998) ("R.C.

R.C. 149.43(A)(2).

Accordingly, a county sheriff is not *required* under R.C. 149.43(B) to disclose to the public investigatory work product, which is contained in a "[c]onfidential law enforcement investigatory record," as defined in R.C. 149.43(A)(2), that relates to a defendant, suspect, or juvenile offender who has not had his records ordered sealed or expunged, but he *may* disclose such investigatory work product to the public, unless the disclosure is otherwise prohibited by state or federal law. *See* R.C. 149.43(A)(1)(v); 1999 Op. Att'y Gen. No. 99-006 at 2-44.

[15] A cautionary note must be raised, however. Where information excepted from public disclosure is so intertwined with the information otherwise required to be released as to reveal the excepted information from the context, the record itself, and not just the excepted information, may be withheld. *See State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St. 3d 28, 31, 546 N.E.2d 939 (1989); 1990 Op. Att'y Gen. No. 90-101 at 2-446. Whether excepted and non-excepted information is so intertwined that it is impossible to release the non-excepted information without revealing the excepted information is a question that must be determined on a case-by-case basis by local officials having custody of the information. *See generally State ex rel. Nat'l Broadcasting Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 526 N.E.2d 786 (1988) (syllabus, paragraph two) ("[a] governmental body refusing to release records has the burden of proving that the records are excepted from disclosure by R.C. 149.43"); 1981 Op. Att'y Gen. No. 81-014 (syllabus, paragraph one) ("[w]hether a particular complaint comes within the definition of 'confidential law enforcement investigatory records' is a question of fact to be determined on a case-by-case basis").

149.43 must be liberally construed in favor of broad access, with any doubt resolved in favor of disclosure of public records"). As explained in 1990 Op. Att'y Gen. No. 90-101 at 2-446:

> the exception [to the public records law] would appear to apply *only* to information that would create a high probability of disclosing the identity of the suspect, *not* to all of the information about the suspect. Inasmuch as the identity of a juvenile is likely to be only a minimal portion of the contents of a record of a law enforcement agency, it is probable that, in many cases, a record that contains confidential law enforcement investigatory record material will also contain information to which no specific exception applies. A particular record, thus, would likely contain both public record and non-public record material. *The existence of non-public record material in such a document does not permit withholding the entire document from public access. Instead, the excepted material must be redacted, and the public record portion must be released.* (Citation omitted and emphasis added.)

Based on the foregoing legal principle, where an investigatory work product report pertaining to a case the records of which have been ordered sealed or expunged contains investigatory work product that is not subject to an exception from the definition of "public record" under R.C. 149.43(A)(1), the county sheriff must release the non-excepted investigatory work product to the public. As stated above, R.C. 2953.321, R.C. 2953.54, and R.C. 2151.358 do not prohibit public disclosure of investigatory work product that relates to a defendant, suspect, or juvenile offender who has not had his records ordered sealed or expunged. Thus, unless one of the other exceptions set forth in R.C. 149.43(A)(1)(a)-(w) applies, a county sheriff is required under R.C. 149.43(B) to disclose information relating to a defendant, suspect, or juvenile offender who has not had his records ordered sealed or expunged that is contained in an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged.[16]

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[16] A record that is ordered sealed under R.C. 2151.358 must be "destroyed by all persons and governmental bodies except the juvenile court." R.C. 2151.358(A). R.C. 2151.358(G)(1) further states that, except as provided in R.C. 2151.358(G), upon receipt of a copy of an order to expunge, "a public office or agency shall destroy its record of the prior adjudication or arrest." Although these provisions require a county sheriff to destroy his record of prior adjudications and arrests of a person who has had his records in a case ordered sealed or expunged, the provisions do not require the sheriff to destroy an investigatory work product report when the report contains information relating to defendants, suspects, or juvenile offenders who have not had their records in the case sealed or expunged. As explained previously, records are sealed or expunged in order to remove information from a person's record. *See* R.C. 2151.358(A), (F); R.C. 2953.32(D); R.C. 2953.53(D); note one, *supra.* Moreover, with respect to persons who have not had their records in a case sealed or expunged, the county sheriff and other law

