May 14, 1993

OPINION NO. 93-010

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

Dear Prosecutor Mayberry:

You have asked the following question: "Are blueprints or building plans submitted to a building inspection department by a property owner or his agent or representative subject to inspection or duplication under the Ohio Public Records Law?" Your letter sets forth the following background information:

> The Wood County Building Inspection Department was recently requested by members of a labor union, not involved in construction, to provide copies of 45 pages of the blueprints for a discount department store.
> In the past, it has been the practice of the Wood County Building Inspection Department, the Ohio Board of Building Standards and its Division of Factories and Buildings to allow inspection of blueprints but not to make copies upon request. The position of the County Building Inspection Department and the Board of Building Standards was that even when attached to an application for building inspection permits, there existed a proprietary interest in the blueprints and copies should not be released pursuant to a public records or other request.
> Blueprints are essential to a Building Inspection Department in the performance of its statutory duties. Hence, it can be argued that O.R.C. §149.43(B) requires such an inspection and duplication given (1) the definition of "records" in O.R.C. §149.011, (2) the definitions of "public records" in §149.43 and (3) the liberal interpretation to be accorded to the Public Records Law.

> However, on the other hand, blueprints and drawings for residential, commercial or industrial property frequently represent a sizeable investment on the part of the owner and carry some proprietary right or interest protected by state or federal law - - e.g. Federal Copyright Law, 17 USC 101 et seq.

Based upon these circumstances, you question whether blueprints in the possession of the county building department constitute public records under R.C. 149.43.

Public Records Law - R.C. 149.43

The availability of public records is governed by R.C. 149.43(B), which states:

> All public records shall be promptly prepared and *made available for inspection* to any person at all reasonable times during regular business hours. *Upon request, a 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, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division. (Emphasis added.)

For purposes of R.C. 149.43, the term "public record" means:

> *any record that is kept by any public office,*[1] including, but not limited to, state [and] county...units, *except* medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under [R.C. 2151.85] and to appeals of actions arising under that section, records listed in [R.C. 3107.42(A)], trial preparation records, confidential law enforcement investigatory records, and *records the release of which is prohibited by state or federal law*. (Footnote and emphasis added.)

R.C. 149.43(A)(1). As used in R.C. Chapter 149, the word "records" is broadly defined 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." R.C. 149.011(G).

Accordingly, if the blueprints or building plans in the possession of a county office, as described in your request, constitute a "record that is kept by [a] public office" and do not fall within

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[1] R.C. 149.011(A) defines the term "public office," for purposes of R.C. Chapter 149, as including "any state agency, public institution, *political subdivision*, or any other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government" (emphasis added).

one of the exceptions listed in R.C. 149.43, not only must they must be made available for inspection at reasonable times during regular business hours, but also, upon request, the person responsible for the blueprints or plans would be required to make copies available at cost, within a reasonable period of time.

A County Building Department Is a Public Office for Purposes of R.C. 149.43

R.C. 307.37 provides, among other things, for the board of county commissioners to "adopt, amend, rescind, administer, and enforce regulations pertaining to the erection, construction, repair, alteration, redevelopment, and maintenance of single-family, two-family, and three-family dwellings within the unincorporated territory of the county...." R.C. 307.37(E) expressly authorizes a board of county commissioners to:

> provide for a building regulation department and [to] employ such personnel as it determines to be necessary for the purpose of enforcing such regulations. Upon certification of the building department under [R.C. 3781.10], the board may direct the county building department to exercise enforcement authority and to accept and approve plans pursuant to [R.C. 3781.03 and R.C. 3791.04] for any other kind or class of building in the unincorporated territory of the county.

Thus, a building department, such as the Wood County Building Inspection Department, established by the board of county commissioners under R.C. 307.37 is a unit of county government and, as such, a public office for purposes of R.C. 149.43. *See generally* 1969 Op. Att'y Gen. No. 69-148 (concluding that a county building department, as an entity of county government, is entitled to representation by the county prosecutor pursuant to R.C. 309.09).

Use of Blueprints by A County Building Department

Whether blueprints or building plans submitted to a county building department constitute a "record," as defined in R.C. 149.011(G), of that department, depends upon whether the blueprints or building plans are submitted to the county building department in connection with that department's functions.

R.C. 3781.10(E) empowers the Board of Building Standards to certify, among others, county building departments "to exercise enforcement authority, *to accept and approve plans and specifications*, and to make inspections, pursuant to [R.C. 3781.03 and R.C. 3791.04]." (Emphasis added.) R.C. 3781.03, in part, authorizes the building inspector or commissioner of buildings in counties whose building departments are certified under R.C. 3781.10 to enforce certain building regulations in unincorporated areas of the county.

