

OPINION NO. 2004-011

Syllabus:

1. R.C. 317.32(I) does not require or authorize a county recorder to impose the fees described therein upon a member of the public who is using a digital camera or other equipment to make copies of documents in the recorder's office, where the equipment is not provided by the county recorder. R.C. 149.43 requires a county recorder to make the public records he maintains available for inspection, without charge, to members of the public, including those who bring their own equipment to make copies of the records they inspect.
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2. A county recorder may, for the purpose of protecting the records in his custody, maintaining the efficient operation of his office, and ensuring that other members of the public are not disturbed, adopt reasonable rules governing the use of copying equipment brought into his office by members of the public. A recorder may not, however, absolutely bar the use of all such equipment within his office.

To: Joseph R. Burkard, Paulding County Prosecuting Attorney, Paulding, Ohio
By: Jim Petro, Attorney General, March 29, 2004

You have asked whether the county recorder is required to charge the two dollars per page in copying fees, as set forth in R.C. 317.32(I), to a person who is using his own digital camera or other imaging device to photograph documents in the recorder's office. If the answer is in the affirmative, you have asked whether the county recorder has the authority to prohibit an individual from photographing the documents if the fees are not paid.

We begin with a brief description of the duties of a county recorder and the scope of his authority to charge a fee for providing copies of the documents he records and maintains. A county recorder is an elected officer of the county, R.C. 317.01, who is "charged with the performance of duties as prescribed by statute," those duties being largely ministerial in nature. *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 114, 173 N.E.2d 758 (1961). See 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451, 452 ("[c]ounty recorders being public officers have only such powers as are conferred by statute and such implied powers as are necessary to effectuate the express powers"). R.C. Chapter 317 imposes upon a county recorder the duty to record, file, keep, and index various documents such as deeds, mortgages, plats, and liens. See, e.g., R.C. 317.08, R.C. 317.081, R.C. 317.09, R.C. 317.10, R.C. 317.24, R.C. 317.35 (records to be kept by the county recorder). See also 1994 Op. Att'y Gen. No. 94-006. R.C. 317.13(A) requires a county recorder to "record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic or electronic process" all instruments "that are required or authorized by the Revised Code to be recorded and that are presented to the recorder for that purpose." See also R.C. 9.01 (note 2, *infra*).

A county recorder is required by R.C. 317.32 to charge "base fees for the recorder's services and housing trust fund fees" in connection with the performance of his various duties. For "photocopying a document, other than at the time of recording and indexing," the recorder "shall charge and collect" a base fee of one dollar and a housing trust fund fee of one dollar per page. R.C. 317.32(I). See 1994 Op. Att'y Gen. No. 94-006 at 2-22 ("where the county recorder performs the service described in R.C. 317.32(I), he has a duty to charge the corresponding fee prescribed by statute for that service," and "has no authority to create such exception;" the recorder may not charge some persons less than the statutory amount); 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451, 452 ("public officials who are required by law to collect certain fees have no authority to decide that in certain cases it would be inequitable or unwise to assess the statutory fees").

A county recorder is also subject to the requirements of R.C. 149.43, which governs the public's right of access to public records.¹ See *Lorain County Title Co. v. Essex*, 53 Ohio App. 2d 274, 373 N.E.2d 1261 (Lorain County 1976); *Land Title Guarantee and Trust Co. v. Essex*, 52 Ohio App. 2d 56, 368 N.E.2d 326 (Lorain County 1977); 1994 Op. Att'y Gen. No. 94-006. R.C. 149.43 requires that, "all public records ... be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours," and that, "[i]n 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." R.C. 149.43(B)(1).² See *State ex rel. Beacon Journal Publishing Co. v. Andrews*, 48 Ohio St. 2d 283, 289, 358 N.E.2d 565 (1976) (a public officer "is under a statutory duty to organize his office and employ his staff in such a way that his office will be able to make these [public] records available for inspection"). A public office must, upon request, "make copies available at cost, within a reasonable period of time."³ R.C. 149.43(B)(1).

¹A "public record" is defined for purposes of R.C. 149.43 to include "records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units." R.C. 149.43(A)(1). See also R.C. 149.011(A) (defining the term "public office," for purposes of R.C. Chapter 149, as including "any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government"); R.C. 149.011(G) (defining the term "records," for purposes of R.C. Chapter 149, as including "any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, 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").

