November 12, 2002

The Honorable C. David Warren
Athens County Prosecuting Attorney
Athens County Court House, First Floor
Athens, Ohio 45701

SYLLABUS: 2002-030

In the absence of facts indicating that the names and addresses of a county sewer district's customers fall within one of the exceptions to the definition of "[p]ublic record" contained in R.C. 149.43(A)(1), such names and addresses are public records that are subject to disclosure by the sewer district in accordance with R.C. 149.43.

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OPINION NO. 2002-030

The Honorable C. David Warren
Athens County Prosecuting Attorney
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Athens, Ohio 45701

Dear Prosecutor Warren:

You have submitted an opinion request in which you ask whether R.C. 149.43 requires the board of county commissioners to provide to private individuals the names and addresses of subscribers within a sewer district created under R.C. Chapter 6117. Your letter mentions a particular sewer district. This opinion, however, will address your question more broadly in terms that apply generally to county sewer districts created under R.C. 6117.01.

Let us begin with a brief discussion of the fundamental requirements of R.C. 149.43, Ohio's public records law. Pursuant to R.C. 149.43(B)(1), with limited exceptions, "all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours," and "upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time." As used in R.C. 149.43, the term "[p]ublic record" means, with various exceptions, "records kept by any public office." R.C. 149.43(A)(1).

In order to determine whether R.C. 149.43 applies to a county sewer district created under R.C. Chapter 6117, we must first determine whether such a sewer district is a "public office," as that term is used in R.C. 149.43. For purposes of R.C. 149.43, the term "public office" includes "any state agency, public institution, political subdivision, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government." R.C. 149.011(A). For the reasons that follow, we believe that a county sewer district is a part of county government and, as such, a "public office" for purposes of R.C. 149.43.

The establishment of county sewer districts is provided for in R.C. 6117.01(B),[1] which states in pertinent part: "For the purpose of preserving and promoting the public health and welfare, a board of county commissioners may lay out, establish, consolidate, or otherwise modify the boundaries of, and maintain, one or more sewer districts within the county and outside municipal corporations."[2] Rather than being managed or operated by its own board of trustees, a county sewer district is created by and remains under the direct supervision of the board of county commissioners. *See, e.g.*, R.C. 6117.01(C) (board of county commissioners may employ a sanitary engineer and may establish a county sanitary engineering department, the cost of which the board of county commissioners has a duty to provide); R.C. 6117.02 (county commissioners are responsible for fixing the rates and charges for the district's sanitary facilities); R.C. 6117.06 (county commissioners' responsibility for having prepared a general plan of sewerage or drainage for the district).

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[1] A county also has authority under R.C. 6117.03 to lay out county sewer districts that include territory within a municipality. *See generally* R.C. 6117.04 (with certain exceptions, granting county same authority over sewer district territory within a municipal corporation as it possesses in districts outside of municipalities).

[2] R.C. 6117.01(B) describes the specific purposes for which such sewer districts may be established, in part, as follows:

> The board may acquire, construct, maintain, and operate within any district sanitary or drainage facilities that it determines to be necessary or appropriate for the collection of sewage and other wastes originating in or entering the district, to comply with the provisions of a contract entered into for the purposes described in [R.C. 6117.41-.44 (county may contract with another public agency for joint construction and use of sanitary or drainage facilities)] and pursuant to those sections or other applicable provisions of law, or for the collection, control, or abatement of waters originating or accumulating in, or flowing in, into, or through, the district, and other sanitary or drainage facilities, within or outside of the district, that it determines to be necessary or appropriate to conduct the wastes and waters to a proper outlet and to provide for their proper treatment, disposal, and disposition. The board may provide for the protection of the sanitary and drainage facilities and may negotiate and enter into a contract with any public agency or person for the management, maintenance, operation, and repair of any of the facilities on behalf of the county upon the terms and conditions that may be agreed upon with the agency or person and that may be determined by the board to be in the best interests of the county. By contract with any public agency or person operating sanitary or drainage facilities within or outside of the county, the board may provide a proper outlet for any of the wastes and waters and for their proper treatment, disposal, and disposition.

