

OPINION NO. 94-006**Syllabus:**

1. Pursuant to R.C. 149.43(B), the county recorder must make the public records of that office available to the public for inspection at all reasonable times during regular business hours and must make copies of such records available within a reasonable period of time. R.C. 149.43(B) does not entitle the public to remove public records from the office of the county recorder.
2. For the performance of the service described in R.C. 317.32(I), the county recorder must charge all persons, without exception, the fee prescribed therein for that service.
3. If a person requests copies of public records stored by the county recorder on microfiche or film, R.C. 149.43(B) requires the county recorder to 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 has presented a legitimate reason why a paper copy of the records would not be sufficient or practicable, and if the person assumes the expense of making a copy in that medium, in lieu of the photocopying fee prescribed by R.C. 317.21(I).

To: Alan R. Mayberry, Wood County Prosecuting Attorney, Bowling Green, Ohio

By: Lee Fisher, Attorney General, March 18, 1994

You have requested an opinion concerning records maintained by the county recorder. You specifically ask:

1. Are members of the public allowed to remove deed, mortgage, or other record books from the recorder's office to make copies thus avoiding the statutory fees for the same?
2. Can the county recorder charge less than the \$1.00 per page photocopying charge under [R.C. 317.32(I)] to certain attorneys, title companies, etc.?
3. If a microfiche has a hundred documents or a roll of film contains five hundred documents, can a member of the public pay for the cost to reproduce such fiche or roll rather than pay the \$1.00 per page charge under [R.C. 317.32(I)]?

Duties of County Recorder

In order to answer your questions, it is first necessary to examine the statutory scheme governing the county recorder's duties generally with respect to deeds, mortgages, and other records. As stated in *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 114, 173 N.E.2d 758, 760 (1961): "A county recorder is an elected public official charged with the performance of

duties as prescribed by statute." For example, R.C. 317.08 imposes upon the county recorder the duty of keeping various records, including deeds, mortgages, powers of attorney, plats, leases, and corrupt activity lien notices. *See also e.g.*, R.C. 317.081 (county and township zoning resolutions); R.C. 317.09 (recording and filing notices of federal tax liens); R.C. 317.10 (notice of matters in bankruptcy); R.C. 317.18 (maintenance of direct and reverse indexes).

With respect to such records, R.C. 317.13 states, in part:

The county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic process, all deeds, mortgages, plats, or other instruments of writing required or authorized to be recorded, presented to him for that purpose.... On the record of each instrument he shall record the date and precise time such instrument was presented for record. All records made, prior to July 28, 1949, by means authorized by this section or by [R.C. 9.01]¹ shall be deemed properly made. (Footnote added.)

Further responsibilities are imposed upon the office of county recorder by R.C. 317.07, which states in part: "On going out of office, each county recorder shall deliver to his successor the seal of office, all books, records, and other instruments of writing belonging to the office, and take his receipt for them."²

Public's Right of Inspection Under R.C. 149.43

The public's right of access to "public records" is established in R.C. 149.43, which states in relevant part:

(B) 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 a manner that they can be made available for inspection in accordance with this division. (Emphasis added.)

¹ R.C. 9.01 authorizes county officers, among others, to record or reproduce certain records by various means, including the microfilm process.

² R.C. Chapter 149 imposes upon public offices, as defined in R.C. 149.011(A), including county officers, various duties with respect to the maintenance of their records. Specifically, R.C. 149.351(A) states in pertinent part:

All records 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 commission provided for under [R.C. 149.38 -.42].... Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

For purposes of R.C. Chapter 149, the term "public record" means, with certain exceptions, "any record that is 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).

The right granted to the public by R.C. 149.43(B) is to have public records "available for inspection...at all reasonable times during regular business hours." R.C. 149.43(B) also states that the person responsible for any public records must, upon request, "make copies available at cost, within a reasonable period of time." Further, where records are kept by any of the methods described in R.C. 9.01, that statute requires that: "All persons utilizing the methods described in this section for keeping records and information shall keep and make readily available to the public the machines and equipment necessary to reproduce the records and information in a readable form."

