

OPINION NO. 97-010**Syllabus:**

1. Information within a workers' compensation claim file that does not fall within one of the exceptions listed in R.C. 149.43(A)(1) is a public record which must be disclosed to the public pursuant to R.C. 149.43(B) when the Bureau of Workers' Compensation, a member of the Industrial Commission, the claimant, or the employer has authorized the examination of the claim file as required by R.C. 4123.88. (1975 Op. Att'y Gen. No. 75-062 (syllabus, paragraph one), overruled.)
2. Information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition is not a public record, as defined in R.C. 149.43(A)(1), which the Bureau of Workers' Compensation must disclose to the public under R.C. 149.43(B).

To: James Conrad, Administrator, Bureau of Workers' Compensation, Columbus, Ohio
By: Betty D. Montgomery, Attorney General, January 22, 1997

You have requested an opinion concerning the release of information from a workers' compensation claim file. Specifically, you wish to know whether information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition is a public record which the Bureau of Workers' Compensation must disclose to the public under R.C. 149.43(B).

R.C. 149.43(B) requires disclosure to the public of all information that qualifies as a public record, subject only to the exceptions specified in R.C. 149.43(A)(1). *Dayton Newspapers, Inc. v. City of Dayton*, 45 Ohio St. 2d 107, 110, 341 N.E.2d 576, 578 (1976); 1996 Op. Att'y Gen. No. 96-005 at 2-20. For purposes of R.C. 149.43(B), R.C. 149.43(A)(1) defines a "public record" as follows:

"Public record" means any record that is kept by any public office ... except that "public record" does not mean any of the following:

- (a) Medical records;
- (b) Records pertaining to probation and parole proceedings;
- (c) Records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section;
- (d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;
- (e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of human services or, pursuant to section 5101.313 of the Revised Code, the division of child support in the department or a child support enforcement agency;
- (f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;
- (g) Trial preparation records;
- (h) Confidential law enforcement investigatory records;
- (i) Records containing information that is confidential under section 4112.05 of the Revised Code;
- (j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;
- (k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;
- (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;
- (m) Records the release of which is prohibited by state or federal law.

Pursuant to R.C. 149.011, the Bureau of Workers' Compensation (Bureau) is a public office, and workers' compensation claim files are records since they serve to document the decisions, procedures, operations, and other activities of the Bureau. *See* 1975 Op. Att'y Gen. No. 75-062 at 2-253; *see also* 1939 Op. Att'y Gen. No. 1071, vol. II, p. 1531. Resolution of your specific question thus requires a determination whether the information within workers' compensation claim files falls within one of the recognized exceptions to disclosure.

Research discloses that 1975 Op. Att'y Gen. No. 75-062 discussed whether any of the information contained in a workers' compensation claim file falls within the exceptions to the definition of public records found in R.C. 149.43(A)(1). After initially determining "that the contents of a claim file, with the exception of physical and psychiatric reports which are specifically excluded by R.C. 149.43, are public records," *id.* at 2-253, the opinion proceeded to examine the provisions of R.C. 4123.88, which currently provides in pertinent part:

No person shall, without prior authority from the bureau, a member of the commission, the claimant, or the employer, examine or directly or indirectly cause

or employ another person to examine any claim file or any other file pertaining thereto.... No district or staff hearing officer or other employee of the bureau or commission, notwithstanding the provisions of section 4123.27 of the Revised Code, shall divulge any information in respect of any claim or appeal which is or may be filed with a district or staff hearing officer, the bureau, or commission to any person other than members of the commission or to the superior of the employee except upon authorization of the administrator of workers' compensation or a member of the commission or upon authorization of the claimant or employer. No person shall solicit or obtain any such information from any such employee without first having obtained an authorization therefor as provided in this section.

1975 Op. Att'y Gen. No. 75-062 found that since R.C. 4123.88 prohibits the release of information from workers' compensation claim files, the files are subject to the public records exception for "records the release of which is prohibited by state or federal law." In this regard, the opinion stated:

I realize that the courts of this state, as well as this office in rendering opinions in the past, have broadly construed the statutes relating to public records in order to facilitate the public's access to a great variety of government records and documents. It is, however, clear that because the General Assembly has required the prior approval of certain persons to examine claim files, it did not consider claim files and the information contained therein to be "public records." R.C. 4123.88 places workmen's compensation claim files within the specific exception from the definition of a "public record" set forth in R.C. 149.43 pertaining to records the release of which is prohibited by state or federal law.

