

OPINION NO. 90-102**Syllabus:**

1. Pursuant to R.C. 5739.024(A), the board of county commissioners may determine what information is required to be reported to administer the county excise tax on hotel lodging furnished to transient guests.
2. Where a provision of state law prohibits the release of a record, the express terms of the statute control the nature and extent of the prohibition.
3. Neither R.C. 149.43 nor any other Revised Code section serves to make confidential all records filed with Ohio taxation authorities. Particular tax information is made confidential by specific Revised Code sections.

4. Pursuant to R.C. 5703.21, no agent of the department of taxation may divulge, except as specified in that section, information as to the transactions, property, or business of any person contained in a tax return or other record kept by the department of taxation.
5. Pursuant to R.C. 5715.49, no former or present county auditor or member of the county board of revision may divulge, except as specified in that section, information as to the transactions, property, or business of any person, company, firm, corporation, association, or partnership contained in a tax return or other record kept by the county auditor or county board of revision.
6. Pursuant to R.C. 5715.50, no former or present expert, clerk, or employee of a county auditor, county board of revision, or the tax commissioner, or any former or present deputy, assistant or agent of the tax commissioner may divulge, except as specified in that section, information as to the transactions, property, or business of any person, company, firm, corporation, association, or partnership contained in a tax return or other record kept by the county auditor, county board of revision or the tax commissioner.

To: Brent A. Saunders, Gallia County Prosecuting Attorney, Gallipolis, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 31, 1990

I have before me your request for my opinion concerning the excise tax levied upon the lodging of hotel guests under R.C. 5739.024. Specifically, you wish to know whether all of the information contained in a tax return and related records, including a record of payment of a particular installment of the tax due, filed pursuant to regulations established under R.C. 5739.024(A), is a public record open for inspection and copying under R.C. 149.43(B). Your letter states that Gallia County has enacted an excise tax pursuant to R.C. 5739.024 and that the proceeds are then contributed to the Convention and Visitors' Bureau of Gallia County ("bureau"). An employee of the bureau has sought to inspect and receive copies of the returns. In a conversation with a member of my staff, you indicated that local hotel operators have objected to the release of the returns which show number of rooms occupied and gross room rentals by individual facilities. With this information, a competitor can calculate occupancy rates and profit margins, potentially gaining an unfair competitive advantage by estimating the relative financial strength of each hotel operator in the local market.

The county excise tax on hotel¹ lodging furnished to transient guests² is established by R.C. 5739.024(A), which states in relevant part, that:

A board of county commissioners may by resolution adopted by a majority of the members of the board, levy an excise tax not to exceed three per cent on transactions by which lodging by a hotel is or is to be furnished to transient guests. The board shall establish all regulations necessary to provide for the administration and allocation of the tax.

¹ For purposes of R.C. 5739.024, "[h]otel' means every establishment kept, used, maintained, advertised or held out to the public to be a place where sleeping accommodations are offered to guests, in which five or more rooms are used for the accommodation of such guests, whether such rooms are in one or several structures." R.C. 5739.01(M).

² For purposes of R.C. 5739.024, "[t]ransient guests' means persons occupying a room or rooms for sleeping accommodations for less than thirty consecutive days." R.C. 5739.01(N).

See also R.C. 5739.024(B) (municipal and township excise tax on hotel lodging furnished to transient guests); R.C. 505.56 (township excise tax on hotel lodging furnished to transient guests); R.C. 5739.02 (state sales tax and municipal township and county excise taxes on transient guest hotel lodging). A portion of the proceeds of the tax are allocated to "a separate fund and shall be spent solely to make contributions to the convention and visitors' bureau operating within the county." R.C. 5739.024(A). See also R.C. 307.693 (board of county commissioners may appropriate money to make contributions to convention and visitors' bureaus); R.C. 505.58 (board of township trustees may expend money to make contributions to convention and visitors' bureaus).