The requirements of R.C. 149.43(B) were recently addressed in *State ex rel. Fenley v. Ohio Historical Society*, 64 Ohio St.3d 509, 597 N.E.2d 120 (1992). At issue in that case was whether R.C. 149.43 requires a custodian of public records to make copies available by mail. In interpreting the language of R.C. 149.43(B), the court stated:

The statute literally requires only that public records be made "available" for inspection "at all reasonable times during regular business hours." The statute further requires the custodian of the records to make copies "available at cost."

.... We find that the language of R.C. 149.43 is clear and unambiguous. A custodian of public records who makes those records available for inspection, and who makes copies available upon request *at the governmental unit's place of business*, fulfills the responsibilities placed upon him or her by R.C. 149.43....

.... Furthermore, R.C. 149.43(B) establishes a standard with which custodians of public records must comply: to make the records available for inspection during business hours and to make copies available at cost. But, the statute also affords a measure of discretion, which this court has held to govern the method of compliance. *State ex rel. Recodat v. Buchanan* (1989), 46 Ohio St. 3d 163, 165, 546 N.E.2d 203, 205; *State ex rel. Margolius v. Cleveland* (1992), 62 Ohio St. 3d 456, 461, 584 N.E.2d 665, 670 ("R.C. 149.43 requires the message, not the medium, to be disclosed."). Thus, *a custodian of public records who complies with the access requirements specified in R.C. 149.43(B) should have some discretion to determine what if any additional access he or she will permit.*

Id. at 511-12, 597 N.E.2d at 122-123 (emphasis added). See also *State ex rel. Nelson v. Fuerst*, 66 Ohio St. 3d 47, 48, 607 N.E.2d 836, 837 (1993) ("R.C. 149.43 does not require custodians to mail either copies of public records or the records themselves"). Thus, the custodian of public records must comply with the access and copy requirements of R.C. 149.43(B) as described in *State ex rel. Fenley v. Ohio Historical Society*. R.C. 149.43 does not, however, entitle the public to remove public records from the custody of the person responsible for the maintenance of those records.

Application of R.C. 149.43 to Records of County Recorder

In the situation you describe, members of the public have asked to remove deed, mortgage, and other records from the county recorder's office in order to make their own copies elsewhere and thus avoid the statutory fees that the county recorder charges for making

photocopies. *See generally* R.C. 317.32(I) (establishing fee that county recorder may charge "for photocopying a document, other than at the time of recording and indexing as provided for in [R.C. 317.32(A)], one dollar per page"). Because the office of county recorder is a county office, *see* R.C. 317.01, records kept by the county recorder constitute public records for purposes of R.C. Chapter 149. According to *State ex rel. Fenley v. Ohio Historical Society* and *State ex rel. Nelson v. Fuerst*, R.C. 149.43 requires only that the county recorder make the records of that office available for inspection at all reasonable times and to make copies thereof available at that location. R.C. 149.43 does not, however, require the county recorder to allow the public to remove such records from the recorder's office.

Fees to be Charged by the County Recorder

Your second question asks whether the county recorder may charge certain attorneys and other persons less than the \$1.00 per page photocopying charge prescribed by R.C. 317.32(I). The fees that the county recorder may charge for the services he renders are prescribed primarily by R.C. 317.32, which states in part:

For his services, the county recorder *shall charge and collect* the following fees:

(A) For recording and indexing an instrument when the photocopy or any similar process is employed, fourteen dollars for the first two pages and four dollars for each subsequent page, size eight and one-half inches by fourteen inches, or fraction of a page, including the caption page, of such instrument;

...

(I) *For photocopying a document*, other than at the time of recording and indexing as provided for in division (A) of this section, *one dollar per page*, size eight and one-half inches by fourteen inches, or fraction thereof. (Emphasis added.)

The use of the word "shall" in describing the county recorder's duties under R.C. 317.32 indicates the General Assembly's intent that the duties so described are mandatory. *See Dorrian v. Scioto Conservancy District*, 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction...the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal intent that [it] receive a construction other than [its] ordinary usage"). Thus, 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. Because R.C. 317.32(I) contains no exception to the charging of fees for the service described therein, the county recorder has no authority to create such exception. *See* 1936 Op. Att'y Gen. No. 5383, vol I, p. 451 (syllabus) ("[a] county recorder is required to record all proper instruments and must charge for his services the fees enumerated in section 2778, General Code [now R.C. 317.32]. The county recorder is unauthorized to reduce these fees where the party who presents the instrument for recording prepares the proper forms used in recording such instrument"). The county recorder may not, therefore, charge some individuals or entities less than one dollar per page for photocopying a document.

