

OPINION NO. 86-069**Syllabus:**

A letter requesting an advisory opinion from the Ohio Ethics Commission under R.C. 102.08 and the documents held by the Commission concerning such advisory opinion are public records for purposes of R.C. 149.43.

To: Stephan W. Stover, Executive Director, Ohio Ethics Commission, Columbus, Ohio

By: Anthony J. Celebrezze, Jr., Attorney General, September 23, 1986

I have before me your request for my opinion concerning whether various documents in the possession of the Ohio Ethics Commission are public records. Based upon a conversation with a member of your staff, I have restated your questions as follows:

1. Are the request letter and the underlying documents relating to an advisory opinion of the Ohio Ethics Commission rendered pursuant to R.C. 102.08 public records under R.C. Chapter 143?
2. Does the fact that the hypothetical or prospective conduct addressed in an advisory opinion of the Commission may, after the issuance of the opinion, actually occur and, further, may result in Commission proceedings under R.C. 102.06 or criminal proceedings alter the nature of such documents for purposes of R.C. 149.43?

The Ohio Ethics Commission is created by R.C. 102.05 and has powers and duties as set forth in various provisions of R.C. Chapter 102. Pursuant to R.C. 102.08, the Commission may render advisory opinions with regard to questions concerning ethics, conflicts of interest, and financial disclosure under R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43. Concerning the practices of the Commission with regard to rendering advisory opinions, your opinion request states:

These opinions are issued in response to written requests from public officials or employees or from members of the general public. In addition, the Commission may answer questions raised of its own volition. However, the Commission will render an

advisory opinion only with regard to prospective or hypothetical facts (See: Ohio Ethics Commission Advisory Opinion No. 75-037).

In practice, the Commission renders two types of advice. First, the Commission issues formal advisory opinions, which receive the review and approval of the Commission in a public meeting. Formal opinions are published and circulated to provide guidance to those public officials or employees who are similarly situated. These opinions do not disclose the identities of the requesting party or the public official or employee involved, but the name of the requesting party appears on the agenda of the meeting. Second, the Commission staff issues informal advisory opinions, addressed to particular individuals. Informal opinions generally are not reviewed in a public meeting, and they are not published or circulated. These opinions are issued by the staff between Commission meetings when a prompt answer is required, provided the question is not one of first impression and may be answered on the basis of past formal advisory opinions and the plain language of the statute.

You specifically ask whether the letter requesting an advisory opinion from the Ohio Ethics Commission and the underlying documents related to such opinions are, for purposes of R.C. Chapter 149, public records.¹ The general rule with regard to access by the general public to public records is set forth in R.C. 149.43(B) which states:

All public records shall be promptly prepared and made available for inspection to any member of the general public at all reasonable times during regular business hours. 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.

The term "records," as used in R.C. Chapter 149, 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...which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

¹ Your opinion request distinguishes between information pertaining to formal and informal advisory opinions issued by the Commission. R.C. 102.08 which authorizes the Ohio Ethics Commission to render advisory opinions does not, however, make any distinction between formal and informal opinions, and, therefore, for purposes of R.C. 149.43, I believe no distinction may be made between types of opinions as to the availability of the documents related thereto for public inspection.

R.C. 149.011(G). See generally 1983 Op. Att'y Gen. No. 83-003 (discussing the types of materials which constitute records for purposes of R.C. Chapter 149). Since the Ohio Ethics Commission is a public office of the state, see generally R.C. 102.05 (creating the Ohio Ethics Commission), all documents created or received by or coming under the jurisdiction of the Commission which serve to document the activities of the Commission qualify as "records," as that term is used in R.C. Chapter 149. It is clear that the request letter for an advisory opinion of the Commission is "received by" the Commission. Similarly, the underlying documents related to an advisory opinion, whether created or received by the Commission, certainly come under the jurisdiction of the Commission. Further, both types of materials serve to document the functions and decisions of the Commission. Thus, the request letter for an advisory opinion and the underlying documents are records of the Commission. See generally R.C. 149.40 ("[t]he head of each public office shall 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").