Pursuant to R.C. 6117.01(C), "[t]he board [of county commissioners] shall provide suitable facilities for the use of the department and shall provide for and pay the compensation of the county sanitary engineer and all authorized necessary expenses of the county sanitary engineer and the sanitary engineering department." In addition, various provisions within R.C. Chapter 6117 authorize the board of county commissioners to issue and incur public obligations or levy taxes for construction of an improvement in the district or for payment of district expenses. *See, e.g.*, R.C. 6117.08, R.C. 6117.25, R.C. 6117.311. Finally, it is the board of county commissioners that contracts for the county sewer district. R.C. 6117.27. The role of the county commissioners in the establishment, operation, and funding of county sewer districts indicates that county sewer districts are part of county government. 1984 Op. Att'y Gen. No. 84-085 at 2-293 ("[i]t is apparent that a sewer district established pursuant to R.C. Chapter 6117 is not an entity or district independent of a county.... [W]hile the unincorporated areas of a county may be divided geographically into sewer districts, these districts are not operated independently of the county, but are governed by the board of county commissioners as part of the board's duties as the governing authority of the county. *Cf.* R.C. Chapter 6115 (sanitary districts)").

Because a county is a political subdivision, the various component parts of county government, including county sewer districts, are a public office for purposes of R.C. 149.43. *See* 1993 Op. Att'y Gen. No. 93-010 at 2-50 ("a building department, such as the Wood County Building Inspection Department, established by the board of county commissioners under R.C. 307.37 is a unit of county government and, as such, a public office for purposes of R.C. 149.43").

Let us now consider whether the names of customers of a county sewer district are a public record that must be disclosed under R.C. 149.43.[3] As used in R.C. 149.43, the term "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." R.C. 149.011(G) (emphasis added).[4]

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[3] We assume that the subscribers to which you refer are those persons or entities that pay rates, charges, or assessments imposed by the county sewer district. For ease of discussion, we will refer to such persons as customers.

[4] This opinion will assume, for purposes of discussion, that a list of the sewer district's customers exists. *See generally State ex rel. Scanlon v. Deters*, 45 Ohio St. 3d 376, 544 N.E.2d 680 (1989) (finding that, if a public office's computer is not programmed to produce a particular compilation of information, such compilation does not exist as a "document" for purposes of the definition of "[r]ecords" set forth in R.C. 149.011(G), and there is no duty to create such compilation), *overruled on other grounds by State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994).

In the operation of a county sewer district, a board of county commissioners has a duty to fix and collect various rates and charges for the use, or the availability for use, of the district's sanitary facilities and drainage facilities. R.C. 6117.02. The rates and charges for sanitary facilities are to be paid "by every person and public agency whose premises are served, or capable of being served, by" such facilities, if those facilities are owned or operated by the county. R.C. 6117.02(A). Similarly, the rates and charges for any drainage facilities owned or operated by or under the jurisdiction of the county are "to be paid by any person or public agency owning or having possession or control of any properties that are connected with, capable of being served by, or otherwise served directly or indirectly by," such drainage facilities. R.C. 6117.02(D). Further responsibility is imposed upon the board of county commissioners to collect any such rates or charges that are unpaid. R.C. 6117.02(C).

The performance of these duties would not be possible without maintenance of the names of persons and the addresses of properties within the district. Thus, such names and addresses serve to document the services provided by, as well as the functions, operations, and activities of the county sewer district. In addition, such names and addresses are actually used by the district in the execution of its functions. *See generally State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St. 3d 61, 64, 697 N.E.2d 640, 642 (1998) (requiring that information actually be used by a public office in order for that information to be a public record, and stating, "R.C. 149.43 and 149.011(G) do not define 'public record' as any piece of paper received by a public office that *might* be used by that office"). The names and addresses of the district's customers, therefore, are "records" of the district for purposes of R.C. 149.43.[5] As "records" of a

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[5] In the recent case of *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000), the Ohio Supreme Court concluded in the syllabus that, "[p]ersonal information of private citizens, obtained by a 'public office,' reduced to writing and placed in record form and used by the public office in implementing some lawful regulatory policy, is not a 'public record' as contemplated by R.C. 149.43." The information sought in *McCleary* was a photo identification program database prepared as part of a city recreation department's program to combat violence and vandalism at the city's swimming pools. The database contained items of personal information about the children using the pools.