²R.C. 9.01 makes explicit that a public agency may record, keep, file, and copy records by means of one or more various technologies. See also *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St. 3d 163, 164, 546 N.E.2d 203 (1989) ("[u]nder R.C. 149.43(B), the duty of providing public records lies with the public office maintaining the records.... [a]ccordingly, the form the records should take also lies with the public office"); 2001 Op. Att'y Gen. No. 2001-012 at 2-68 ("the medium upon which information is stored is irrelevant for purposes of determining whether the information is a public record"). Regardless of the format in which an office maintains its records, however, R.C. 9.01 requires the agency to "keep and make readily available to the public the machines and equipment necessary to reproduce the records and information in a readable form." See 1990 Op. Att'y Gen. No. 90-057 at 2-243 (a county recorder is "authorized to record any of the documents listed in R.C. 317.13 by microfilming them"); 1965 Op. Att'y Gen. No. 65-173 (syllabus, paragraph three) (pursuant to R.C. 9.01, "[i]t is permissible for the County Recorder to microfilm [a document] and to make available to the general public for use in the Recorder's office the microfilm alone by making available sufficient viewers to enlarge the microfilm"). See also R.C. 317.321. R.C. 9.01 has been interpreted as requiring an agency to provide the necessary equipment to copy, as well as view, records. *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St. 3d at 165 ("R.C. 149.43(B) requires disclosure of the records and R.C. 9.01 requires the [county auditor] to provide the necessary equipment to copy the records").

³R.C. 149.43 requires that copies of public records be made available "at cost." R.C. 149.43(B)(1). The phrase, "at cost," has been interpreted to mean "actual cost," which does not include "labor costs regarding employee time." *State ex rel. Warren Newspapers, Inc. v.*

Although R.C. 149.43 authorizes a public office to pass on the cost of making copies of public records to the requester, it does not authorize an agency to charge a fee for making public records available for inspection. *See State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 624, 640 N.E.2d 174 (1994) (“[t]he right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under R.C. 149.43,” and thus, the financial burden of making a redacted copy of a public record that can be inspected by the requester may not be passed on to the requester); *State ex rel. Lemke v. Columbiana County Prosecutor’s Office*, Case No. 93-C-56, 1996 Ohio App. LEXIS 521 (Columbiana County Feb. 16, 1996) at *3-*4 (R.C. 149.43 “does not require payment of any sort for inspection of those public records. Hence, there certainly can be no cost of preparation passed on to the public for inspecting public records”); 2000 Op. Att’y Gen. No. 2000-046 at 2-281 (“a county recorder may not charge and collect a fee for providing Internet access to indexed public records”). Reading R.C. 317.32(I) and R.C. 149.43 together, we conclude that, a county recorder has no authority to impose a fee upon a member of the public who is using his own digital camera or imaging equipment to make copies of documents in the recorder’s office. *See generally State ex rel. Pratt v. Weygandt*, 164 Ohio St. 463, 132 N.E.2d 191 (1956) (syllabus, paragraph two) (“[s]tatutes relating to the same matter or subject, although passed at different times and making no reference to each other, are *in pari materia* and should be read together to ascertain and effectuate if possible the legislative intent”).

We begin our analysis with an examination of 2000 Op. Att’y Gen. No. 2000-046. This opinion concluded that R.C. 317.32(I) does not require or authorize a county recorder to charge and collect fees from people who access records from a remote location by way of the Internet, and then print copies of the records on a printer that the recorder neither operates nor maintains. In reaching this conclusion, 2000 Op. Att’y Gen. No. 2000-046 relied upon the fact that the equipment with which the records were accessed and printed was not owned, operated, or maintained by the county recorder. As discussed in 2000 Op. Att’y Gen. No. 2000-046, the purpose of R.C. 317.32(I) is to authorize county recorders to

Hutson, 70 Ohio St. 3d 619, 625-26, 640 N.E.2d 174 (1994). *See also* 2001 Op. Att’y Gen. No. 2001-012 at 2-69 (“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”).

The “at cost” standard of R.C. 149.43(B)(1) may be superceded by a statute that sets a particular fee for copies. *See State ex rel. Butler County Bar Association v. Robb*, 66 Ohio App. 3d 398, 399, 584 N.E.2d 76 (Butler County 1990) (as to R.C. 149.43, which requires that copies of public records shall 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 the requirement of R.C. 149.43 that copies be made available “at cost”). Cf. 1994 Op. Att’y Gen. No. 94-006 at 2-24 (“if microfiche or film is used by the county recorder’s office to store public records, the county recorder must make available in the same medium a copy of the portions of the microfiche or film containing those public records ... if the person requesting such copy assumes the expense of making a copy in that medium, in lieu of the photocopying fee prescribed by [R.C. 317.32(I)]”). Thus, as to copying costs, R.C. 317.32 “trumps” R.C. 149.43, and a county recorder is required to charge the fees set forth in R.C. 317.32(I) rather than making photocopies of records available “at cost.”

