

**OPINION NO. 76-049****Syllabus:**

(1) Records concerning individuals applying for or receiving services from the Rehabilitation Services Commission are not public records within the meaning of R.C. 149.43, because the general release of such records is prohibited by R.C. 3304.21 and 45 CFR 401.47.

(2) When information from an individual case record is sought by subpoena by a party other than the client or his representative and the release of such information is prohibited under R.C. 3304.21 and 45 CFR 401.47, the Rehabilitation Services Commission may properly respond by way of application for a protective order under CR 26(C) or by motion to quash under CR 45(B), as information the release of which is prohibited by law is not within the scope of discovery under CR 26 (B).

(3) 45 CFR 401.47(B)(5) requires that information from a Rehabilitation Services Commission client's case record be available upon his request to him or his representative for use in any proceeding or action. The Rehabilitation Services Commission, however, must release only such information as is relevant to the action or proceeding and, if medical or psychological information contained in the case record may be harmful to the client, must arrange either to release the information to a representative of the client or to have the information released to the client by a physician or licensed psychologist.

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**To: Richard P. Oestreich, Administrator, Rehabilitation Services Commission,  
Columbus, Ohio**

**By: William J. Brown, Attorney General, June 30, 1976**

I have before me your request for my opinion on several questions concerning the confidentiality of case records maintained by the Rehabilitation Services Commission. Speci-

fically, your questions concern the availability of case records and the procedures to be followed when:

- 1) Case records are subpoenaed by an attorney representing a client of the Rehabilitation Services Commission, or
- 2) Case records are subpoenaed by an attorney or party not representing a client of the Rehabilitation Services Commission.

Initially, it must be recognized that R.C. 149.43 provides that all public records shall be open at all reasonable times for inspection. Public records, as defined by R.C. 149.43 include all records required to be kept by any governmental unit, except records pertaining to physical or psychiatric proceedings and records the release of which is prohibited by state or federal law. For further discussion of the requirements of R.C. 149.43, see Dayton Newspapers v. Dayton, 45 Ohio St. 2d 107 (1976); State, ex rel. Peason Journal Publishing Co. v. Andrews, Ct. of Appeals, Franklin County, January 15, 1976, No. 75 AP-418; 1976 Op. Atty. Gen. No. 76-011.

R.C. 3304.21 provides for the confidentiality of the records of individuals applying for or receiving services from the Rehabilitation Services Commission in the following terms:

"No person shall, except for the purposes of sections 3304.11 to 3304.27, inclusive, of the Revised Code, and in accordance with the rules established by the rehabilitation services commission, solicit, disclose, receive, make use of, authorize, knowingly permit, participate in, or acquiesce in the use of any list of names or information concerning persons applying for or receiving any services from the commission, which information is directly or indirectly derived from the records of the agency or is acquired in the performance of the person's official duties."

The availability of records concerning individuals applying for or receiving rehabilitation services is, therefore, limited to the purposes of R.C. 3304.11 to R.C. 3304.27.

R.C. 3304.16 specifies the powers and duties of the Rehabilitation Services Commission. R.C. 3304.16(A) specifies that the Commission shall develop all necessary rules and regulations and R.C. 3304.16(E)(5) specifies that the Commission may take any other necessary or appropriate action to assure compliance with any requirements necessary to obtain federal funds.

45 C.F.R. 401.47 sets forth federal requirements of confidentiality for federal funding of state vocational rehabilitation programs in the following terms:

(a) The State plan shall provide that the State agency will adopt and implement such regulations as are necessary to assure that:

(1) All information as to personal facts given or made available to the State agency, its representatives, or its employees, in the course of the administration of the vocational rehabilitation program, including lists of names and addresses and records of agency evaluation, shall be held to be confidential;

(2) The use of such information and records shall be limited to purposes directly connected with the administration of the vocational rehabilitation program;

(3) Information shall not be disclosed directly or indirectly, other than in the administration program, unless the informed consent of the client has been obtained in writing;

(4) Release of information to any individual, agency, or organization shall be conditioned upon satisfactory assurance by such individual, agency, or organization that the information will be used only for the purpose for which it is provided and that it will not be released to any other individual, agency, or organization;

(5) Upon written request, information shall be released to the client or, as appropriate, his parent, guardian, or other or his representative for purposes in connection with any proceeding or action for benefits or damages, including any proceeding or action against any public agency: *Provided*, (i) That only such information as is relevant to the needs of the client shall be released, and (ii) in the case of medical or psychological information, the knowledge of which may be harmful to the client, such information will be released to the parent, guardian, or other representative of the client by the State agency, or to the client by a physician or by a licensed or certified psychologist; and

(6) Information will be released to an organization or individual engaged in research only for purposes directly connected with the administration of the State vocational rehabilitation program and only if the organization or individual furnishes satisfactory assurance that the information will be used only for the purpose for which it is provided; that it will not be released to persons not connected with the study under consideration; and that the final product of the research will not reveal any information that may serve to identify any person about whom information has been obtained through the State agency without written consent of such person and the State agency.

