

September 20, 2000

OPINION NO. 2000-036

David E. Aldstadt, Director
Governor's Office of Veterans Affairs
65 South Front Street
Columbus, Ohio 43215

Dear Director Aldstadt:

You have requested an opinion whether military discharge certificates on file with the Governor's Office of Veterans Affairs are public records subject to inspection by members of the public pursuant to R.C. 149.43. Attached to your opinion request was a copy of a Certificate of Release or Discharge from Active Duty (DD Form 214). Contained on this form are, among other matters, the service member's name, branch of military service, social security number, home address at time of entry, dates of service, military education, type of separation, and character of service.

In order to answer your question, we must begin by examining the fundamental requirement of R.C. 149.43, which states in pertinent part:

(B)(1) Subject to division (B)(4) of this section,¹ all public records shall be promptly prepared and made *available for inspection* to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records *shall make copies available* at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division. (Footnote and emphasis added.)

Accordingly, each public office and each officer in charge of public records is required to make such records available for inspection at all reasonable times during regular business hours, and, upon request, to provide a copy at cost within a reasonable time. We must, therefore, determine whether the DD Forms 214 held by the Governor's Office of Veterans Affairs constitute

¹ R.C. 149.43(B)(4) denies certain persons who are incarcerated pursuant to a criminal conviction or a juvenile adjudication the right to inspect and copy certain public records.

“public records” which are subject to inspection by the public and copying in accordance with R.C. 149.43.

As used in R.C. 149.43, the term “[p]ublic record” means, with certain exceptions,² “any record that is kept by any public office.” R.C. 149.43(A)(1). *See generally* R.C. 149.011(G) (defining “[r]ecords” for purposes of R.C. 149.43 as including “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*” (emphasis added)). The term “public office,” as used in R.C. 149.43, includes, among others, “any state agency,” R.C. 149.011(A), including “every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government,” R.C. 149.011(B). Thus, if the Governor’s Office of Veterans Affairs is a “[p]ublic office,” as defined in R.C. 149.011(A) and (B), “any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of [the Governor’s Office of Veterans Affairs], which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office,” R.C. 149.011(G), with certain statutory exceptions, is a “public record” for purposes of R.C. 149.43.

The Governor’s Office of Veterans Affairs is created by R.C. 5902.01. The duties of the Director of the Governor’s Office of Veterans Affairs are set forth primarily in R.C. 5902.02 and include such things as providing guidance and adopting rules for the operation of county veterans service commissions, assisting the general public in obtaining records of vital statistics pertaining to veterans or their dependents, developing and monitoring programs and agreements to enhance employment and training for veterans, and developing and monitoring programs and agreements to enable county veterans service commissions to address homelessness, indigency, and other veteran-related issues. Having been created by statute to carry out the purpose of assisting veterans, the Governor’s Office of Veterans Affairs is a “public office” for purposes of R.C. 149.43. *See* 1988 Op. Att’y Gen. No. 88-103 (finding a county veterans service commission to be a “public office” for purposes of R.C. 149.43). *See generally State ex rel. Dickman v. Defenbacher*, 164 Ohio St. 142, 128 N.E.2d 59 (1955) (finding an appropriation by the General Assembly to various veterans’ organizations for the rehabilitation of war veterans and the promotion of patriotism to be for a public purpose and not, therefore, in violation of Ohio Const. art. VIII, § 4, which prohibits the state’s lending its aid and credit to private associations and corporations).

Turning now to the nature of the records about which you ask, let us begin by briefly describing the DD Forms 214, which are also known as certificates of discharge or release from active duty. *See generally* 10 U.S.C.A. § 1168 (1998). Part 45 of Title 32 of the Code of Federal

² The exceptions from the term “[p]ublic record” are found in R.C. 149.43(A) and include, among others, medical records, records concerning adoption proceedings, records containing information that is confidential under R.C. 2317.023 (mediation communications), and “[r]ecords the release of which is prohibited by state or federal law.”

Regulations (C.F.R.) sets forth the procedure for, among other things, the preparation and distribution of DD Form 214.³ As explained in 32 C.F.R. § 45.2(b) (1999), DD Forms 214 and 215⁴ serve several purposes, including providing the military services with information for administrative purposes, providing the service member with “a brief, clear-cut record of the member’s active service with the Armed Forces at the time of transfer, release, or discharge, or when the member changes status or component while on active duty,” 32 C.F.R. § 45.2(b)(2), and providing “[a]ppropriate governmental agencies with an authoritative source of information which they require in the administration of Federal and State laws applying to personnel who have been discharged, otherwise released, or transferred to a Reserve component while on active duty,” 32 C.F.R. § 45.2(b)(3).