Any investigatory work product that is not subject to public disclosure because of R.C. 2953.321, R.C. 2953.54, or R.C. 2151.358 must, however, be redacted from an investigatory work product report before any non-excepted investigatory work product in the report is made available to the public. Therefore, in response to your first question, pursuant to R.C. 2953.321, R.C. 2953.54, and R.C. 2151.358, a county sheriff may not disclose to the public information in an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358, but the sheriff must disclose information in the report that relates to a defendant, suspect, or juvenile offender who

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enforcement agencies have legitimate purposes for maintaining information about these persons. *See generally United States v. Laub Baking Co.*, 283 F. Supp. 217, 220 (N.D. Ohio 1968) ("[a]s a public officer charged with preserving the peace, the sheriff has additional implied powers under Ohio law. He possesses the authority to engage in activities which are reasonably necessary for the due and efficient exercise of the powers expressly granted to him"); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 470, 423 N.E.2d 105 (1981) (a power may be fairly implied where it is reasonably related to the duties of the entity). Accordingly, a county sheriff who is ordered to seal or expunge a person's record in a case is not required to destroy an investigatory work product report that pertains to that case when the report contains information relating to defendants, suspects, or juvenile offenders who have not had their records sealed or expunged. In such a situation, the sheriff must erase or delete any references in the report to the person who has had his records in the case sealed or expunged, thus, effectively destroying the record of the person's prior adjudications or arrests in the case, while maintaining the records of prior adjudications and arrests of persons who have not had their records sealed or expunged.

We would be remiss in our counsel to you should we fail to caution that a court may reach the opposite conclusion on this point, and rule that redaction of the expunged or sealed portions of a record does not equate with destruction for purposes of R.C. 2151.358. It is within the power of a court that issues an order of expungement or sealing under R.C. 2151.358 to require that the custodian of a particular record effect the complete, physical destruction of that record. If a court so orders, then it is incumbent upon the custodian either to comply with that order or seek its reversal or modification by whatever avenues of redress may be available. *See generally Bd. of Educ. v. Hamilton Classroom Teachers Ass'n*, 5 Ohio App. 3d 51, 53, 449 N.E.2d 26 (Butler County 1982) ("[a]n order issued by a court with jurisdiction must be obeyed until it is reversed by orderly and proper proceedings"); 1993 Op. Att'y Gen. No. 93-038 at 2-197 (same); 1992 Op. Att'y Gen. No. 92-072 at 2-306 (same). Refusal to comply with the order of a court having jurisdiction in a matter puts one at risk of being found in contempt and subject to such penalties as the court, in the exercise of its inherent authority to punish for contempt, may choose to impose, s*ee* 1990 Op. Att'y Gen. No. 90-009 at 2-39, and "an opinion of the Attorney General regarding a court's authority cannot authorize a public official to disregard any order of that court," *id.* *Accord* 1993 Op. Att'y Gen. No. 93-038 at 2-197; 1992 Op. Att'y Gen. No. 92-072 at 2-306.

has not had this information ordered sealed or expunged, unless one of the exceptions set forth in R.C. 149.43(A) applies to the information.

Your second question asks about a situation in which the prosecuting attorney is aware of statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been sealed or expunged pursuant to R.C. 2953.31-.61[17] and that is subject to discovery under rule 16 of the Ohio Rules of Criminal Procedure.[18] In particular, you wish to know whether, in such circumstances, R.C. 2953.321, R.C. 2953.35, or R.C. 2953.55 prohibits the prosecuting attorney from disclosing the information to the defendant pursuant to rule 16.[19]

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[17] No provision in R.C. 2953.31-.61 currently authorizes a court to order the records of a person in a case expunged. However, former R.C. 2953.41-.43 authorized a court to order such action in a case in which a person was arrested for a misdemeanor and effected an agreed bail forfeiture. R.C. 2953.41-.43 were repealed in 1988. 1987-1988 Ohio Laws, Part II, 2554 (Am. Sub. H.B. 175, eff. June 29, 1988). Accordingly, under former R.C. 2953.41-.43, a person could have had his records in a case expunged.

