

November 29, 2017

The Honorable David Kelley
Adams County Prosecuting Attorney
Courthouse
110 West Main Street, Room 112
West Union, Ohio 45693

SYLLABUS:

2017-042

Pursuant to R.C. 2151.313 and R.C. 149.43(A)(1)(v), fingerprints or photographs of a child obtained or taken under R.C. 2151.313(A)(1) or (2), copies of fingerprints or photographs of that nature, or records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature, are not “public records,” as that term is used in R.C. 149.43, unless: (1) the originals and copies of fingerprints and photographs taken under R.C. 2151.313(A)(2) of a child described in R.C. 2151.313(B)(3), and any records of the arrest or custody that was the basis for the taking of the fingerprints or photographs, are transferred by a law enforcement agency pursuant to R.C. 2151.313(B)(3)(b)(ii) to files that are used for the retention of fingerprints and photographs taken of adults who are arrested for, otherwise taken into custody for, or under investigation for the commission of a criminal offense, and (2) the transferred records are not otherwise excluded from the definition of “public record” by any of the exceptions in R.C. 149.43(A)(1)(a)-(ff). (1990 Op. Att’y Gen. No. 90-101, syllabus, paragraph 3, modified and clarified).



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OPINION NO. 2017-042

The Honorable David Kelley
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110 West Main Street, Room 112
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Dear Prosecutor Kelley:

We have received your request whether certain records of a child who has been fingerprinted or photographed pursuant to R.C. 2151.313 are “public records” under R.C. 149.43. “R.C. 149.43 designates certain records as public records and provides for public access to such records.” 1983 Op. Att’y Gen. No. 83-003, at 2-9; *see also State ex rel. DiFranco v. City of S. Euclid*, 144 Ohio St. 3d 565, 2015-Ohio-4914, 45 N.E.3d 981, at ¶17 (“R.C. 149.43(B) requires that public records be made accessible and available upon request”). R.C. 149.43(B)(1) provides, in part: “Upon request . . . , all public records responsive to the request shall be promptly prepared and made available for inspection” or shall be copied “within a reasonable period of time.” R.C. 149.43(A)(1) states that “public record,” as used in R.C. 149.43, “means records kept by any public office,” except for those records delineated in R.C. 149.43(A)(1)(a)-(ff). *See* R.C. 149.011(A) (defining “public office”); R.C. 149.011(G) (defining “records”). R.C. 149.43(A)(1)(a)-(ff) exclude from the definition of “public record” a variety of records, including, as set forth in R.C. 149.43(A)(1)(v), “[r]ecords the release of which is prohibited by state or federal law.”

Divisions (A)(1) and (2) of R.C. 2151.313 authorize a law enforcement officer or other authorized person to fingerprint or photograph a child in the investigation of any violation of law with the consent of a juvenile judge or, without such consent, under the circumstances set forth in those divisions.¹ R.C. 2151.313(D)(3) prohibits a person from knowingly releasing originals

¹ R.C. 2151.313 does not apply to a child who “has been arrested or otherwise taken into custody for committing, or has been adjudicated a delinquent child for committing, an act that would be a felony if committed by an adult or has been convicted of or pleaded guilty to committing a felony,” R.C. 2151.313(A)(3)(a), or when “[t]here is probable cause to believe that the child may have committed an act that would be a felony if committed by an adult,” R.C. 2151.313(A)(3)(b).

or copies of fingerprints or photographs of a child taken or obtained under R.C. 2151.313(A)(1) or (2), “or records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature other than in accordance with [R.C. 2151.313(B) or (C)].” Thus, pursuant to R.C. 149.43(A)(1)(v), if R.C. 2151.313(B) and (C) prohibit the release of the fingerprints, photographs, or records described in R.C. 2151.313(D)(3), those records are not “public records” for the purpose of R.C. 149.43.