R.C. 5739.024, however, is silent as to whether the returns filed under that section are open to public access. Whether tax returns under R.C. 5739.024 are public records is determined by application of the provisions of R.C. 149.43. "Public record" is defined by R.C. 149.43(A)(1) as being:

any record that is kept by any public office, 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, records pertaining to actions under section 2151.85 of the Revised Code and to appeals of actions arising under that section, records listed in division (A) of section 3107.42 of the Revised Code, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

Except for "records the release of which is prohibited by state or federal law," none of the stated exceptions in R.C. 149.43(A)(1) appear to apply to transient guest lodging tax returns.

Neither federal law nor a Revised Code provision expressly prohibits the release of returns under R.C. 5739.024. Since the returns under R.C. 5739.024 are not specifically prohibited from release, a careful examination of whether any provision of state law generally prohibits the release of tax records is required. Ohio statutes restricting the release of information kept by public offices, however, have generally made only narrow classes of such information confidential. See generally 1990 Op. Att'y Gen. No. 90-007; 1988 Op. Att'y Gen. No. 88-103, at 2-510; Recchie & Wayland, *Ohio's Privacy Act: An Analysis*, 10 U. Tol. L. Rev. 159, 188 (1978). Various types of tax returns, however, have been made confidential. See, e.g., R.C. 718.07 (municipal income tax); R.C. 5711.11 (personal property tax returns); R.C. 5733.03 (corporate franchise tax); R.C. 5739.107 (island sales tax); R.C. 5747.18 (individual income tax); but see R.C. 5719.04 (county auditor is required to publish delinquent personal property tax list). None of these provisions, however, applies specifically to the excise tax levied under R.C. 5739.024.

While no general prohibition against the release of Ohio tax filings is found in either Ohio or federal law, three similar statutes apply to a broad range of tax filings and restrict their release—R.C. 5703.21, R.C. 5715.49 and R.C. 5715.50. The most comprehensive of these nearly identical statutes, R.C. 5715.50, states, in relevant part:

No former or present expert, clerk, or employee of a county auditor, county board of revision, or the tax commissioner, and no former or present deputy, assistant, or agent of the tax commissioner shall divulge, except in the performance of his duties or in his report to the county auditor, the county board of revision, or the tax commissioner, or when called upon to testify in any court or proceeding, any information acquired by him in the exercise of the powers vested in him by any law, or while claiming to exercise such powers, as to the transactions, property, or business of any person, company, firm, corporation, association, or partnership. Whoever violates this section shall thereafter be disqualified from acting in any official capacity in connection with the assessment or collection of taxes or recoupment charges. The names of officers and directors of

any corporation are not within the prohibition of this section.
(Emphasis added.)

R.C. 5703.21, applicable to agents of the department of taxation, describes the information which may not be disclosed in terms substantially the same as set forth in R.C. 5715.50, while R.C. 5715.49, using similar language, applies to former and present county auditors and members of the board of revision.

I have previously determined that R.C. 5715.49 and R.C. 5715.50 are statutes that serve to enumerate information which constitutes "records the release of which is prohibited by state...law." 1985 Op. Att'y Gen. No. 85-087, at 2-357 ("[l]ike R.C. 5715.49, R.C. 5715.50 contains a prohibition, with certain exceptions, against the disclosure of information acquired by certain enumerated persons in their statutory powers"). The similarity of the language in R.C. 5703.21 to that in R.C. 5715.49 and R.C. 5715.50 also leads me to apply the rationale discussed in Op. No. 85-087, and to conclude that R.C. 5703.21 serves as an exception to R.C. 149.43. The prohibitions against release of information contained in R.C. 5703.21, R.C. 5715.49 and R.C. 5715.50 are, however, relatively narrow. As a general rule, an Ohio statutory provision limiting access to tax filings requires a restrictive reading. *In re Herrnstein*, 6 Ohio Supp. 260, 20 Ohio Opinions 405 (P. Ct. Ross County 1941). Moreover, I note that these statutes are penal in nature and must be narrowly construed. See *State ex rel. Moore Oil Co. v. Dauben*, 99 Ohio St. 406, 124 N.E. 232 (1919); R.C. 5703.99(A) (criminal penalty for violation of R.C. 5703.21); R.C. 5715.99(E) (criminal penalty for violation of R.C. 5715.49 and R.C. 5715.50); Op. No. 85-087, at 2-356. Additionally, as an exception to the right of public access provided by R.C. 149.43, these statutes must be strictly interpreted, with doubt as to the applicability of an exception being resolved in favor of disclosure. *State ex rel. National Broadcasting Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 526 N.E.2d 786 (1988). Further, any statutory provision that restricts the release of information is to be read so that the express terms of that provision control the extent of the prohibition. See Op. No. 90-007.

