

OPINION NO. 86-057**Syllabus:**

1. To the extent that a township clerk's statutory duties consist of functions that need not, by their nature, be performed at a particular time or place or in a particular manner, the board of township trustees does not have authority to regulate the time, place, or manner in which such duties are performed. (1960 Op. Att'y Gen. No. 1151, p. 94, approved and followed.)
2. Pursuant to R.C. 507.05, the township clerk is given responsibility for overseeing the township books. Pursuant to R.C. 149.351, the township clerk is prohibited from wrongfully removing, damaging, or disposing of the township books. Pursuant to 149.43(B), the township clerk is required to maintain the township books in such a manner that they can be made available for inspection to any member of the general public at all reasonable times during regular business hours.
3. A board of township trustees has no authority to require that the township books be kept only in the township building.
4. A person may at the same time occupy the office of township clerk and serve as secretary of a city board of education, provided that it is physically possible for such person to perform the duties of both positions.

To: Jeffrey M. Welbaum, Miami County Prosecuting Attorney, Troy, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, July 31, 1986

I have before me your request for an opinion concerning the following questions:

1. Does a Board of Township Trustees have lawful authority to require that the books of the township be kept only in the township building, thus preventing the Clerk of the Township from taking the books home to utilize them in performing the clerk's official duties?
2. What lawful authority, if any, does a Board of Township Trustees possess to regulate the activities of the Township Clerk as to the manner, time, and place in which the Township Clerk performs her duties?
3. In the event said resolution is a lawful exercise of power of the Board of Township Trustees, are the positions of Township Clerk and Secretary of a City Board of Education incompatible where the clerk is unable by virtue of her secretarial position and her other responsibilities to perform her duties as clerk at the Township office where the township books are located in the evenings or week-ends, or to otherwise fulfill her duties?

In your correspondence you state that the Concord Township Trustees have passed a resolution requiring that the township books not be removed from the township building at any time, and that the resolution prohibits even removal by the township clerk in the performance of her duties. You also state that the concern of the clerk is that she be permitted to perform her duties and that the concern of the trustees is for the assurance of the safety of the township books.

It is helpful to begin with a discussion of the general status and duties of the township clerk and the clerk's relationship to the township trustees. Pursuant to R.C. 507.01, the township clerk is an elected official of the township. It has, thus, been stated that the clerk's "office is on the same plane as are the offices of the members of the board of trustees, which among other things means that under normal circumstances he, like the trustees, is responsible only to the people." 1960 Op. Att'y Gen. No. 1151, p. 94, at 96. See also R.C. 507.03 (providing that township clerk shall give bond). Various duties are imposed upon the clerk by statute. R.C. 507.04 requires the township clerk to "keep an accurate record of the proceedings of the board of township trustees at all its meetings, and of all its accounts and transactions, including the acceptance of the bonds of township officers." See also, e.g., R.C. 505.33 (the township clerk shall certify to the county auditor the names of property owners and a description of lands that are delinquent as to waste disposal service charges); R.C. 507.051 (the township clerk shall notify the board of elections of vacancies in township offices and of township boundary changes); R.C. 507.08 (the township clerk shall record the bonds of constables in the book kept for that purpose); R.C. 507.11 (no money belonging to the township shall be paid out except upon an order signed by at least two trustees and countersigned by the clerk).

Under R.C. 507.05, the township is required to provide the clerk with books for the keeping of various records. R.C. 507.05 states:

The township clerk shall, in addition to the books for the record of the proceedings of the board of township trustees, be provided by the township with a book for the record of township roads, a book for the record of marks and brands, and a book for the record of official oaths and bonds of township officers.

Since the clerk serves the township and keeps records of the proceedings of the board of township trustees, see R.C. 507.04, it has been stated that "[t]he clerk of the township is clerk of the board of trustees." State ex rel. Osborn v. Mitchell, 22 Ohio C.C. 208, 210 (Cuyahoga County 1901). The board of township trustees is authorized to employ "such number of persons as it finds necessary to provide stenographic and clerical assistance" to the township clerk. R.C. 507.021. The board of township trustees is also authorized to provide a township hall or other space for township offices, see R.C. 505.26; R.C. 511.01, and, thus, may provide an office for the township clerk. If no such office is provided, the township clerk's home may be considered the official office. See 1961 Op. Att'y Gen. No. 2715, p. 735.

