

**OPINION NO. 86-096****Syllabus:**

1. R.C. 122.42 does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for financial assistance other than loans under R.C. 122.39-.62. Further, R.C. 122.42 does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for a loan under R.C. 122.39-.62 where such information is not contained in either a financial statement or other financial data submitted to the Director of Development by a corporation, partnership, or person in connection with the loan application.
2. R.C. 122.78(C) does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for a loan under R.C. 122.78(A), unless such information is submitted to the Director of Development, the Controlling Board, or the Minority Development Financing Commission in connection with the loan application.
3. R.C. 166.05(E) does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for financial assistance under R.C. Chapter 166, unless such information is submitted to the Director of Development, the Development Financing Advisory Board, or the Controlling Board by a private sector person in connection with such financial assistance.
4. Neither R.C. 122.42 nor R.C. 122.78(C) prohibits the disclosure by the Department of Development of the actual number of jobs retained or created following the final approval of a loan under R.C. 122.39-.62 or R.C. 122.78(A) or other financial assistance under R.C. 122.39-.62.
5. R.C. 166.05(E) prohibits the disclosure of the actual number of jobs created or retained as a result of financial assistance granted under R.C. Chapter 166 where such information is contained in, or taken from, financial statements or other data submitted to the Director of Development, the Development Financing Advisory Board, or the Controlling Board by a private sector person in connection with such financial assistance.
6. R.C. 122.42, R.C. 122.78(C) and R.C. 166.05(E) do not prohibit the disclosure of the repayment status of any financial assistance provided under R.C. 122.39-.62, R.C. 122.78(A), or R.C. Chapter 166.

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**To: Clarence D. Pawlicki, Director, Department of Development, Columbus, Ohio**  
**By: Anthony J. Celebrezze, Jr., Attorney General, December 10, 1986**

I have before me your request for an opinion as to whether the Director of Development is required to keep certain records

confidential and, thus, not open to public inspection under R.C. 149.43. Your request concerns R.C. Chapters 122 and 166, which provide for, and govern, certain financial assistance programs administered by the Department of Development. You specifically inquire whether R.C. 122.42, R.C. 122.78(C), or R.C. 166.05(E) prohibits the disclosure of the following information:

1. a borrower's actual number of employees at the time an application for state financial assistance was made;
2. the actual number of jobs retained and/or created at any time following the final approval of state financial assistance for such a borrower;
3. the repayment history and/or current repayment status of a borrower with respect to loans or loan guarantees made by the Department of Development pursuant to its lending authority.

Pursuant to R.C. 149.43(B), information contained in a public record is available to the general public. The term "public record" is defined in R.C. 149.43(A)(1) as, "any record that is kept by any public office, including, but not limited to, state...units," with certain exceptions. R.C. 149.011(A) defines "public office" as including, "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." See R.C. 149.011(B) (defining "state agency" as including, "every department...established by the constitution and laws of this state for the exercise of any function of state government..."). The Department of Development is created by statute, see R.C. 121.02(O), for the purpose of exercising certain governmental functions, see, e.g., R.C. Chapter 122; R.C. Chapter 166. See generally 1985 Op. Att'y Gen. No. 85-011. Thus, the Department of Development is, for purposes of R.C. Chapter 149, a public office. As used in R.C. Chapter 149, the term "records" is defined as including, "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." R.C. 149.011(G). R.C. 149.40 imposes a duty upon the head of the Department of Development to:

cause to be made only such records as are necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and for the protection of the legal and financial rights of the state and persons directly affected by the agency's activities.

I will assume, therefore, that the types of information about which you ask are contained in items created, or received by, or coming within the jurisdiction of, the Department and serve to document the activities of the Department, such items thus constituting records kept by a public office for purposes of R.C. 149.43(A)(1).