Pursuant to R.C. 3791.04, before entering into a contract for, or beginning the

construction of, a building, as defined in R.C. 3781.06,[2] the owner must submit the plans or drawings, specifications, and other data to the county building department, if certified, or other appropriate public entity for approval. Thus, where the county building department has been certified under R.C. 3781.10, R.C. 3791.04 requires that, prior to construction of a building, the owner submit the blueprints or building plans to that department for approval. The blueprints or building plans, once so submitted to the county building department, constitute a "record that is kept by [a] public office," within the meaning of R.C. 149.43.

Public Records Exception - Release Prohibited by State or Federal Law

While such blueprints and building plans thus are records, not all records kept by a public office constitute public records for purposes of R.C. 149.43(A). You have asked whether the blueprints or building plans in the possession of the county building department are "records the release of which is prohibited by...federal law" under R.C. 149.43(A)(1), and, as such, would not be "public records" subject to public access under R.C. 149.43.[3] *See generally* 1992 Op. Att'y Gen. No. 92-005 (a copy of federal income tax form W-2, prepared by a township as employer, is a public record for purposes of R.C. 149.43); 1991 Op. Att'y Gen. No. 91-053 (discussing circumstances in which federal tax returns are confidential under 26 U.S.C. §6103, and concluding that the release of such returns filed in a common pleas court by a litigant in connection with a child support determination or modification proceeding is not prohibited by federal law).[4] In particular, your letter questions whether the owner's copyright or other similar proprietary interest under state or federal law in such blueprints and building plans may be viewed as prohibiting their release so as to prevent their disclosure under the public records law.

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[2] R.C. 3781.06(B) defines the word "building" as meaning, "any structure consisting of foundations, walls, columns, girders, beams, floors, and roof, or a combination of any number of these parts, with or without other parts or appurtenances."

[3] In *State ex rel. White v. City of Cleveland*, 34 Ohio St. 2d 37, 295 N.E.2d 665 (1973), the court left undisturbed the lower court's finding that building plans filed with a city building department in conjunction with an application for a building permit are public records, subject to disclosure under R.C. 149.43; however, the court did not address whether any provision of federal law may prohibit the building department's release of such plans, nor whether such plans may be subject to protection under state law as trade secrets.

[4] According to information submitted in connection with your request, no assertion of protection as a trade secret has been made with respect to the blueprints about which you ask nor has there been any assertion that the blueprints are in any way subject or entitled to confidential treatment. This opinion does not, therefore, address the provisions of R.C. 1333.51, relating to trade secrets, or any other provisions of law relating to confidential materials.

Federal Copyright Law

17 U.S.C. §102 states, in pertinent part:

> (a) Copyright protection subsists, in accordance with this title, in original works of authorship fixed in any tangible medium of expression, now known or later developed, from which they can be perceived, reproduced, or otherwise communicated, either directly or with the aid of a machine or device. Works of authorship include the following categories:
> ...
> (8) architectural works.
> (b) In no case does copyright protection for an original work of authorship extend to any idea, procedure, process, system, method of operation, concept, principle, or discovery, regardless of the form in which it is described, explained, illustrated, or embodied in such work.

Thus, 17 U.S.C. §102(a)(8) extends copyright protection to an architectural work, which is defined as: "the design of a building as embodied in any tangible medium of expression, including a building, architectural plans, or drawings. The work includes the overall form as well as the arrangement and composition of spaces and elements in the design, but does not include individual standard features." 17 U.S.C. §101. For purposes of discussion, it is assumed, therefore, that the blueprints or building plans about which you ask constitute architectural works for purposes of U.S.C. Title 17 or are otherwise original works of authorship subject to copyright protection.

Protections Granted to Copyright Owner

17 U.S.C. §106 establishes the exclusive rights of a copyright owner, as follows:

Subject to sections 107 through 120,[5] the owner of copyright under this title has the

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[5] Specifically concerning architectural works, 17 U.S.C. §120 states:

> (a) PICTORIAL REPRESENTATION PERMITTED. - The copyright in an architectural work that has been constructed does not include the right to prevent the making, distributing, or public display of pictures, paintings, photographs, or other pictorial representations of the work, if the building in which the work is embodied is located in or ordinarily visible from a public place.
> (b) ALTERATIONS TO AND DESTRUCTION OF BUILDINGS. - Notwithstanding the provisions of section 106(2), the owners of a building embodying an architectural work may, without the consent of the author or copyright owner of the architectural work, make or authorize the making of alterations to such building, and destroy or authorize the destruction of such building.