1975 Op. Att'y Gen. No. 75-062 at 2-254 (citations omitted). In accordance with this analysis, the opinion determined that workers' compensation claims files are excepted from the definition of public record in R.C. 149.43 "because R.C. 4123.88 specifically prohibits the examination or release of any claim file without the express prior authorization of the claimant, employer, a member of the Industrial Commission, or the Administrator of the Bureau of Workmen's Compensation." *Id.* (syllabus, paragraph one).

Although 1975 Op. Att'y Gen. No. 75-062 determined that workers' compensation claim files are not public records, the opinion did find that certain materials within claim files are public records. As stated in the opinion at 2-255 and 2-256:

There are other provisions governing the operations of the Industrial Commission which indicate that notwithstanding R.C. 4123.88 some items which may be contained in a claim file are public records. R.C. 4121.10, which requires that all sessions of the Industrial Commission be open to the public, provides as follows:

"The industrial commission shall be in continuous session and open for the transaction of business during all business hours of every day excepting Sundays and legal holidays. The sessions of the commission shall be open to the public and shall stand and be adjourned without further notice thereof on its record. All of the proceedings of the commission shall be shown on its record, which

shall be a public record, and all voting shall be had by calling the name of each member of the industrial commission by the secretary, and each member's vote shall be recorded on the record of proceedings as cast. The commission shall keep a separate record of its proceedings relative to claims coming before it for compensation for injured and the dependents of killed employees, which record shall contain its findings and the award in each such claim for compensation considered by it, and in all such claims the reasons for the allowance or rejection thereof shall be stated in said record." (Emphasis added.)

Thus, pursuant to R.C. [4121.10], the Industrial Commission is required to keep, and any member of the public is permitted to inspect, records of its proceedings relative to claims for compensation presented for the Commission's consideration. Accordingly, the Commission's findings, awards and each member's vote as cast in all such claims are public records. Moreover, because all proceedings of the Commission are open to the public, transcripts and evidence introduced, if any, at such public hearings are also public records.

See State ex rel. Szalay v. Industrial Comm'n, 130 Ohio St. 269, 199 N.E. 76 (1935); *see also* R.C. 4121.36(E) ("[a]ll meetings of the [industrial] commission and district and staff hearing officers shall be public").

Because all records of the proceedings, findings, awards, and votes of Industrial Commission members in claims for compensation and the transcripts and evidence introduced at public hearings are public records pursuant to R.C. 4121.10,¹ the opinion found that such records, transcripts, and evidence are public records even if they are filed within a workers' compensation claim file. Therefore, 1975 Op. Att'y Gen. No. 75-062 concluded that, except for records of the proceedings, findings, awards, and votes of Industrial Commission members in claims for compensation and the transcripts and evidence introduced at public hearings that are included in a workers' compensation claim file, information within workers' compensation claim files is excepted from the definition of "public record" set forth in R.C. 149.43(A)(1).

Subsequent to the rendering of 1975 Op. Att'y Gen. No. 75-062, the Ohio Supreme Court decided the case of *State ex rel. Plain Dealer Publishing Co. v. Krouse*, 51 Ohio St. 2d 1, 364 N.E.2d 854 (1977). During the course of discussing whether remittance advice forms, which are issued in conjunction with state warrants to individuals or institutions providing medically related services or supplies to workmen's compensation claimants, are public records, the court stated:

In support of the assertion that the release of [Remittance Advice Forms] is prohibited by state law, the respondents cite R.C. 4123.88, which provides, in part that "[n]o person shall, without prior authority from a member of the commission, the claimant, or the employer, examine or directly or indirectly cause or employ another person to examine any claim file or any other file pertaining

¹ I note that R.C. 4121.10 has not been amended since the writing of 1975 Op. Att'y Gen. No. 75-062.

thereto." These forms are not placed in claim files, but they might conceivably be considered part of some "other file pertinent thereto." However, *the language of R.C. 4123.88 does not in any event prohibit the release of such files*, but only requires prior authorization by a member of the commission, the claimant, or the employer. Under R.C. 4121.10, the findings and awards of the commission are matters of public record and as such available to the public upon request under R.C. 149.43. Where the commission has determined to allow a claim or award, a notation of that decision such as a Remittance Advice Form is also a public record, and the provisions of R.C. 4123.88 do not prohibit its release. (Emphasis added.)