For ease of discussion, I turn now to your second question, which asks if a board of township trustees has any authority to

regulate the activities of the township clerk as to the manner, time, and place in which the township clerk's duties are performed. One of my predecessors addressed a similar question in 1960 Op. No. 1151 and concluded, at 96, that "a board of township trustees is without authority to regulate the duties of the township clerk and thereby require him to be present in the township office certain day-time hours each week." I believe that this conclusion is applicable to your question. The township clerk is an elected official with statutory responsibilities to the township and its residents. The clerk is required to perform the duties imposed by statute and, where the nature of such duties requires that the clerk be present at a particular time or place, or act in a particular manner, the clerk must do so. See, e.g., R.C. 507.04 (requiring the clerk to keep an accurate record of the proceedings of the board of township trustees at all its meetings).

The township trustees have certain statutory duties to assure that accurate township records are kept and, in order to fulfill their responsibilities, the trustees must make certain that the clerk's functions are adequately performed. See, e.g., R.C. 121.22 (requiring that the minutes of a meeting of any board of a township be promptly recorded and open to public inspection); Thomas v. Board of Trustees, 5 Ohio App. 2d 265, 267, 215 N.E.2d 434, 436 (Trumbull County 1966) ("the board of township trustees is required by statute to keep a record of its proceedings"). See generally Board of Township Trustees v. Spring Creek Gravel Co., 45 Ohio App. 2d 288, 290, 344 N.E.2d 156, 158 (Shelby County 1975) ("township trustees are governed by R.C. 507.04, which requires the clerk to 'keep an accurate record of the proceedings of the township trustees at all its meetings' as well as by R.C. 121.22...") (emphasis by the court). If, for example, the township trustees schedule a meeting, they must make certain that the township clerk is notified, so that the clerk can be present at the appropriate time and place to make a record of the proceedings. In the sense that the township trustees may schedule and define activities to which the clerk's duties relate, the trustees may be considered as possessing certain authority to regulate the activities of the clerk.

Where, however, the clerk has duties that need not, by their nature, be performed at any particular time or place, or in any particular manner, the clerk has discretion to choose the time, place, and manner of performance, provided that the duties are performed in compliance with law. In such matters, the township trustees have no authority to control the discretion of the clerk. In particular, the township trustees are not authorized to require that the township clerk "be present in his office certain day-time hours each week," 1960 Op. No. 1151 (syllabus, paragraph one), or that the township clerk perform all his clerical duties in the township building.

I turn now to your first question, which asks whether a board of township trustees has authority to require that the township books be kept only in the township building, so that the clerk may not take the books home to work on them. I assume that the board of township trustees has provided the clerk with suitable office space within the township building for keeping and working on the books. See generally 1961 Op. No. 2715 at 736 ("[t]he main duty of [the township] clerk is the keeping of township records, and it is assumed that this duty is generally performed at the township offices").

It is firmly established that "trustees can exercise only those powers conferred by statute, or such others as are necessarily to be implied from those granted, in order to enable them to perform the duties imposed upon them." Trustees of New London Township v. Miner, 26 Ohio St. 452, 456 (1875). It is, therefore, clear that, with respect to township records and the activities of the township clerk, the trustees have only such powers as are derived from statute. I am aware of no statute which, expressly or by implication, authorizes a board of township trustees to require that the township books be kept only in the township building. I find, instead, as discussed more fully below, that the statutory provisions governing public records place responsibility for the safekeeping of township books primarily upon the township clerk.

General provisions governing the protection and availability of public records appear in R.C. Chapter 149. R.C. 149.011 contains the following definitions:

As used in this chapter:

(A) "Public office" includes 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.

....
(G) "Records" 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.

Township books, kept by the township clerk pursuant to R.C. 507.04 and 507.05, are clearly "records" for purposes of the definition appearing in R.C. 149.011(G).

R.C. 149.351 provides, as follows, for the safekeeping of such records:

All records as defined in section 149.011 of the Revised Code are the property of the public office concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or in part, except as provided by law or under the rules adopted by the records commissions provided for under sections 149.38 to 149.42¹ of the Revised Code. Such records shall be

¹ R.C. 149.42 establishes township records commissions, as follows:

There is hereby created in each township a township records commission, composed of the chairman of the board of township trustees, the clerk of the township, and the auditor of the county wherein the township is situated. The commission shall meet at least once every twelve months, and upon call of the chairman.