> exclusive rights to do and to authorize any of the following:
> (1) to reproduce the copyrighted work in copies or phonorecords;
> (2) to prepare derivative works based upon the copyrighted work;
> (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending.... (Footnote added.)

Further, 17 U.S.C. §106A establishes the rights of certain authors to attribution and integrity.

As explained in *Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 546-47 (1985):

> The rights conferred by copyright are designed to assure contributors to the store of knowledge a fair return for their labors. *Twentieth Century Music Corp. v. Aiken*, 422 U.S.151, 156 (1975).
> Article I, §8, of the Constitution provides:
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> > "The Congress shall have Power... to Promote the Progress of Science and useful Arts, by securing for limited times to Authors and Inventors the exclusive Right to their respective Writings and Discoveries."
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> As we noted last Term: "[This] limited grant is a means by which an important public purpose may be achieved. *It is intended to motivate the creative activity of authors and inventors by the provision of a special reward, and to allow the public access to the products of their genius after the limited period of exclusive control has expired*." *Sony Corp. of America v. Universal City Studios, Inc*, 464 U.S. 417, 429 (1984)....
>
> . Section 106 of the Copyright Act confers a bundle of exclusive rights to the owner of the copyright. Under the Copyright Act, these rights - to publish, copy, and distribute the author's work - vest in the author of an original work from the time of its creation.[6] (Emphasis and footnote added. Footnote in original deleted.)

Thus, it is clear that federal copyright law does not provide for any right of confidentiality with respect to a copyrighted work; rather, the policy behind the copyright laws is to encourage the broad dissemination of copyrighted works, albeit in a manner which protects the economic interest of the author.

Copyright Law Does Not Generally Prohibit the Release of Records

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[6] Pursuant to 17 U.S.C. §411(a), with certain exceptions, however, "no action for infringement of the copyright in any work shall be instituted until registration of the copyright claim has been made in accordance with this title."

Since the federal copyright laws do not protect the confidentiality of copyrighted materials, it would appear to follow that such laws would not properly be characterized as prohibiting the *release* of records so as to keep such records from becoming "public records" within the meaning of R.C. 149.43(A)(1). As your letter implicitly acknowledges with respect to the blueprints in question, the fact that the blueprints may be subject to copyright does not in any way protect them from *inspection* by members of the public. Accordingly, under the plain language of R.C. 149.43(A), it appears inappropriate to characterize blueprints in the possession of a public office as a record "the release of which is prohibited by ... federal law," based on the fact that they may be subject to a copyright. [7] Therefore, it necessarily follows that such blueprints are "public records" under R.C. 149.43(A)(1).

As noted above, the Ohio public records law provides that once a record is determined to be a "public record," it becomes subject both to inspection and to copying for the purpose of making copies available upon request.[8] Since the blueprints you describe are public records, R.C. 149.43(B) requires that, upon request, the person responsible for the blueprints make copies available at cost, within a reasonable period of time.

It is apparent, however, that such a conclusion arguably results in a situation in which compliance by governmental officials and employees with the requirements of state law would result in a violation of federal law, if the copying and dissemination of a copyrighted public record were determined to violate the exclusive rights of the copyright holder under U.S.C. Title 17. This apparent conflict, however, appears to be resolved by the "fair use" exception in the copyright laws.

Fair Use Exception to Rights of Copyright Holder

U.S.C. Title 17 provides certain exceptions to the statutory rights conferred upon a copyright owner. *See, e.g.,* 17 U.S.C. §107 ("fair use" exception); 17 U.S.C. §108 (permissible

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[7] In this regard, it should be noted that under the federal copyright laws, numerous documents submitted to the government by third parties would appear to be subject to a copyright. A determination that materials subject to copyright protection were not public records would create a large body of information, used by public offices in carrying out their duties, that would be wholly inaccessible to the public, a result clearly not contemplated by the General Assembly in the enactment of R.C. 149.43.

[8] R.C. 149.43(B) clearly states that once a record is determined to be a public record, "[u]pon request, a person responsible... *shall* make copies available at cost, within a reasonable period of time." (Emphasis Added.) Thus, the General Assembly has imposed a mandatory duty upon those responsible for public records not only to allow inspection, but also to provide copies upon request. *See generally Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (the use of the word "shall" in a statute generally indicates that the duty so described is mandatory).

reproduction by libraries and archives); and 17 U.S.C. §110 (exemption of certain performances and displays). Particularly relevant to the situation about which you ask is 17 U.S.C. §107, which establishes the "fair use" exception to the exclusive rights granted to a copyright holder, in part as follows:

> Notwithstanding the provisions of sections 106 and 106A, the fair use of a copyrighted work, *including such use by reproduction in copies* or phonorecords or by any other means specified by that section, for purposes such as criticism, comment, news reporting, teaching..., scholarship, or research, is not an infringement of copyright. In determining whether the use made of a work in any particular case is a fair use the factors to be considered shall include -
> (1) the purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes;
> (2) the nature of the copyrighted work;
> (3) the amount and substantiality of the portion used in relation to the copyrighted work as a whole; and
> (4) the effect of the use upon the potential market for or value of the copyrighted work. (Emphasis added.)

