

OPINION NO. 2001-012**Syllabus:**

1. Data, photographs, maps, and other information created, collected, prepared, maintained, and published pursuant to R.C. 1504.02(A)(6) by the Department of Natural Resources' Division of Real Estate and Land Management are public records for purposes of R.C. 149.43.
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2. If the Department of Natural Resources stores, produces, organizes, or compiles public records in such a manner that enhances the value of data or information included therein, it may charge for copies an amount that includes the additional costs of copying the information in such enhanced or "value-added" format.
3. R.C. 1501.01, which authorizes the Director of the Department of Natural Resources to "publish and sell" data, reports, and information, does not authorize the Director to charge an amount in excess of its actual cost for providing copies of the records created and maintained pursuant to R.C. 1504.02(A)(6).

To: Samuel W. Speck, Director, Ohio Department of Natural Resources, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, March 28, 2001

You have requested an opinion regarding the ability of the Ohio Department of Natural Resources (ODNR) to charge fees for records produced as part of its Geographic Information Management System (GIMS).

An Overview of the Department of Natural Resources and GIMS

You have explained the nature of "GIMS" and the duties of ODNR with respect thereto as follows:

GIMS is a term used to describe a collection of related technologies used to manage spatial data. These technologies include geographic information systems (GIS), computer-aided design systems, automated and desktop mapping systems, remote sensing and image analysis systems, and their related database management systems. Maps generated by these technologies assist governmental officials, planners, and resource managers in understanding land use planning and resource management. GIMS also entails the collection and analysis of aerial photography, satellite data, and other data pertaining to land, water, and other resources of the State.

You have pointed out that R.C. 1504.02 authorizes the Division of Real Estate and Land Management (Division) to prepare and publish maps and digital data relating to the state's land use and land cover over time on a local, regional, and statewide basis, and to locate and distribute hard copy maps, digital data, aerial photography, and other resource data and information to government agencies and the public. You have also noted that R.C. 1501.01 authorizes the Director of ODNR generally to publish and sell, and otherwise distribute, data, reports, and information.

You wish to know whether the information generated by ODNR pursuant to GIMS technologies constitutes a public record, copies of which must be supplied "at cost" pursuant to R.C. 149.43, or whether R.C. 1501.01 authorizes ODNR to charge a fee that exceeds the actual cost of providing the copies. In addressing your questions, we must bear in mind that ODNR, as a state agency, has only those powers conferred by statute, either expressly or by necessary implication. *See* 1989 Op. Att'y Gen. No. 89-024 at 2-112 ("ODNR and its officials are creatures of statute and thus only have those powers expressly conferred on them by statute or necessarily implied therefrom"); 1980 Op. Att'y Gen. No. 80-005.

R.C. 149.43, Ohio's Public Records Act

We begin our discussion with an examination of the requirements of R.C. 149.43, Ohio's public records law. Division (B)(1) of R.C. 149.43 reads in part:

[A]ll public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.... [U]pon 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. (Emphasis added.)

The mandates of R.C. 149.43 apply to any item that is a "[p]ublic record," which is defined to mean, with certain exceptions, "any record that is kept by any public office."¹ R.C. 149.43(A)(1). The term "[r]ecord" includes "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." R.C. 149.011(G). A record kept by a public office is subject to the disclosure requirements of R.C. 149.43, unless it is excepted from the definition of a "public record" pursuant to division (A)(1) of R.C. 149.43.

Application of R.C. 149.43 to GIMS Information

We turn now to the application of R.C. 149.43 to the information about which you have asked. As you note, R.C. 1504.02(A)(6) requires the Division of Real Estate and Land Management to generate, store, and distribute various information. *See generally* R.C. 121.04; R.C. Chapter 1504. The Division's duties in this regard may be divided into three categories.

First, the Division must produce information in order to assist ODNR and the Division itself. R.C. 1504.02(A)(6)(a)(iii) requires the Division to "[s]upport the geographic information system needs for the department" by "[c]reating, maintaining, and documenting spatial digital data bases for the division and for other divisions as assigned by the director." R.C. 1504.02(A)(6)(d) requires the Division to "[c]oordinate and administer the remote sensing needs of the department including the collection and analysis of aerial photography, satellite data, and other data pertaining to land, water, and other resources of the state."