The function of the commission shall be to review applications for one-time records disposal

delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully. (Footnote added.)

Pursuant to R.C. 149.011 and R.C. 149.351, township books are the property of the township and must be delivered by outgoing officials and employees to their successors. See also R.C. 503.28 ("[a]ll township officers shall deliver to their successors in office all books, records, documents, laws, obligations, papers, blanks, and all other articles and property belonging to their respective offices or deposited with them in their official capacity"). R.C. 149.351 provides that no records may be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, except as provided by law or by the appropriate records commission. See R.C. 149.99 ("[a]ny person aggrieved by a violation of [R.C. 149.351]...may bring a civil action to compel compliance, and may recover a forfeiture of one thousand dollars and reasonable attorneys fees for each violation"). The township clerk is clearly subject to these provisions and may not wrongfully remove the township books.

It might be argued that the language of R.C. 149.351 that prohibits the removal of records except as provided by law or under rules adopted by the appropriate records commission operates, even in the absence of action by the township trustees, as an absolute prohibition against the removal of township records by the clerk from the township building. I cannot accept this argument. "[I]t is a settled rule of construction that, in accordance with the maxim noscitur a sociis, the meaning of a word may be ascertained by reference to the meaning of words associated with it; and again, according to a similar rule, the coupling of words together shows that they are to be understood in the same sense." Myers v. Seaberger, 45 Ohio St. 232, 236, 12 N.E. 796, 798 (1887)(citation omitted). Under this rule, the word "removed," as used in R.C. 149.351, must be read in the context of other words appearing in that section: "destroyed, mutilated,

and schedules of records retention and disposition submitted by township offices. Records may be disposed of by the commission pursuant to the procedure outlined in this section. The commission may at any time review any schedule it has previously approved, and for good cause shown may revise that schedule.

When township records have been approved for disposal, a list of such records shall be sent to the auditor of state. If he disapproves the action by the commission, in whole or in part, he shall so inform the commission within a period of sixty days, and these records shall not be destroyed. Before public records are disposed of, the Ohio historical society shall be informed and given the opportunity for a period of sixty days to select for its custody such public records as it considers to be of continuing historical value.

The authority of a township records commission relates to the disposal of records, and not to the manner in which records are maintained.

transferred, or otherwise damaged or disposed of." These terms are addressed not to the precise location in which records are kept but to the fact that they are to be retained in proper custody and held securely. If, in order to perform statutory duties, it is reasonably necessary for a township clerk to move certain records from the township building, that movement is contemplated by law and permitted under R.C. 149.351. Any action by the township trustees that attempted to prevent such movement would appear to thwart the goals of R.C. 149.351, in addition to interfering with the statutory functions of the township clerk. The determination as to whether a particular movement of records is permissible under R.C. 149.351 must be made on a case-by-case basis, in light of all relevant facts.

In addition to being "records," for purposes of R.C. Chapter 149, township books are "public records," as that term is defined in R.C. 149.43(A)(1),² and, therefore, are subject to the provisions of R.C. 149.43(B). R.C. 149.43(B) states:

All public records shall be promptly prepared and made available for inspection to any member of the general public 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.

Pursuant to R.C. 149.43(B), a township is required to maintain its public records in such a manner that they can be made available for inspection to any member of the general public at all reasonable times during regular business hours.

R.C. 149.43 does not specify precisely who is to act on behalf of the township. It has, however, been held that, "[w]hen statutes impose a duty on a particular official to oversee records, that official is the 'person responsible' under R.C. 149.43(B)." State ex rel. Mothers Against Drunk Drivers [MADD] v. Gosser, 20 Ohio St. 3d 30, 485 N.E.2d 706 (1985) (syllabus, paragraph two). The MADD case found that the clerk of courts was the "person responsible" under R.C. 149.43(B), not only for providing copies of court records upon

² R.C. 149.43 defines "public record" as follows:

(A) As used in this section:

(1) "Public record" means any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law. (Emphasis added.)

request, but also for making such records available for inspection to members of the general public. Since, under R.C. 507.05, township books are provided to the township clerk, it appears that the clerk has been given the duty of overseeing such records and that the duty of making them available for inspection also rests upon the clerk. The township clerk has, therefore, a duty of maintaining the township books in such a manner that they can be made available for inspection at reasonable times during regular business hours. See generally R.C. 149.99 ("[a]ny person aggrieved by a violation of [R.C. 149.43]...may bring a civil action to compel compliance, and may recover a forfeiture of one thousand dollars and reasonable attorneys fees for each violation").

