January 28, 1997

OPINION NO. 97-011

The Honorable Gregory A. White
Lorain County Prosecuting Attorney
226 Middle Avenue, 4th Floor
Elyria, Ohio 44035

Dear Prosecutor White:

We are in receipt of your letter requesting an opinion relating to the duties of the county recorder. You have asked whether the county recorder must retain the original affidavits and certificates submitted pursuant to R.C. 4123.76 and 4123.78, or whether it is permissible to retain only a filmed or imaged copy of the original.

R.C. 4123.76 and 4123.78 apply to situations in which an employer fails to fulfill its workers' compensation obligations under R.C. 4123.35. That section provides, in general, that each employer must either pay workers' compensation premiums to cover its employees or be granted status as a self-insuring employer and comply with applicable requirements. R.C. 4123.35; *see also* R.C. 4123.01(B). If an employer does not comply with R.C. 4123.35, the Administrator of Workers' Compensation is required to file with the county recorder of each county in which the employer's property is located a certificate of the amount of premium due from the employer, and that amount is a lien against the employer's real and personal property within the county. R.C. 4123.78. Similarly, if an application for workers' compensation benefits is made against an employer who failed to comply with R.C. 4123.35, the Bureau of Workers' Compensation is required to "make and file for record in the office of the county recorder in the counties where the employer's property is located," an affidavit setting forth the date of the application, the name and address of the employer, and the fact that the employer has not complied with R.C. 4123.35. R.C. 4123.76; *see also* R.C. 4123.75. A copy of the application must be filed with the affidavit. The affidavit constitutes a lien upon the employer's real and tangible personal property located within the county. R.C. 4123.76.

When the county recorder receives an affidavit under R.C. 4123.76 or a certificate under R.C. 4123.78, the county recorder is required by statute to "accept and file" the affidavit or certificate and "record the same as a mortgage on real estate" and to "file the same as a chattel mortgage" and "index the same" as a "mortgage on real estate and as a chattel mortgage." R.C. 4123.76; R.C. 4123.78. Therefore, in order to determine whether the county recorder must retain the

original affidavits and certificates, or whether a filmed or imaged copy is sufficient, it is necessary to examine the requirements governing the recording and indexing of mortgages on real estate and the filing and indexing of chattel mortgages (now known as financing statements).[1]

Let's consider first the statutory provisions governing the recorder's duties with respect to mortgages on real estate. The county recorder is required by statute to keep sets of various types of records, including mortgages. R.C. 317.08(B).

When an instrument of writing is presented to the county recorder for record, the county recorder marks it with the date, the time of presentation, and a file number. The file numbers are consecutive, in the order of receipt, except for financing statements, which have a separate series of file numbers and are filed separately, as provided in R.C. 1309.38-.40. Each instrument is kept on file in the same numerical order until it is recorded. When the instrument is recorded, it is marked with the time when recorded and the location at which the record can be found. R.C. 317.12; R.C. 317.13.

The county recorder has express statutory authority to record a mortgage by making a copy of it. R.C. 317.13 requires the county recorder to "*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." R.C. 317.13 (emphasis added). Thus, a county recorder may record a deed or mortgage by making a copy of the written instrument presented for recording[2] and need not retain the original. *See, e.g.*, 1990 Op. Att'y Gen. No. 90-057; 1965 Op. Att'y Gen. No. 65-173. The copy constitutes the county's record, and the original is returned to the person who presented it for recording. *See, e.g.*, *Green v. Garrington*, 16 Ohio St. 548, 550 (1866) ("[o]rdinarily, the recording of an instrument means the copying of it into the public records kept for the purpose"); 1960 Op. Att'y Gen. No. 1348, p. 335, at 340.[3]

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[1] "Chattel mortgage" is a term for a security device granting a security interest in personal property. *See Black's Law Dictionary* 237 (6th ed. 1990). That term was commonly used in earlier statutes. Under current law, a chattel mortgage is included as a financing statement and is subject to R.C. 1309.01-.50. *See* R.C. 1309.02(B); 1962 Op. Att'y Gen. No. 3142, p. 558; 1962 Op. Att'y Gen. No. 3072, p. 473. Therefore, the provisions of R.C. Chapter 1309 governing financing statements are applicable to affidavits and certificates under R.C. 4123.76 and 4123.78. *See* 1962 Op. Att'y Gen. No. 3072, p. 473.

[2] In certain instances, a certified copy of a record from one county may be recorded in another county. *See* R.C. 317.14-.16.