Second, the Division is required to generate and distribute information in order to assist other governmental agencies. Division (A)(6)(b) of R.C. 1504.02 requires the Division to "[p]rovide information to and otherwise assist government officials, planners, and resource managers in understanding land use planning and resource management." Division (A)(6)(c) requires the Division to "[p]rovide continuing assistance to local government officials and others in natural resource digital data base development and in applying and utilizing the geographic information system for land use planning, current agricultural use

¹A "[p]ublic office" is defined to include any "state agency," R.C. 149.011(A). The Department of Natural Resources is a state agency for purposes of R.C. 149.011 and R.C. 149.43. *See* R.C. 149.011(B) (defining "[s]tate agency"). *See also* R.C. 121.02(F); R.C. Chapter 1501.

value assessment, development reviews, coastal management, and other resource management activities." See also R.C. 1504.02(A)(6)(f).

Third, the Division is required to provide information to the public generally. Division (A)(6)(e) of R.C. 1504.02 requires the Division to "[p]repare and publish maps and digital data relating to the state's land use and land cover over time on a local, regional, and statewide basis." Division (A)(6)(f) requires the Division to "[l]ocate and distribute hard copy maps, digital data, aerial photography, and other resource data and information to government agencies and the public."

The various items described fall within the definition of "record" set forth in R.C. 149.011(G).² Furthermore, they are "public records" for purposes of R.C. 149.43, in the absence of any specific facts indicating the applicability of one or more of the exceptions to what constitutes a "public record" set forth in division (A)(1) of R.C. 149.43.

Even though the information held by ODNR may be stored in an electronic format, it is by now well-established that the medium upon which information is stored is irrelevant for purposes of determining whether the information is a public record. As noted above, the definition of "record" includes any item, *regardless of physical form or characteristic*. See also *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 584 N.E.2d 665 (1992) (syllabus) ("[a] governmental agency must allow the copying of the portions of computer tapes to which the public is entitled pursuant to R.C. 149.43"); *State ex rel. Harmon v. Bender*, 25 Ohio St. 3d 15, 17, 494 N.E.2d 1135, 1136 (1986) ("[w]hen viewed in light of R.C. 149.43 and the case law interpreting that statute, videotapes of trial proceedings fit squarely within the definition of public records"); *Lorain County Title Co. v. Essex*, 53 Ohio App. 2d 274, 277, 373 N.E.2d 1261, 1263 (Lorain County 1976) ("[c]learly the legislature intended that microfilmed records are to be readily available to the public just as any other type of public record"). Thus, the fact that the information may constitute electronic data that is stored digitally has no bearing on whether it is a public record. Furthermore, R.C. 149.43(B) was amended in 1999³ to provide that a requester may choose to have a public record copied on paper, on the medium upon which the public office keeps the public record, or "upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record." R.C. 149.43(B)(2).

Also, the fact that information held by ODNR may be organized into a "compilation" is irrelevant for determining whether it is a public record. Compilations of information gathered from public records are themselves public records that must be disclosed pursuant to R.C. 149.43. *State ex rel. Margolius v. City of Cleveland*; *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 527 N.E.2d 1230 (1988). *Cf. State ex rel. Kerner v. State Teachers Retirement Board*, 82 Ohio St. 3d 273, 274, 695 N.E.2d 256, 258 (1998) (a public office "has no duty to create a new document by searching for and compiling information from its existing records ... a compilation of information must already exist in public records before access to it will be ordered"); *State ex rel. Scanlon v. Deters*, 45 Ohio St. 3d 376, 379, 544 N.E.2d 680, 683 (1989), *overruled on other grounds*, *State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 639 N.E.2d 83 (1994) ("the clerk could not be required to create a new

²The fact that an item is generated for the purpose of assisting ODNR personnel or other government agencies in the performance of their duties (as opposed to being generated specifically for public use) does not mean the item is not a record. See generally *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St. 3d 229, 729 N.E.2d 1182 (2000).

³Am. Sub. S.B. 78, 123rd Gen. A. (1999) (eff. Dec. 16, 1999).