There are, however, several types of records set forth in R.C. 149.43(A)(1) which are kept by a public office and which do not, for purposes of R.C. 149.43, constitute public

records. Specifically excepted from the definition of public records are "records the release of which is prohibited by state or federal law." R.C. 149.43(A)(1). You wish to know whether R.C. 122.42, R.C. 122.78(C), or R.C. 166.05(E) prohibits the release of certain information concerning potential borrowers.<sup>1</sup>

The first statute about which you ask, R.C. 122.42, states in part:

(A) The director of development shall:

(1) Receive applications for assistance under sections 122.39 to 122.62 of the Revised Code, and, after processing, forward them to the [Development Financing Advisory Board] together with necessary supporting information;

....  
Financial statements and financial data submitted to the director by any corporation, partnership or person in connection with a loan application, or any information taken from such statements or data for any purpose, shall not be open to public inspection.

Thus, R.C. 122.42 requires that all financial statements and financial data submitted to the Director of Development by any corporation, partnership, or person in connection with an application for a loan under R.C. 122.39-.62 and all information contained therein be kept confidential and not open to public inspection.<sup>2</sup>

The information about which you inquire is of three types: the number of persons employed by an applicant at the time of application for assistance, the actual number of jobs retained or created following approval of the application, and the applicant's repayment history or current repayment status with respect to loans or loan guarantees made by the Department of

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<sup>1</sup> R.C. 149.43(A)(1) also excepts from the definition of a "public record" trial preparation records, inter alia. Under certain circumstances, the information about which you ask could constitute trial preparation records. See R.C. 149.43(A)(4) (defining "trial preparation record"). Since your opinion request specifically asks whether the release of the information which you mention is prohibited by R.C. 122.42, R.C. 122.78(C), or R.C. 166.05(E), I will limit my discussion to the exception for records the release of which is prohibited by state or federal law and will not address whether such information is otherwise excluded from the definition of public records.

<sup>2</sup> In addition to lending funds, the Director of Development may, under R.C. 122.39-.62, provide other types of financial assistance to applicants. See, e.g., R.C. 122.451 (authorizing the Director of Development, with Controlling Board approval, to insure, or make advance commitments to insure, certain mortgage payments). Since the prohibition contained in R.C. 122.42 relates to information submitted in connection with "loan" applications, R.C. 122.42 does not appear to prohibit the release of information submitted to the Director in connection with any other type of financial assistance under R.C. 122.39-.62.

Development. In order to be subject to nondisclosure under R.C. 122.42, however, such information must be contained in, or taken from, a financial statement or other financial data submitted to the Director "in connection with a loan application" (emphasis added). R.C. 122.42. The clear intent of this provision is to encompass the contents of the financial statement and all other financial data submitted by a corporation, partnership, or person to the Director in the loan application process.<sup>3</sup>

If information concerning the number of persons employed by an applicant were contained in, or taken from, a financial statement or other financial data submitted to the Director by one of the specified entities in connection with a loan application, then such information would be required by R.C. 122.42 to be kept confidential. It is my understanding, however, that the number of persons employed by an applicant is not provided by the applicant in either the financial statement or other financial data submitted to the Director in connection with an application for a loan under R.C. 122.39-.62, although such information may be submitted at a later time. R.C. 122.42 does not, therefore, prohibit the release of such information. The second type of information about which you ask is the actual number of jobs retained or created following approval of a loan application, as opposed to a projection of how many jobs would be created or retained if the loan were approved. It is clear that since such information could not be determined prior to approval of an application for a loan, it could not be submitted as part of the loan application procedure, and, thus, does not fall within the type of information intended to be kept confidential by R.C. 122.42. Similarly, the repayment history or current repayment status with respect to a loan made by the Department under R.C. 122.39-.62 is information which obviously cannot be obtained prior to approval of a loan application, and is information compiled by the State, rather than information submitted by the applicant; R.C. 122.42 does not, therefore, prohibit the release of such information. Part of your question is whether the repayment history or current repayment status with respect to a loan guarantee made by the Department under R.C. 122.39-.62 is information which must be kept confidential pursuant to R.C. 122.42. Since R.C. 122.42 specifies the information to be kept confidential as being that which is submitted in connection with a "loan application" and does not mention information compiled by the State or information submitted by an applicant in connection with other types of financial assistance provided under R.C. 122.39-.62, I