[3] Although your questions pertain to the retention of original documents, it is appropriate also to consider the means by which the county recorder may dispose of documents that are not retained. Pursuant to R.C. 149.351, "[a]ll records are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in

R.C. 9.01 contains general provisions concerning the recording, filing, and copying of records. It states, in part:

> When *any officer*, office, court, commission, board, institution, department, agent, or employee of the state, or *of a county*, or any political subdivision, *who is charged with the duty or authorized or required by law to record*, preserve, keep, maintain, *or file any record, document*, plat, court file, paper, *or instrument in writing*, or to make or furnish copies of any thereof, *deems it necessary or advisable, when recording any such document*, plat, court file, *paper, or instrument in writing, or when making a copy or reproduction of any thereof* or of any such record, for the purpose of recording or copying, preserving, and protecting the same, reducing space required for storage, or any similar purpose, *to do so by means of any photostatic, photographic, miniature photographic, film, microfilm, or microphotographic process*, or perforated tape, magnetic tape, other magnetic means, electronic data processing, machine readable means, graphic or video display, or any combination thereof, *which correctly and accurately copies, records, or reproduces*, or provides a medium of copying, recording, or reproducing, *the original record, document*, plat, court file, paper, *or instrument in writing, such use* of any such photographic or electromagnetic processes, *for any such purpose, is hereby authorized....*
> *...When so recorded, or copied or reproduced to reduce space required for storage or filing of such records*, said photographs, microphotographs, microfilms, perforated tape, magnetic tape, other magnetic means, electronic data processing, machine readable means, graphic or video display, or any combination thereof, or films, or

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part, except as provided by law or under the rules adopted by the [appropriate] records [commission]." R.C. 149.351(A). "Records" include "any document, device, or item...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). The county recorder is permitted to dispose of county records only in accordance with applicable requirements. *See* R.C. 149.38; 1990 Op. Att'y Gen. No. 90-057; 1961 Op. Att'y Gen. No. 2129, p. 184.

Each county has a county records commission that provides rules for retention and disposal of records of the county and reviews applications for one-time records disposal and schedules of records retention and disposal submitted by county offices. R.C. 149.38(A)-(B). When county records are approved for disposal, a copy of the records list is sent to the Auditor of State, who may disapprove the action. In addition, the Ohio Historical Society must be given a chance to select for its custody records that are of continuing historical value. R.C. 149.38(C).

When a mortgage is recorded by the making of a copy, that copy constitutes a county record and may be disposed of only in accordance with applicable provisions. *See, e.g.*, 1960 Op. Att'y Gen. No. 1348, p. 335. The original from which the copy is made must, similarly, be dealt with and disposed of in an appropriate manner. *See, e.g.*, 1989 Op. Att'y Gen. No. 89-042; 1961 Op. Att'y Gen. No. 2129, p. 184; 1955 Op. Att'y Gen. No. 5667, p. 371.

> prints made therefrom, when properly identified by the officer by whom or under whose supervision the same were made, or who has the custody thereof, *have the same effect at law as the original record....*

R.C. 9.01 (emphasis added). *See generally* 1990 Op. Att'y Gen. No. 90-057; 1965 Op. Att'y Gen. No. 65-173. The county recorder, as an officer of a county, is thus authorized to record mortgages by means of filmed or imaged copies.

In addition to requiring that the county recorder record the affidavits and certificates in question as mortgages on real estate, R.C. 4123.76 and R.C. 4123.78 require that the county recorder index them as mortgages on real estate. We must consider, therefore, whether it is necessary for the county recorder to retain the original document in order to perform this function.

The county recorder's duty to index a mortgage consists of listing it in various indexes under appropriate names or other categories, with reference to the location at which the instrument is recorded. *See* R.C. 317.18; R.C. 317.20; R.C. 1309.40(D). *See generally* 1985 Op. Att'y Gen. No. 85-041. The function of indexing does not require that the original document be retained. *See, e.g., Green v. Garrington*.

It is evident from the foregoing discussion that a county recorder is authorized to record and index a mortgage while retaining a copy, rather than the original document. Therefore, a county recorder may record and index an affidavit under R.C. 4123.76 or a certificate under R.C. 4123.78 as a mortgage on real estate without retaining the original document.

Next it is necessary to examine the requirements governing financing statements to determine whether a county recorder must retain the original of such a document in order to properly file and index it. As noted above, financing statements must be filed separately from other instruments of writing received by the county recorder. R.C. 317.12. They are governed by the provisions of the Ohio Uniform Commercial Code appearing in R.C. Chapter 1309. *See generally* 1985 Op. Att'y Gen. No. 85-041.

When a financing statement is presented to the county recorder for filing, the county recorder must mark it with a file number and with the date and hour of filing and must "hold the statement or a microfilm or other photographic copy thereof for public inspection." R.C. 1309.40(D). This language clearly indicates that the recorder may make and hold a microfilm or other photographic copy of a financing statement received for filing, but does not address the question whether the recorder also must retain the original document.[4]

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[4] In certain circumstances, an instrument of writing presented to the county recorder and referred to in this opinion as the "original" may itself be a copy. *See generally, e.g.,* 1962 Op. Att'y Gen. No. 3289, p. 723, at 725-26; 1949 Op. Att'y Gen. No. 257, p. 45. In particular, a copy of a security agreement serves as a financing statement if it contains the necessary information and is signed by the debtor. Further, a "carbon, photographic, or other reproduction of a security

Historically, the recording of a document such as a mortgage on real estate consists of copying the document into the public records and thereby preserving an official copy. *See Green v. Garrington*; R.C. 317.08. In contrast, the filing of a document consists of "placing it in the custody of the public official...and the making of the proper endorsement by the officer." 1949 Op. Att'y Gen. No. 257, p. 45, at 47. A document that is filed need not be copied into a particular record book, but it will still be held as a public record in a more general sense. *See* 1949 Op. Att'y Gen. No. 257, p. 45, at 47-48.

