

OPINION NO. 80-103**Syllabus:**

1. The information regarding the owners of unclaimed funds and the beneficiaries of life insurance coverage which is collected and maintained by the Department of Commerce pursuant to R.C. Chapter 169 qualifies as a personal information system as defined by R.C. Chapter 1347.
2. Pursuant to R.C. 149.43, the term "trial preparation records" includes only those records specifically compiled by a governmental unit after the unit's attention has focused upon a particular person or claim, in reasonable anticipation of a civil or criminal proceeding, and does not include those records routinely compiled by a governmental unit as a matter of common practice.
3. R.C. 169.06(C), which requires that an alphabetical listing of owners of unclaimed funds and beneficiaries of life insurance policies be made available to the general public, does not restrict access of the general public to records compiled by the Department of Commerce which are public records as defined by R.C. 149.43.
4. With the exception of trial preparation records, records compiled by the Department of Commerce pursuant to R.C. Chapter 169 are public records (as defined by R.C. 149.43), to which the general public is entitled to access.

To: J. Gordon Pettler, Director, Department of Commerce, Columbus, Ohio
By: William J. Brown, Attorney General, December 31, 1980

I have before me your request for an opinion regarding the accessibility of records pertaining to unclaimed funds, which are collected and maintained by the Director of the Department of Commerce pursuant to R.C. Chapter 169. Your specific questions are as follows:

1. Does the collection or group of related records containing personal information on the owners of unclaimed funds and, in the case of life insurance coverage, the beneficiaries constitute a personal information system?
2. Is the general public entitled to access of the records containing personal information or is access limited to information set forth in Section 169.06(C) of the Revised Code?
3. If the collection or group of related records containing personal information is not a personal information system, what information can be denied to the general public pursuant to Section 1347.08(F) of the Revised Code?

R.C. Chapter 169 provides for the administration of "unclaimed funds" in the possession of a "holder." R.C. 169.01(B) defines "unclaimed funds" as follows:

"Unclaimed funds" means any moneys, rights to moneys, or intangible property, described in section 169.02 of the Revised Code, when, as shown by the records of the holder, the owner has not, within the times provided in section 169.02 of the Revised Code:

- (1) Increased, decreased, or adjusted the amount of such funds;
- (2) Assigned, paid premiums, or encumbered such funds;
- (3) Presented an appropriate record for the crediting of such funds or received payment of such funds by check, draft, or otherwise;
- (4) Corresponded with the holder concerning such funds;
- (5) Otherwise indicated an interest in or knowledge of such funds; or
- (6) Transacted business with the holder.

A "holder" is defined by R.C. 169.01(D) as follows:

"Holder" means any person who has possession, custody, or control of moneys, rights to moneys, or other intangible property, or who is indebted to another if:

- (1) Such person resides in this state;
- (2) Such person is formed under the laws of this state;
- (3) Such person is formed under the laws of the United States and has a home office or principal place of business in this state; or
- (4) The records of such person indicate that the last known address of the owner of such moneys, rights to moneys, or other intangible property is in this state.

Pursuant to R.C. 169.03(A), every holder of unclaimed funds must file annually, with the Director of the Department of Commerce, a verified report which includes the following information:

- (1) The full name, if known, and last known address, if any, of each person appearing from the records of the holder to be the owner of unclaimed funds under Chapter 169. of the Revised Code;
- (2) In the case of unclaimed funds reported by holders providing life insurance coverage, the full name of the insured or annuitant and beneficiary, if any, and their last known addresses according to such holder's records;
- (3) The nature and identifying number, if any, or description of the funds and the amount appearing from the records to be due;
- (4) The date when the funds became payable, demandable, or returnable and the date of the last transaction with the owner with respect to the funds except with respect to each item of unclaimed funds having a value of less than twenty-five dollars;
- (5) Other information, which the director prescribes as necessary for the administration of Chapter 169. of the Revised Code.

It is my understanding that the Department of Commerce, upon the receipt of the reports required to be filed by holders of unclaimed funds, assigns an owner number to each owner and beneficiary listed in the reports, and deposits the personal information with the State Data Center for storage and processing. The information so deposited with the State Data Center is stored on microfiche for the use of the Department of Commerce.