[18] Discovery is the process by which attorneys exchange information pertaining to pending civil or criminal cases. *State v. Forehope*, 71 Ohio App. 3d 435, 440, 594 N.E.2d 83 (Stark County 1991); *Black's Law Dictionary* 478 (7th ed. 1999); *see also* Ohio R. Crim. P. 16; Ohio R. Civ. P. 26. Rule 16 of the Ohio Rules of Criminal Procedure provides for discovery in criminal cases. In particular, rule 16(B) sets forth the information that must be disclosed to a defendant by the prosecuting attorney. This rule requires a prosecuting attorney to disclose, *inter alia*, statements made by the defendant or co-defendants, rule 16(B)(1)(a), "the names and addresses of all witnesses whom the prosecuting attorney intends to call at trial, together with any record of prior felony convictions of any such witness, which record is within the knowledge of the prosecuting attorney," rule 16(B)(1)(e), and "all evidence, known or which may become known to the prosecuting attorney, favorable to the defendant and material either to guilt or punishment," rule 16(B)(1)(f). Thus, rule 16(B) requires the prosecuting attorney to disclose the information listed therein to a defendant upon the defendant's request. *See generally* Ohio R. Crim. P. 16(A) ("[u]pon written request each party shall forthwith provide the discovery herein allowed").

[19] A prosecuting attorney's failure to disclose to a defendant during discovery under rule 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to R.C. 2953.31-.61 may violate the defendant's rights as guaranteed by various provisions of the United States and Ohio Constitutions. *See generally State v. Johnston*, 39 Ohio St. 3d 48, 529 N.E.2d 898 (1988) (the suppression by the prosecution of evidence favorable to an accused violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution); *State v.*

In order to answer this question, we must consider first the effect of a court order sealing or expunging the records in a case. When a court orders the sealing or expunging of records in a case pursuant to R.C. 2953.31-.61, the proceedings in the case are deemed never to have occurred. R.C. 2953.32(C)(2); R.C. 2953.52(B)(3). Moreover, courts and prior Attorneys General have determined that information in a record that is ordered sealed or expunged pursuant to these statutory provisions may not be disclosed by any officer or employee of the state or a political subdivision of the state, unless the disclosure is permitted by other provisions of law.[20] *See Shifflet v. Thomson Newspapers (Ohio), Inc.*, 69 Ohio St. 2d 179, 185, 431 N.E.2d 1014; *State ex rel. The Cincinnati Enquirer, Div. of Gannett Satellite Info. Network, Inc. v. Winkler*, 149 Ohio App. 3d 350, 2002-Ohio-4803, at ¶25, 777 N.E.2d 320; *State ex rel. Beacon Journal Publishing Co. v. Radel*, 82 Ohio App. 3d 193, 198, 611 N.E.2d 520; *Bound v. Biscotti*, 76 Ohio Misc. 2d 6, 14, 663 N.E.2d 1376; 1993 Op. Att'y Gen. No. 93-038; 1983 Op. Att'y Gen. No. 83-100.

