May 31, 1996

OPINION NO. 96-034

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

Dear Prosecutor Mayberry:

You have requested my opinion whether the Ohio Supreme Court's decision in *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994), requires a county recorder to remove or obliterate social security account numbers that appear on mortgages, mortgage releases, veterans discharges, and financing statements before he records those documents. You state in your letter that the social security account numbers are obtained and inscribed on those documents by "banks and other lenders for purposes unrelated to the conduct of public business," and the county recorder neither requires nor makes use of those numbers in fulfilling his statutory filing and recording responsibilities.

In order to facilitate a clear understanding of my response to your inquiry, I shall first review the specific facts and legal issues addressed in the Ohio Supreme Court's decision. *State ex rel. Beacon Journal Publ. Co. v. City of Akron* was an appeal from a decision by the Summit County Court of Appeals that granted a writ of mandamus requested by The Akron Beacon Journal newspaper against the City of Akron and its finance director. Pursuant to R.C. 149.43,[1] the public

---

[1] R.C. 149.43(B) states, in pertinent part, that, "[a]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours," and "[u]pon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time." As used in R.C. 149.43, R.C. 149.43(A)(1) defines "[p]ublic record" as

> any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised

records law, the newspaper had asked the city to provide it with computer tape records containing the city's year-end employee master payroll files for 1990 and 1991. The requested files contained information that included each employee's name, address, telephone number, social security number, date of birth, educational background, employment status and position, rate of pay, service ratings, overtime hours and pay, and year-to-date earnings. The city provided the newspaper with copies of the requested files, but with all social security numbers and unlisted telephone numbers deleted.

The newspaper made a second request for the files and specifically asked that the employees' social security numbers be included. The city refused to comply with that request. The newspaper then petitioned the court of appeals for a writ of mandamus. The appellate court granted the writ. The court of appeals determined that the employees' social security numbers were "[r]ecords," as defined in R.C. 149.011(G), and thus were "[p]ublic records" for purposes of R.C. 149.43, and further determined that disclosure of the social security numbers was neither prohibited by state or federal law nor violative of any employee's right of privacy or any public policy. *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, C.A. No. 15872, 1993 Ohio App. LEXIS 3979 (Summit County Ct. App. Aug. 11, 1993).

In a 4-3 decision, the Ohio Supreme Court reversed the appellate court's decision, holding that "R.C. 149.43 does not mandate that a city disclose the Social Security numbers of its employees upon demand." *State ex rel. Beacon Journal Publ. Co. v. City of Akron* (syllabus). In arriving at this holding, the majority opinion, written by Justice Pfeifer, found that although the employees' social security numbers were "[r]ecords" as defined in R.C. 149.011(G), those numbers were not "[p]ublic record[s]" as defined in R.C. 149.43(A)(1), and thus were not subject to mandatory disclosure under that section. The majority opinion determined that, for purposes of R.C. 149.43(A)(1), the social security numbers comprised records "the release of which is prohibited by state or federal law," *see* note one, *supra*, hence there was no obligation on the part of the city to release or otherwise disclose the numbers as requested. The court reasoned that disclosure of the employees' social security numbers would violate their constitutional rights to privacy, and thus it followed that release of the numbers was prohibited by federal law. *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d at 607, 640 N.E.2d at 166.

> Code, trial preparation records, confidential law enforcement investigatory records, records containing information that is confidential under section 4112.05 of the Revised Code, DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code, and *records the release of which is prohibited by state or federal law.* (Emphasis added.)

As used in R.C. Chapter 149, the term "[r]ecords" is defined in R.C. 149.011(G) to include "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."

In finding that the city employees had constitutionally-protected privacy interests in their individual social security numbers, the court cited the decision in *Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977), for the proposition that every person enjoys "a federal right to privacy which protects against governmental disclosure of the private details of one's life." *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d at 608, 640 N.E.2d at 167. The court then stated that although the *Nixon* decision was not dispositive of the precise issue before the court, the decision provided the proper analytical framework for that issue's resolution. That framework required the court to determine whether the city employees had a legitimate expectation of privacy in their social security numbers, and if so, whether those individual privacy interests outweighed whatever interests would benefit from the disclosure of those numbers.