R.C. 2151.313(B) and (C) primarily restrict the release of a child’s fingerprints, photographs, and records to courts and other law enforcement agencies. *See* R.C. 2151.313(B)(1)-(2) (setting forth the retention period during which a law enforcement agency is required to retain a child’s fingerprints, photographs, and records, and providing the circumstances under which the fingerprints, photographs, and records shall be delivered to the juvenile court); R.C. 2151.313(B)(4) (requiring a child’s fingerprints, photographs, and records to be sealed or destroyed in accordance with a sealing or expungement order issued under R.C. 2151.356-.358); R.C. 2151.313(C)(1)-(2) (prohibiting a law enforcement agency, during the retention periods set forth in R.C. 2151.313(B)(1)-(2), from releasing a child’s fingerprints, photographs, and records other than to a court with jurisdiction over the child’s case or to other law enforcement officers, or from using the fingerprints, photographs, and records other than for investigatory purposes). Relying upon these restrictions, opinions of the Attorney General have recognized, either explicitly or by implication, that, pursuant to R.C. 149.43(A)(1)(v) and R.C. 2151.313, fingerprints or photographs of a child obtained or taken under R.C. 2151.313(A)(1) or (2), copies of fingerprints or photographs of that nature, or records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature, are not “public records” under R.C. 149.43. *See, e.g.*, 1990 Op. Att’y Gen. No. 90-101 (syllabus, paragraph 3) (“[i]f, pursuant to R.C. 2151.313, a law enforcement officer or other authorized person takes fingerprints or photographs of a juvenile arrested or taken into custody, the fingerprints, photographs and other records relating to that arrest or custody of the juvenile are not public records”); 1987 Op. Att’y Gen. No. 87-010 (syllabus, paragraph 2) (“[i]f a law enforcement officer or other authorized person takes photographs and fingerprints of a juvenile taken into custody for a first-time drug or alcohol offense, records of that custody and of the photographs and fingerprints may be disclosed only as permitted by R.C. 2151.313”). A conclusion in one of these opinions, 1990 Op. Att’y Gen. No. 90-101, is the reason for your inquiry.

In 1990 Op. Att’y Gen. No. 90-101 (syllabus, paragraph 3), the Attorney General advised that the originals and copies of fingerprints and photographs of a child taken or obtained pursuant to R.C. 2151.313(A)(1) or (2), and records “relating to” the arrest or custody that was the basis of the taking of fingerprints or photographs, were not “public records” for the purpose of R.C. 149.43. You suggest that records “*relating to*” the arrest or custody that was the basis of the taking of the child’s fingerprints or photographs, as so described by the Attorney General in the 1990 opinion, includes a category of records that is broader than “records *of* the arrest or custody that was the basis of the taking of fingerprints or photographs,” as that phrase is used in

R.C. 2151.313(D)(3). Accordingly, you ask us to clarify whether the Attorney General's description of "records *relating to*" the child's arrest or custody in the 1990 opinion was meant to include the same or a different category of records as those the release of which is restricted by R.C. 2151.313(D)(3).

Webster's New World College Dictionary 1014 (5th ed. 2014) defines "of" to mean, among other things, "concerning; about; with reference to." Therefore, the phrase, "records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature," as used in R.C. 2151.313(D)(3), means records concerning, about, or with reference to, the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature. *See generally* R.C. 1.42 ("phrases shall be read in context and construed according to the rules of grammar and common usage"). *Webster's New World College Dictionary* 1225 defines "relate" to mean "to have some connection or relation (*to*)." Although it is possible to read the term, "relating to," more expansively than the terms, "concerning," "about," "or with reference to," it is clear from the Attorney General's reasoning in 1990 Op. Att'y Gen. No. 90-101 that it was not the intent of that opinion to describe records different from those the release of which is restricted by R.C. 2151.313(D)(3). The Attorney General stated in that opinion:

R.C. 2151.313(D) restricts the disclosure of juvenile justice records when fingerprints or photographs of a juvenile are taken, by stating:

No person shall knowingly do any of the following:

....

(3) Use or release fingerprints or photographs of a child obtained or taken under division (A)(1) or (2) of this section, copies of any such fingerprints or photographs, or records of the arrest or custody that was the basis of the taking of any such fingerprints or photographs other than in accordance with division (B) or (C) of this section.

....

Since exceptions to the Public Records Act must be construed narrowly so that doubt as to the applicability of an exception is resolved in favor of disclosure, ... *R.C. 2151.313 limits access only to those records specifically enumerated [therein]*. I applied this stricture in Op. No. 87-010 at 2-59, when I stated:

Because R.C. 2151.313(D)(3) protects from disclosure only fingerprints and photographs, copies of fingerprints and photographs, and 'records of [an] arrest or custody that was the basis of the taking of any ... fingerprints or photographs,' I find that the statute does not forbid the disclosure of records of an arrest or custody that was *not* the basis of the taking of any fingerprints and photographs.