Form of Reproduction of Public Records

Your final question asks: "If a microfiche has a hundred documents or a roll of film contains five hundred documents, can a member of the public pay for the cost to reproduce such fiche or roll rather than pay the \$1.00 per page charge under [R.C. 317.32(I)]?" The manner in which public records must be copied for the public in accordance with R.C. 149.43 was recently addressed by the Ohio Supreme Court in *State ex rel. Margolius v. City of Cleveland*,

62 Ohio St. 3d 456, 584 N.E.2d 665 (1992). Presented for the court's consideration was the issue of "whether the public is entitled to a copy of the public information on the tapes [containing records of the city's police activity] in computer-readable form in lieu of a paper copy of their contents, or alternatively whether computer tapes containing public, nonproprietary records are themselves public records." *Id.* at 458, 584 N.E.2d at 668.

The *Margolius* court began its analysis by acknowledging that the records stored on the computer tapes were public records.³ The court then referred to its decision in *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 527 N.E.2d 1230 (1988), where it held that a compilation of information gathered from public records is itself a separate public record and is, therefore, subject to disclosure under R.C. 149.43. The *Schweikert* court had reasoned that the public should not have the unreasonable burden of gathering information that already has been compiled and organized by public officials at public expense.

By way of analogy to the situation before the court in *Schweikert*, the *Margolius* court reasoned as follows:

Similarly, a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records.

....[T]he manner in which the records are organized can add to the value of the information contained within those records. When such value is added, a new set of enhanced public records is created that must be disclosed to the public.

In a similar vein, a set of public records stored in an organized fashion on a magnetic medium also contains an added value that inherently is a part of the public record. Here, the added value is not only the organization of the data, but also the compression of the data into a form that allows greater ease of public access.

Id. at 460, 584 N.E.2d at 669. Based upon this reasoning, the *Margolius* court held that:

[A] governmental agency must allow the copying of the portions of computer tapes to which the public is entitled pursuant to R.C. 149.43, if the person requesting the information has presented a legitimate reason why a paper copy of the records would be insufficient or impracticable, and if such person assumes the expense of copying.

Id. See also *State ex rel. Athens County Property Owners Assn., Inc. v. City of Athens*, 85 Ohio App. 3d 129, 619 N.E.2d 437 (Athens County 1992) (person responsible for public records does not comply with R.C. 149.43 by providing only hard copy of public records that were normally stored on electronic medium at taxpayer expense and that would be "unreasonably expensive" to replicate from hard copy).

³ The court in *State ex rel. Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 459, 584 N.E.2d 665, 668 (1992), limited its decision in *State ex rel. Recodat Co. v. Buchanan*, 46 Ohio St. 3d 163, 546 N.E.2d 203 (1989), as follows: "we limit that decision to the unique facts of that case, and to the proposition that proprietary software does not constitute a public record under R.C. 149.43, even if such software is necessary in order to read public information contained on computer tapes." You have not asked about, and thus this opinion will not address, the copying of proprietary software.

Applying the holding of *Margolius* to the question you ask, it appears that 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 the information has presented a legitimate reason why a paper copy of the records would not be sufficient or practicable, and 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. 317.21(I).

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that:

1. Pursuant to R.C. 149.43(B), the county recorder must make the public records of that office available to the public for inspection at all reasonable times during regular business hours and must make copies of such records available within a reasonable period of time. R.C. 149.43(B) does not entitle the public to remove public records from the office of the county recorder.
2. For the performance of the service described in R.C. 317.32(I), the county recorder must charge all persons, without exception, the fee prescribed therein for that service.
3. If a person requests copies of public records stored by the county recorder on microfiche or film, R.C. 149.43(B) requires the county recorder to 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 has presented a legitimate reason why a paper copy of the records would not be sufficient or practicable, and if the person assumes the expense of making a copy in that medium, in lieu of the photocopying fee prescribed by R.C. 317.21(I).