Regarding the first prong of that inquiry, the Ohio Supreme Court expressed its view that the enactment of uncodified section 7 of the Privacy Act of 1974, Pub. L. No. 93-579, 88 Stat. 1896, 1909 (appearing at 5 U.S.C. § 552a note (1988)) reflected a recognition by the United States Congress of "the societal perception that [social security numbers] should not to [*sic*] be available to all." *Id.* at 609, 640 N.E.2d at 168. The court then determined that the foregoing legislative scheme was "sufficient to create an expectation of privacy in the minds of city employees concerning the use and disclosure of their [social security numbers]." *Id.*

The court then proceeded to weigh and balance the employees' privacy interests in their social security numbers against those interests advocating disclosure. The court focused its attention upon the harm that might be caused to persons whose social security numbers were released by governmental agencies that had access to those numbers. The court first recounted a description of such harm from the decision in *Greidinger v. Davis*, 988 F.2d 1344, 1353-54 (4th Cir. 1993), a case that challenged a Virginia election law provision that required citizens to provide their social security numbers when registering to vote:

> "[A]rmed with one's [social security number], an unscrupulous individual could obtain a person's welfare benefits or Social Security benefits, order new checks at a new address on that person's checking account, obtain credit cards, or even obtain the person's paycheck. * * * Succinctly stated, the harm that can be inflicted from the disclosure of [a social security number] to an unscrupulous individual is alarming and potentially financially ruinous."

State ex rel. Beacon Journal Publ. Co. v. City of Akron, 70 Ohio St. 3d at 610, 640 N.E.2d at 168 (quoting from *Greidinger v. Davis*). The court of appeals in *Greidinger* determined that Virginia's interest in assuring proper voter identification and preventing voter fraud could be satisfied without the disclosure of each voter's social security number. *Id.*

Relying upon the analysis in *Greidinger v. Davis*, the Ohio Supreme Court then stated that, "[t]he public's interest in obtaining city employees' [social security numbers] must be weighed against the harm caused by the invasion of employees' privacy resulting from the release of the [social security numbers]." *Id.* In that regard the court first noted that the city's refusal to release its employees' social security numbers did not significantly interfere with the public's right to monitor

governmental conduct, nor did such numbers themselves reveal any substantial, useful information about the city's employees. On the other hand, disclosure of an employee's social security number might well result in any number of serious problems for the employee: "[A] person's [social security number] is a device which can quickly be used by the unscrupulous to acquire a tremendous amount of information about a person." *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d at 611, 640 N.E.2d at 169.

The court related two examples of the types of mischief that could result when a person acquired knowledge of another person's social security number. The first instance concerned an employee of the City of Akron whose credit record was damaged when another person with the same name as that of the employee inadvertently obtained the employee's social security number and used the number to open various credit card accounts in the employee's name. The malefactor failed to pay the amounts charged to those accounts and thus the accounts became delinquent. This fact was then reflected upon the city employee's credit record. The second example concerned a journalist who testified before a social security subcommittee of the United State House of Representatives about his ability, during a journalistic investigation, to obtain highly confidential information about the Vice-President as a result of having obtained the Vice-President's social security number.

Given the foregoing examples and case law, the court declared that, "the high potential for fraud and victimization caused by the unchecked release of city employee [social security numbers] outweighs the minimal information about governmental processes gained through the release of the [numbers]." *Id.* at 612, 640 N.E.2d at 169. The court then concluded that the United States Constitution prohibited disclosure of the city employees' social security numbers in the circumstances presented by the newspaper's request.[2] *Id.*

The decision in *State ex rel. Beacon Journal Publ. Co. v. City of Akron* thus makes an emphatic statement about a person's expectation of privacy regarding the use and disclosure of his social security number. The court's opinion also acknowledges the harm and inconvenience that may be caused to a person should his social security number be subject to compelled disclosure. Nonetheless, I hesitate to extrapolate from that decision an obligation on the part of a county recorder to remove or obliterate social security numbers that appear on mortgages, mortgage releases, veterans discharge papers, and financing statements prior to recording those instruments. Instead, I am of the view that the court's holding and its supporting rationale are not immediately applicable to the situation of the county recorder described in your letter. My reasons for so thinking are several.

