September 20, 2004

The Honorable Robert P. DeSanto
Ashland County Prosecuting Attorney
Suite 307, Orange Street
Ashland, Ohio 44805

SYLLABUS: 2004-033

A county recorder who makes available in her office a photocopying machine for use by the public may not charge the two dollar per page fee set forth in R.C. 317.32(I) where the photocopier is operated by the public without the assistance of the recorder or her staff. The recorder is, instead, subject to R.C. 149.43(B), which requires a public office to provide copies of public records "at cost."

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OPINION NO. 2004-033

The Honorable Robert P. DeSanto
Ashland County Prosecuting Attorney
Suite 307, Orange Street
Ashland, Ohio 44805

Dear Prosecutor DeSanto:

You have asked whether R.C. 317.32(I) or R.C. 149.43 governs the copying charges that a county recorder may collect when a member of the public copies a document on a photocopy machine that is provided by the recorder, but not operated by the county recorder or her staff. You have explained that, in Ashland County, the county recorder maintains in her office a county-leased photocopy machine that is accessible to members of the public.[1] You have also explained that, if a person is familiar with the recorder's indexing system, he can locate and inspect the documents without the assistance of the recorder or her staff. He can then use the photocopier to make a copy of the document, also without the assistance of the recorder or her staff.

We note initially that this Office recently had occasion, in 2004 Op. Att'y Gen. No. 2004-011, to examine a county recorder's responsibilities under R.C. 317.32 and R.C. 149.43 to make documents available for public inspection, and his ability to charge a fee for providing copies of the documents he maintains. We will not, therefore, repeat the opinion's general discussion of a county recorder's statutory duties and authority, nor reiterate in its entirety the explanation of R.C. 317.32 and R.C. 149.43 found in 2004 Op. Att'y Gen. No. 2004-011.[2] We will, instead, briefly summarize these statutes as they pertain to your question.

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[1] Although a public agency may record, keep, file, and copy records by means of one or more technologies, R.C. 9.01 requires a public agency to "keep and make readily available to the public the machines and equipment necessary to reproduce the records and information in a readable form." R.C. 9.01 has been interpreted as requiring an agency to provide the necessary equipment to copy, as well as view, records. *State ex rel. Recodat Co. v. Buchanan,* 46 Ohio St. 3d 163, 165, 546 N.E.2d 203 (1989). *See also* 2004 Op. Att'y Gen. No. 2004-011 at 2-85, n. 2.

[2] 2004 Op. Att'y Gen. No. 2004-011 also is responsive to your other questions. The opinion concludes that, a member of the public may use his own scanning device, such as a

R.C. 149.43, Ohio's public records act, requires any public office, *see* R.C. 149.011(A), upon request, to make copies of public records "available at cost, within a reasonable period of time." R.C. 149.43(B)(1). The phrase, "at cost," has been interpreted to mean "actual cost," and does not include "labor costs regarding employee time." *State ex rel. Warren Newspapers, Inc. v. Hutson,* 70 Ohio St. 3d 619, 625-26, 640 N.E.2d 174 (1994).

The "at cost" standard of R.C. 149.43(B)(1) may be superceded, however, by a statute, such as R.C. 317.32(I), that sets a particular fee for copies. *State ex rel. Slagle v. Rogers,* 103 Ohio St. 3d 89, 2004-Ohio-4354, 814 N.E.2d 55, at ¶ 6 ("when a statute specifically sets forth the cost of making copies of records, that statute must take precedence over the 'at cost' provision of R.C. 149.43(B)(1)," citing 1989 Op. Att'y Gen. No. 89-073 with approval). Division (I) of R.C. 317.32 provides that, "[f]or photocopying a document, other than at the time of recording and indexing," the county recorder "shall charge and collect" a base fee of one dollar per page and a housing trust fund fee of one dollar per page. *See* note 4, *infra*. R.C. 317.32, when applicable, is deemed to "trump" R.C. 149.43, and "a county recorder is required to charge the fees set forth in R.C. 317.32(I) rather than making photocopies of records available 'at cost.'" 2004 Op. Att'y Gen. No. 2004-011, at 2-86, n. 3. *See generally* 1994 Op. Att'y Gen. No. 94-006 (where the recorder performs the service described in R.C. 317.32(I), he has a duty to charge the corresponding fee prescribed by statute for that service and has no authority to create an exception); 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451, 452 ("public officials who are required by law to collect certain fees have no authority to decide that in certain cases it would be inequitable or unwise to assess the statutory fees"). We must determine, therefore, whether R.C. 317.32(I) applies when members of the public operate a county-owned or operated photocopier without the assistance of the recorder or her staff. If R.C. 317.32(I) does not apply, the recorder would be authorized to charge only the actual cost for copies made by the public, rather than the two dollar per page fee. [3]

