October 22, 2007

The Honorable Ramona Francesconi Rogers
Ashland County Prosecuting Attorney
307 Orange Street
Ashland, Ohio 44805

SYLLABUS: 2007-034

A piece of physical evidence collected by law enforcement in connection with a criminal investigation and held by a county prosecuting attorney following conclusion of the trial, appeals, and post-conviction proceedings to which the evidence pertains is not a public record for purposes of R.C. 149.43.

STATE OF OHIO
OFFICE OF THE ATTORNEY GENERAL
MARC DANN, 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

October 22, 2007

OPINION NO. 2007-034

The Honorable Ramona Francesconi Rogers
Ashland County Prosecuting Attorney
307 Orange Street
Ashland, Ohio 44805

Dear Prosecutor Rogers:

You have requested an opinion of the Attorney General concerning the application of R.C. 149.43, the Ohio public records law, to a request for DNA testing of a cigarette butt that was collected as evidence at the scene of a crime. By way of background, you explain that the cigarette butt was collected by a deputy sheriff and was then sent to the Bureau of Criminal Identification and Investigation (BCI). BCI analyzed the cigarette butt and found that it contained amylase, which is a component of saliva. BCI retained the cigarette butt for later DNA comparison when samples from the suspect and the victim were submitted to it. Because neither the state nor the defendant in the associated criminal case requested DNA testing and analysis, however, none was performed.

Subsequently, BCI returned the cigarette butt to your office, which has since maintained the cigarette butt in a locked evidence cabinet. The cigarette butt was not introduced as evidence at the trial. After Defendant was convicted, his motions for post-conviction DNA testing of the cigarette butt were denied on the basis that the testing would not be outcome determinative. Defendant unsuccessfully appealed his conviction and the denial of the post-conviction testing. Defendant is now deceased. Through counsel, however, Defendant's mother now asserts that the cigarette butt is a "public record" of your office, and requests that your office submit the cigarette butt to a private laboratory for DNA testing and analysis.

You specifically ask whether a cigarette butt that was collected as evidence at the scene of a crime in connection with a criminal case that is now concluded, which evidence is currently in the possession of your office, is a "record," as defined in R.C. 149.011(G), for purposes of R.C. 149.43. In the event that the cigarette butt is a record, you ask whether you, as prosecuting attorney, have authority to send the cigarette butt to a private laboratory for DNA testing and analysis. For the reasons that follow, we conclude that a cigarette butt that was collected as evidence in a criminal matter in which all appeals and other post-conviction proceedings are

concluded and that is in the possession of the county prosecuting attorney is not a "public record" of the county prosecuting attorney's office for purposes of R.C. 149.43.

Public Records Generally

Before addressing your specific questions, let us briefly review the basic requirements of R.C. 149.43, Ohio's public records law. R.C. 149.43, as recently amended in Sub. H.B. 9, 126th Gen. A. (2006) (eff., in part, Sept. 29, 2007), provides, in pertinent part:

> (B)(1) Upon request and subject to division (B)(8) of this section,[1] all public records responsive to the request shall be promptly prepared and made *available for inspection* to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, *upon request*, a public office or person responsible for public records *shall make copies of the requested public record available at cost and within a reasonable period of time*. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.
>
> . . . .
>
> (6) . . . . Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record. (Footnote and emphasis added.)

Although Sub. H.B. 9 made significant changes in R.C. 149.43, the fundamental requirements of the statute remain unchanged. R.C. 149.43(B) requires a public office to make all public records available to any person for inspection at all reasonable times during normal business hours, and, upon request, to make copies of such records, at cost, within a reasonable period of time.

Application of R.C. 149.93 to Office of Prosecuting Attorney

For purposes of R.C. 149.43, the term "public office" includes, unless otherwise specified, "any state agency, public institution, political subdivision, or 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). The office of prosecuting attorney is created within each county by R.C. 309.01, and is a "public office" for purposes of R.C. 149.43. *See State ex*

---

[1] R.C. 149.43(B)(8) establishes procedures by which a "person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication" may request public records.

rel. WLWT-TV5 v. Leis, 77 Ohio St. 3d 357, 673 N.E.2d 1365 (1997); *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994).

Because the office of prosecuting attorney is a public office that is subject to R.C. 149.43, it must comply with the inspection and copying requirements of R.C. 149.43(B) with regard to the office's public records. As used in R.C. 149.43, the term "public record" means, with certain exceptions, "*record*s kept by any public office." R.C. 149.43(A)(1) (emphasis added).

As used in R.C. 149.43, the term "records" means:

> any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in [R.C. 1306.01], 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). Thus, unless an item "serves to document the organization, functions, policies, decisions, procedures, operations, or other activities" of the public office possessing such item, the item is not a "record" of that office for purposes of R.C. 149.43. *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002) ¶9 ("[t]o the extent that an item does not serve to document the activities of a public office, it is not a public record and need not be disclosed"). *See State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St. 3d 160, 2005-Ohio-4384, 833 N.E.2d 274 (2005) ¶29 ("simply because an item is received and kept by a public office does not transform it into a record under R.C. 149.011(G)").

Application of R.C. 149.43 to Piece of Evidence Kept by Prosecuting Attorney Following Conviction of Defendant in Proceeding to Which Evidence Pertains

In the situation you describe, the cigarette butt, which remains in the possession of the prosecuting attorney's office, must be available to the public for inspection and copying under R.C. 149.43 only if it is, among other things, a "record" of the prosecuting attorney's office. The cigarette butt you describe is a piece of physical evidence from a criminal proceeding in which all appeals and post-conviction proceedings are concluded. As such, the cigarette butt does not "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office" of the prosecuting attorney, and thus, is not a record of your office.[2]

---

[2] *See generally, e.g.*, *State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 82 Ohio St. 3d 37, 41, 693 N.E.2d 789 (1998) (finding that allegedly racist e-mail created by sheriff's employee through the office's e-mail system was not a "record" for purposes of R.C. 149.43 because it did "not serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the sheriff's department. There is no evidence or allegation that the alleged racist e-mail documented sheriff's department policy or procedures. It was allegedly circulated only to a few co-workers and was not used to conduct sheriff's department business");

Because the cigarette butt you describe is not a "record" of the prosecuting attorney's office, it also is not a "public record" for purposes of R.C. 149.43.

In light of our answer to your first question, it is not necessary to address your second question.

Conclusion

Based upon the foregoing, it is my opinion, and you are hereby advised that, a piece of physical evidence collected by law enforcement in connection with a criminal investigation and held by a county prosecuting attorney following conclusion of the trial, appeals, and post-conviction proceedings to which the evidence pertains is not a public record for purposes of R.C. 149.43.

Respectfully,

MARC DANN
Attorney General

State ex rel. Fant v. Enright, 66 Ohio St. 3d 186, 188, 610 N.E.2d 997 (1993) ("[t]o the extent that any item contained in a personnel file is not a 'record,' *i.e.*, does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed"); *Sideri v. Office of the District Attorney*, 663 N.Y.S.2d 206, 207, 243 A.D.2d 423 (App. Div. 1997) (finding that physical evidence, including clothing and weapons, held by the district attorney were not part of "'the documents and statistics leading to [governmental] determinations'" and were not, therefore, "records" for purposes of New York's Freedom of Information Law, N.Y. Pub. Off. Law §§ 84-90 (various citations omitted)). *Cf. generally* R.C. 2953.81(B) (expressly providing that test results of post-conviction DNA testing, authorized by R.C. Chapter 2953, are public records).