

OPINION NO. 80-036**Syllabus:**

A county welfare department is not required pursuant to R.C. 329.091 to file a quarterly report with the county auditor listing the names of all recipients to whom public assistance has been granted and the amount paid to each recipient. (1953 Op. Att'y Gen. No. 2201, p. 358; 1957 Op. Att'y Gen. No. 737, p. 274, overruled.)

To: Lowell S. Petersen, Ottawa County Pros. Atty., Port Clinton, Ohio
By: William J. Brown, Attorney General, June 11, 1980

I have before me your request for an opinion on the following question:

Is the county welfare department required to file a report listing the names of all recipients of public assistance and the amount paid to each pursuant to O.R.C. Section 329.091 even though the same appears to be in conflict with the provision of the privacy act?

R.C. 329.091 provides in pertinent part as follows:

Before the thirtieth day of January, April, July, and October of each year each county, city, or state authority, administration, department, board, division, or office responsible by law for the administration of the public assistance programs of aid for the aged,

aid for the blind, aid for dependent children, aid for the permanently and totally disabled, and poor relief may file a report with the auditor of the county listing the names of all recipients to whom such agency has granted, paid, or authorized payment of public assistance during the preceding fiscal quarter year of such agency and the amounts paid to each.

. . . The reports of any agency, required by this section, shall be open to examination by the attorney general, auditor of state, and federal and state legislative representatives, commissions, committees, and their designated representatives, and any other public official or public body required to have such information for the proper discharge of official duties.

The report filed in the office of the county auditor as required by this section shall be open to examination by any elector of the county who first signs his name and gives the reason in writing for such examination and files said request with the county auditor. (Emphasis added.)

As you note in your inquiry, R.C. 329.091, as originally enacted, provided that "each county, city, or state authority, administration, department, board, division or office. . . shall file a report with the auditor of the county." 1953 Ohio Laws 671, 673 (Am. Sub. S.B. No. 86, eff. Oct. 29, 1953) (emphasis added). My predecessors interpreted that section as requiring the agencies enumerated therein to file a quarterly report with the county auditor. 1958 Op. Att'y Gen. No. 2201, p. 358; 1957 Op. Att'y Gen. No. 737, p. 274.

In 1965, however, R.C. 329.091 was amended to substantially its present form and the words "may file" were substituted for the words "shall file." 1965 Ohio Laws 224 (Am. H.B. No. 491, eff. Nov. 5, 1965). The phrase "required by this section," as used in R.C. 329.091 in reference to the filing of such reports, was retained subsequent to the amendment. Your inquiry, therefore, necessarily involves the question as to whether the legislature in substituting the word "may" for the word "shall" in R.C. 329.091 intended to relieve the agencies enumerated in R.C. 329.091 of the duty to file quarterly reports with the county auditor.

It is well-settled that in statutory construction the word "may" is to be construed as permissive, whereas the word "shall" is to be construed as mandatory, unless there appears from the language of the statute as a whole a legislative intent to the contrary. Dorrian v. Scioto Conservancy District, 27 Ohio St. 2d 102, 271 N.E. 2d 834 (1971). Thus, it would appear, in the absence of any evidence to the contrary, that the legislature in employing the word "may" in R.C. 329.091 intended merely to authorize the filing of such reports, rather than to require that such reports be filed. The retention of the phrase "reports filed in the office of the county auditor as required by this section," as used in R.C. 329.091 in reference to disclosure of such reports, would not seem to constitute evidence of a clear and unequivocal legislative intent to the contrary in light of the fact that R.C. 329.091 was specifically amended to substitute the word "may" for the word "shall."

The courts have generally held that the substitution of "may" for "shall" manifests a clear legislative intent to make the action in question permissive instead of mandatory. State ex rel. Methodist Children's Home Association v. Board of Education, 105 Ohio St. 438, 138 N.E. 865 (1922). In discussing the substitution in a statute of the word "may" for the word "shall," the Ohio Supreme Court in Lindsey v. Public Utilities Commission, 111 Ohio St. 6, 14, 144 N.E. 2d 729, 731 (1924), held as follows:

[I]t is apparent that where a section is amended, and the only amendment in the section is to change words, mandatory in their ordinary interpretation, to words which merely authorize the performance of certain acts, the intention of the Legislature was to either clarify its former expression, from an apparent command to a

mere authorization, or to withdraw the command and substitute an authorization.

The only substantial change resulting from the amendment of R.C. 329.091 in 1965 was the substitution of the word "may" for the word "shall." Am. H.B. No. 491. Consequently, based upon the aforementioned principles of statutory construction, I am of the opinion that R.C. 329.091 does not require the agencies enumerated therein to file quarterly reports with the county auditor, but rather merely authorizes the filing of such reports and leaves the decision as to whether to file within the discretion of the agency concerned.

In making a decision as to whether to exercise its option to file reports pursuant to R.C. 329.091, an agency should, of course, consider all relevant provisions of law. For example, federal law, while permitting a state to provide for disclosure of information regarding recipients of public assistance, requires the state to adopt safeguards which permit disclosure only to persons for purposes directly connected with the administration of the public assistance plan. See 42 U.S.C. §§302(a)(7), 602(a)(9), 1202(a)(9), 1352(a)(9) (1970). While R.C. 329.091 contains a prohibition against using any lists of names of aid recipients "for commercial or political purposes of any nature or for any purpose not directly connected with the administration of public assistance," it also provides that reports filed "as required" by R.C. 329.091 "shall be open to examination by any elector of the county who first signs his name and gives the reason in writing for such examination and files said request with the county auditor." Hence, there may be some question as to whether the restrictions upon disclosure imposed by R.C. 329.091 are adequate safeguards as contemplated by 42 U.S.C. §§302(a)(7), 602(a)(9), 1202(a)(9), 1352(a)(9) (1970), to insure that reports voluntarily filed under R.C. 329.091 will not be disclosed in violation of federal law. Since you have not asked whether the voluntary filing of such reports may violate laws governing the disclosure of information concerning recipients of public welfare, I will refrain from entering into a detailed discussion of that issue at this time. I would suggest, however, that the agency opt not to file such reports where the filing of such reports would result in an obvious violation of federal law.

You have suggested in your inquiry that if R.C. 329.091 were deemed to require the filing of quarterly reports with the county auditor a possible violation of federal laws which restrict disclosure of information concerning recipients of public assistance might result. See, e.g., 45 C.F.R. §205.50 (1979) (restricting access to information regarding state public assistance programs under the Social Security Act); 42 U.S.C. §§302(a)(7), 602(a)(9), 1202(a)(9), 1352(a)(9) (1970) (requiring adoption of safeguards for disclosure of information regarding public assistance programs under the Social Security Act). As previously mentioned, some question may exist as to the adequacy, under federal law, of the restrictions upon disclosure imposed by R.C. 329.091. If the restrictions imposed by R.C. 329.091 were deemed to be inadequate safeguards, a requirement that such reports be filed might result in a violation of federal law. Since, however, it is clear from the language of R.C. 329.091 that there is no mandatory duty to file quarterly reports with the county auditor, it is unnecessary to discuss whether such a requirement would result in a violation of federal laws governing access to information concerning recipients of public assistance.

In conclusion, it is my opinion, and you are advised, that a county welfare department is not required pursuant to R.C. 329.091 to file a quarterly report with the county auditor listing the names of all recipients to whom public assistance has been granted and the amount paid to each recipient. (1958 Op. Att'y Gen. No. 2201, p. 358; 1957 Op. Att'y Gen. No. 737, p. 274, overruled.)