The introductory language of 17 U.S.C. §107 sets forth the general proposition that when a copyrighted work is used for such purposes as "criticism, comment,...or research," such use, "including such use by reproduction in copies," is not an infringement of copyright. The statute then lists a number of factors to be considered in determining whether a use is a "fair use." The factors enumerated in 17 U.S.C. §107 are not, however, meant to be exclusive. *Harper & Row Publishers, Inc. v. Nation Enterprises, Inc.*, 471 U.S. at 560. The determination of whether a particular use constitutes a fair use under 17 U.S.C. §107 is a mixed question of law and fact, dependant upon evaluation of each of the factors set forth in 17 U.S.C. §107. *Id.*

Inspection and Copying of Public Records under R.C. 149.43 as "Fair Use"

No judicial decisions have specifically addressed the issue of whether, in response to a public records request, a county building department's copying of building plans that have been filed with it as part of its statutory duties constitutes a fair use of such building plans within the meaning of 17 U.S.C. §107.[9] As noted above, the determination of whether a particular use of copyrighted material constitutes a fair use under 17 U.S.C. §107 is a mixed question of law and fact. *Id.* Accordingly, the specific factual circumstances must in each case be analyzed in determining whether a particular use is a fair use. Certain characteristics common to all records kept by public offices within the state, however, strongly support the position that the copying of public records by the government

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[9] For a discussion of issues similar to those involved in your opinion request, concerning the availability of copyrighted material in the possession of a governmental entity, see *Ass'n of American Medical Colleges v. Cuomo*, 928 F.2d 519 (2d Cir. 1991), *cert. denied*, 112 S. Ct. 184 (1991).

pursuant to a public records request would generally be for purposes such as "comment, criticism, and...research," within the meaning of 17 U.S.C. §107 and, as such, would constitute a fair use under that statute.[10] *See generally* 57 Fed. Reg. 61,013 (1992) (to be codified in 10 C.F.R. 2.790) (suggesting fair use as basis for Nuclear Regulatory Commission's copying activities, and proposing specific procedures governing the submission of copyrighted material to, and the handling of such material by, the Commission in conjunction with its regulatory and licensing procedures, including the making of copies in response to public requests).

Purposes Served by Ohio Public Records Law and Balancing of Competing Interests Thereunder

In *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 172-73, 527 N.E.2d 1230, 1232 (1988), the court described the General Assembly's intent in the enactment of R.C. 149.43, as follows: "The Act represents a legislative policy in favor of the open conduct of government and free public access to government records," and concluded that, "[b]ecause the law is intended to benefit the public through access to records, this court has resolved doubts in favor of disclosure." *See, e.g., State ex rel. Fox v. Cuyahoga County Hospital System*, 39 Ohio St. 3d 108, 529 N.E.2d 443 (1988). *See also State ex rel. Toledo Blade Co. v. University of Toledo Foundation*, 65 Ohio St. 3d 258, 602 N.E.2d 1159 (1992). The rationale behind this legislative policy was explained in *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 109-10, 341 N.E.2d 576, 577-78 (1976), as follows:

> "The rule in Ohio is that *public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people*; therefore anyone may inspect such records at any time, subject only to the limitation that such inspection does not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer having custody of the same."....
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> ....
>
> ...[W]e believe that doubts should be resolved in favor of disclosure of records...held by governmental units. Aside from the exceptions mentioned in R.C. 149.43, records should be available to the public *unless* [(emphasis in original)] the custodian of such records can show a legal prohibition to disclosure. (Citation and footnote omitted; emphasis added.)

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[10] Without addressing the precise issue of whether federal copyright law prohibits a governmental entity from releasing copies of copyrighted material submitted to it in connection with a permit or licensing procedure, a number of copyright infringement actions assume, without discussion, that if state law permits public inspection of governmental records generally, such right of inspection extends as well to copyrighted material in the governmental entity's possession. *See, e.g., Joseph J. Legat Architects, P.C. v. United States Development Corp.*, 625 F. Supp. 293 (N.D. Ill. 1985)(architectural plans filed with HUD and local building regulation authority); *WPOW, Inc. v. MRLJ Enterprises*, 584 F. Supp. 132 (D.D.C. 1984)(engineering report filed with FCC as part of application to construct broadcasting facilities).