The *McCleary* court concluded that the requested information was not a public record because it was not a "record," as that term is defined in R.C. 149.011(G). As explained by the court:

> The information sought ... was created by and is under the custody of a public office, the Department. However, the specific information requested consists of certain personal information regarding children who participate in the Department's photo identification program. Standing alone, that information, *i.e.*, names of children, home addresses, names of parents and guardians, and medical information, does nothing to document any aspect of the City's Recreation and Parks Department.

public office, the names and addresses of the county sewer district's customers are thus "public records" for purposes of R.C. 149.43, unless such records fall within one of the exceptions listed in R.C. 149.43(A)(1).

R.C. 149.43(A)(1) excepts from the definition of "[p]ublic record" various types of information, including, among other things, medical records, certain probation and parole records, certain adoption records, trial preparation records, peace officer residential and familial information, information pertaining to the recreational activities of a person under the age of eighteen, and records the release of which is prohibited by state or federal law. Although it is not immediately apparent that any of these exceptions is applicable to the names and addresses of a county sewer district's customers, your concern may have arisen from several recent cases concerning whether certain lists of names and addresses held by a public office are public records for purposes of R.C. 149.43.

For example, in *State ex rel. Besser v. Ohio State University*, 89 Ohio St. 3d 396, 732 N.E.2d 373 (2000) ("*Besser II*"), at issue was the release of various records related to the university's contemplated purchase of a medical center. One such record in the university's possession was a list of the medical center's top patient-volume physicians. The *Besser II* court found that such list constituted a trade secret that was excepted from the definition of "public record" as a record the release of which is prohibited by state or federal law, R.C. 149.43(A)(1)(v).[6]

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88 Ohio St. 3d at 368, 725 N.E.2d at 1147.

It is unclear whether the *McCleary* court's analysis applies to the question whether the names and addresses of a county sewer district's customers constitute "[r]ecords," as defined in R.C. 149.011(G). There is a distinction, however, between the information sought in *McCleary* and the names and addresses of a county sewer district's customers. The information sought in *McCleary* did not document a function of the parks and recreation department. In contrast, the information maintained by the county sewer district in your request is essential to the county's execution of its duties under R.C. 6117.02, *e.g.*, providing sanitary and drainage facilities to properties within the district and collecting charges and rates attributable to such properties, and is actually used in carrying out such duties. The names and addresses maintained by the county sewer district in this instance document the functions and operations of the district and thus do not appear to be excluded from the definition of "[r]ecords" under the *McCleary* court's analysis. *See generally State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St. 3d 61, 697 N.E.2d 640 (1998).

[6] Earlier, in *State ex rel. Besser v. Ohio State University*, 87 Ohio St. 3d 535, 721 N.E.2d 1044 (2000) ("*Besser I*"), the court found that "trade secrets," as defined in R.C. 1333.61(D), are excepted from the definition of public records under R.C. 149.43 as "records the release of which is prohibited by state or federal law," currently at R.C. 149.43(A)(1)(v), and that, subsequent to Ohio's adoption of the Uniform Trade Secrets Act, R.C. 1333.61-.69 (enacted in 1993-1994

The *Besser II* court began its analysis, as follows:

> In reviewing the records withheld by OSU, the precept guiding our analysis is that the inherent, fundamental policy of R.C. 149.43 is to promote open government, not restrict it. *State ex rel. The Miami Student v. Miami Univ.* (1997), 79 Ohio St. 3d 168, 171, 680 N.E.2d 956, 959. Consistent with this policy, exceptions to disclosure must be strictly construed against the public records custodian, and the custodian bears the burden to establish the applicability of an exception. *State ex rel. McGowan v. Cuyahoga Metro. Hous. Auth*. (1997), 78 Ohio St. 3d 518, 519, 678 N.E.2d 1388, 1389.

89 Ohio St. 3d at 398, 732 N.E.2d at 376-77.

In considering whether certain information fell within the category of trade secrets, the *Besser II* court began with the definition of "[t]rade secret" prescribed by R.C. 1333.61(D), in pertinent part, as follows:

> any business information or plans, ... or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.[7] (Footnote added.)

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Ohio Laws, Part III, 5403 (Am. Sub. H.B. 320, eff. July 20, 1994)), a public entity could have its own trade secrets.