---

[2] A dissenting opinion in *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994), voiced harsh criticism of the court's holding and the reasons adduced in the majority opinion to support that holding. *State ex rel. Beacon Journal Publ. Co. v. City of Akron* has been cited with apparent approval in *State ex rel. Plain Dealer Publ. Co. v. City of Cleveland*, 75 Ohio St. 3d 31, 661 N.E.2d 187 (1996) (per curiam), and in *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St. 3d 245, 643 N.E.2d 126 (1994) (per curiam).

First, the Ohio Supreme Court has not been asked to consider the specific question you have presented. I cannot predict with any substantial certainty what the court would decide were it to address that question. What is certain, however, is that the court neither addressed nor decided that question in *State ex rel. Beacon Journal Publ. Co. v. City of Akron.* For that reason, I am able to advise you that the court's decision in that case does not impose an obligation upon a county recorder to remove or obliterate social security numbers that appear on mortgages, mortgage releases, veterans discharges, and financing statements before he records those instruments.

In addition, were it to consider the question you now raise, the court could decline to extend to the county recorder's situation the principles it set down in *State ex rel. Beacon Journal Publ. Co. v. City of Akron.* It is important to bear in mind the particular factual circumstances that confronted the court in that case. A newspaper made a public records request of a public employer and asked the public employer to release certain personal and work-related information about each of its employees. Included among that information were the employees' social security numbers. It is reasonable to presume that the employees previously had been requested to furnish those numbers to their employer in order that it could properly fulfill its responsibilities under the wage withholding provisions of the Social Security Act and the Internal Revenue Code. In that context, therefore, the court's statements about the employees' privacy expectations, given the employer's figurative status as custodian of their social security numbers, seem appropriate and justified.

I question, however, whether a similar expectation of privacy would be found to prevail in the circumstances you have described. Your request concerns the responsibility of a county recorder to record mortgages, mortgage releases, veterans discharges, and financing statements. A county recorder receives and records those instruments in accordance with specific directives in R.C. Chapter 317 and certain provisions in R.C. Chapter 1309 (secured transactions). R.C. 317.13 states that the county recorder "shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded, presented to him for that purpose." R.C. 317.08 further provides that the county recorder "shall keep five separate sets of records," and thereafter describes those five sets of records by referring to the types of instruments that comprise each set. R.C. 317.08(B)(1) specifically requires the recording of all "mortgages, including amendments, supplements, modifications, and extensions of mortgages, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered." This provision thus imposes an obligation upon the county recorder to record all mortgages and mortgage releases. R.C. 317.24(A) states separately that "[u]pon request of any discharged member of the armed forces of the United States and presentation of his discharge, the county recorder shall record the discharge in a book to be furnished by the board of county commissioners for that purpose." The responsibility of a county recorder to accept and record financing statements is addressed by the pertinent provisions of R.C. 1309.38. *See* R.C. 1309.38(A)(1)-(4).

Recording is "the copying of [an instrument] into the public records kept for that purpose, by or under the direction or authority of the proper public officer," *Green v. Garrington,* 16 Ohio St.

548, 550-51 (1866), and "[t]he office of county recorder exists to record instruments," 1990 Op. Att'y Gen. No. 90-103 at 2-456. The recording of written instruments in such fashion is intended to provide public notice, either actual or constructive, to all persons of the various matters set forth in those instruments. *See, e.g., Pinney v. Merchants' Nat'l Bank*, 71 Ohio St. 173, 72 N.E. 884 (1904) (recording mortgage assignment); *Eggleston v. Harrison*, 61 Ohio St. 397, 55 N.E. 993 (1900) (recording deed of assignment); *Coe v. Erb*, 59 Ohio St. 259, 52 N.E. 640 (1898) (recording acts generally). The county recorder thus has a duty to ensure that all such documents and instruments are readily accessible to any member of the public. *See, e.g.*, R.C. 317.12 (until recorded, each instrument received by the county recorder "shall be kept on file in the same numerical order, for easy reference"); R.C. 317.19 (the county recorder shall keep in his office a daily register of deeds and mortgages, which "shall be open to the inspection of the public during business hours"); R.C. 317.21 (all records kept and maintained in, *inter alia*, the office of the county recorder "shall be at all times subject to the use, examination, and inspection of the public"); 1946 Op. Att'y Gen. No. 1068, p. 482 (syllabus) (instruments deposited with a county recorder for record or filing are public documents, and from the instant they are filed with the recorder they are available for inspection by the public under such reasonable rules and regulations as the recorder may adopt for the use and occupancy of his office and the examination of such instruments).