Pursuant to 32 C.F.R. § 45.3(e)(vi), copy six of DD Form 214 is sent to “the appropriate State Director of Veterans Affairs ... if the member so requested.” You have informed us that in Ohio it is the Director of the Governor’s Office of Veterans Affairs who receives these copies. Thus, when a copy of a service member’s DD Form 214 is sent to a state director of veterans affairs, the state director of veterans affair has an “authoritative source of information “ for use in administering federal and state laws for those persons. *See* 32 C.F.R. § 45.2(b)(3). *See generally* 1988 Op. Att’y Gen. No. 88-078 at 2-388 (“[f]or purposes of Ohio veteran’s benefits law the DD Form 214 is the most important evidence for determining eligibility for benefits”).

According to a member of your staff, your office is also in possession of copies of DD Form 214 submitted to the state by veterans who wished to participate in former Ohio war bonus programs.⁵ Because the DD Forms 214 submitted by veterans and kept by the Governor’s Office of

³ Pursuant to 32 C.F.R. § 45.2 (1999):

(a) The provisions of this part apply to the Office of the Secretary of Defense, the Military Services, the Joint Staff, and the Defense Agencies (hereafter referred to as “DoD Components”). The term “Military Services,” as used here, refers to the Army, Navy, the Air Force, the Marine Corps and, by agreement with the Department of Transportation, to the Coast Guard.

⁴ *See generally* 32 C.F.R. § 45.3(e)(3) (explaining that DD Form 215 is used to correct errors in DD Form 214 that are discovered after the original has been delivered or distributed).

⁵ *See, e.g.*, Ohio Const. art. VIII, § 2b (adjusted compensation for service in World War II); Ohio Const. art. VIII, § 2d (Korean War bonus). Under these former programs, the Adjutant General maintained copies of DD Form 214 for each applicant. *See generally* 1988 Op. Att’y Gen. No. 88-063 (discussing the duties of the Board of Commissioners of the Sinking Fund under Ohio Const. art. VIII, §§ 2b and 2d, where a balance remains in the World War II compensation bond retirement fund or the Korean Conflict compensation bond retirement fund, respectively, after the retirement of all bonds that have been issued and the payment of all valid claims for compensation made within the applicable time limitations). In 1993-1994 Ohio Laws, Part IV, 6089 (Am. Sub. H.B. 448, eff. July 22, 1994), however, the General Assembly transferred from the Adjutant

Veterans Affairs, or submitted at the request of a service member in accordance with 32 C.F.R. § 45.3(e)(vi), are used by the Governor's Office of Veterans Affairs for, among other things, carrying out its functions and duties, we conclude that such copies constitute "records" of that office, R.C. 149.011(G), for purposes of R.C. 149.43.⁶

As records held by a public office, the copies of DD Form 214 you describe are "public records" for purposes of R.C. 149.43, unless they are excepted from the meaning of that term as defined in R.C. 149.43(A). In this regard, let us next consider R.C. 149.43(A)(1)(s), which excepts from the meaning of "[p]ublic record" any "[r]ecords the release of which is prohibited by state or federal law."

We begin by examining Part 45 of Title 32 of the Code of Federal Regulations. The initial distribution of the original and copies of DD Form 214 is governed by 32 C.F.R. § 45.3(e), which, in part, requires that the original (copy 1) be given to the member, copy 2 be retained by the appropriate military service, copy 3 be sent to the Department of Veterans Affairs, copy 5 be sent to Louisiana UCX/UCFE, Claims Control Center, Louisiana Department of Labor, and copy 6 be sent to the appropriate state director of veterans affairs. The distribution of copies 7 and 8 is governed by regulations of the military services. Pursuant to 32 C.F.R. § 45.3(b)(1)(A), "Copy No. 4, containing the statutory or regulatory authority, reentry code, SPD code, and narrative reason for

General to the newly created Governor's Office of Veterans Affairs the duty of maintaining veterans' certificates of discharge or separation from military service that were submitted in conjunction with applications for Ohio war bonus programs. R.C. 5902.03 (formerly at R.C. 5913.012). Thus, your office currently maintains these certificates as well as those submitted to your office pursuant to 32 C.F.R. § 45.3(e)(vi). The reason we distinguish between the types of DD Forms 214 held by your office is that R.C. 5902.03, which addresses the use of DD Forms 214 by the Governor's Office of Veterans Affairs, is limited by its terms to only those DD Forms 214 "submitted by Ohio veterans in conjunction with their applications for Ohio war bonuses."

