November 16, 1993

OPINION NO. 93-033

The Honorable Stephanie Tubbs Jones
Cuyahoga County Prosecuting Attorney
Courts Tower, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

Dear Prosecutor Jones:

You have requested an opinion on the following questions:

1. Are documents such as rent rolls, financial statements, income and expense statements, preliminary appraisal reports, and any other documents labeled "confidential", trade secrets, as defined in O.R.C. §1333.51, and protected from public inspection?

2. Are all documents submitted in advance of a Board of Revision hearing open to public inspection under §5715.07?

3. Are real estate appraisal reports submitted in advance available for public inspection?

4. Under what circumstances, if any, could the Board of Revision members or its staff be held accountable under O.R.C. §5715.49 and §5715.50 for permitting public inspection of the subject documents?

Background

You have indicated that your request for an opinion was prompted by a claim by taxpayers that certain documents such as income and expense statements, financial statements of profit and loss, preliminary appraisal reports and rent rolls submitted to the board of revision are "trade secrets." The taxpayers claim that documents which constitute trade secrets should not be subject to public inspection pursuant to R.C. 5715.07, which provides as follows:

All files, statements, returns, reports, papers, or documents of any kind relating to the

> assessment of real property which are in the office of a county auditor or county board of revision or in the official custody or possession of such officer or board shall be open to public inspection.

Whether a Document Is a Trade Secret Pursuant to R.C. 1333.51(A)(3) Is a Question of Fact

You ask first whether rent rolls, financial statements, income and expense statements, preliminary appraisal reports, and other documents labeled "confidential" are trade secrets protected from public inspection by R.C. 1333.51. A "trade secret" is defined by R.C. 1333.51(A)(3) as

> the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers, which has not been published or disseminated, or otherwise become a matter of general public knowledge. Such scientific or technical information, design, process, procedure, formula, or improvement, or any business plans, financial information, or listing of names, addresses, or telephone numbers is presumed to be secret when the owner thereof takes measures designed to prevent it, in the ordinary course of business, from being available to persons other than those selected by the owner to have access thereto for limited purposes.

Trade secrets have been held to include certain types of commercial and financial information. "Although trade secrets are generally thought of as scientific or technical designs, processes, procedures or formulas, the state legislature has specifically included within the statutory definition the terms 'business plans' and 'financial information.'" *State, ex rel. Jacobs v. Prudoff,* 30 Ohio App. 3d 89, 93, 506 N.E.2d 927, 932 (Lorain County 1986). The types of documents you have described, *i.e.*, rent rolls including names and addresses, financial statements, income and expense statements, and preliminary appraisal reports, clearly constitute "financial information," and thus they might qualify as trade secrets, depending on the circumstances.

However, whether any particular information qualifies as a trade secret within the meaning of R.C. 1333.51(A)(3) requires a factual determination. *Water Management, Inc. v. Stayanchi,* 15 Ohio St. 3d 83, 472 N.E.2d 715 (1984). "The particular documents in question must be scrutinized according to the standards set forth in [R.C. 1333.51(A)(3)]." *State, ex rel. Jacobs,* 30 Ohio App. 3d at 93, 506 N.E.2d at 932. In *Pyromatics, Inc. v. Petruziello*, 7 Ohio App. 3d 131, 134-5, 454 N.E.2d 588, 592 (Cuyahoga County 1983) (quoting *Koch Eng'g v. Faulconer*, 610 P.2d 1094, 1104 (Kansas 1980)), the court noted that such scrutiny requires a determination of the following factors:

> (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.

Thus, each type of document in question, such as rent rolls, financial statements, income and expense statements, preliminary appraisal reports, and any other documents, must be examined with respect to these factors. Since such a determination is purely factual, however, it cannot be made by means of an opinion of the Attorney General. 1983 Op. Att'y Gen. No. 83-057.

All Documents Relating to the Assessment of Real Property That Are in the Office of a Board of Revision or in the Custody or Possession of the Board Are Open to Public Inspection Pursuant to R.C. 5715.07

Your second question asks whether all documents submitted to a board of revision in advance of a hearing are open to public inspection pursuant to R.C. 5715.07.

The language of R.C. 5715.07 is broad. With respect to the county board of revision, the disclosure requirement of R.C. 5715.07 applies to "all...documents of any kind relating to the assessment of real property" that are in the office of the board or in the custody or possession of the board. R.C. 5715.07. Whether R.C. 5715.07 is applicable to any particular document therefore depends upon whether the document relates to the assessment of real property.

"Assessment" is not defined for purposes of R.C. 5715.07, and thus it must be accorded its natural, literal, common or plain meaning. *State v. Dorso,* 4 Ohio St. 3d 60, 446 N.E.2d_449 (1983). The dictionary defines "assessment," with respect to taxation, as "[t]he listing and valuation of property for the purpose of apportioning a tax upon it, either according to value alone or in proportion to benefit received." *Black's Law Dictionary* 116 (6th ed. 1990). The authority to assess the real property of the county lies with the county auditor. R.C. 5713.01. However, R.C. 5715.11 provides that "complaints *relating to* the valuation or *assessment* of real property" are required to be heard by the county board of revision. (Emphasis added.) R.C. 5715.11 also provides that "[t]he board shall investigate all such complaints and may increase or decrease any such valuation or correct any assessment complained of, or it may order a reassessment by the original assessing officer." Thus, although the duty to assess the real property of the county lies with the county auditor, the county board of revision has the power to correct assessments and to order reassessments. Any documents used by the board of revision for this purpose clearly relate to the assessment of real property.