(b) The State plan shall further

provide that all information is the property of the State agency;

(c) The State plan shall further provide that the State agency will adopt and maintain such procedures and standards as are necessary to:

(1) Give effect to these regulations; and

(2) Assure that all vocational rehabilitation applicants, clients, providers of services, and interested persons will be informed as to the confidentiality of vocational rehabilitation information and the conditions for the release of such information."

(Emphasis added.)

It follows therefore, that records concerning an individual's application for or receipt of rehabilitation services are not public records as defined by R.C. 149.43, since the general release of such records is prohibited by both R.C. 3304.21 and 45 CFR 401.47.

However, while 45 CFR 401.47 sets forth stringent general standards for confidentiality, it should be noted that subsection (a)(5) specifically requires that, subject to limitations set out therein, information shall be released to a client or his representative for use in any proceeding or action for benefits or damages. The Rehabilitation Services Commission is charged under that section with the duty of releasing information relevant to the client's needs to the action or proceeding.

The Commission is further charged with making a determination as to whether medical or psychological information contained in the case record may be harmful to the client. If this possibility of harm exists, the Commission must make arrangements either to release the information to the client's representative or to have the information released to the client by a physician or a licensed psychologist.

In the first situation you present, it is the client's attorney who has subpoenaed the client's case records. Under the terms of 45 CFR 401.47, such information must be made available to the client or his representative. The Commission, however, must observe its duty under that section to release only relevant information and to arrange for release either to the client's representative or to the client through a physician or licensed psychologist if the medical or psychological information involved may be harmful to the client.

In the second situation you present, however, the case records have not been subpoenaed by the client or his attorney. When the Rehabilitation Services Commission receives a request or subpoena for information from a source other than the client or his representative, it may properly release case records only as set forth in R.C. 3304.21 and 45 CFR 401.47. If a subpoena by an attorney or individual other than the client or his representative does not fall within the availability of case records as defined by these provisions of law, the Commission may not properly release the information sought. The Ohio Civil Rules of Procedure set forth several courses of action open to the Commission in such a situation.

CR 26 sets forth general authority for discovery, and CR 26(B) defines the scope of discovery. Under that provision discovery does not extend to "privileged" information. CR 34, which deals with the production of documents, provides that such production shall be subject to the scope of discovery under CR 26(B).

While the rule does not define "privileged", the courts have applied an exception to the right to discovery where the asserted privilege testifying or producing evidence rests upon some statutory or constitutional provision. In re Story, 159 Ohio St. 144, 147 (1953); Mutual of Omaha Ins. Co. v. Garrigan, 31 O. Misc. 1, 60 Ohio Op. 2d 29 (1971). The release of information from a client's case record is specifically restricted by R.C. 3304.21 and by 45 CFR 401.47. It is, therefore, my opinion that such records are not within the scope of discovery under CR 26.

With respect to the response of the Rehabilitation Services Commission to a subpoena for confidential case records, CR 26(C) and CR 45(B) are relevant. Under CR 26(C) the court may, upon motion by the person from whom discovery is sought, issue a protective order that the discovery not be had, or that it be limited in accordance with provisions of the court order. CR 45(B) authorizes the issuance of a subpoena commanding the production of documents, but provides that the court may upon a timely filed motion quash or modify the subpoena.

It is, then, my opinion and you are so advised that:

- (1) Records concerning individuals applying for or receiving services from the Rehabilitation Services Commission are not public records within the meaning of R.C. 149.43, because the general release of such records is prohibited by R.C. 3304.21 and 45 CFR 401.47.
- (2) When information from an individual case record is sought by subpoena by a party other than the client or his representative and the release of such information is prohibited under R.C. 3304.21 and 45 CFR 401.47, the Rehabilitation Services Commission may properly respond by way of application for a protective order under CR 26(C) or by motion to quash under CR 45(B), as information the release of which is prohibited by law is not within the scope of discovery under CR 26(B).
- (3) 45 CFR 401.47(B)(5) requires that information from a Rehabilitation Services Commission client's case record be available upon his request to him or his representative for use in any proceeding or action. The Rehabilitation Services Commission, however, must release only such information as is relevant to the action or proceeding and, if medical or psychological information contained in the case record may be harmful to the client, must arrange either to release the information to a representative of

the client or to have the information released to the client by a physician or licensed psychologist.