It is evident that, since the records kept by the clerk constitute the records of the township, the board of township trustees has an interest in assuring that they are safely maintained. It appears, however, that responsibility for the safe maintenance of such records has been placed primarily upon the clerk, rather than upon the trustees. See R.C. 507.05. I conclude, therefore, that the responsibility for both the safekeeping of the township books and their availability to the public rests with the township clerk, and that the board of township trustees has no authority to require that the township books be kept only in the township hall. I note, however, that the right of the township trustees to inspect the township books is at least as great as that of the general public and that, at a minimum, the books must be maintained in such a manner that they can be made available for inspection by the trustees in accordance with R.C. 149.43(B). See generally State ex rel. Beacon Journal Publishing Co. v. Andrews, 48 Ohio St. 2d 283, 289, 358 N.E.2d 565, 569 (1976) (an official who has charge of public records "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 [the] records available for inspection and to provide copies when requested within a reasonable time. This is the public's business, not the [official's] private record").

I am aware that the foregoing analysis of the rights and duties of the township trustees and the township clerk does not provide a simple solution to the concerns you have raised with respect to the custody and maintenance of township books. I find that the relationship between the township trustees and the clerk is somewhat analogous to that between a judge and the clerk of courts, and I share the following words of guidance set forth in a case concerning a dispute between an administrative judge and the clerk of a municipal court:

It is rather incongruous to call him "the Clerk of the Municipal Court," responsible for all the clerical functions in the court, but then to infer, as the relator does, that he is totally independent of the judges in the operation of his office. As the clerk, the relator must be answerable to the judges of the Cleveland Municipal Court and even is subject to contempt proceedings, if the situation warrants such drastic action. However, resort to the exercise of contempt powers should be the last weapon in the judicial arsenal to be used, especially in matters involving other elected public officials.

It cannot be denied that, despite the fact that the clerk of courts is a separately elected official, the nature of his duties so closely connects him with

the court, and especially the administrative judge, that the administrative judge must have a certain amount of control over the clerk....

The administrative judge and the clerk of court should work together in order that each may efficiently carry out his duties. M.C. Sup. R. 2 contemplates such a relationship. Section (C) spells out the duties of the administrative judge. One of his duties is to "(7) [m]eet with the clerk on a monthly basis to discuss the implementation of these rules." The relator and the respondent should rise above their differences, however engendered, and should be motivated to follow the spirit of the rule in the interest of the public. (Emphasis added.)

State ex rel. Krakowski v. Stokes, 16 Ohio App. 3d 62, 66, 474 N.E.2d 695, 699-70 (Cuyahoga County 1984). Similarly, the township trustees and township clerk are connected by the fact that their duties relate to the records of the township. They should work together to establish a system which permits the township books to be maintained safely and made available to the public, while allowing both the board of trustees and the clerk to perform their duties in an efficient manner.

Your third question relates to the compatibility of the positions of township clerk and secretary of a city board of education. Your concern is that, on the facts of a particular case, it may be physically impossible for an individual who serves as a secretary to perform the duties of the clerk. If this is the case, the individual is clearly not permitted to serve in both positions. See, e.g., 1986 Op. Att'y Gen. No. 86-007; 1985 Op. Att'y Gen. No. 85-042; 1981 Op. Att'y Gen. No. 81-010. Whether this is the case is a question of fact, to be resolved in light of particular circumstances. As discussed above, however, the township clerk has discretion in determining when to perform those duties that need not, by their nature, be performed at a particular time or place. The clerk thus has a considerable amount of flexibility in scheduling certain duties, and may well be able to hold a full-time position other than that of township clerk, provided that the clerk is able to avoid conflicts as to those duties which must be performed at a particular time or place.