Your letter raises the question of whether documents representing trade secrets that are used by the board of revision to correct assessments are available for public inspection pursuant to R.C. 5715.07. Trade secrets have long been recognized in Ohio as a form of property. *See, e.g., Recording and Computing Machines Co. v. Neth,* 7 Ohio N.P. (n.s.) 217, 237 (C.P. Montgomery County 1904), *aff'd,* 75 Ohio St. 603 (1906) ("[t]hat which he has been employed and paid to accomplish becomes,

when accomplished, the property of his employer," quoting *Solomons v. U.S.*, 137 U.S. 342, 346 (1890)); *see also National Cash Register v. Heyne,* 10 Ohio N.P. (n.s.) 465 (C.P. Montgomery County 1910). It is the element of secrecy that makes a trade secret a valuable property. "[T]he nature of a trade secret is such that so long as it remains a secret it is valuable property to its possessor, who can exploit it commercially to his own advantage." *Underwater Storage, Inc. v. United States Rubber Co.*, 371 F.2d 950 (D.C. Cir. 1966), *cert. den.*, 386 U.S. 911 (1967). Once revealed, a trade secret loses its value to the owner. However, R.C. 5715.07 contains no express exceptions for trade secrets.[1]

R.C. 1333.51, which grants statutory protection to trade secrets, does not apply to information made available for public inspection under R.C. 5715.07. R.C. 1333.51 prohibits (1) a person from obtaining a trade secret with the intent to deprive the owner of its control or the intent to convert the trade secret to his own use or the use of another; (2) a person who has obtained a trade secret with the owner's consent from converting the trade secret to his own use or that of another person or, without the owner's consent, making a copy or exhibiting it to another.[2] However, only "persons" are prohibited from the activities listed in R.C. 1333.51. "Person" is not defined specifically for R.C. 1333.51. Generally, "unless expressly provided, the term 'person,' when used in a statute, does not encompass public entities such as the state, counties, or municipal corporations, or officers thereof."

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[1] R.C. 5715.07 was originally enacted in 1915 as G.C. 5591, 1914-1915 Ohio Laws 272 (H.B. 29, eff. Jan. 1, 1916). R.C. 1333.51, which offers express statutory protection for trade secrets, was enacted substantially later, in 1967. 1967-1968 Ohio Laws, Parts II-III, 2733 (Am. H.B. 730, eff. Nov. 14, 1967). Since 1967, the General Assembly has expressly provided, in certain instances, that material consisting of trade secrets is not open to public inspection for that very reason. *See, e.g.*, R.C. 122.36(A) ("[a]ny materials or data submitted, made, or received by the director of development, the industrial technology and enterprise advisory board, and the controlling board, to the extent that the material or data consists of *trade secrets*...is not deemed to be public information or public documents and shall not be open to public inspection"). (Emphasis added.) R.C. 122.36(B) provides similar protection for information "submitted, made available to, or received by Ohio technology transfer agents or the department of development in connection with the activities of the Ohio technology transfer organization...to the extent that the materials or data consist of *trade secrets*." (Emphasis added.) These legislative exceptions to protect the confidentiality of trade secrets clearly reveal that the General Assembly has recognized the value of trade secrets to their owners and the need to protect them from disclosure to the public. Accordingly, it appears that the failure of the General Assembly to provide an express exception to R.C. 5715.07's public inspection requirement in the case of trade secrets might be the result of inadvertence, and may present an appropriate subject to be addressed by legislation.

[2] R.C. 1333.51 further prohibits a person from using force, violence, threat, bribe, reward or offer of anything of value to obtain or attempt to obtain an article representing a trade secret, and from entering upon the premises of another, without authorization, with intent to obtain possession of or access to an article representing a trade secret. R.C. 1333.51(D) and (E).

1979 Op. Att'y Gen. No. 79-062 at 2-209. *See also In re McLaughlin,* 16 Ohio Op. 2d 191 (P. Ct. Noble County 1960), *aff'd*, 17 Ohio Op. 2d 498 (Ct. App. Noble County 1961). The county board of revision is comprised of the county treasurer, the county auditor, and the president of the board of county commissioners. R.C. 5715.02. Each of these positions constitutes a county office. *See* R.C. 305.01 (board of county commissioners); R.C. 319.01 (county auditor); R.C. 321.01 (county treasurer). Thus, the prohibitions of R.C. 1333.51 do not apply to the activities of the county board of revision in the exercise of its statutory duty to make documents available for public inspection pursuant to R.C. 5715.07. *See generally Thaxton v. Medina City Bd. of Educ.*, 21 Ohio St. 3d 56, 58, 488 N.E.2d 136, 138 (1986) ("a public board of education is not a 'person,' as defined in R.C. 1331.01(A), when the board operates within its clear legal authority").