You have further indicated in your request that the Department may require holders of unclaimed funds to additionally provide to the Department the original policy of insurance, the application for insurance, the signature card, the passbook or deposit book, and any communications with the holder. It is my understanding that such information is added to the records of unclaimed funds maintained by the Department.

In your first question, you have inquired whether this collection of records, which contains personal information regarding the owners of unclaimed funds or the beneficiaries of life insurance policies, constitutes a personal information system as that term is defined in R.C. Chapter 1347.

R.C. Chapter 1347 governs the maintenance and use of personal information systems by a "state agency," which, by definition, includes a department of the state. R.C. 1347.01(A). As I discussed in 1980 Op. Att'y Gen. No. 80-096, virtually all information in the possession of governmental agencies qualifies as personal information as that term is used in R.C. Chapter 1347. R.C. 1347.01(E) defines "personal information" as "any information that describes anything about a person, or indicates actions done by or to a person, or indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person." R.C. 1347.01(F) defines "system" as "any collection or group of related records that are kept in an organized manner and are under the control of a state or local agency from which information is retrieved by the name of the person or by some identifying number, symbol, or other identifying particular assigned to the person."

You have advised that the information collected and maintained by the Department pursuant to R.C. Chapter 169 includes information as to the last known addresses and social security or federal identification numbers of holders or beneficiaries of unclaimed funds, as well as information concerning the nature and balances of the unclaimed funds. You have further advised that this information is organized through the use of owner identification numbers, assigned by the Department, and that the Department may retrieve information placed on microfiche through the use of such owner identification numbers.

These facts clearly indicate that the information maintained by the Department pursuant to R.C. Chapter 169 constitutes an organized collection of related records, which describe something about a person, and which may be retrieved by the Department, for its own use, by means of an identifying number assigned to a person. Consequently, I am of the opinion that the information regarding owners of unclaimed funds and beneficiaries of insurance policies which is collected and maintained by the Department of Commerce pursuant to R.C. Chapter 169 qualifies as a personal information system pursuant to R.C. Chapter 1347.

In your second question you have inquired whether the general public is entitled to access to personal information contained in records compiled pursuant to R.C. Chapter 169, or whether public access is limited to the information set forth in R.C. 169.06(C). It is my understanding that, in using the term "general public," you are inquiring whether persons who have no property interest in the fund and who are not the subject of the information maintained are entitled to access to such information. See R.C. 169.06(B)(2) (providing for access to information concerning unclaimed funds by persons possessing a property interest in the unclaimed funds).

R.C. 169.06(C) provides, in pertinent part, as follows:

The director shall have available in his office during business hours an alphabetical list of owners and where a holder is a person providing life insurance coverage, beneficiaries, and their last known addresses, if any, whose funds are being held by the state pursuant to Chapter 169. of the Revised Code.

R.C. 169.06(C) clearly provides for disclosure to the public of information concerning the names of "owners. . . , beneficiaries, and their last known addresses, if any." To determine whether the general public is entitled to other information gathered pursuant to R.C. Chapter 169, it is necessary to consider whether the records maintained pursuant to R.C. Chapter 169 are public records as defined by R.C. 149.43.

R.C. 149.43, Ohio's public records statute, provides in pertinent part as follows:

(A) As used in this section:

(1) "Public record" means any record that is required to be kept by any governmental unit, 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, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

. . . .

(B) All public records shall be promptly prepared and made available to any member of the general public at all reasonable times for inspection. 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, the general public is entitled to access to all records in the possession of governmental agencies that are "required to be kept" and are not designated as confidential by law. Thus, if the records maintained by the Department pursuant to R.C. Chapter 169 are "required to be kept," and are not made confidential by law, the general public is entitled to access to such records.