'document' by compiling material to facilitate review of the public records," and "[c]onversely, if the clerk's computer were already programmed to produce the desired printout, the 'document' would already exist for the purpose of an R.C. 149.43 request").

Thus, in the absence of any facts indicating that a particular item falls within one of the exceptions set forth in R.C. 149.43(A)(1), the data, maps, photographs, and other information generated, collected, and maintained by ODNR pursuant to R.C. 1504.02(A)(6), are "public records" the availability of which is subject to the requirements of R.C. 149.43. See generally *State ex rel. James v. Ohio State University*, 70 Ohio St. 3d 168, 169, 637 N.E.2d 911, 912 (1994) ("exceptions to disclosure are to be construed strictly against the custodian of public records and doubt should be resolved in favor of disclosure," and "the burden to establish an exception is on the custodian of the public records"); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 623, 640 N.E.2d 174, 178 (1994) ("public records are the people's records, and officials in whose custody they happen to be are merely trustees for the people").

Fee for Providing Copies of GIMS Information

Having determined that the items of information about which you ask are public records, we turn to the issue whether ODNR may charge a fee for copies of the data or other items that is in excess of ODNR's cost to provide the copies. As set forth above, R.C. 149.43(B) requires a public office to make public records available for inspection and to make copies of the public records for which it is responsible available to any person "at cost." See generally *Land Title Guarantee and Trust Co. v. Essex*, 52 Ohio App. 2d 56, 58, 368 N.E.2d 326, 327-28 (Lorain County 1977) ("the statutory right to inspect incorporates within its meaning the right to copy such records within reasonable limitations," such that "the public records may be safely preserved and the orderly administration of [the public officer's] office be maintained"). Under R.C. 149.43(B), a public office may charge no more than the *actual cost* it incurs in making the copies. See *State ex rel. Russell v. Thomas*, 85 Ohio St. 3d 83, 706 N.E.2d 1251 (1999) (the charge for copying a public record must represent actual copying costs); *State ex rel. Warren Newspapers, Inc. v. Hutson* (R.C. 149.43(B) means the actual cost involved in making a copy, but does not include the cost of employee time); 1989 Op. Att'y Gen. No. 89-073 at 2-337 (the public office responsible for public records "may adopt a reasonable policy setting a fee for copies which reflects the actual costs involved in making a copy"). We emphasize that the amount an agency may charge is its cost to make the copy or copies. An agency may not recoup through its copying charges the costs it incurred in creating or producing the original record. For example, the expenses of developing or acquiring a new technology could not be recovered through fees charged to persons requesting copies of records produced by the new technology.

However, the manner in which records are organized, including the medium upon they are stored, may enhance the value of the information contained therein. See *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d at 623, 640 N.E.2d at 178 ("[t]he manner in which the records are organized can add to the value of information contained within records; when such value is added, a new set of enhanced public records is created that must be disclosed to the public"); *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d at 460, 584 N.E.2d at 669 (when the manner in which records are organized adds to the value of the information, "a new set of enhanced public records is created that must be disclosed to the public"). Any increase in costs to copy the "enhanced" public records may be passed on to the party making the request for copies. *Id.*, 62 Ohio St. 3d at 460 n. 4, 584 N.E.2d at 669 n. 4.

Thus, if ODNR stores, produces, organizes, or compiles public records in such a manner that enhances the value of data or information included therein, it may charge a requester an amount to cover the costs of copying the public records in such enhanced or "value-added" format. Again, however, the charge must reflect the actual cost of *copying* the records as they exist in that format, and may not include an amount related to the expense of producing the original records in that format. For example, if ODNR compiles a number of public records which were originally created on paper, adds annotations and commentary, and then produces the compilation on a CD-ROM, the value or usefulness of the original information has been enhanced. The compilation itself is a public record, and ODNR may charge a copying fee that reflects the actual cost of providing a copy of the compilation on the CD-ROM. ODNR may not, however, include as part of that fee the costs it incurred in order to create the compilation.