⁶ Recently, in *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000), the Ohio Supreme Court decided that personal information regarding children who participate in a public office's photo identification program is not a public record for purposes of R.C. 149.43. The *McCleary* court concluded that personal information that was voluntarily given to a public office and that provided no insight into the conduct, operations, or programs of the public office did not constitute a "record," as defined in R.C. 149.011(G), for purposes of R.C. 149.43. The court further noted that, even if the information were a "record," disclosure of such information would be an unwarranted invasion of privacy and was not required by R.C. 149.43. Finally, the *McCleary* court stated that, "[b]ecause of the inherent vulnerability of children, release of personal information of this nature creates an unacceptable risk that a child could be victimized." 88 Ohio St. 3d at 372, 725 N.E.2d at 1150. Whether the analysis in *McCleary* would require a similar finding with respect to the DD Forms 214 in the possession of the Governor's Office of Veterans Affairs is a matter that we cannot predict.

separation also will be physically delivered to the separatee prior to departure, if he/she so requested....”⁷

The provision of copies of DD Form 214 after a service member’s separation is governed by 32 C.F.R. § 45.3(e)(4),⁸ which states, in pertinent part:

Agencies maintaining a separatee’s DD Form 214 will provide a copy *only upon written request by the member*. *Agencies* will provide the member with 1 copy with the Special Additional Information section, and 1 copy with that information deleted. In the case of DD Form 214 issued prior to July 1, 1979, *agencies* will provide the member with 1 copy containing all items of information completed, and 1 copy with the following items deleted from the form: Specific authority and narrative reason for separation, reenlistment eligibility code, and separation program designator/number. (Emphasis added.)

The meaning of the word “[a]gencies,” as used in 32 C.F.R. § 45.3(e)(4) is not defined by rule and is somewhat unclear. Of those to whom the original and copies of DD Form 214 are initially distributed pursuant to 32 C.F.R. § 45.3(e), only the military services are entities to which Part 45 of Title 32 of the Code of Federal Regulations is made expressly applicable. *See generally* note three, *supra*. The question then arises whether the Governor’s Office of Veterans Affairs, as an entity to which a copy of DD Form 214 may be sent in accordance with 32 C.F.R. § 45.3(e), is one of the “[a]gencies” that is subject to the prohibition in 32 C.F.R. § 45.3(e)(4) against the distribution of copies of DD Form 214 without the written consent of the service member who is the subject of the form.

Examination of the remaining provisions of 32 C.F.R. Part 45 reveals that the word “agencies” is used elsewhere therein with clear reference to entities other than the military services. *See, e.g.*, 32 C.F.R. § 45.3(d)(3) (stating in part, “[c]opies of DD Form 214 transmitted to *various*

⁷ It is interesting to note that not all copies of DD Form 214 contain identical information. For example, pursuant to 32 C.F.R. § 45.3(d)(4):

The authority for a member’s transfer or discharge will be cited by reference to the appropriate Military Service regulation, instruction, or manual, followed by the appropriate separation program designator on copies 2, 4, 7, and 8 only. A narrative description to identify the reason for transfer or separation will not be used on copy 1.

See also 32 C.F.R. § 45.3(e)(4) (specifying information to be deleted from copies of DD Form 214 provided after separation); 32 C.F.R. Part 45 app. A.

⁸ Pursuant to 32 C.F.R. § 45.3, each of the Military Services, *see generally* note three, *supra*, are authorized to issue instructions for the preparation and distribution of DD Forms 214 consistent with the requirements of that rule. 32 C.F.R. § 45.3(d) and (e).

governmental agencies shall be legible, especially those provided to the Veterans Administration (Department of Veterans Affairs, effective March 15, 1989, in accordance with section 18(a), Public Law 100-527 []) and the Department of Labor” (emphasis added)⁹; 32 C.F.R. § 45.4(e)(2) (“[a]gencies or individuals who come into the possession of [lists of separation program designator codes] are cautioned on their use because a particular list may be outdated and not reveal correctly the full circumstances relating to an individual’s separation or discharge”). It appears, therefore, that the use of the word “agencies” in 32 C.F.R. § 45.3(e)(4) was not intended to refer to only those entities expressly made subject to Part 45 of Title 32 of the Code of Federal Regulations by 32 C.F.R. § 45.2(a).