charge and collect a fee for providing *photocopying services*. When a person remotely accesses a record by way of the Internet and prints a copy of it on computer equipment that the recorder neither operates nor maintains, the recorder provides no photocopying services for that person: "No photocopier or similar device, photocopying supplies, or personnel of the county recorder's office are used in making a copy of the record." 2000 Op. Att'y Gen. No. 2000-046 at 2-282.⁴

Use of a digital camera in the recorder's office differs somewhat from accessing and copying records remotely by way of the Internet. A member of the public who uses a digital camera must still visit the recorder's office, and it is arguable that, depending upon the medium upon which the recorder maintains documents and the manner in which his office is operated, *see note 2, supra*, the recorder's office must perform at least some services in order to make records available to a person who is using a digital camera to produce copies. These same services, to the extent they are necessary, however, would presumably have to be performed for anyone seeking only to inspect records, for which the recorder may not charge a fee. To broadly interpret R.C. 317.32(I) as authorizing the recorder to charge a fee for making records available for inspection, where the requester then uses his own equipment to make copies of the records he is inspecting, would run afoul of Ohio's strong public policy, expressed by the General Assembly in R.C. 149.43, that the public have access to government records, without cost, to the greatest extent possible, "subject only to the

⁴2000 Op. Att'y Gen. No. 2000-046 also contrasted the technology that is used to make a copy by means of a photocopier with that used to access and copy data or images that are on the Internet. The opinion states that, "a county recorder may charge and collect the fee prescribed by R.C. 317.32(I) only when he makes a copy of a record in his custody by way of a photocopier or other device that photographically reproduces the original record." *Id.*, at 2-282. Because a county recorder does not make a "photocopy" of an original record when a member of the public accesses and copies it by way of the Internet, the opinion concludes that the recorder is not entitled to charge an Internet user the fee that is prescribed by R.C. 317.32(I). *But cf.* 1933 Op. Att'y Gen. No. 167, vol. I, p. 194, 196 ("[e]ven though the ordinary conception of printing at the time of the enactment of section 2778 [now R.C. 317.32] involves reproduction by the use of pressure, it does not follow that a new and different method of obtaining the same result is not within the meaning of the term. It is a well settled principle that the law becomes applicable to new inventions as new inventions come into use, without the same being especially included").

Different technologies are likewise used to produce photocopies and digital copies, and use of a digital camera to reproduce a record does not constitute photocopying. Photocopying is the "process whereby written or printed matter is directly copied by photographic techniques.... Principal photocopying processes include silver halide, transfer, plan, thermographic, and electrostatic." <http://reference.allrefer.com/encyclopedia/P/photocop.html>. Digital images are "electronic snapshots taken of a scene or scanned from documents.... The digital image is sampled and mapped as a grid of dots or picture elements (pixels). Each pixel is assigned a tonal value (black, white, shades of gray or color), which is represented in binary code (zeros and ones). The binary digits ('bits') for each pixel are stored in a sequence by a computer and often reduced to a mathematical representation (compressed). The bits are then interpreted and read by the computer to produce an analog version for display or printing." <http://www.library.cornell.edu/preservation/tutorial/intro/intro-01.html>. *See also* R.C. 9.01 (listing various technologies by which a public agency may record, copy, preserve, protect, and store records, documents, and other instruments); R.C. 317.13 (a recorder may record "by any authorized photographic *or* electronic process" (emphasis added)).

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.”⁵ *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d at 623. See also *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 172, 527 N.E.2d 1230 (1988) (the public records act “represents a legislative policy in favor of the open conduct of government and free public access to government records”). A person who is using a digital camera, which is not provided by the recorder’s office, to make copies of records is akin to someone who is merely inspecting the records. The recorder is providing no photocopying or other service for which he may charge under R.C. 317.32 or R.C. 149.43.

In *Land Title Guarantee and Trust Co. v. Essex*, the court considered a question quite similar to yours. Under the facts of that case, the plaintiff title company had, for a number of years, been copying land title information from the county recorder’s records by using camera equipment. There came a time, however, when the recorder prohibited use of the equipment and offered instead to produce and furnish copies of the information, at a minimal charge, using the equipment in the recorder’s office. The parties agreed that the recorder had never denied the title company the right to inspect records, had never refused to make copies of records for the company, and had charged plaintiff the same amount that he charged to other members of the public for the same service. Nonetheless, the trial court granted the title company’s request to be able to continue copying the records by means of its own camera equipment rather than have the recorder furnish copies.