In this regard, R.C. 2935.321(C)(1) states, in part, that, except as provided in R.C. 2953.321(B)(3), when a court issues an order pursuant to R.C. 2953.32(C)(2) directing that all official records pertaining to a case be sealed, "no law enforcement officer or other person employed by a law enforcement agency shall knowingly release, disseminate, or otherwise make the investigatory work product or any information contained in that work product available to, or discuss any information contained in it with, any person not employed by the employing law enforcement agency." Additionally, R.C. 2953.54(A)(1) states, in pertinent part, that except as provided in R.C. 2953.54(A)(3), when a court issues an order pursuant to R.C. 2953.52(B) directing that all official records pertaining to a case be sealed, no law enforcement officer "shall

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Eubank, 38 Ohio App. 3d 141, 528 N.E.2d 1294 (Lucas County 1987) (when a defendant raises a claim that the prosecutor failed to disclose exculpatory evidence relevant to the defendant's defense, the prosecutor will not have violated his constitutional duty unless his omission is of sufficient significance to result in the denial of the defendant's right to a fair trial), *aff'd mem.*, 68 Ohio St. 3d 1416, 624 N.E.2d 191 (1993). Whether a particular course of conduct by a prosecuting attorney in a criminal case violates a defendant's constitutional rights is a question that must be answered by the judiciary, rather than by means of an Attorney General opinion. *See* 2002 Op. Att'y Gen. No. 2002-040 at 2-261 n.9; 2001 Op. Att'y Gen. No. 2001-003 at 2-18; 1988 Op. Att'y Gen. No. 88-030 at 2-124 and 2-125. *See generally* R.C. 1.47 ("[i]n enacting a statute, it is presumed that: … Compliance with the constitutions of the state and of the United States is intended"); 2002 Op. Att'y Gen. No. 2002-006 at 2-32 n.10 ("the Office of the Attorney General has no authority to determine the constitutionality of a statute, either facially or as applied").

[20] Various statutes authorize the disclosure of information in a record that is ordered sealed or expunged by a court pursuant to R.C. 2953.31-.61. *See, e.g.*, R.C. 2953.32(C)(2), (D)-(F); R.C. 2953.321(B)(3); R.C. 2953.53(D); R.C. 2953.54(A)(3); *see also* R.C. 2953.35(A); R.C. 2953.55(B).

knowingly release, disseminate, or otherwise make the records and reports or any information contained in them available to, or discuss any information contained in them with, any person not employed by the officer's employing law enforcement agency."[21]

For purposes of R.C. 2953.321 and R.C. 2953.54, a prosecuting attorney is a "law enforcement officer." R.C. 2901.01(A)(11)(h); *see* 1990 Op. Att'y Gen. No. 90-101 at 2-445. Thus, R.C. 2953.321 and R.C. 2953.54 prohibit a prosecuting attorney from disclosing to the public investigatory work product that pertains to a case the records of which have been ordered sealed pursuant to R.C. 2953.31-.61.

Moreover, R.C. 2953.35(A) and R.C. 2953.55(B) make it a criminal offense to disclose for certain specified purposes information in a record that is ordered sealed or expunged by a court pursuant to R.C. 2953.31-.61. R.C. 2953.35(A) provides:

> Except as authorized by divisions (D), (E), and (F) of [R.C. 2935.32][22] or by [R.C. Chapter 2950],[23] *any officer or employee of the state, or a political subdivision of the state, who releases or otherwise disseminates or makes available* for any purpose involving employment, bonding, or licensing in connection with any business, trade, or profession to any person, or to any department, agency, or other instrumentality of the state, or any political subdivision of the state, *any information or other data concerning any arrest, complaint, indictment, trial, hearing, adjudication, conviction, or correctional supervision the records with respect to which the officer or employee had knowledge of were sealed by an existing order issued pursuant to [R.C. 2953.31-*

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[21] Although you have not asked whether R.C. 2953.54 prohibits a prosecuting attorney from disclosing the information set forth in your second question to a defendant pursuant to rule 16, we will also consider this statute insofar as the language of this statute is similar to the language used in R.C. 2935.321.

[22] R.C. 2953.32(D) provides that a law enforcement officer, a prosecuting attorney or his assistants, the parole or probation officer of the person who is the subject of the records, the bureau of criminal identification and investigation, and an individual named in an application by the person who is the subject of the records may, under certain circumstances, inspect and use information or other data pertaining to a case the records of which have been ordered sealed pursuant to R.C. 2953.32(C)(2). R.C. 2953.32(E) provides that "[i]n any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued." R.C. 2953.32(F) states that an index to sealed records must be made available for the purposes set forth in R.C. 2953.32(C)-(E).