1990 Op. Att'y Gen. No. 90-101, at 2-446 to 2-447 (emphasis added).

As the above excerpt demonstrates, the Attorney General's reference in 1990 Op. Att'y Gen. No. 90-101 (syllabus, paragraph 3) to records "relating to" the arrest or custody that was the basis for the taking of fingerprints or photographs was meant to describe the same records as those governed by R.C. 2151.313(D)(3). However, to the extent that the word "relate" may not be an exact synonym for the preposition "of," we shall clarify the Attorney General's conclusion in 1990 Op. Att'y Gen. No. 90-101 (syllabus, paragraph 3).

When 1990 Op. Att'y Gen. No. 90-101 was issued, R.C. 2151.313(B) and (C) restricted the release of a child's fingerprints or photographs taken or obtained under R.C. 2151.313(A)(1) or (2) and records of the arrest or custody that was the basis of the taking of the fingerprints or photographs, to courts and other law enforcement agencies. The Attorney General relied upon these restrictions in advising without qualification that the fingerprints, photographs, and records were not "public records" under R.C. 149.43. 1990 Op. Att'y Gen. No. 90-101 (syllabus, paragraph 3). After the opinion's issuance, the General Assembly amended R.C. 2151.313 to authorize a law enforcement agency to release fingerprints or photographs of a child obtained or taken under R.C. 2151.313(A)(2), and records of the arrest or custody that was the basis of the taking of the fingerprints or photographs, as if the fingerprints, photographs, and records were that of an adult offender. *See* 1991-1992 Ohio Laws, Part II, 3471 (Sub. H.B. 198, eff. July 7, 1992) (adding division (B)(3) to R.C. 2151.313). Therefore, it is necessary to further modify the conclusion in 1990 Op. Att'y Gen. No. 90-101 (syllabus, paragraph 3) to reflect this statutory amendment.

R.C. 2151.313(B)(3) provides, in this regard:

If a child is adjudicated a delinquent child for violating [R.C. 2923.42] or for committing an act that would be a misdemeanor offense of violence if committed by an adult, or is convicted of or pleads guilty to a violation of [R.C. 2923.42], a misdemeanor offense of violence, or a violation of an existing or former municipal ordinance or law of this state, another state, or the United States that is substantially equivalent to [R.C. 2923.42] or any misdemeanor offense of violence ...

...

(b) [o]riginals and copies of fingerprints and photographs taken under [R.C. 2151.313(A)(2)], and any records of the arrest or custody that was the basis for the taking of the fingerprints or photographs, may be retained for the period of time and in the manner specified in division (B)(3)(b) of this section.

R.C. 2151.313(B)(3)(b) requires that the photographs and records described in that section "be retained and ... kept in a file separate and apart from all photographs taken of adults"

during the time period in which the child is under the age of eighteen years old. A law enforcement agency may maintain originals and copies of the child's fingerprints "in the files of fingerprints taken of adults." *Id.* When the child reaches the age of eighteen years old, R.C. 2151.313(B)(3)(b) requires that the fingerprints, photographs, and records be disposed of in accordance with R.C. 2151.313(B)(3)(b)(i) or (ii). R.C. 2151.313(B)(3)(b)(i) requires that the fingerprints, photographs, and records be disposed of in accordance with any order issued by a juvenile judge. If a juvenile judge has not issued an order providing for the disposition of the originals and copies of the child's fingerprints, photographs, and records, R.C. 2151.313(B)(3)(b)(ii) sets forth the manner in which those fingerprints, photographs, and records shall be disposed.

R.C. 2151.313(B)(3)(b)(ii) confers upon a law enforcement agency the discretion to dispose of the child's fingerprints, photographs, and records in one of two ways. First, a law enforcement agency may deliver the fingerprints, photographs, and records to the juvenile court. *Id.* Second, a law enforcement agency may "transfer [the fingerprints, photographs, and records] to the files that are used for the retention of fingerprints and photographs taken of adults who are arrested for, otherwise taken into custody for, or under investigation for the commission of a criminal offense."² *Id.* If a law enforcement agency chooses to transfer the fingerprints, photographs, and records to files that are used for the retention of fingerprints and photographs taken of adults, the child's transferred records "may be maintained, used, *and released* ... as if the fingerprints and photographs had been taken of, and as if the records pertained to, an adult who was arrested for, otherwise taken into custody for, or under investigation for the commission of a criminal offense." R.C. 2151.313(B)(3)(b)(ii) (emphasis added). Thus, when a law enforcement agency transfers a child's fingerprints, photographs, and records to files that are used for the retention of the fingerprints and photographs of adults pursuant to R.C. 2151.313(B)(3)(b)(ii), R.C. 2151.313 no longer restricts the release of the child's transferred fingerprints, photographs, and records to courts and other law enforcement agencies. Instead, the child's transferred fingerprints, photographs, and records may be released as if the fingerprints and photographs had been taken of, and as if the records pertained to, an adult who was arrested for, otherwise taken into custody for, or under investigation for the commission of a criminal offense.