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digital camera, to make copies of records while in the recorder's office, and the recorder has no authority to charge a copying fee in such an instance. The recorder may, however, adopt reasonable rules governing the use of copying equipment brought into the office by members of the public.

[3] The actual cost of photocopying is likely to be substantially less than the two dollar per page fee required under R.C. 317.32(I). *See, e.g., State ex rel. Russell v. Thomas,* 85 Ohio St. 3d 83, 706 N.E.2d 1251 (1999) (the actual cost of copies was significantly less than the agency's charge of one dollar per page); *State ex rel. Heyduk v. City of Westlake,* No. 69443, 1996 Ohio App. LEXIS 936 at *6-*7 (Cuyahoga County) (court would not issue a writ of mandamus to compel city to make copies of records available at the actual per page cost where neither the requester nor the city had "demonstrated that the charge of 25 cents per page constitutes the actual cost of creating a copy of a public record;" nor would the court "sanction a charge of 25 cents per page for a copy of a public record. The respondent [city] may charge only the actual cost").

R.C. 317.32(I) does not specify the scope of its "for photocopying a document" language. The first paragraph of R.C. 317.32 states, however, that the "base fee" charged for each of the enumerated transactions is "for the recorder's services." Thus, the one dollar per page base fee charged under division (I) (to which the one dollar housing trust fund fee corresponds)[4] is paid in exchange for the recorder's *service* of photocopying. The pertinent question, then, is whether the recorder is providing photocopying services on the facts that you posit.

The performance of a service denotes more than the mere provision of access to equipment. According to its common usage, *see* R.C. 1.42, the term "service" means assistance or effort provided *personally* by one person for the benefit of another. *See Webster's New World Dictionary* 1301 (2nd college ed. 1984) (defining "service" to include: "work done or duty performed for another or others … an act giving assistance or advantage to another … professional aid or attention *[*the fee for his *services]*"); *Black's Law Dictionary* 1372 (7th ed. 1999) (defining "service" as "[a]n intangible commodity in the form of human effort, such as labor, skill, or advice"). If the term "service," as used in R.C. 317.32, is given its common meaning, therefore, division (I) would not apply where the recorder (or a member of her staff) does not personally photocopy documents for members of the public, but merely provides access to a photocopier.

This interpretation is supported by the fact that the recorder's fees have historically been charged for services performed personally by the recorder. Although a recorder's duties are considered to be largely ministerial, *State ex rel. Preston v. Shaver,* 172 Ohio St. 111, 114, 173 N.E.2d 758 (1961), they have historically been "labor intensive," requiring the personal attention and meticulous and painstaking efforts of the recorder and his staff. *See, e.g.,* Rev. Stat. § 1145 (1895) (the recorder "shall record in a fair and legible handwriting, in the proper record, all such deeds, mortgages, or other instruments of writing required by law to be recorded, and which are presented to him for that purpose"); Rev. Stat. § 1146 (recorder may be liable to suit on his bond if he neglects to record instruments within twenty days after they are received for record). While