[23] R.C. Chapter 2950 authorizes the dissemination of sexual offender registration information to the general public. *See* R.C. 2950.10; R.C. 2950.11.

> *.36], or were expunged by an order issued pursuant to [R.C. 2953.42] as it existed prior to the effective date of this amendment, is guilty of divulging confidential information, a misdemeanor of the fourth degree*. (Footnotes and emphasis added.)

Similarly, R.C. 2953.55(B) states:

> *An officer or employee of the state or any of its political subdivisions who knowingly releases, disseminates, or makes available* for any purpose involving employment, bonding, licensing, or education to any person or to any department, agency, or other instrumentality of the state, or of any of its political subdivisions, *any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to [R.C. 2953.52], is guilty of divulging confidential information, a misdemeanor of the fourth degree*. (Emphasis added.)

In order to comply with the provisions of these statutes and avoid committing a criminal offense, a prosecuting attorney must not disclose information from a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 for any purpose involving employment, bonding, licensing, or education. These statutes, thus, in essence, prohibit disclosure by the prosecuting attorney, for the purposes specified therein, of any information or other data concerning any arrest, complaint, indictment, information, trial, adjudication, or correctional supervision, the records of which have been sealed pursuant to R.C. 2953.31-.61. *See* 1993 Op. Att'y Gen. No. 93-038; 1983 Op. Att'y Gen. No. 83-100.

A review of the provisions of R.C. 2953.321, R.C. 2953.54, R.C. 2953.35(A), and R.C. 2953.55(B) quoted above discloses that a prosecuting attorney is prohibited from disclosing to the public information included in a record that has been ordered sealed or expunged pursuant to R.C. 2953.31-.61, unless the disclosure is otherwise permitted by law. As explained above, pursuant to R.C. 149.43(A)(1)(v), "[r]ecords the release of which is prohibited by state or federal law" are not public records that must be disclosed to the public under R.C. 149.43(B)(1). Accordingly, R.C. 2953.321, R.C. 2953.54, R.C. 2953.35(A), and R.C. 2953.55(B) provide an exception to the public disclosure requirements of R.C. 149.43.

None of these statutes, however, excepts this information from disclosure to a defendant during discovery under rule 16 of the Ohio Rules of Criminal Procedure. Indeed, the public's right to information under R.C. 149.43 and a defendant's right in a criminal case to discovery under rule 16 are significantly different. As explained in *State v. Forehope*, 71 Ohio App. 3d 435, 440, 594 N.E.2d 83 (Stark County 1991):

> We conclude that discovery proceedings in original criminal actions are governed by the provisions of Crim. R. 16. Invocation of the Public Records Law, R.C. 149.43, in the criminal proceeding requires independent compliance with its unique procedural prerequisites to access.

> Public information (the public's right to know) and pretrial discovery in a specific case are significantly different. They differ in purpose, method, and targeted persons.
>
> *Discovery* is the means by which attorneys exchange certain information pertaining to a pending case. See Crim. R. 16. A discovery motion or motion to compel discovery is the request upon an *attorney* to produce information, or on the court to require the attorney to produce information. To the contrary, *R.C. 149.43(B)* contemplates a request for records to be made to the person responsible for keeping the record within the *governmental unit* in which such records are maintained. (Emphasis in original.)

See generally State ex rel. WHIO-TV-7 v. Lowe, 77 Ohio St. 3d 350, 354, 673 N.E.2d 1360 (1997) ("[d]iscovery is neither a public process nor typically a matter of public record. Historically, discovery materials were not available to the public or press. Moreover, documents collected during discovery are not 'judicial records.' Discovery, whether civil or criminal, is essentially a private process because the litigants and the courts assume that the sole purpose of discovery is to assist trial preparation. That is why parties regularly agree, and courts often order, that discovery information will remain private" (citations omitted) (quoting *United States v. Anderson*, 799 F.2d 1438, 1441 (11th Cir. 1986))).