Furthermore, if a specific statute authorizes a public office to charge a fixed fee or a fee that is in excess of actual copying costs, then the specific statute prevails. *See State ex rel. Butler County Bar Association v. Robb*, 66 Ohio App. 3d 398, 399, 584 N.E.2d 76, 77 (Butler County 1990) (as to R.C. 149.43(B), which requires that copies of public records be made available at cost, and R.C. 2303.20, which authorizes the clerk of the court of common pleas to charge a fee of one dollar per page for copies of certain documents, "a specific statute trumps a general statute when the two conflict"); 1989 Op. Att'y Gen. No. 89-073 at 2-336 (where "a statute establishes a fee to be charged for copies provided, the statutory fee will control" over R.C. 149.43's requirement that copies be made available "at cost"). There is nothing in R.C. 1504.02 that authorizes ODNR to charge an amount that exceeds its actual cost of providing copies of the data and documents described therein. We must consider more fully, however, whether R.C. 1501.01, which authorizes the Director of ODNR to "publish and sell" data, reports, and information,⁴ empowers the Director to charge such an amount.

It is arguable that the term "sell" implies the element of profit. However, neither the common definition of the word,⁵ nor definitions found as part of statutory schemes governing commercial or business transactions support this argument. *See, e.g.,* R.C. 1302.01(A)(11) ("[a] 'sale' consists in the passing of title from the seller to the buyer for a price");⁶ R.C. 5739.01(B) (defining "[s]ale" and "[s]elling" as the listed transactions "for a

⁴R.C. 1501.01 states that, "[t]he director may publish and sell or otherwise distribute data, reports, and information." Interpreting this language according to the rules of grammar, *see* R.C. 1.42, we must read "publish and sell" together as a phrase, rather than as separate activities in which the Director may engage. Otherwise the statute would have authorized the Director to "publish, sell, or otherwise distribute data, reports, and information."

⁵*See* R.C. 1.42 (in interpreting statutory language, words shall be construed according to common usage). *Webster's New World Dictionary* 1293 (2nd college ed. 1984) defines "sell" as, "to give up, deliver, or exchange (property, goods, services, etc.) for money or its equivalent." *Black's Law Dictionary* 1365 (7th Edition 1999) defines "sell" as "[t]o transfer (property) by sale," and defines "sale" as "[t]he transfer of property or title for a price." *Id.* at 1337. *See also Webster's New World Dictionary* at 1128 (defining "price" as "the amount of money, etc. asked or paid for something; cost; charge").

⁶R.C. Chapter 1302 is part of the Ohio Uniform Commercial Code, which is intended "[t]o simplify, clarify, and modernize the law governing commercial transactions," and "[t]o permit the continued expansion of commercial practices through custom, usage, and agreement of the parties." R.C. 1301.02(B). Specifically, R.C. Chapter 1302 governs the sales of goods. R.C. 1302.02.

consideration in any manner ... whether for a price or rental, in money or by exchange, and by any means whatsoever").⁷

If the term "sell" is not interpreted as including the authority to charge an amount in excess of actual cost, however, the issue arises as to what purpose the term serves in R.C. 1501.01 since, as discussed above, all public agencies are authorized by R.C. 149.43 to provide copies of public records "at cost." See *Carter v. Division of Water*, 146 Ohio St. 203, 65 N.E.2d 63 (1946) (syllabus, paragraph 1) (in construing a statute, none of the language should be disregarded); *State ex rel. Brownell v. Industrial Comm'n*, 131 Ohio St. 124, 2 N.E.2d 260 (1936) (syllabus, paragraph 1) ("[i]n the construction of a statute no part of the language employed should be ignored or disregarded"). The language of R.C. 1501.01 in question was enacted, as G.C. 154-10, in 1949 as part of the legislation creating the Department of Natural Resources. 1949-1950 Ohio Laws 84, 87-88 (Am. S.B. 13, filed May 12, 1949).⁸ R.C. 149.43 was not enacted until 1963. 1963 Ohio Laws 155, 1644 (Am. Sub. H.B. 187, eff. Sept. 27, 1963). Thus, at the time G.C. 154-10 was enacted, there was no general statutory authority for public agencies to charge for the cost of providing copies of records. By providing that ODNR could "publish and sell" information, G.C. 154-10 authorized ODNR to mass produce compilations of information for the public⁹ and to charge purchasers for the cost of providing a copy of such compilation. This authorization perhaps reflected the recognition that it is generally more costly for an agency to produce and distribute publications than to provide, upon request, copies of individual records or documents, and that without the ability to recover its costs an agency would be unable to publish information for the benefit of the public. It is also consistent with the principle discussed above, that a public agency providing information in an enhanced or "value-added" format may charge for the additional costs associated with copying information in that format. There is no indication, however, that the General Assembly intended to authorize ODNR to charge an amount that exceeds the actual cost of providing a copy of the publication.