In addition, we note that 32 C.F.R. § 45.4 emphasizes the value of the forms in validating the eligibility of veterans for benefits and the vulnerability of the forms to fraudulent use. *See, e.g.*, 32 C.F.R. § 45.4(a) (stating in part, “[t]he DD Forms 214 and 215 are a source of significant and authoritative information used by civilian and governmental agencies to validate veteran eligibility for benefits. As such, they are valuable forms and, therefore, vulnerable to fraudulent use. Since they are sensitive, the forms must be safeguarded at all times. They will be transmitted, stored, and destroyed in a manner which will prevent unauthorized use”). Moreover, 32 C.F.R. § 45.4(a) requires all of the military services to issue instructions to assure the security of DD Forms 214, both prior to and after their preparation and distribution. It would be reasonable, therefore, to conclude that 32 C.F.R. § 45.3(e)(4) includes as “[a]gencies” all of the entities to which copies of DD Form 214 are submitted under 32 C.F.R. § 45.3(e), including state directors of veterans affairs.

Although no cases of which we are aware have expressly addressed the possible application of 32 C.F.R. § 45.3(e)(4) to state directors of veterans affairs, the distribution and subsequent use of DD Forms 214 has been the subject of comment in a number of cases, which suggest that DD Forms 214 are not disclosed without the consent of the service member who is the subject of the particular form. *See, e.g., Karr v. Castle*, 768 F. Supp. 1087, 1099-1100 n.5 (D.Del. 1991) (describing the entities to which copies of DD Form 214 are distributed, and stating, “[t]hese agencies cannot further disclose the form without the individual’s consent”); *Nethery v. Orr*, 566 F. Supp. 804, 806 n.3 (D.D.C. 1983) (“[u]pon discharge from the armed forces, a service member is issued a discharge certificate called a ‘DD-214.’ The DD-214 is a 7-ply [now 8-ply] form, only 4 copies of which provide information regarding the statutory or regulatory authority for discharge. *These copies are not available to the public*” (emphasis added)).

While the wording of these cases suggests that no entity to which a copy of DD Form 214 is sent may release a copy thereof without the written consent of the service member who is the subject of the form, none of these cases identifies specifically the provision of law pursuant to

⁹ The Department of Veterans Affairs and the Department of Labor, both of which also receive copies of DD Form 214, are also not made subject to 32 C.F.R. § 45.3(e). *See* note three, *supra*. As executive departments of the federal government, 5 U.S.C.A. § 101, however, they are subject to the provisions of the Privacy Act, 5 U.S.C.A. § 552a.

which copies of DD Form 214 are made unavailable to the public.¹⁰ Rather, the cases reflect a common understanding that copies of DD Form 214 generally are not, without the written consent of the subject service member, disclosed by the entities to which the copies are distributed under 32 C.F.R. § 45.3(e).

We conclude, therefore, that, as an agency to which a copy of DD Form 214 may be sent in accordance with 32 C.F.R. § 45.3(e)(vi), the Governor's Office of Veterans Affairs is subject to the prohibition in 32 C.F.R. § 45.3(e)(4) against the distribution of copies of DD Form 214 in its possession without the written consent of the service member who is the subject of the form. Accordingly, DD Forms 214 maintained by the Governor's Office of Veterans Affairs are excepted by R.C. 149.43(A)(1)(s) from the definition of "[p]ublic record" for purposes of R.C. 149.43, and pursuant to 32 C.F.R. § 45.3(e)(4), the Governor's Office of Veterans Affairs may not release a DD Form 214, absent a written request by the service member who is the subject of the form.¹¹

¹⁰ The broad statements in these cases may arise from the fact that the entities, other than the member and the state directors of veterans affairs, to which copies of DD Form 214 are distributed are federal entities that are subject to the provisions of the Privacy Act, 5 U.S.C.A. § 552a. With limited exceptions not here applicable, 5 U.S.C.A. § 552a provides, in pertinent part, that, "[n]o agency shall disclose any record which is contained in a system of records by any means of communication to any person, or to another agency, except pursuant to a written request by, or with the prior written consent of, the individual to whom the record pertains..." 5 U.S.C.A. § 552a(b). See 5 U.S.C.A. § 552a(f) (requiring each agency to adopt rules to carry out the provisions of 5 U.S.C.A. § 552a). See generally 5 U.S.C.A. § 552a(a)(1) (adopting definition of "agency" set forth in 5 U.S.C.A. § 552(f)(1), which defines "agency" to include "any executive department, military department, Government corporation, Government controlled corporation, or other establishment in the executive branch of the Government (including the Executive Office of the President), or any independent regulatory agency"). Thus, irrespective of the possible application of 32 C.F.R. § 45.3(e)(4) to the federal entities other than the military services that receive copies of DD Form 214, *i.e.*, the Department of Labor and the Department of Veterans Affairs, 5 U.S.C.A. § 552a prohibits those departments, with limited exceptions, from distributing copies of DD Form 214 without the written consent of the subject of the form. Accordingly, all of the federal entities to which copies of DD Form 214 are distributed are prohibited by 5 U.S.C.A. § 552a or 32 C.F.R. § 45.3(e)(4) from releasing copies of DD Form 214 to the public without the written consent of the subjects of the form.