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<sup>3</sup> In this regard, I note that before the Director may lend funds under R.C. 122.43, he must make specific findings, one of which is that the contemplated project "is economically sound and will benefit the people of the state by increasing opportunities for employment and strengthening the economy of the state," R.C. 122.43(A). See also R.C. 122.45 (setting forth findings which the Director must make prior to approval of a loan to a political subdivision). R.C. 122.43 does not specify what information the Director may require in order to make the findings required by that section. It is, therefore, within the Director's discretion as to what information he may require of an applicant under R.C. 122.42. See generally State ex rel. Hunt v. Hildebrant, 93 Ohio St. 1, 112 N.E. 138 (1915).

conclude that R.C. 122.42 has no application to information concerning loan guarantees or their repayment status. See note 2. SUPRA.

The second statute mentioned in your opinion request, R.C. 122.78(C) states: "Financial statements and financial data submitted to the director, controlling board, or commission in connection with a loan application, or any information taken from such statements or data for any purpose, are not open to public inspection." This provision relates to those loans provided for in R.C. 122.78(A), which authorizes the Director of Development, upon recommendation of the Minority Development Financing Commission, see generally R.C. 122.72, and with Controlling Board approval, to loan money from the fund established in R.C. 122.82 to minority business enterprises and certain others for the purposes set forth in that division. The Director is empowered to make such loans when the Minority Development Financing Commission has made certain findings. See R.C. 122.78; 1 Ohio Admin. Code 127-1-13 (standards and requirements for minority business development loan application).

The information required to be kept confidential under R.C. 122.78(C) is only that information contained in, or taken from, financial statements or financial data submitted to the Director of Development, the Controlling Board, or the Minority Development Financing Commission in connection with an application for a loan under R.C. 122.78(A). As with the provisions of R.C. 122.42, discussed above, the fact that R.C. 122.78(C) specifies that such financial information be submitted in connection with a loan "application" makes it clear that only information which is submitted in the loan application process is subject to the prohibition against disclosure set forth in that statute. Thus, should a proposed borrower's number of employees at the time of applying for a loan be part of the financial statement or financial data submitted to one of the specified entities as part of the loan application process, R.C. 122.78(C) requires that such information be kept confidential. The actual number of jobs retained or created following approval of the loan, however, information which is impossible of compilation prior to approval of the loan, does not fall within the confidentiality requirement of R.C. 122.78(C). Similarly, since it is not possible to determine the repayment status of a borrower's loan prior to approval of the loan, such information cannot be submitted as part of the loan application process.<sup>4</sup> Further, such repayment information, as discussed above, would be compiled by the State and not submitted to one of the entities specified in R.C. 122.78(C). R.C. 122.78(C) does not, therefore, require that such information be kept confidential.

The last part of your question concerns the confidentiality requirements of R.C. 166.05(E) which states in part: "Financial statements and other data submitted to the director of development, the development financing advisory board, or the controlling board by any private sector person in connection with financial assistance under [R.C. Chapter 166], or any information taken from such statements or data for any purpose,

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<sup>4</sup> Since R.C. 122.78(A) does not concern loan guarantees, I assume that the portion of your question concerning the disclosure of loan guarantee repayments is not at issue with regard to the prohibition set forth in R.C. 122.78(C).

shall not be open to public inspection." R.C. 166.05(E) thus prohibits the disclosure of any information contained in a financial statement or other data which is submitted to the entities named in R.C. 166.05(E) "by any private sector person in connection with financial assistance under [R.C. Chapter 166]," not only information provided in connection with an application for such financial assistance. Thus, R.C. 166.05(E) prohibits the disclosure of any information contained in a financial statement or other data submitted by a private sector person in connection with any form of financial assistance under R.C. Chapter 166, whether submitted before or after approval of such financial assistance.