Public agencies do not operate for a commercial purpose or on a "for-profit" basis,¹⁰ and when the General Assembly has intended that an agency have the power to convey items

⁷R.C. 5739.01 is the definitional section for the state sales tax law. Although "profit" is not part of the definition of "sale" or "selling," the element is picked up elsewhere for purposes of imposition of the sales tax. See R.C. 5739.01(F) (defining "[b]usiness" as including "any activity engaged in by any person with the object of gain, benefit, or advantage, either direct or indirect"). See also 1974 Op. Att'y Gen. No. 74-052 (if a board of education sells to its students at cost or only at such a mark-up so as to cover its actual cost, then no sales tax need be charged; however, if the purpose of the sales is to make a profit, then the sales tax must be collected).

⁸The pertinent language of R.C. 1501.01, as it currently reads, is virtually identical to that of G.C. 154-10 as enacted. 1949-1950 Ohio Laws 84, 87-88 (Am. S.B. 13, filed May 12, 1949) read: "The director of natural resources shall have power to publish and sell or otherwise distribute data, reports, and information."

⁹See *Webster's New World Dictionary* 1149 (2nd college ed. 1984) (defining "publish" as "to issue (a printed work, etc.) to the public, as for sale").

¹⁰*Cf. Slodov v. Animal Protective League*, 90 Ohio App. 3d 173, 176, 628 N.E.2d 117, 119 (Cuyahoga County 1993) (the Ohio Humane Society "is not and should not be in the business of selling animals as contemplated by the Uniform Commercial Code," and the fact that appellant paid \$45 to the Animal Protective League for the adoption of a dog, in order to cover costs, does not mean the transaction was a sale of goods governed by the Uniform Commercial Code).

for an amount that exceeds their actual cost to produce, it has expressly granted such authority in unambiguous terms. *See, e.g.*, R.C. 317.32(I) (a county recorder may charge one dollar per page “[f]or photocopying a document, other than at the time of recording and indexing”); R.C. 2303.20(Z) (a clerk of the court of commons pleas shall charge a fee of “[o]ne dollar for each page, for copies of pleadings, process, record, or files, including certificate and seal”); R.C. 3313.811 (uniform school supplies, foods, candies, and like supplies shall not be sold for profit except when the profit is to be used for school purposes); R.C. 4503.26 (the registrar of motor vehicles may make photographic copies of bureau records and charge two dollars per copy). *Cf.* R.C. 3313.81 (a board of education’s operation of facilities for school food service purposes or to provide meals for the elderly “shall not be for profit”). Such specific authority is lacking in this instance.

In light of foregoing, it appears that the language of R.C. 1501.01, authorizing the Director of ODNR to “publish and sell” data, reports, and information, is not sufficient to overcome the mandate of R.C. 149.43 that copies of public records be made available at cost, and authorize ODNR to charge an amount in excess of its actual cost for providing copies of the records produced and maintained pursuant to R.C. 1504.02(A)(6).

It is, therefore, my opinion, and you are hereby advised that:

1. Data, photographs, maps, and other information created, collected, prepared, maintained, and published pursuant to R.C. 1504.02(A)(6) by the Department of Natural Resources’ Division of Real Estate and Land Management are public records for purposes of R.C. 149.43.
2. If the Department of Natural Resources stores, produces, organizes, or compiles public records in such a manner that enhances the value of data or information included therein, it may charge for copies an amount that includes the additional costs of copying the information in such enhanced or “value-added” format.
3. R.C. 1501.01, which authorizes the Director of the Department of Natural Resources to “publish and sell” data, reports, and information, does not authorize the Director to charge an amount in excess of its actual cost for providing copies of the records created and maintained pursuant to R.C. 1504.02(A)(6).