The prohibitions in R.C. 5703.21, R.C. 5715.49 and R.C. 5715.50 are very specific as to the officials bound by their terms. R.C. 5703.21 applies to agents of the department of taxation; R.C. 5715.49 controls former and present county auditors and members of the boards of revision; R.C. 5715.50 restricts former and present experts, clerks and employees of a county auditor, a county board of revision and the tax commissioner, as well as former and present deputy and assistant tax commissioners and agents of the tax commissioner. The express language of these statutes extends their prohibition, thus, only to those enumerated officials.

Moreover, the express terms of R.C. 5703.21, R.C. 5715.49 and R.C. 5715.50 prohibit only the release of "any information acquired...as to the transactions, property, or business" of any entity required to file tax returns. Therefore, it is necessary to examine the type of information which may not be divulged. Since R.C. 5703.21, R.C. 5715.49 and R.C. 5715.50 do not prohibit the release of tax returns, in and of themselves, but only to specified information likely to be on the forms, a brief examination of the types of information contemplated by R.C. 5739.024 is in order. No uniform tax return or form for the reporting of data from hotel operators for the calculation, collection and auditing of taxes due under R.C. 5739.024 is prescribed by the Revised Code. Instead, R.C. 5739.024 requires that each board of county commissioners that levies a transient guest lodging tax "shall establish all regulations necessary to provide for the administration and allocation of the tax." The statute does not prescribe the content of the regulations a board of county commissioners must adopt concerning the administration and allocation of the tax. It is firmly established that absent a provision of law specifying how a particular duty is to be carried out, it may be carried out in any reasonable manner. See, e.g., *State ex rel. Hunt v. Hildebrant*, 93 Ohio St. 1, 12, 112 N.E. 138, 141 (1915), *aff'd*, 241 U.S. 555 (1916) (holding that where a statute gives no direction to a public officer as to the manner of performing a task, the officer has the "implied authority to determine, in the exercise of a fair and impartial official discretion, the manner and method of doing the thing commanded"); *Jewett v. Valley Ry. Co.*, 34 Ohio St. 601, 608 (1878) ("[w]here authority is given to do a specified thing, but the precise mode of performing it is not prescribed, the presumption is that the

legislature intended the party might perform it in a reasonable manner"). Under R.C. 5739.024, therefore, the board of county commissioners may require the reporting of such information as the board considers reasonably necessary to administer and allocate the tax. By administrative necessity, the forms must require the reporting of sufficient information to allow verification that the proper amount of tax was collected on each transaction subject to the tax. A tax return under R.C. 5739.024 may, thus, properly require the reporting of number of rooms occupied and gross room rentals by individual facilities. Therefore, inasmuch as these tax returns contain "information...as to the transactions, property, or business" of hotel operators, the public officials enumerated in R.C. 5703.21, R.C. 5715.49 and R.C. 5715.50 are prohibited from divulging such information. *See also* 1931 Op. Att'y Gen. No. 3703, at 1298 (G.C. 12924-7, now R.C. 5715.49, clearly relates to information secured in connection with tax returns).

Thus, although R.C. 5703.21, R.C. 5715.49, and R.C. 5715.50 prohibit the release of certain tax return information, such prohibition applies only to information in the tax returns and related records which are kept by the public offices enumerated in R.C. 5703.21, R.C. 5715.49 or R.C. 5715.50.³ Other public offices are not bound by those provisions.