In light of this distinction, the Ohio Supreme Court in *Henneman v. City of Toledo*, 35 Ohio St. 3d 241, 520 N.E.2d 207 (1988), held that a law enforcement agency has a duty to disclose during civil discovery[24] information that is not subject to public disclosure under R.C. 149.43. In this case the court specifically addressed the question "whether information and records compiled by a police department pursuant to its internal investigation of alleged police misconduct are subject to an executive privilege, either qualified or absolute, protecting such information and records from the normal discovery requirements of civil litigation." *Henneman v. City of Toledo*, 35 Ohio St. 3d 241, 242, 520 N.E.2d 207. In considering this question, the court stated:

> In arguing that internal affairs investigatory files are shielded from disclosure in this case by the foregoing provisions, appellants rely heavily on cases from this court holding that law enforcement investigation records are exempt from the public disclosure requirements of R.C. 149.43. Appellants' reliance is misplaced. These cases stand for the proposition that the law enforcement records described in R.C. 149.43(A)(2) are not subject to the requirement of R.C. 149.43(B) that all public records must be made available to the general public upon request at any reasonable time. Appellee herein is not contending that the records she requests must be made available to her as a

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[24] General provisions governing discovery in civil cases are set forth in rule 26 of the Ohio Rules of Civil Procedure.

> member of the general public. *R.C. 149.43(A)(2) only operates to exempt the records described therein from the requirement of availability to the general public on request. It does not protect records from a proper discovery request in the course of litigation, if such records are otherwise discoverable. Thus, R.C. 149.43 is not dispositive.* (Citations omitted and emphasis added.)

Henneman v. City of Toledo, 35 Ohio St. 3d 241, 244-45, 520 N.E.2d 207.

Thus, under *Henneman v. City of Toledo*, information from a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 must be disclosed by a prosecuting attorney during discovery in a civil case, if such information is otherwise discoverable. In other words, R.C. 2953.321, R.C. 2953.35, R.C. 2953.54, and R.C. 2953.55 do not prohibit a prosecuting attorney from disclosing the information to another party during discovery in a civil case.

Although *Henneman v. City of Toledo* concerned the disclosure of information during discovery in civil cases, nothing in the court's decision indicates that its reasoning and holding do not apply in discovery proceedings in criminal cases. To the contrary, the court states that R.C. 149.43 "does not protect records from a proper discovery request in the course of litigation." *Henneman v. City of Toledo*, 35 Ohio St. 3d 241, 245, 520 N.E.2d 207. The court makes no distinction between discovery proceedings conducted in civil and criminal cases. Therefore, in light of *Henneman v. City of Toledo*, it reasonably follows that, notwithstanding R.C. 2953.321, R.C. 2953.35, R.C. 2953.54, and R.C. 2953.55, information from a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 must be disclosed by a prosecuting attorney during discovery in a criminal case, if such information is otherwise discoverable. S*ee generally State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St. 3d 357, 359, 673 N.E.2d 1365 (1997) ("[i]nformation assembled by law enforcement officials in connection with a probable or pending criminal proceeding is, by the work product exception found in R.C. 149.43(A)(2)(c), excepted from required release to the public, as said information is compiled in anticipation of litigation *whether or not some of such information may be disclosed to the defendant pursuant to Crim. R. 16*" (emphasis added)); 1996 Op. Att'y Gen. No. 96-049 (syllabus) ("[a]n attorney who is employed by a county humane society pursuant to R.C. 2931.18 to prosecute criminal violations of R.C. Title 9 is permitted to receive criminal history record information from the law enforcement automated data system (LEADS) in order to provide that information to a defendant pursuant to Ohio Criminal Rule 16(B)(1)(b)"[25]).