The court of appeals upheld the decision of the trial court, noting that, although there was no question that the recorder had complied with the mandates of R.C. 149.43 concerning the inspection of records and impartial levy of an appropriate charge for supplying copies, the title company had the right to produce its own copies of the records at its own cost, which was substantially lower than the recorder’s. The court noted that R.C. 149.43 speaks in terms of the user’s right to inspect, not specifically of his right to copy; rather, it speaks to the duty of the person responsible for the records to make copies of those records available. The court held, however, that “the statutory right to inspect incorporates within its meaning the right to copy such records within reasonable limitations,” the remaining issue being only the method of copying the records. *Id.*, 52 Ohio App. 2d at 58. The court of appeals found “no error in the lower court’s decision which, in addition to the order permitting the record copying, orders that the process be allowed under reasonable rules

⁵Indeed, this policy was well established prior to the enactment of R.C. 149.43 in 1963. 1963 Ohio Laws 155, 1644 (Am. Sub. H.B. 187, eff. Sept. 27, 1963). In *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 171 N.E.2d 508 (1960), for example, the court examined several statutes authorizing the Registrar of Motor Vehicles to search records and make reports thereof, and provide copies of records for a specified fee. Although the decision was rendered prior to the enactment of R.C. 149.43, the court held that, “it is apparent that *all documents in the possession of the Registrar of Motor Vehicles are public records open to the public*, and that the fees prescribed in such statutes are for *services rendered and materials furnished by the registrar* upon request. The statutes do not expressly prohibit personal examination of the records by a member of the public, and the provisions that fees may be charged by the registrar when he renders a service in furnishing information contained in his records do not preclude a member of the public from making a personal examination of such records without paying such fees.” (Emphasis in original.) *Id.*, 171 Ohio St. at 371. See also *State ex rel. Louisville Title Ins. Co., Inc. v. Brewer*, 147 Ohio St. 161, 70 N.E.2d 265 (1946).

made by [the recorder], so that the public records may be safely preserved and the orderly administration of [the recorder's] office be maintained." *Id.*

We conclude, therefore, that R.C. 317.32(I) does not require or authorize a county recorder to impose a fee upon a member of the public who is using a digital camera or other equipment to make copies of documents in the recorder's office where the equipment is not provided by the county recorder. Further, R.C. 149.43 requires a county recorder to make the public records he maintains available for inspection, without charge, to members of the public, including those who bring their own equipment to the recorder's office for the purpose of copying the records they inspect.

A county recorder may, of course, "establish and enforce reasonable rules and regulations covering the examination of the records in his custody and control to insure the orderly and efficient operation of his department." *State ex rel. Patterson v. Ayers*, 171 Ohio St. 369, 372, 171 N.E.2d 508 (1960). *Accord State ex rel. Louisville Title Ins. Co., Inc. v. Brewer*, 147 Ohio St. 161, 164, 70 N.E.2d 265 (1946) (the public's use of a public record is "subject to the limitation that it must not endanger the safety of the record, or unreasonably interfere with the discharge of the duties of the officer charged with custody of the same conceding the general rule as to the right of an abstractor or insurer of titles to have access to the office of a clerk or register for the purpose of inspecting or copying the public records, the exercise of such right is, nevertheless, subject to any reasonable rule and regulation which the clerk or register may make with respect to the use and occupancy of his office"); *Land Title Guarantee and Trust Co. v. Essex*, 52 Ohio App. 2d at 58 (wherein the court upheld the recorder's authority to prescribe reasonable rules for persons making copies by means of a camera, "so that the public records may be safely preserved and the orderly administration of [the recorder's] office be maintained"). *See also* 1994 Op. Att'y Gen. No. 94-006 (R.C. 149.43 does not require the county recorder to allow the public to remove records from his office in order to copy them elsewhere and avoid the statutory copying fees). Therefore, the county recorder may, for the purpose of protecting the records in his custody, maintaining the efficient operation of his office, and ensuring that other members of the public are not disturbed, adopt reasonable rules governing the use of copying equipment brought into his office by members of the public. Upon the authority of *Land Title Guarantee and Trust Co. v. Essex*, however, the recorder may not absolutely bar the use of all such equipment within his office.

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

1. R.C. 317.32(I) does not require or authorize a county recorder to impose the fees described therein upon a member of the public who is using a digital camera or other equipment to make copies of documents in the recorder's office, where the equipment is not provided by the county recorder. R.C. 149.43 requires a county recorder to make the public records he maintains available for inspection, without charge, to members of the public, including those who bring their own equipment to make copies of the records they inspect.
2. A county recorder may, for the purpose of protecting the records in his custody, maintaining the efficient operation of his office, and ensuring that other members of the public are not disturbed, adopt reasonable rules governing the use of copying equipment brought into his office by members of the public. A recorder may not,

however, absolutely bar the use of all such equipment within his office.