The assistance provided for in R.C. Chapter 166 is of two types, loan guarantees, R.C. 166.06, and loans, R.C. 166.07. Pursuant to R.C. 166.04, the Director of Development, prior to entering any agreement for assistance under R.C. Chapter 166, must determine that the assistance will conform to the requirements of the chapter. With respect to this duty, R.C. 166.05 states in part:

(A) In determining the projects to be assisted and the nature, amount and terms of assistance to be provided for an eligible project under Chapter 166. of the Revised Code:

(1) The director of development shall take into consideration all of the following:

(a) The number of jobs to be created or preserved, directly or indirectly;

(b) Payrolls, and the taxes generated, at both state and local levels, by the eligible project and by the employment created or preserved by the eligible project;

....  
(2) The benefits to the local area, including taxes, jobs, and reduced unemployment and reduced welfare costs, among others, may be accorded value in the leasing or sales of project facilities and in loan and guarantee arrangements.

(B) Prior to his final approval of the assistance to be provided, the director shall determine that the benefits to be derived by the state and local area from the establishment or development, and operation, of the eligible project will exceed the cost of providing such assistance and shall submit to the development financing advisory board and to the controlling board a copy of such determination including the basis for such determination.

(C) Prior to the submission provided for in division (B) of this section to the controlling board, the director shall submit to the development financing advisory board data pertinent to the considerations set forth in division (A) of this section, the terms of the proposed assistance, and such other relevant information as the development financing advisory board may request.

(D) The development financing advisory board shall, on the basis of such data, make recommendations as to the appropriateness of the assistance to be provided. Such recommendations may be revised to reflect any changes in the proposed assistance as the director may submit to the board. The recommendations, as amended, of the board as to the appropriateness of the proposed assistance shall be submitted to the controlling board.

It is apparent that the types of information which may be submitted by a private sector person in connection with the financial assistance provided under R.C. Chapter 166 are numerous, and specifically include the employment created or preserved by the project which is financially assisted. R.C. 166.05(E), therefore, prohibits the disclosure of the actual number of jobs created or retained as a result of the financial assistance granted under R.C. Chapter 166, where such data is contained in, or taken from, a financial statement or other data submitted by a private sector person to the Director of Development, the Development Financing Advisory Board, or the Controlling Board in connection with such financial assistance, whenever submitted. Although not specifically included as information which the Director shall consider in determining whether to grant financial assistance under R.C. Chapter 166, should a private sector applicant provide data in connection with such financial assistance indicating the number of persons employed by the applicant at the time of application, R.C. 166.05(E) would prohibit the disclosure of such information, whether submitted before or after approval of the application. The repayment history or current repayment status with respect to financial assistance provided under R.C. Chapter 166 is not data which would be submitted by any person granted such assistance, but, rather, is information which would be compiled by the State, and is not, therefore, encompassed within the prohibition against disclosure set forth in R.C. 166.05(E).

It is, therefore, my opinion and you are advised, that:

1. R.C. 122.42 does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for financial assistance other than loans under R.C. 122.39-.62. Further, R.C. 122.42 does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for a loan under R.C. 122.39-.62 where such information is not contained in either a financial statement or other financial data submitted to the Director of Development by a corporation, partnership, or person in connection with the loan application.
2. R.C. 122.78(C) does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for a loan under R.C. 122.78(A), unless such information is submitted to the Director of Development, the Controlling Board, or the Minority Development Financing Commission in connection with the loan application.
3. R.C. 166.05(E) does not prohibit the disclosure of the number of persons employed by an applicant at the time of application for financial assistance under R.C. Chapter 166, unless such information is submitted to the Director of Development, the Development Financing Advisory Board, or the Controlling Board by a private sector person in connection with such financial assistance.
4. Neither R.C. 122.42 nor R.C. 122.78(C) prohibits the disclosure by the Department of Development of the actual number of jobs retained or created following the final approval of a loan under R.C.

122.39-.62 or R.C. 122.78(A) or other financial assistance under R.C. 122.39-.62.

5. R.C. 166.05(E) prohibits the disclosure of the actual number of jobs created or retained as a result of financial assistance granted under R.C. Chapter 166 where such information is contained in, or taken from, financial statements or other data submitted to the Director of Development, the Development Financing Advisory Board, or the Controlling Board by a private sector person in connection with such financial assistance.
6. R.C. 122.42, R.C. 122.78(C) and R.C. 166.05(E) do not prohibit the disclosure of the repayment status of any financial assistance provided under R.C. 122.39-.62, R.C. 122.78(A), or R.C. Chapter 166.