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[4] Prior to the enactment of Am. Sub. H.B. 95, 125th Gen. A. (2003) (relevant sections eff. Aug. 1, 2003), a county recorder was required to charge only one fee for each of the transactions listed in R.C. 317.32. The fee was charged by the recorder "for his services." *See* 1993-1994 Ohio Laws, Part IV, 7622, 7629 (Am. Sub. H.B. 790, eff. Sept. 12, 1994) (the first paragraph of R.C. 317.32 reading: "For his services, the county recorder shall charge and collect the following fees;" one dollar per page was charged for photocopying). Am. Sub. H.B. 95 enacted R.C. 317.36, requiring county recorders to collect a second fee for deposit in the state housing trust fund. R.C. 317.36(A). The fee that was originally charged for the recorder's services is now called the "base" fee. R.C. 317.36 also provides that, "[t]he amount of any housing trust fund fee the recorder is authorized to collect is equal to the amount of any base fee the recorder is authorized to collect for services. The housing trust fund fee shall be collected in addition to the base fee." Money generated from the base fee is deposited in the county treasury, R.C. 325.27, and money generated from the housing trust fund fee is ultimately deposited in the state treasury pursuant to R.C. 319.63. R.C. 317.36(B).

the work of the recorder has been eased by recent technology allowing for the automation of certain processes,[5] including the production of copies,[6] the functions of his office remain heavily reliant on the personal efforts of the recorder and his staff, and no systematic changes have been made to revise the fee system in light of these technologies. *See*, *e.g.,* R.C. 317.32(C) (the recorder shall charge and collect "[f]or *manual or typewritten* recording of assignment or satisfaction of mortgage or lease or any other marginal entry, a base fee of four dollars and a housing trust fund fee of four dollars") (emphasis added); R.C. 317.32(F) (the recorder shall charge and collect "[f]or recording *manually* any plat not exceeding six lines, a base fee of two dollars and a housing trust fund fee of two dollars, and for each additional line, a base fee of ten cents and a housing trust fund fee of ten cents") (emphasis added).

As your question suggests, a recorder may make available in her office a photocopier for use by members of the public without the personal assistance of the recorder or a member of her staff. Because the fees in R.C. 317.32 have been established in relation to the performance of the recorder's personal services, however, R.C. 317.32(I) would not apply in that situation.

Our conclusion is supported by the courts' recognition that, "inherent in R.C. 149.43 is the fundamental policy of promoting open government, not restricting it." *State ex rel. The Miami Student v. Miami University*, 79 Ohio St. 3d 168, 171, 680 N.E.2d 956 (1997). *See also State ex rel. Findlay Publishing Co. v. Schroeder,* 76 Ohio St. 3d 580, 582, 669 N.E.2d 835 (1996) ("R.C. 149.43 is liberally construed to further broad access"). Accordingly, "the exceptions to disclosure are strictly construed against the custodian of public records in order to promote this public policy," and "[a]ny doubt of whether to disclose public records is to be resolved in favor of providing access to such records." *State ex rel. The Miami Student v. Miami University*, 79 Ohio St. 3d at 171. *Accord State ex rel. Findlay Publishing Co. v. Schroeder.* The burden of establishing an exception is on the custodian of the records. *State ex rel. Findlay Publishing Co. v. Schroeder.* Similarly, division (I) of R.C. 317.32 is an exception to the "at cost" standard of R.C. 149.43, and as such, must be narrowly construed in favor of the public.

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[5] For example, the current version of Rev. Stat. § 1145, now R.C. 317.13, reads: "the county recorder shall record in the proper record, in legible handwriting, *typewriting, or printing, or by any authorized photographic or electronic process*, all deeds, mortgages, plats, or other instruments of writing that are required or authorized by the Revised Code to be recorded and that are presented to the recorder for that purpose" (emphasis added). *See also* 2000 Op. Att'y Gen. No. 2000-046.

[6] The authority of a county recorder to charge a fee in excess of actual cost for photocopying documents has been granted relatively recently. 1993-1994 Ohio Laws, Part IV, 7622, 7629-30 (Am. Sub. H.B. 790, eff. Sept. 12, 1994). *See generally* 1966 Op. Att'y Gen. No. 66-125 (prior to Am. Sub. H.B. 790, county recorders were required to provide copies at cost pursuant to R.C. 149.43).

Therefore, it is my opinion, and you are so advised that, a county recorder who makes available in her office a photocopying machine for use by the public may not charge the two dollar per page fee set forth in R.C. 317.32(I) where the photocopier is operated by the public without the assistance of the recorder or her staff. The recorder is, instead, subject to R.C. 149.43(B), which requires a public office to provide copies of public records "at cost."

Respectfully,

JIM PETRO
Attorney General