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[25] Rules governing LEADS restrict the dissemination of information accessed through LEADS "to the use of duly authorized law enforcement and/or criminal justice agencies for the administration of criminal justice[,]" and state specifically: "The data shall not be sold, transmitted, or disseminated to any non-law enforcement agency, non-criminal justice agency or unauthorized person." 10 Ohio Admin. Code 4501:2-10-06(B). *See generally* 1994 Op. Att'y Gen. No. 94-046 (syllabus) ("records of information contained in or processed through LEADS

We find additional support for this conclusion in R.C. 2953.32(E). This provision provides that, "[i]n any criminal proceeding, proof of any otherwise admissible prior conviction may be introduced and proved, notwithstanding the fact that for any such prior conviction an order of sealing previously was issued pursuant to [R.C. 2953.31-.36]." Because proof of a prior conviction is generally in the custody of courts and law enforcement agencies, the General Assembly must have intended for such information to be subject to discovery by the parties in a criminal case. Otherwise, it would have been unnecessary for the General Assembly to enact R.C. 2953.32(E). *See generally* R.C. 1.47 ("[i]n enacting a statute, it is presumed that: … A result feasible of execution is intended"); *State v. Wilson*, 77 Ohio St. 3d 334, 336, 673 N.E.2d 1347 (1997) (it is to be presumed that the General Assembly inserts language into a statute to accomplish some definite purpose). Accordingly, no provision in R.C. 2953.321, R.C. 2953.35, R.C. 2953.54, or R.C. 2953.55 prohibits a prosecuting attorney from disclosing to a defendant during discovery under Ohio R. Crim. P. 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to R.C. 2953.31-.61.[26]

Based on the foregoing, it is my opinion, and you are hereby advised as follows:

1. Pursuant to R.C. 2953.321, R.C. 2953.54, and R.C. 2151.358, a county sheriff may not disclose to the public information in an investigatory work product report that pertains to a case the records of which have been ordered sealed or expunged pursuant to R.C. 2953.31-.61 or R.C. 2151.358, but the sheriff must disclose information in the report that relates to a defendant, suspect, or juvenile offender who has not had this

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… are not public records subject to disclosure pursuant to R.C. 149.43(B)"). The dissemination of criminal history record information is further restricted pursuant to state and federal law. *See* 28 C.F.R. § 20.1 (2002); 28 C.F.R. §§ 20.20-.21 (2002); 28 C.F.R. §§ 20.30-.34 (2002); R.C. 5503.10.

[26] As a final matter, we note that any information that a prosecuting attorney discloses to a defendant "for discovery purposes pursuant to Crim. R. 16 is not thereby subject to release as a 'public record' pursuant to R.C. 149.43." *State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St. 3d 350, 673 N.E.2d 1360 (1997) (syllabus). *See generally State ex rel. Gannett Satellite Info. Network, Inc. v. Petro*, 80 Ohio St. 3d 261, 265, 685 N.E.2d 1223 (1997) (exemptions to the public disclosure provisions of R.C. 149.43 "are usually fully applicable absent evidence that the public office having custody of the records disclosed the records to the public"); *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St. 3d 357, 361, 673 N.E.2d 1365 (1997) ("[a]bsent evidence that respondents have already disclosed the investigatory records to the public and thereby waived application of certain exemptions [to the public disclosure provisions of R.C. 149.43], the exemptions are fully applicable").

information ordered sealed or expunged, unless one of the exceptions set forth in R.C. 149.43(A) applies to the information.

2. No provision in R.C. 2953.321, R.C. 2953.35, R.C. 2953.54, or R.C. 2953.55 prohibits a prosecuting attorney from disclosing to a defendant during discovery under Ohio R. Crim. P. 16 statements made by the defendant or co-defendants, any record of a witness's prior felony convictions, and evidence favorable to the defendant that are included in a record that has been ordered sealed or expunged pursuant to R.C. 2953.31-.61.

Respectfully,

JIM PETRO
Attorney General