Your letter does not suggest that there would be any incompatibility between the positions of township clerk and secretary of a city board of education apart from the question of physical impossibility. You have not indicated whether the city school district encompasses any portion of the territory of the township. I find that, regardless of the location of the city school district, if time constraints permit one individual to perform the duties of both positions, the positions of township clerk and secretary of a city board of education are compatible. One of my predecessors concluded that an individual may serve as both township clerk and member of the board of education of the local school district. 1961 Op. Att'y Gen. No. 2480, p. 532. Cf. 1985 Op. Att'y Gen. No. 85-006 (finding that the positions of member of the board of education of a local school district and trustee of a township which is located within the school district are incompatible because, under R.C. 5731.48, the township trustees determine whether certain estate tax receipts are credited to the general revenue fund of the township or to the board of education of the school district of which the township is a part). There is even less likelihood of any conflict of interest occurring

between the positions of township clerk and secretary of the board of education of a city school district, since the secretary's duties are ministerial in nature.

In reaching the conclusion that the positions of township clerk and secretary of a city board of education are compatible, I reject the contention that incompatibility results merely from the fact that both the township and the board of education submit their budgets to the county budget commission. See R.C. 5705.28; R.C. 5705.30-.32; R.C. 5705.37; Op. No. 85-006; Op. No. 81-010. While it is true that the township clerk is the fiscal officer of the township and may appear before the county budget commission to explain the financial needs of the township, see R.C. 5705.32(E)(2), I do not believe that the fact of employment as a secretary for a city board of education will cause such a conflict as to interfere with the clerk's capacity to serve the township. See Op. No. 85-006; 1981 Op. Att'y Gen. No. 81-087 (syllabus) ("[i]f it is physically possible for one person to hold both positions and if the holding of both positions is not prohibited by local law, the positions of township clerk and treasurer's assistant for a local board of education are compatible"); Op. No. 81-010 at 2-33 (finding that a county commissioner is not precluded from being employed as a local school principal merely on the basis that both the board of county commissioners and the board of education present their budgets to the county budget commission and stating: "the possibility that [the county commissioner] would not use his best judgment in preparing the [county's] budget merely because he is employed as a principal is too remote to render the positions incompatible")(citation omitted); 1961 Op. No. 2480; 1960 Op. No. 1151 (syllabus, paragraph two) ("[a] person may at the same time occupy the office of township clerk and be a full time employee of the county treasurer, provided it is physically possible for such person to perform the duties of both such positions"); 1959 Op. Att'y Gen. No. 1031, p. 708. But see 1972 Op. Att'y Gen. No. 72-109 (finding that the positions of township clerk and county highway department employee are incompatible because the township clerk might be tempted to subordinate his interests in the township budget in favor of the budget of the county highway department); 1966 Op. Att'y Gen. No. 66-060 (finding that the position of member of the board of education of a local school district and the position of township trustee of a township within the local school district are incompatible because the bodies may be competing for available funds); 1963 Op. Att'y Gen. No. 559, p. 566 (finding that the position of township clerk is incompatible with the position of member of the board of health of a general health district because both bodies present their budget requests to the county budget commission); 1958 Op. Att'y Gen. No. 2202, p. 361 at 363 (concluding that the positions of township trustee and clerk of a local school board are incompatible because the township trustees and local school board might be in competition for available funds and that, "even though the clerk of the local school board occupies a ministerial position, the possibility of dual loyalties is such that objectivity may be difficult to maintain"). See generally 1983 Op. Att'y Gen. No. 83-016.

Accordingly, it is my opinion, and you are advised, as follows:

1. To the extent that a township clerk's statutory duties consist of functions that need not, by

their nature, be performed at a particular time or place or in a particular manner, the board of township trustees does not have authority to regulate the time, place, or manner in which such duties are performed. (1960 Op. Att'y Gen. No. 1151, p. 94, approved and followed.)

2. Pursuant to R.C. 507.05, the township clerk is given responsibility for overseeing the township books. Pursuant to R.C. 149.351, the township clerk is prohibited from wrongfully removing, damaging, or disposing of the township books. Pursuant to 149.43(B), the township clerk is required to maintain the township books in such a manner that they can be made available for inspection to any member of the general public at all reasonable times during regular business hours.
3. A board of township trustees has no authority to require that the township books be kept only in the township building.
4. A person may at the same time occupy the office of township clerk and serve as secretary of a city board of education, provided that it is physically possible for such person to perform the duties of both positions.