[7] The *Besser II* court then listed the following factors to be considered in determining whether information constitutes a trade secret:

> "(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, *i.e.*, by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information." *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, 687 N.E.2d 661, 672, *citing Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131, 134-135, 7 OBR 165, 169, 454 N.E.2d 588, 592.

Ultimately the university's list of the medical center's top patient-volume physicians was found to be a trade secret because:

> [t]he disclosure of this [list] would permit OSU's competitors to determine which physicians affiliated with Park Medical Center produce the most revenue, and competitors could target these physicians in order to increase their revenues, to the detriment of OSU. This list is similar to a business's customer list, which constitutes an intangible asset that is presumptively a trade secret when the owner of the list takes measures to prevent its disclosure in the ordinary course of business to persons other than those selected by the owner.

89 Ohio St. 3d at 402, 732 N.E.2d at 380 (citation omitted).

Unlike the list of top patient-volume physicians at issue in *Besser II*, the names and addresses of a county sewer district's customers do not appear to constitute a trade secret, as defined in R.C. 1333.61(D). One of the essential elements of a trade secret is that it derives "independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use." R.C. 1331.61(D)(1). Thus, in order to constitute a trade secret, a county sewer district's customer list must derive independent, economic value to the county from its nondisclosure to others who can obtain economic value from its disclosure or use. Whether the names and addresses of a sewer district's customers have such value to the county depends upon various factors, including whether there is competition to provide the services and perform the functions of the sewer district.[8]

In addition, "R.C. 1333.61 grants a document trade secret status only if the information is not generally known or readily ascertainable to the public." *State ex rel. Plain Dealer v. Ohio Department of Insurance*, 80 Ohio St. 3d 513, 529, 687 N.E.2d 661, 675 (1997). Because the names and addresses of a county sewer district's customers are readily available through records

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*State ex rel. Besser v. Ohio State University*, 89 Ohio St. 3d 396, 399-400, 732 N.E.2d 373, 378 (2000).

[8] Ultimately, "[t]he question whether a particular knowledge or process is a trade secret is ... a question of fact to be determined by the trier of fact upon the greater weight of the evidence." *Fred Siegel Co., L.P.A. v. Arter & Hadden*, 85 Ohio St. 3d 171, 181, 707 N.E.2d 853, 862 (1999) (citation omitted). In addition, "[a]n entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy" (citation omitted). *State ex rel. Besser v. Ohio State University*, 89 Ohio St. 3d at 400, 732 N.E.2d at 378. An opinion of the Attorney General is not, however, an appropriate means by which to resolve questions of fact. *See* 1986 Op. Att'y Gen. No. 86-076 at 2-422 ("it is inappropriate for [the Attorney General] to use the opinion-rendering function to make findings of fact or determinations as to the rights of particular individuals" (various citations omitted)).

maintained in other county offices, *e.g.*, R.C. 319.28 (general tax list and duplicate of real and public utility property), it would not appear that the customer list you describe falls within the trade secret exception to the definition of a "[p]ublic record."

In another case, *State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St. 3d 273, 695 N.E.2d 256 (1998), the Ohio Supreme Court considered whether the names of State Teachers Retirement System members meeting specified criteria were public records subject to disclosure under R.C. 149.43. In finding the requested information not to be a public record, the *Kerner* court began by noting that the State Teachers Retirement Board did not have the requested compilation of information. Nowhere had the members' names been segregated from those of other members in accordance with the specific criteria requested. As stated by the *Kerner* court, a public office "has no duty to create a new document by searching for and compiling information from its existing records." 82 Ohio St. 3d at 274, 695 N.E.2d at 258. Accordingly, the court found that the Board had no duty to provide access to the requested information.

In the situation you describe, it is our understanding that the sewer district has been asked to provide a list of the names and addresses of all of the sewer district's customers. Should the sewer district possess a list of its customers, and should granting access to the requested information not require the creation of a new document, the release of the customer list would not be excepted from disclosure under the rationale of *State ex rel. Kerner v. State Teachers Retirement Bd*.

Based upon the foregoing, it is my opinion, and you are hereby advised that, in the absence of facts indicating that the names and addresses of a county sewer district's customers fall within one of the exceptions to the definition of "[p]ublic record" contained in R.C. 149.43(A)(1), such names and addresses are public records that are subject to disclosure by the sewer district in accordance with R.C. 149.43.

Respectfully,

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