As I discussed in Op. No. 80-096, a determination of the precise meaning of the term "required to be kept" has proved difficult. In 1976, the Ohio Supreme Court, in Dayton Newspapers, Inc. v. Dayton Daily News, 45 Ohio St. 2d 107, 108-09, 341 N.E. 2d 576, 577 (1976), concluded that the term, "required to be kept," included "any record which but for its keeping the governmental unit could not carry out its duties and responsibilities." The language employed by the court in subsequent cases, however, created some question as to the continued viability of the Dayton standard. See State ex rel. Citizens' Bar Association v. Gagliardo, 55 Ohio St. 2d 70, 378 N.E. 2d 153 (1978); State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology, 49 Ohio St. 2d 245, 361 N.E. 2d 444 (1977).

In Op. No. 80-096, I had the opportunity to consider, in detail, the question of the continued viability of the Dayton standard. In that opinion, I concluded, after a thorough analysis of the foregoing cases, that "the statement of the law set forth in the syllabus of Dayton Daily News still applies, and that a record is 'required to be kept' by a governmental unit, within the meaning of R.C. 149.43, where the unit's keeping of such record is necessary to the execution of its duties and responsibilities." Op. No. 80-096. Consequently, the records maintained by the Department must be deemed to be "required to be kept," as that term is used in R.C. 149.43, if such records are necessary to the execution of the Department's duties and responsibilities.

The information concerning unclaimed funds which is collected and maintained by the Department is used by the Department in carrying out the duties imposed by R.C. Chapter 169. See R.C. 169.05 (Director of Department of Commerce is agent for mortgage insurance fund, housing guarantee fund and housing development fund, to which unclaimed funds are allocated); R.C. 169.08 (Director of Department of Commerce shall resolve claims concerning unclaimed funds).

Moreover, as I concluded in response to your first question, the information so maintained constitutes "personal information" as defined in R.C. Chapter 1347. R.C. 1347.05 requires those governmental agencies that are subject to the provisions of R.C. Chapter 1347 to maintain only that personal information "that is

necessary and relevant to the functions that the agency is required or authorized to perform by statute." R.C. 121.21 further requires a state agency to create and preserve "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" (emphasis added). As I discussed in Op. No. 80-096, the similarity of the standards set forth in R.C. 1347.05 and R.C. 121.21 to the "required to be kept" standard as interpreted in Dayton Daily News is readily apparent. Thus, if a record is necessary to an agency's functions and duties, it is, unless otherwise designated as confidential, a public record. Therefore, if, in the face of a request to inspect records, a governmental agency attempts to argue that the record is not required to be kept, such an assertion is an implicit admission that the agency has violated R.C. 1347.05, R.C. 121.21, or both.

On the basis of these two observations, I must conclude that the records in question are necessary and relevant to the performance of the Department's statutory duties, and, therefore, are records "required to be kept" within the meaning of R.C. 149.43. As such, each record so maintained is a public record unless it is specifically made confidential by law.

Pursuant to R.C. 149.43, records required to be kept by a governmental unit are not public records if the records are medical records, trial preparation records, law enforcement investigatory records, records pertaining to adoption, probation or parole, or records made confidential by state or federal law. The records maintained by the Department pursuant to R.C. Chapter 169 clearly fail to come within the exception for medical records, law enforcement investigatory records, or records relating to adoption, probation or parole. You have indicated, however, that records pertaining to unclaimed funds may constitute trial preparation records, as such records are compiled with knowledge of the fact that an individual whose claim is rejected by the Department may file an administrative appeal.

R.C. 149.43(A)(4) defines "trial preparation record" as "any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding" (emphasis added). I am not aware of any court decisions which have interpreted the phrase "specifically compiled in reasonable anticipation. . ." to determine the scope of the exception provided in R.C. 149.43 for trial preparation records. It appears, however, that in using the term "specifically compiled," the General Assembly intended to include only those records compiled by a governmental unit after the unit's attention has focused upon a particular person or claim, rather than to include all records routinely compiled by the unit, as a matter of course, in order to carry out its statutory duties. If the exception for "trial preparation records" were construed to include any record which ultimately could be used in a hearing, it is conceivable that all records maintained by governmental units would be deemed to come within the "trial preparation record" exception. Such a construction would result in the exception effectively nullifying any right to access provided under R.C. 149.43. Clearly, such was not the legislative intent.

