

OPINION NO. 81-014**Syllabus:**

1. Complaints filed with the Division of Real Estate concerning violations of R.C. Chapter 4735, except those complaints which qualify as "confidential law enforcement investigatory records" as defined by R.C. 149.43(A)(2), are public records within the meaning of R.C. 149.43 and must be made available for public inspection. Whether a particular complaint comes within the definition of "confidential law enforcement investigatory

March 1981

records" is a question of fact to be determined on a case-by-case basis.

2. Pursuant to R.C. 103.23(D), the Division of Real Estate is required to make available to the Legislative Service Commission all complaints filed with the Division when the Commission requests such complaints pursuant to its statutory power, in the absence of a federal statute making such records confidential.

To: J. Gordon Peltier, Director, Department of Commerce, Columbus, Ohio
By: William J. Brown, Attorney General, March 25, 1981

I have before me your request for my opinion as to whether the Division of Real Estate is required, under the terms of R.C. 149.43, to treat as public records all complaints received by it or whether the terms of R.C. 149.43 include as public records only those complaints which, after investigation, are found to have a sufficient basis to justify an administrative hearing or the filing of a criminal complaint. In addition, you have asked that in responding to your request I take into consideration the issues raised by the Director of the Legislative Service Commission (hereafter LSC) in a letter to this office expressing his views concerning the subject matter of your request. In that letter, the Director posed the following question:

[W]hether, given the language and intent of sections 103.11 to 103.22 of the Revised Code, the LSC staff may, for legislative purposes, review complaint files of the Real Estate Commission and the Division of Real Estate, without having to resort to use of the subpoena power provided in section 103.17 of the Revised Code.

R.C. 149.43 defines a public record as "any record that is required to be kept by a governmental unit. . . except medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records of which is prohibited by state or federal law." Thus, for purposes of R.C. 149.43, public records consist of those records maintained by a governmental unit that are "required to be kept" and are not specifically excepted from the definition of public records.

In view of this definition, your first question requires an initial determination of whether the records in question are "required to be kept" within the meaning of R.C. 149.43. As I have previously indicated, it is my position that the proper test for making that determination is whether the unit's maintenance of such records is necessary to the execution of its duties and responsibilities. 1980 Op. Att'y Gen. No. 80-096; Dayton Newspapers, Inc. v. Dayton Daily News, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976). A review of the provisions of R.C. 4735.05(C)(1) suggests that there can be no question that the complaints described in your letter are records "required to be kept" for the purpose of R.C. 149.43. Pursuant to R.C. 4735.051, the Division of Real Estate is required to "investigate the conduct of any licensee against whom a written complaint is filed." In order for the Division to carry out that duty, the maintenance of records of such complaints is clearly a prerequisite, and the records are, therefore, "required to be kept" within the meaning of R.C. 149.43.

Moreover, it should be noted that the complaints filed with the Division of Real Estate consist of "personal information" as that term is defined in

R.C. Chapter 1347, the Privacy Act.¹ As a governmental agency subject to the provisions of the Privacy Act,² the Division of Real Estate may collect, maintain, and use such personal information only if such information is necessary to the functions of the agency. R.C. 1347.05. Similarly, R.C. 121.21 permits a state agency to make 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 have pointed out in previous opinions, the record keeping limitations imposed by R.C. 1347.05 and R.C. 121.21 are markedly analogous to the test for determining if a record is "required to be kept" under R.C. 149.43. Thus, the fact that the Division of Real Estate is permitted by law to keep only such records as are necessary for it to perform its statutory duties is further support of my contention that the records in question are "required to be kept" for the purposes of R.C. 149.43.

Having determined that the complaints constitute records "required to be kept," I find that the next consideration must be whether the complaints are specifically excepted from the definition of "public records" under R.C. 149.43. The complaints filed with the Division of Real Estate clearly do not come within the exception for medical records or the exception for records pertaining to adoption, probation, or parole proceedings. However, whether the complaints may be regarded as trial preparation or confidential law enforcement investigatory records, or whether their release may be said to be prohibited by state or federal law, thereby removing them from the definition of public records, requires additional analysis.

As noted above, R.C. 149.43 specifically excepts records the release of which is prohibited by state or federal law from the definition of "public records." As expressed in your letter, one of your concerns is whether the release of the complaints in question is prohibited under the terms of R.C. Chapter 1347 (Ohio's Privacy Act), R.C. 4735.05(C)(4), or 5 U.S.C. §552(b)(7). While, as originally enacted, the initial provisions of Ohio's Privacy Act created some question as to whether public records containing personal information could properly be released, R.C. Chapter 1347 has since been extensively amended. The current provisions of the Privacy Act clearly do not restrict access to records that are public under the terms of R.C. 149.43. R.C. 1347.04(B); 1980 Op. Att'y Gen. No. 80-096.