Id. at 3, 364 N.E.2d at 856. The court thus indicated that R.C. 4123.88 does not prohibit the Bureau from disclosing information in workers' compensation claim files or files pertinent thereto. Therefore, information within a claim file that is not otherwise excepted from the definition of "public record" set forth in R.C. 149.43(A)(1) is a public record which is subject to disclosure pursuant to R.C. 149.43(B) when the Bureau, a member of the Industrial Commission, the claimant, or the employer has authorized the examination of the claim file as required by R.C. 4123.88. *See generally* 1939 Op. Att'y Gen. No. 1071, vol. II, p. 1531.

In light of the Ohio Supreme Court's decision in *State ex rel. Plain Dealer Publishing Co. v. Krouse* that R.C. 4123.88 does not prohibit the release of information within workers' compensation claim files, I overrule 1975 Op. Att'y Gen. No. 75-062 to the extent that it is inconsistent with the decision reached in that case. *See* 1989 Op. Att'y Gen. No. 89-098 at 2-479 ("when a court of competent jurisdiction has rendered a decision which is in conflict with an opinion of the Attorney General, the interpretation of the statute by the court of competent jurisdiction should be followed"). Thus, information within a workers' compensation claim file that does not fall within one of the exceptions listed in R.C. 149.43(A)(1) is a public record which must be disclosed to the public pursuant to R.C. 149.43(B) when the Bureau, a member of the Industrial Commission, the claimant, or the employer has authorized the examination of the claim file as required by R.C. 4123.88.

I turn now to the issue whether information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition falls within one of the exceptions specified in R.C. 149.43(A)(1). As stated above, R.C. 149.43(A)(1) expressly excludes the release of records which would violate state or federal law. Accordingly, if the Bureau is prohibited by state or federal law from releasing information relating to an individual's affliction with AIDS or an AIDS-related condition, the Bureau is not required to disclose such information even if it is contained within a workers' compensation claim file. *See State ex rel. Beacon Journal Publishing Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994); *see also State ex rel. Fostoria Daily Review Co. v. Fostoria Hosp. Assn.*, 44 Ohio St. 3d 111, 541 N.E.2d 587 (1989). *But see State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St. 3d 374, 662 N.E.2d 334 (1996).

In *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, *supra*, the Ohio Supreme Court recognized that every individual enjoys a federal constitutional "right to privacy which protects against governmental disclosure of the private details of one's life." *Id.* at 608, 640 N.E.2d at 167; *see Nixon v. Administrator of Gen. Serv.*, 433 U.S. 425 (1977); *Whalen v. Roe*, 429 U.S. 589 (1977). An individual's constitutional right to privacy prohibits a governmental entity from publicly disclosing highly sensitive personal information concerning that individual.

See, e.g., *State ex rel. Beacon Journal Publishing Co. v. City of Akron* (since the disclosure of a city employee's social security number would violate his constitutional right to privacy, a city is prohibited from releasing an employee's social security number); *Doe v. City of Cleveland*, 788 F. Supp. 979 (N.D. Ohio 1991) (the United States Constitution protects private individuals from disclosure by the government of personal information). Moreover, since the public disclosure of an individual's personal information violates an individual's constitutional right to privacy, the release of such information is prohibited by federal law. *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, 70 Ohio St. 3d at 607, 640 N.E.2d at 166.

With respect to your specific question, I note that various courts in Ohio and elsewhere have determined that an individual "has a constitutional right to privacy which protects against public disclosure of the results of an HIV test or diagnosis of AIDS or an AIDS-related condition." *Arnold v. American Nat'l Red Cross*, 93 Ohio App. 3d 564, 580, 639 N.E.2d 484, 495 (Cuyahoga County 1994); accord *Doe v. Attorney General of the United States*, 941 F.2d 780, 796 (9th Cir. 1991); *Doe v. Town of Plymouth*, 825 F. Supp. 1102, 1107 (D. Mass. 1993); *Doe v. City of Cleveland*, 788 F. Supp. 979, 984-85 (N.D. Ohio 1991); *Doe v. Borough of Barrington*, 729 F. Supp. 376, 382-85 (D. N.J. 1990); *Woods v. White*, 689 F. Supp. 874 (W.D. Wis. 1988), *aff'd mem.*, 899 F.2d 17 (7th Cir. 1990); *Doe v. University of Cincinnati*, 42 Ohio App. 3d 227, 538 N.E.2d 419 (Franklin County 1988); *Hillman v. Columbia County*, 164 Wis. 2d 376, 400-02, 474 N.W.2d 913, 922-23 (Ct. App. 1991). These courts have determined that there are few areas which more closely intimate facts of a personal nature than one's HIV status. As stated in *Doe v. Borough of Barrington*, 729 F. Supp. at 384:

The sensitive nature of medical information about AIDS makes a compelling argument for keeping this information confidential. Society's moral judgments about the high-risk activities associated with the disease, including sexual relations and drug use, make the information of the most personal kind. Also, the privacy interest in one's exposure to the AIDS virus is even greater than one's privacy interest in ordinary medical records because of the stigma that attaches with the disease. The potential for harm in the event of a nonconsensual disclosure is substantial....

Accord *Woods v. White*, 689 F. Supp. at 876.

I find the reasoning employed in the aforementioned cases persuasive. It is difficult to believe that information regarding one's HIV status is not information of the most personal kind, or that an individual would not have an interest in protecting against the dissemination of such information. I am of the view, therefore, that an individual has a federal constitutional right to privacy that protects against the public disclosure of an individual's HIV status.

An individual's privacy interest in such information is not absolute, however. Rather, it must be determined whether the societal interest in disclosure outweighs an individual's right to privacy. See *State ex rel. Beacon Journal Publishing Co. v. City of Akron*; see also *Doe v. City of Cleveland*.

Upon balancing the privacy interests of an individual against the public's interests, I find that the Bureau's interest in the dissemination of information in a workers' compensation claim

file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition does not outweigh the substantial privacy interest involved. There is no important governmental interest to be served by the disclosure of such information by the Bureau. The disclosure of such information does not advance a governmental interest in preventing the spread of AIDS. Nor is society's interest in a safe and adequate blood supply imperiled by the nondisclosure of this information by the Bureau. Moreover, the disclosure of an individual's HIV status could be extremely harmful to the individual. As noted above, the potential for harm in the event of a nonconsensual disclosure is substantial because of the hideous stigma and harassment that comes with public knowledge of one's affliction with AIDS or an AIDS-related condition. *See generally Doe v. Borough of Barrington*, 729 F. Supp. at 384 n.8 (listing numerous examples of the hysteria AIDS provokes).

In light of the harm to an individual's reputation, the hostility towards AIDS victims, and the lack of any countervailing governmental interest in favor of disclosure, I believe that the release of information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition implicates constitutionally protected privacy interests which outweigh the public's interest in disclosure. Accordingly, the United States Constitution forbids the Bureau from disclosing information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition.

In addition to a federal constitutional right to privacy, individuals diagnosed as having AIDS or an AIDS-related condition may be afforded additional protection under a federal legislative scheme such as the Americans with Disabilities Act, which is set forth in 42 U.S.C. § 12101-213 (1994). *See generally* 29 C.F.R. § 36.104 (1996) (for purposes of 42 U.S.C. § 12181, which prohibits discrimination on the basis of disability by public accommodations, the term "disability" includes HIV disease (whether symptomatic or asymptomatic)). Whether in a given situation an individual qualifies for protection under such a legislative scheme, however, is a factual question which must be answered on a case-by-case basis; thus, it is beyond the scope of this opinion.

Because the disclosure of information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition violates the individual's constitutional right to privacy, the release of such information is prohibited by federal law. Consequently, information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition is not a "public record," as described in R.C. 149.43(A)(1). Therefore, such information is not subject to disclosure under R.C. 149.43(B).

Based on the foregoing, it is my opinion and you are advised as follows:

1. Information within a workers' compensation claim file that does not fall within one of the exceptions listed in R.C. 149.43(A)(1) is a public record which must be disclosed to the public pursuant to R.C. 149.43(B) when the Bureau of Workers' Compensation, a member of the Industrial Commission, the claimant, or the employer has authorized the examination of the claim file as required by R.C. 4123.88. (1975 Op. Att'y Gen. No. 75-062 (syllabus, paragraph one), overruled.)

2. Information in a workers' compensation claim file that indicates that an individual has been diagnosed as having AIDS or an AIDS-related condition is not a public record, as defined in R.C. 149.43(A)(1), which the Bureau of Workers' Compensation must disclose to the public under R.C. 149.43(B).