Therefore, in regard to records compiled by the Department pursuant to R.C. Chapter 169, it must be concluded that those records routinely compiled, including reports filed by holders pursuant to R.C. 169.03(A) and additional information generally requested by the Department pursuant to R.C. 169.03(A)(5), do not qualify

¹Pursuant to R.C. 1347.04, as amended by Sub. H.B. No. 799 (eff. Jan. 23, 1981), governmental agencies that perform as their "principal function, any activity relating to the enforcement of the criminal laws" are exempt from the provisions of R.C. Chapter 1347. See Op. No. 80-096. Since the Department of Commerce does not perform, as its principal function, an activity relating to the enforcement of the criminal laws, R.C. 1347.04 would not serve to exempt the Department from compliance with the provisions of R.C. Chapter 1347.

as trial preparation records pursuant to R.C. 149.43. Although such records may, at some point, assist the Department in adjudicating a claim filed pursuant to R.C. 169.08, such records are not specifically compiled with reference to a particular claim, or in reasonable anticipation of such claim being filed, but rather are routinely compiled to enable the Department to carry out the various duties incumbent upon it as administrator of unclaimed funds.

This is not to say, however, that records compiled by the Department pursuant to R.C. Chapter 169 may never constitute trial preparation records. Once the Department's attention has focused upon a particular unclaimed fund, in reasonable anticipation of a civil or criminal proceeding, the records thereafter compiled by the Department in regard to such unclaimed fund which are in addition to those records routinely compiled may constitute trial preparation records as that term is used in R.C. 149.43. Given the variety of information regarding unclaimed funds which may be requested by the Department and included in its records, I am unable to determine, in the abstract, which specific records would constitute trial preparation records pursuant to R.C. 149.43. This is a determination which must be made by the Department, itself, on a case-by-case basis, upon consideration of the nature of the information and the purpose for which such information was compiled. It is my opinion, however, that only records which contain information that is not routinely compiled, but rather is specifically compiled in regard to a particular unclaimed fund after the Department's attention has focused upon that particular fund in reasonable anticipation of a civil or criminal proceeding, come within the exception for trial preparation records provided in R.C. 149.43.

Since most records maintained by the Department pursuant to R.C. Chapter 169 would not qualify as trial preparation records, such records are public records unless their release is otherwise prohibited by state or federal law. I am aware of no statutory provision or case law which would limit the disclosure of the records in question. Although R.C. 169.06(C), to which you refer in your inquiry, specifically requires only that an alphabetical listing of owners, beneficiaries, and their last known addresses be made available to the general public, the language of that section does not in any way purport to limit public access to other information. Rather, a construction of the provisions of R.C. 169.06 in light of R.C. 149.43 leads to the conclusion that the intent, in requiring such an alphabetical listing to be made available, was to insure greater ease of access to such information than is provided under R.C. 149.43.

R.C. 149.43(B) provides that "all public records shall be promptly prepared and made available." Thus, although a governmental unit is required pursuant to R.C. 149.43 to maintain public records "in such a manner that they can be made available for inspection," a governmental unit is not required to maintain public records in any particular manner which would allow for inspection without any prior preparation. On the other hand, R.C. 169.06(C), which was enacted in 1967, requires that information concerning owners' and beneficiaries' names and addresses be maintained in an alphabetical listing, available in the Director's office for immediate inspection. The fact that the alphabetical listing required to be made available pursuant to R.C. 169.06(C) provides the most convenient means for an individual to determine the existence of a personal interest in an unclaimed fund leads to the conclusion that R.C. 169.06(C) was intended merely to provide greater access to certain information, rather than to restrict the access already provided under the public records statute.

The fact that R.C. 169.06(C) was enacted at a time when R.C. 149.43 did not require governmental units to maintain or prepare public records in a manner which would promote prompt inspection further evidences that such was the legislative intent. Prior to 1980, R.C. 149.43 provided only that "all public records shall be open at all reasonable times for inspection." 1963 Ohio Laws 155, 1644 (Am. Sub. H.B. No. 187, eff. Sept. 27, 1963). Thus, although governmental units were required to permit public inspection of public records, governmental units were not required either to maintain or to prepare public records in a manner that would allow convenient and meaningful access to specific information which was requested. It, therefore, must be concluded that R.C. 169.06(C) was enacted not to restrict public access, but to provide greater access to certain specific information.