My conclusion that the returns and filings under R.C. 5739.024(A) are not confidential if kept by offices other than those specifically listed by statute has the unsettling effect of opening some tax information to potential public scrutiny. Strongly persuasive public policy arguments that tax returns and filings *ought* to be confidential are present. As stated in *In re Hampers*, 651 F.2d 19, 21 (1st Cir. 1981), the public policy is stressed in the "long standing confidential nature of state tax returns, an attribute conferred on such data by many...states, said to be a critical factor in stimulating voluntary compliance with the tax laws." Recognizing "a veritable chorus of policy declarations designed by [the New York State] Legislature," the New York Court of Appeals in *New York State Department of Taxation and Finance v. New York State Department of Law*, 44 N.Y.2d 575, 406 N.Y.S.2d 747, 378 N.E.2d 110 (1978), recited an extensive litany of such considerations that included individual privacy and protection from self-incriminatory demands, as well as the state's own administrative ends. The court emphasized this last point by stating:

Full compliance with its laws on such information-gathering is particularly vital to tax collection. Without gainsaying the fact that penal sanctions against tax evasion constitute the ultimate compulsion for observance of these laws, the degree to which self-reporting and partial self-auditing by the taxpayer is relied on by our revenue system is not to be underestimated. Were it not for the volitional acts of countless citizens in providing complete statements of their financial affairs, the manpower and resources which would have to be expended to enforce our tax laws would increase enormously. "[B]asically the Government depends on the good faith and integrity of each potential taxpayer to disclose honestly all information relevant to tax liability."

...

Thus, it is recognized that a major "purpose of...statutory provisions prohibiting disclosure is to facilitate tax enforcement by encouraging a taxpayer to make full and truthful declarations in his return, without fear that these statements will be revealed or used against him for other purposes.

Id. at 44 N.Y.2d at 580, 406 N.Y.S.2d at 750-751, 378 N.E.2d at 113 (citations omitted.) Despite the underlying public policy arguments that serve as the reason

³ You have related that although in Gallia County the returns under R.C. 5739.024 are currently required to be filed only with the county auditor, the practice in other counties is that copies of the return are filed in the office of the board of county commissioners.

for tax confidentiality statutes, I am constrained to read the relevant tax confidentiality provisions as written and enacted by the legislature. Where, as in R.C. 5703.21, R.C. 5715.49, and R.C. 5715.50, the language of the statutes is clear, the statutes speak for themselves and there is no occasion for interpretation. *State ex rel. Stanton v Zangerle*, 117 Ohio St. 436, 159 N.E. 823 (1927). I, therefore, cannot extend the statutes' reach beyond that stated by their precise language.

Moreover, the Franklin County Court of Appeals, in *Collins v. Ferguson*, 48 Ohio App. 2d 255, 258, 357 N.E.2d 51, 53 (Franklin County 1976), stated that "the Ohio...tax law is a creature of the General Assembly...which require[s] strict statutory construction. The nub of the matter is that the legislature has acted in this particular area, and if it chooses to amend its previous enactments, that, to be sure, is the legislature's province." There, the court interpreted the law as written and specifically noted that the "present question involves the law as it is now." Similarly, as to the issue presented in this opinion it is required that I apply the "law as it is now." While it is tempting to balance the apparent public policies against the effect of the statutes, it is improper for the Attorney General to do so. The balancing of the respective interests has been done by the General Assembly. They may not be reweighed independently. See *State ex rel. Multimedia, Inc. v. Whalen*, 48 Ohio St. 3d 41, 549 N.E.2d 167 (1990).

Therefore, it is my opinion and you are hereby advised that:

1. Pursuant to R.C. 5739.024(A), the board of county commissioners may determine what information is required to be reported to administer the county excise tax on hotel lodging furnished to transient guests.
2. Where a provision of state law prohibits the release of a record, the express terms of the statute control the nature and extent of the prohibition.
3. Neither R.C. 149.43 nor any other Revised Code section serves to make confidential all records filed with Ohio taxation authorities. Particular tax information is made confidential by specific Revised Code sections.
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6. Pursuant to R.C. 5715.50, no former or present expert, clerk, or employee of a county auditor, county board of revision, or the tax commissioner, or any former or present deputy, assistant or agent of the tax commissioner may divulge, except as specified in that section, information as to the transactions, property, or business of any person, company, firm, corporation, association, or partnership contained in a tax return or other record kept by the county auditor, county board of revision or the tax commissioner.