Given the fundamental purpose for which particular instruments are submitted for recording pursuant to the foregoing statutes, I do not believe a reasonable basis generally exists for asserting a privacy interest with respect to the information or matters that are contained in those instruments. I would include in that regard social security numbers that appear upon the instruments you have asked about. Thus, a person who is asked to furnish his social security number for inclusion within a mortgage, mortgage release, veterans discharge, or financing statement, which eventually is submitted for recording by the county recorder, should not reasonably expect that the number itself will thereafter remain a private matter, forever shielded from public scrutiny.

I believe, therefore, that the factual circumstances of the county recorder's situation provide a basis for a court to find that a person's expectation of privacy in his social security number is qualified by or dependent upon the specific context in which that person furnishes the number to another party. Indeed, in a more recent decision, the Ohio Supreme Court perhaps has signalled the possibility of such an approach in future cases that concern social security numbers. In *State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St. 3d 374, 662 N.E.2d 334 (1996) (per curiam), the court held that audio tapes of various "911" emergency calls recorded by law enforcement authorities are "[p]ublic record[s]" for purposes of R.C. 149.43, and are not exempt from release or disclosure when the subject of a public records request under that statute. In the course of addressing contrary assertions that such tapes were exempt from disclosure, the court stated as follows:

> From the foregoing, it is evident that 911 tapes are not prepared by attorneys or other law enforcement officials. Instead, 911 calls are routinely recorded without any specific investigatory purpose in mind. *There is no expectation of privacy when a person makes a 911 call. Instead, there is an expectation that the information provided will be recorded and disclosed to the public....*

> * * * *
>
> The particular content of the 911 tapes is irrelevant. Therefore, it does not matter that release of the tapes might reveal the identity of an uncharged suspect or contain information which, if disclosed, would endanger the life or physical safety of a witness. Cf. R.C. 149.43(A)(1), 149.43(A)(2)(a) and (d). *Further, although less likely to occur, it makes no difference that the disclosure of the tapes might reveal Social Security Numbers* or trade secrets. Cf. *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 640 N.E.2d 164; *State ex rel. Seballos v. School Emp. Retirement Sys*. (1994), 70 Ohio St.3d 667, 640 N.E.2d 829. In addition, the fact that the tapes in question subsequently came into the possession and/or control of a prosecutor, other law enforcement officials, or even the grand jury has no significance. Once clothed with the public records cloak, the records cannot be defrocked of their status.

State ex rel. Cincinnati Enquirer v. Hamilton County, 75 Ohio St. 3d at 378, 662 N.E.2d at 337 and 338 (emphasis added; citations omitted).

It is, therefore, my opinion, and you are advised that the decision of the Ohio Supreme Court in *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994), does not impose an obligation upon a county recorder to remove or obliterate social security account numbers that appear on mortgages, mortgage releases, veterans discharges, and financing statements before he records those instruments.

Respectfully,

BETTY D. MONTGOMERY
Attorney General

May 31, 1996

The Honorable Alan R. Mayberry
Wood County Prosecuting Attorney
One Courthouse Square
Bowling Green, Ohio 43402

SYLLABUS: 96-034

The decision of the Ohio Supreme Court in *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994), does not impose an obligation upon a county recorder to remove or obliterate social security account numbers that appear on mortgages, mortgage releases, veterans discharges, and financing statements before he records those instruments.