As explained in note one, *supra*, since legislation was first enacted in 1967 to provide express statutory protection for trade secrets, the General Assembly has acted to protect trade secrets from being made available for public inspection in certain defined circumstances. *See, e.g.,* R.C. 122.36(A), (B). The failure to do so under the circumstances addressed in this opinion may well be the result of inadvertence, and thus it may be appropriate for this issue to be addressed by legislation.

Real Estate Appraisal Reports that Relate to the Assessment of Real Property Are Open to Public Inspection Pursuant to R.C. 5715.07

Your third question asks whether real estate appraisal reports submitted to a board of revision in advance of a hearing are available for public inspection. R.C. 5715.07 requires all documents relating to the assessment of real property that are in the possession of the board of revision to be open to public inspection. Thus, real estate appraisal reports relating to the assessment of real property that are in the office of the board of revision or in its custody or possession are open to public inspection pursuant to R.C. 5715.07.

Members and Employees of a County Board of Revision Do Not Violate R.C. 5715.49 or R.C. 5715.50 When They Permit Public Inspection of Documents Pursuant to R.C. 5715.07

Your fourth question asks under what circumstances, if any, the members or employees of a board of revision could be held accountable under R.C. 5715.49 or R.C. 5715.50 for permitting inspection of documents pursuant to R.C. 5715.07.

R.C. 5715.49 prohibits a former or present county auditor or member of a county board of revision from divulging, "except in the performance of his duties or upon the order of the department of taxation, or when called upon to testify in any court or proceeding, any information acquired by him in the exercise of the powers vested in him by the laws relating to taxation, or while claiming to exercise any such powers, as to the transactions, property, or business of any person, company, firm, corporation, association, or partnership." R.C. 5715.50 sets forth a similar prohibition for former and present experts, clerks, and employees of the county auditor, county board of revision, and tax

commissioner, and former and present deputies, assistants, and agents of the tax commissioner.

The prohibitions expressed in R.C. 5715.49 and R.C. 5715.50 do not apply when the officer or employee divulges information "in the performance of his duties." The requirement of R.C. 5715.07 that all documents relating to the assessment of real property be open to public inspection necessarily places an affirmative duty upon the members and employees of a county board of revision to make such documents available for public inspection. Therefore, when a member or an employee of the county board of revision, pursuant to R.C. 5715.07, makes available for public inspection documents concerning the transactions, property, or business of any person, company, firm, corporation, association, or partnership there is no violation of R.C. 5715.49 or R.C. 5715.50 because such action on the part of the employee or board member occurs "in the performance of his duties."[3]

Conclusions

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

1. The determination of whether a particular document represents a "trade secret," as it is defined by R.C. 1333.51(A)(3), is a question of fact and therefore cannot be determined by means of an Attorney General opinion.

2. Pursuant to R.C. 5715.07, all documents relating to the assessment of real property that are in the office of a county board of revision or in the official custody or possession of the board of revision are required to be open to public inspection.

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[3] In 1985 Op. Att'y Gen. No. 85-087, it was determined that information required to be open to public inspection under R.C. 5715.07 is excepted from the prohibition against disclosure contained in R.C. 5715.49 and R.C. 5715.50. This conclusion was based on the reasoning of 1931 Op. Att'y Gen. No. 3703, vol. III, p. 1295, which construed the provisions of G.C. 5591 (currently at R.C. 5715.07) and G.C. 12924-7 (currently at R.C. 5715.49). 1931 Op. No. 3703 concluded that G.C. 12924-7 (now R.C. 5715.49) "clearly relates to information secured in connection with tax returns and not to information bearing upon valuations assessed by public officials." 1931 Op. No. 3703 at 1298.

3. A member or an employee of a county board of revision who, pursuant to R.C. 5715.07, makes available for public inspection documents concerning the transactions, property, or business of any person, company, firm, corporation, association or partnership that are in the office of the county auditor or county board of revision or in the official custody or possession of such officer or board, does not violate R.C. 5715.49 or R.C. 5715.50.

Respectfully,

LEE FISHER
Attorney General

November 16, 1993

The Honorable Stephanie Tubbs Jones
Cuyahoga County Prosecuting Attorney
Courts Tower, Justice Center
1200 Ontario Street
Cleveland, Ohio 44113

SYLLABUS: 93-033

1. The determination of whether a particular document represents a "trade secret," as it is defined by R.C. 1333.51(A)(3), is a question of fact and therefore cannot be determined by means of an Attorney General opinion.

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3. A member or an employee of a county board of revision who, pursuant to R.C. 5715.07, makes available for public inspection documents concerning the transactions, property, or business of any person, company, firm, corporation, association or partnership that are in the office of the county auditor or county board of revision or in the official custody or possession of such officer or board, does not violate R.C. 5715.49 or R.C. 5715.50.