It has generally been the practice for a county recorder to retain the original of a document that is presented for filing. *See* 1949 Op. Att'y Gen. No. 257, p. 45; note 4, *supra*. Statutory provisions governing the copying of documents, however, permit the county recorder, when carrying out the duty of filing documents, to make a copy instead of retaining the original document presented. Pursuant to R.C. 9.01, quoted in part above, a county officer, including a county recorder, who is charged with the duty to file any document, may, when making a copy or reproduction of the document for the purpose of copying, preserving, and protecting the document, reducing space required for storage, or any similar purpose, make a copy that has the same effect at law as the original record. Thus, the county recorder is permitted to retain a copy of a financing statement as the official county record, rather than retaining the original document. *See* 1961 Op. Att'y Gen. No. 2129, p. 184 (syllabus) ("[p]ursuant to...[R.C. 9.01], the public officials therein enumerated, are authorized to use the microfilm process of reproduction for the...filing...of records they are required to...file..., and to dispose of the original records or copies of such records in accordance with the provisions of [R.C. 149.31, 149.32, 149.37, 149.38, 149.39, 149.41 and 149.42]"); 1955 Op. Att'y Gen. No. 5667, p. 371. *See generally* 1990 Op. Att'y Gen. No. 90-057.[5]

We should take note of the fact that certain provisions of the Ohio Uniform Commercial Code refer to originals and copies or records of financing statements.[6] Those provisions, however,

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agreement or a financing statement is sufficient as a financing statement if the security agreement so provides or if the original has been filed in this state." R.C. 1309.39(A); *see also* note 2, *supra*.

[5] The original documents may be disposed of only in accordance with applicable requirements. *See* note 3, *supra*.

[6] For example, R.C. 1309.40(G) states that, if the person filing a financing statement or related document furnishes a copy, the filing officer "shall upon request note upon the copy the file number and date and hour of the filing of the original and deliver or send the copy to such person." Further, R.C. 1309.41 provides for the filing of a termination statement to indicate that the secured party no longer claims a secured interest under a financing statement. With respect to the disposal of the original financing statement, that statute states:

If the filing officer has a microfilm or other photographic record of the financing statement,

> and of any related continuation statement, statement of assignment, and statement of release, he may remove the originals from the files at any time after receipt of the

do not conflict with the copying authorized by R.C. 9.01. Rather, a portion of the Uniform Commercial Code, from which the Ohio Uniform Commercial Code is derived, permits a local statute on the disposition of public records to vary the provisions governing the removal and destruction of lapsed financing statements. U.C.C. (U.L.A.) § 9-403 (1992).[7] It is appropriate, therefore, for provisions of Ohio law relating to the retention of public records to apply to documents filed pursuant to the Ohio Uniform Commercial Code.

Let us turn now to the question whether it is necessary for the county recorder to retain the original affidavit or certificate in order to index it as a chattel mortgage, as required by statute. *See* R.C. 4123.76; R.C. 4123.78. The indexing of a financing statement is made under the name of the debtor with notation to the file number. R.C. 1309.40(D); 1985 Op. Att'y Gen. No. 85-041. The availability of a photographic copy for public inspection satisfies the indexing requirements, and the original need not be held for that purpose.

For the reasons discussed above, it is my opinion, and you are advised, that when an affidavit under R.C. 4123.76 or a certificate under R.C. 4123.78 is presented to a county recorder, the county recorder may record a filmed or imaged copy as a mortgage on real estate and may file a filmed or imaged copy as a chattel mortgage or financing statement, rather than retaining the original document.

Respectfully,

> termination statement, or if he has no such record, he may remove them from the files at any time after one year after receipt of the termination statement.

R.C. 1309.41(B). *See also* note 7, *infra*.

[7] Section 9-403(3) of the Uniform Commercial Code, which provides the basis for R.C. 1309.40, states in part: "Unless a statute on disposition of public records provides otherwise, the filing officer may remove a lapsed statement from the files and destroy it immediately if he has retained a microfilm or other photographic record, or in other cases after one year after the lapse." U.C.C. (U.L.A.) § 9-403(3) (1992). The words "[u]nless a statute on disposition of public records provides otherwise" were not included in the Ohio statute. R.C. 1309.40(C).

BETTY D. MONTGOMERY
Attorney General

January 28, 1997

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SYLLABUS: 97-011

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