¹R.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 maintained by a state or local agency and from which information is retrieved by the name of the person or by some identifying number, symbol, or other identifier assigned to the person." Since the complaints filed with the Division of Real Estate constitute an organized group of records containing information concerning the conduct of persons with respect to real estate transactions, which information presumably may be retrieved through use of a person's name or other identifier, the complaints must be regarded as personal information for purposes of the Privacy Act.

²All state agencies which maintain personal information systems, unless specifically exempted, are subject to the provisions of the Privacy Act. By definition, "state agencies" include a state department such as the Department of Commerce of which the Division of Real Estate is a part. R.C. 1347.01(A). The Department is not among those agencies exempted from the Privacy Act under R.C. 1347.04. Although the Department does perform certain duties relating to the enforcement of criminal laws, the performance of those duties may not be regarded as its principal function nor as the principal function of the Division of Real Estate; thus, neither the Department or the Division is exempt from the Privacy Act as an agency that "performs as its principal function any activity relating to the enforcement of criminal laws." R.C. 1347.04(A)(1)(a).

Consequently, if such complaints constitute public records under R.C. 149.43, the Privacy Act would not operate to prohibit their release.³

Release of these complaints is not prohibited by R.C. 4735.05(C)(4) either. That provision mandates that any "[i]nformation obtained from licensees by investigators or audits shall be held in confidence." Such information would be obtained in the course of investigation of a complaint. However, the question you have raised is whether the complaints are public, not whether information acquired in the investigation thereof is public.

You also expressed concern that the provisions of 5 U.S.C. §552(b)(7) may prohibit the release of these complaints. However, the applicability of 5 U.S.C. §552, the federal Freedom of Information Act, hinges upon the definition of the term "agency" set forth in 5 U.S.C. §552(e), which limits the term to branches, divisions and instrumentalities of the federal government. While the provisions of 5 U.S.C. §552 limit the disclosure of certain information by federal agencies, neither the Ohio Department of Commerce nor the Division of Real Estate is a federal agency and, thus, the provisions of this section do not prohibit the release of information by these state agencies. Nor am I aware of any other provision of state or federal law which would operate to prohibit the disclosure of the complaints at issue. Thus, I conclude that the complaints do not come within the exception to R.C. 149.43 for "records the release of which is prohibited by state or federal law."

Another exception to the definition of public records is "trial preparation records." However, this exception is also inapplicable to the complaints at issue. R.C. 149.43(H)(4) defines "trial preparation records" 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). Admittedly, the complaints in question may ultimately lead to the institution of criminal charges or an administrative hearing, but such complaints are compiled routinely by the Division of Real Estate to enable the Division to conduct investigations for the purpose of determining if there is a need for civil or criminal proceedings, rather than in reasonable anticipation thereof. Accordingly, the complaints do not qualify as "trial preparation records." See 1980 Op. Att'y Gen. No. 80-103. I realize that as a practical matter the filing of a complaint almost invariably leads to a formal administrative hearing; in fact, pursuant to R.C. 4735.051, a formal hearing is mandated if one is subsequently requested by the complainant. Nevertheless, a hearing does not automatically follow from the filing of a complaint and, therefore, it may not be said that complaints are specifically compiled in anticipation of such hearings.

Also excepted from the definition of public records are "confidential law enforcement investigatory records." R.C. 149.43(A)(2) defines such records as follows:

"Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent

³It should be noted, however, that if it is determined that a particular complaint is not a public record under R.C. 149.43, the Division of Real Estate could be held liable under the Privacy Act for the wrongful disclosure of such complaints. R.C. 1347.10(A)(2) provides for civil damages for harm caused by the intentional use or disclosure of "personal information in a manner prohibited by law." By definition, if a record required to be kept by a governmental agency does not qualify as a public record under R.C. 149.43, it is because the record is made confidential by law. Inasmuch as the Division of Real Estate is subject to the Privacy Act and the complaints at issue do contain the type of personal information to which the provisions of the Privacy Act apply, the intentional release of complaints that are not public records could result in civil liability under the Privacy Act.

that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose his identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

It is important to note that a record need not have been compiled in the actual course of an investigation to come within this exception. Although the exception is entitled "confidential law enforcement investigatory records" (emphasis added), that term is defined so as to require that the record merely "pertain to a law enforcement matter" (presumably of an investigatory nature), and not that the record actually be the product of an investigation.