In light of the fact that R.C. 169.06(C) does not prohibit public access to the records in question and there is no other statute which specifically prohibits such access, it must be concluded that the records compiled by the Department of Commerce pursuant to R.C. Chapter 169, with the exception of records which, as previously discussed, qualify as trial preparation records, are public records pursuant to R.C. 149.43. In specific answer to your second question, then, it is my opinion that, pursuant to R.C. 149.43, the general public is entitled to access to all records maintained by the Department pursuant to R.C. Chapter 169, except to those records which qualify as trial preparation records, and that such public access is not limited to the information specified in R.C. 169.06(C).

In your third question, you have inquired what information may be denied to the public pursuant to R.C. 1347.08(F), if the records in question are not a personal information system.

Prior to its amendment in January, 1980, R.C. 1347.08(F) provided that "[t]his section does not allow a person to have access to any information compiled in reasonable anticipation of a civil or criminal action or proceeding." Am. Sub. S.B. 224, 112th Gen. A. (Aug. 26, 1977). Your question appears to be based upon the assumption that R.C. 1347.08(F), prior to its amendment, restricted public access to information compiled in reasonable anticipation of a civil or criminal proceeding, if the information was maintained within a personal information system as defined in R.C. Chapter 1347. Thus, you have inquired whether R.C. 1347.08(F) also restricts public access to information which is not maintained within a personal information system.

Since, as I concluded in answer to your first question, the information compiled by the Department pursuant to R.C. Chapter 169 does constitute a personal information system, there is no need to discuss your third question in detail. It should be noted, however, that R.C. 1347.08(F) was amended in January, 1980, and subsequently reenacted as R.C. 1397.08(E), as part of the recent amendments to R.C. Chapter 1347, the Privacy Act. Am. Sub. H.B. No. 799 (eff. Jan. 23, 1981). R.C. 1347.08(E) provides, in pertinent part, as follows:

(E)(1) This section regulates access to personal information that is maintained in a personal information system by persons who are the subject of the information, but does not limit the authority of any person, including a person who is the subject of personal information maintained in a personal information system, to inspect or have copied, pursuant to section 149.43 of the Revised Code, a public record as defined in that section.

(2) This section does not provide a person who is the subject of personal information maintained in a personal information system, his legal guardian, or an attorney authorized by the person, with a right to inspect or have copied, or require an agency that maintains a personal information system to permit the inspection of or to copy, a confidential law enforcement investigatory record or trial preparation record, as those terms are defined in divisions (A)(2) and (4) of section 149.43 of the Revised Code.

R.C. 1347.08(F), as amended, clearly applies only to access to information maintained in personal information systems by persons who are the subject of the information. As I discussed in Op. No. 80-096, R.C. Chapter 1347 does not restrict access of the general public to public records, as defined by R.C. 149.43. Thus, R.C. 1347.08(F) does not in any way restrict access of the general public to records compiled by the Department pursuant to R.C. Chapter 169.

In conclusion, it is my opinion, and you are so advised, that:

1. The information regarding the owners of unclaimed funds and the beneficiaries of life insurance coverage which is collected and maintained by the Department of Commerce pursuant to R.C.

Chapter 169 qualifies as a personal information system as defined by R.C. Chapter 1347.

2. Pursuant to R.C. 149.43, the term "trial preparation records" includes only those records specifically compiled by a governmental unit after the unit's attention has focused upon a particular person or claim, in reasonable anticipation of a civil or criminal proceeding, and does not include those records routinely compiled by a governmental unit as a matter of common practice.
3. R.C. 169.06(C), which requires that an alphabetical listing of owners of unclaimed funds and beneficiaries of life insurance policies be made available to the general public, does not restrict access of the general public to records compiled by the Department of Commerce which are public records as defined by R.C. 149.43.
4. With the exception of trial preparation records, records compiled by the Department of Commerce pursuant to R.C. Chapter 169 are public records (as defined by R.C. 149.43), to which the general public is entitled to access.