Thus, in order to assure the greatest possible public access to matters concerning the operations of government, the courts have consistently applied R.C. 149.43 to require the disclosure of information to the public. To further facilitate public access to information in the government's possession, not only does R.C. 149.43(B) make public records available for inspection - it also requires a public office to provide copies of such records upon request.

In the *University of Toledo Foundation* case, *supra*, the court recognized that in certain instances there may be competing interests involved in the decision whether to release records in possession of a public body. The court explained the process by which the General Assembly has accommodated these competing interests, stating:

> It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code.

65 Ohio St. 3d at 266, 602 N.E.2d at 1164-65.

Purposes Served by Federal Copyright Law and Balancing of Competing Interests Thereunder

As the General Assembly has done in enacting and amending R.C. 149.43, Congress, in formulating the law of copyright, has considered the availability of information to the public to be a fundamental consideration. As stated in *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417, 431-32 (1984):

> In a case like this, in which Congress has not plainly marked our course, we must be circumspect in construing the scope of rights created by a legislative enactment which never contemplated such a calculus of interests. In doing so, we are guided by Justice Stewart's exposition of the correct approach to ambiguities in the law of copyright:
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> "The limited scope of the copyright holder's statutory monopoly, like the limited copyright duration required by the Constitution, reflects a balance of competing claims upon the public interest: Creative work is to be encouraged and rewarded, but private motivation must ultimately serve the cause of promoting broad public availability of literature, music, and the other arts. The immediate effect of our copyright law is to secure a fair return for an _author's_ creative labor. But the ultimate aim is, by this incentive, to stimulate artistic creativity for the general public good. _The sole interest of the United States and the primary

> object in conferring the monopoly,_ this Court has said, _lie in the general benefits derived by the public from the labors of authors._ When technological change has rendered its literal terms ambiguous, the Copyright Act must be construed in light of this basic purpose." (Citations omitted.)

Balancing of Competing Interests Between Public Records Law and Copyright Law

From the foregoing it appears that the governmental interest in allowing broad access to public records is sufficiently compelling to conclude that, as a general rule, the copying and dissemination of public records by governmental officials and employees pursuant to requests for such public records constitute a "fair use" under federal copyright law. As noted above, since the United States Supreme Court has determined that whether a particular use of copyrighted materials constitutes a "fair use" is a mixed question of law and fact which must be determined on the specific facts in each case, *see Harper & Row Publishers, Inc., supra,* whether the copying of copyrighted material in the possession of a public body in response to a public records request will ultimately be found by a court to constitute a fair use of that material will depend, in part, on the specific facts before the court.[11] In light of the legislative policy strongly favoring public access to information in the possession of public bodies, however, until a court has decided this matter, the better view is that the material constitutes a public record, particularly under the circumstances outlined in your opinion request. Allowing public access to such records accommodates the similar ends served by both the fair use exception and by the public records law, *i.e.,* the encouragement of an informed public through liberal access to information, whether contained in copyrighted material or public records.[12]

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[11] In circumstances involving the purely voluntary submission of copyrighted materials to a public body, the copying and distribution of such copyrighted materials might also be allowed on the theory that such a voluntary submission constitutes the grant of an implied license to the governmental body to make and distribute copies pursuant to a public records request. However, because the submission of the blueprints in the circumstances described in your letter is mandated by R.C. 3791.04 as a precondition to the construction of a building, it is questionable whether it would be reasonable to conclude that the submission created such an implied license.

[12] Because R.C. 149.43 was not drafted with the provisions of federal copyright law in mind, this may be an appropriate area for a clarifying amendment to the public records law by the General Assembly.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, blueprints submitted to the Wood County Building Inspection Department for approval under R.C. 3791.04 are, while in the possession of the Department, public records within the meaning of R.C. 149.43, which requires the department to make such blueprints "available for inspection to any person at all reasonable times during regular business hours" and, upon request, to "make copies available at cost, within a reasonable period of time."

Respectfully,

LEE FISHER
Attorney General

May 14, 1993

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

SYLLABUS: 93-010

Blueprints submitted to the Wood County Building Inspection Department for approval under R.C. 3791.04 are, while in the possession of the Department, public records within the meaning of R.C. 149.43, which requires the department to make such blueprints "available for inspection to any person at all reasonable times during regular business hours" and, upon request, to "make copies available at cost, within a reasonable period of time."