Inasmuch as the complaints at issue concern alleged violations of R.C. Chapter 4735 or other misconduct of real estate licensees and trigger investigations which may lead to civil or criminal proceedings, I am of the opinion that the complaints do pertain to law enforcement investigatory matters and, thus, satisfy the first part of this definition. However, the definition further requires that the release of such a record would create a significant risk that certain highly sensitive information would be disclosed. Whether the release of one of the complaints in question would create one of the specified risks would depend on the particular circumstances and the particular complaint involved. It does appear, however, that prior to the commencement of any civil or criminal proceedings, the release of such a complaint in most instances would create a high probability of disclosing "the identity of a suspect who has not been charged with the offense to which the record pertains." R.C. 149.43(A)(2)(a). Of course, once a licensee is charged, this risk would no longer be present.

Thus, complaints filed with the Division of Real Estate may not be categorically classified as "confidential law enforcement investigatory records." The complaints as a class do pertain to law enforcement matters, but must be evaluated on an individual basis to determine whether the release of a particular complaint would create one of the risks enumerated in R.C. 149.43(A)(2). Those complaints which do come within the definition of "confidential law enforcement investigatory records" are not public records for the purposes of R.C. 149.43 and, therefore, need not be made available for public inspection. The remaining complaints are public records. The status of these complaints as public records is not affected by whether, after investigation of the complaint, a sufficient basis is found to justify an administrative hearing or the filing of a criminal complaint. As public records, these complaints must be "made available to any member of the general public at all reasonable times for inspection," and "[u]pon request, a person responsible for public records shall have copies available at cost." R.C. 149.43(B).

The final matter which you have asked me to address is what effect the general powers and duties of the LSC under R.C. Chapter 103 have on the ability of the LSC to review the complaint files of the Real Estate Commission and the Division of Real Estate without resorting to its subpoena power under R.C. 103.17. Since you submitted your request, R.C. 103.23 was enacted. R.C. 103.23(D) provides in pertinent part as follows:

No official of a state agency, department, bureau, commission, or institution shall refuse to provide or make available to the legislative service commission any information or records under its control or in its possession when requested to provide such

information as part of the exercise of the commission's powers in this section and section 103.13 of the Revised Code unless the law dealing with the information or records specifically states that the commission is not authorized to review such information or records.

In summary, this provision grants the LSC the right, in conjunction with exercising its statutory powers, to review any record in the possession or control of a state agency unless there is a statute which specifically denies LSC, as opposed to the public in general, the right to review a particular record.

A provision under state law denying access to an agency record to the public in general would not affect the LSC's specific right of access to that record pursuant to R.C. 103.23. It is a longstanding rule of statutory construction that a special law operates as an exception to a general law to the extent of any irreconcilable conflict. R.C. 1.51. A special statute is one which deals with a particular purpose and subject matter. See, e.g., Leach v. Collins, 123 Ohio St. 530, 176 N.E. 77 (1931). R.C. 103.23 is a special statute in that it specifically deals with the LSC's right of access to agency records. Thus, any general confidentiality provisions under state law must yield to the more specific provisions of R.C. 103.23 which grant the LSC a right of access to agency records in the absence of a statute specifically denying the LSC that right. It is, therefore, possible that a record would not be available to the public under R.C. 149.43 because it is made confidential by state law, and yet would be available to the LSC pursuant to R.C. 103.23. However, R.C. 103.23 would, of course, not prevail over a federal statute making such records confidential. Where a law passed by a state comes in conflict with a valid act of Congress, the state law must yield. E.g., Case v. Bowles, 327 U.S. 90 (1946).

To my knowledge, there is no statute dealing with complaints filed with the Division of Real Estate which specifically states that the LSC is not authorized to review such complaints. Nor am I aware of any federal statute making such records confidential. It is my understanding that this question arose in the context of LSC's seeking access to the complaints in question as part of a study of various state boards and commissions, including the Real Estate Commission, which has functions and activities closely tied to those of the Division of Real Estate. The LSC is authorized to undertake such a study by R.C. 103.23(A) which mandate that the LSC "[c]onduct program reviews of state agencies and departments." Because the LSC requested the complaints pursuant to carrying out its duties under R.C. 103.23(A) and there is no prohibition against the LSC reviewing such complaints nor any federal law making the complaints confidential, R.C. 103.23(D) requires the Division to comply with such a request.

Accordingly, it is my opinion, and you are advised, that:

1. Complaints filed with the Division of Real Estate concerning violations of R.C. Chapter 4735, except those complaints which qualify as "confidential law enforcement investigatory records" as defined by R.C. 149.43(A)(2), are public records within the meaning of R.C. 149.43 and must be made available for public inspection. Whether a particular complaint comes within the definition of "confidential law enforcement investigatory records" is a question of fact to be determined on a case-by-case basis.
2. Pursuant to R.C. 103.23(D), the Division of Real Estate is required to make available to the Legislative Service Commission all complaints filed with the Division when the Commission requests such complaints pursuant to its statutory power, in the absence of a federal statute making such records confidential.