R.C. 149.43(A)(1)(v) declares that "[r]ecords the release of which is prohibited by state or federal law" are not "public records" for the purpose of R.C. 149.43(B)(1). R.C. 2151.313(D)(3) prohibits the release of the originals and copies of a child's fingerprints or photographs obtained or taken pursuant to R.C. 2151.313(A)(1) or (2), or records of the arrest or

² If, pursuant to the retention policy set forth in R.C. 2151.313(B)(3)(b), a law enforcement agency placed the originals and copies of the child's fingerprints in the files of fingerprints taken of adults prior to the child attaining the age of eighteen years, the fingerprints need not be transferred with the child's photographs and records after the child reaches that age.

custody that was the basis of the taking of fingerprints or photographs of that nature, other than in accordance with R.C. 2151.313(B) or (C). R.C. 2151.313(B) and (C) restrict the release of such records to courts and other law enforcement agencies, except in the limited circumstances provided for in R.C. 2151.313(B)(3)(b)(ii). Accordingly, we conclude that pursuant to R.C. 2151.313 and R.C. 149.43(A)(1)(v), fingerprints or photographs of a child obtained or taken under R.C. 2151.313(A)(1) or (2), copies of fingerprints or photographs of that nature, or records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature, are not “public records,” as that term is used in R.C. 149.43, unless the originals and copies of fingerprints and photographs taken under R.C. 2151.313(A)(2) of a child described in R.C. 2151.313(B)(3), and any records of the arrest or custody that was the basis for the taking of the fingerprints or photographs, are transferred by a law enforcement agency pursuant to R.C. 2151.313(B)(3)(b)(ii) to files that are used for the retention of fingerprints and photographs taken of adults who are arrested for, otherwise taken into custody for, or under investigation for the commission of a criminal offense, and the transferred records are not otherwise excluded from the definition of “public record” by any of the exceptions in R.C. 149.43(A)(1)(a)-(ff).³

Based on the foregoing, it is my opinion, and you are hereby advised that pursuant to R.C. 2151.313 and R.C. 149.43(A)(1)(v), fingerprints or photographs of a child obtained or taken under R.C. 2151.313(A)(1) or (2), copies of fingerprints or photographs of that nature, or records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature, are not “public records,” as that term is used in R.C. 149.43, unless: (1) the originals and copies of fingerprints and photographs taken under R.C. 2151.313(A)(2) of a child described in R.C. 2151.313(B)(3), and any records of the arrest or custody that was the basis for the taking of the fingerprints or photographs, are transferred by a law enforcement agency pursuant to R.C. 2151.313(B)(3)(b)(ii) to files that are used for the retention of fingerprints and photographs taken of adults who are arrested for, otherwise taken into custody for, or under investigation for the commission of a criminal offense, and (2) the transferred records are not otherwise excluded

³ R.C. 2151.313 does not restrict the release of all records of a child who has been fingerprinted or photographed pursuant to R.C. 2151.313(A)(1) or (2). *See* 1990 Op. Att’y Gen. No. 90-101, at 2-447. The restrictions set forth in R.C. 2151.313 apply only to fingerprints or photographs of a child obtained or taken under R.C. 2151.313(A)(1) or (2), copies of fingerprints or photographs of that nature, or records of the arrest or custody that was the basis of the taking of fingerprints or photographs of that nature. Records that are not of the arrest or custody that was the basis of the taking of the fingerprints or photographs of a child pursuant to R.C. 2151.313(A)(1) or (2) are not excluded from the definition of “public record” by R.C. 2151.313. *See* 1990 Op. Att’y Gen. No. 90-101, at 2-447. Whether such records are “public records” for the purpose of R.C. 149.43(B)(1) depends upon whether (1) the records are kept by a public office and (2) the records are excluded from the definition of “public record” by another state or federal law or otherwise qualify under one of the other exceptions delineated in R.C. 149.43(A)(1)(a)-(ff).

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from the definition of “public record” by any of the exceptions in R.C. 149.43(A)(1)(a)-(ff). (1990 Op. Att’y Gen. No. 90-101, syllabus, paragraph 3, modified and clarified).

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a long, sweeping tail on the "e".

MICHAEL DEWINE
Ohio Attorney General