¹¹ We caution, however, as summarized in 1999 Op. Att'y Gen. No. 99-029 at 2-193:

Prior opinions have emphasized the limitations placed upon the Attorney General to provide definitive interpretations of federal statutory law and administrative regulations to state departments and agencies that must operate in accordance with such laws and regulations. These opinions have stated that where there is no definitive interpretation on a matter of federal law, the Attorney General is able to

Your letter states that your office receives requests from various entities requesting copies of DD Form 214. Because 32 C.F.R. § 45.3(e)(4) prohibits your office from releasing copies of DD Form 214 without the written request of the service member, however, absent such a written request, you may not release a copy of the form.¹²

As a final matter, let us address the powers and duties of your office with respect to certain of the DD Forms 214 in your possession. Pursuant to R.C. 5902.03, the Director of the Governor's Office of Veterans Affairs "may microfilm or otherwise duplicate all or any part of copies of original certificates of discharge and separation *submitted by Ohio veterans in conjunction with their applications for Ohio war bonuses.*" (Emphasis added.) R.C. 5902.03 also authorizes the Director to prepare and maintain copies of such forms for specific uses described therein. We note, however, that although R.C. 5902.03 authorizes your office to make copies of DD Form 214 that have been submitted to your office by veterans in conjunction with their applications for Ohio war bonuses and to make those copies available to specific persons and organizations for particular purposes, nothing in R.C. 5902.03 requires your office to make such copies available to anyone without the written consent of the veterans who are the subjects of those forms.

Based upon the foregoing, it is my opinion, and you are hereby advised that, because 32 C.F.R. § 45.3(e)(4) prohibits the Governor's Office of Veterans Affairs from releasing a copy of

advise only whether a state department's or agency's adoption of a particular interpretation appears to be consistent with the department's or agency's duty to carry out its statutory responsibilities. (Citations omitted.)

¹² We must also note that, the General Assembly has provided a device to facilitate the availability of DD Forms 214 to persons other than the service member should the service member so choose. Pursuant to R.C. 317.24, a discharged member of the United States armed forces may present a copy of his discharge to the county recorder for record at no charge. Pursuant to R.C. 317.24(A), "[t]he record of discharge, or a certified copy of the record, shall be received in evidence in all cases where the original discharge would be received." R.C. 317.24(B) also permits a discharged service member to request expungement of the individual's recorded discharge or expungement of the individual's separation program number from the record of discharge. *See generally* R.C. 317.24(C) (for purposes of R.C. 317.24(B), "[s]eparation program number" means "the coded number or numbers used to specify the reasons for a person's separation from active duty, as contained in line 9 (c) or line 11 (c) of a veteran's discharge paper, United States department of defense form DD-214"). Thus, discharged service members may assure the availability of their DD Forms 214 to surviving family members, as well as to others, by having such forms recorded in accordance with R.C. 317.24. In addition, 10 U.S.C.A. § 1041 authorizes providing a replacement of a certificate of discharge for a person discharged honorably or under honorable conditions to either the person or that person's spouse upon presentation of satisfactory proof. Such a replacement certificate, however, "may not be accepted as a voucher for the payment of a claim against the United States for pay, bounty, or other allowance, or as evidence in any other case." 10 U.S.C.A. § 1041.

David E. Aldstadt, Director

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DD Form 214 without the written consent of the service member, DD Forms 214 kept by the Governor's Office of Veterans Affairs are not "public records" for purposes of R.C. 149.43 and may not be released without the written consent of the service member who is the subject of the DD Form 214.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

September 20, 2000

David E. Aldstadt, Director
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65 South Front Street
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SYLLABUS:

2000-036

Because 32 C.F.R. § 45.3(e)(4) prohibits the Governor's Office of Veterans Affairs from releasing a copy of DD Form 214 without the written consent of the service member, DD Forms 214 kept by the Governor's Office of Veterans Affairs are not "public records" for purposes of R.C. 149.43 and may not be released without the written consent of the service member who is the subject of the DD Form 214.