The next relevant inquiry is whether the records about which you ask constitute public records. For purposes of R.C. 149.43, the term "public record" is defined as:

any record that is kept by any public office, including, but not limited to, state...units, except medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions under [R.C. 2151.85] and to appeals of actions arising under that section, records listed in [R.C. 3107.42(A)], trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

R.C. 149.43(A)(1). The fact that the records about which you ask are kept by the Commission qualifies the records as public records, unless one of the exceptions enumerated in R.C. 149.43(A)(1) encompasses such records.

Assuming that the documents about which you ask are not medical records, records pertaining to adoption, probation, and parole proceedings, records pertaining to actions or appeals under R.C. 2151.85, or records listed in R.C. 3107.42(A), it is necessary to determine whether such records constitute trial preparation records, confidential law enforcement investigatory records, or records the release of which is prohibited by state or federal law.

I will first address the exception for records the release of which is prohibited by state or federal law. I am unaware of any federal law prohibiting the release of the records about which you ask. As noted in your letter, however, R.C. Chapter 102 contains various provisions relating to the confidentiality or permissible disclosure of the Commission's records. You specifically mention R.C. 102.06, which states in pertinent part: "All papers, records, affidavits, and documents upon any complaint, inquiry, or investigation relating to the proceedings of the commission shall be sealed and are private and confidential, except as otherwise provided in this

section." In order to determine whether the request letter and other documents relating to an advisory opinion rendered by the Commission pursuant to R.C. 102.08 fall within the above-quoted provision of R.C. 102.06, it is useful to examine the statutory scheme governing the powers and duties of the Ohio Ethics Commission.

R.C. Chapter 102 sets forth various distinct activities performed by the Ohio Ethics Commission. Pursuant to R.C. 102.02, certain public officers and employees and candidates for public office must file financial disclosure statements with the "appropriate ethics commission," see generally R.C. 102.01(F), which is, in certain instances, the Ohio Ethics Commission. As a general rule, statements filed under R.C. 102.02 are subject to public inspection. R.C. 102.02(A). R.C. 102.02(B), however, sets forth an exception to this rule, and states in part: "Disclosure statements filed under this division with the Ohio ethics commission by members of boards, commissions, or bureaus of the state for which no compensation is received other than reasonable and necessary expenses shall be kept confidential."

R.C. 102.08 authorizes the Ohio Ethics Commission to "recommend legislation relating to ethics, conflicts of interest, and financial disclosure, and render advisory opinions with regard to questions concerning these matters for persons for whom it is the appropriate ethics commission." R.C. 102.08 does not specifically require, however, that such activities be kept private and confidential.

R.C. 102.06 establishes the duties of the Ohio Ethics Commission with regard to violations of R.C. Chapter 102, R.C. 2921.42, and R.C. 2921.43, see generally 1981 Op. Att'y Gen. No. 81-063, and states in part:

The commission shall investigate complaints and may investigate charges presented to it and may request further information...if the information sought is directly relevant to a complaint or charges received by the commission pursuant to this section. Such information is confidential....Proceedings of the commission in connection therewith, shall be kept confidential except as otherwise provided by this section.

R.C. 102.06 then provides for a hearing on the complaint where the Commission finds the complaint not frivolous and finds reasonable cause to believe that the facts alleged in the complaint constitute a violation of R.C. 102.02-.04, R.C. 2921.42, or R.C. 2921.43. Pursuant to R.C. 102.06, "[t]he hearing shall be closed to the public." If the Commission dismisses a complaint, the Commission shall:

upon the request of the accused person, make a public report of the finding, but in such case all evidence and the record of the hearing shall remain confidential unless the accused person also requests that the evidence and record be made public. Upon request by the accused person, the commission shall make the evidence and the record available for public inspection.

R.C. 102.06. The Commission is also empowered, pursuant to R.C. 102.06, to subpoena witnesses and documents and to depose

witnesses. Additionally, R.C. 102.06 requires the Ohio Ethics Commission to report on its activities to the General Assembly.

The final paragraph of R.C. 102.06 states: "All papers, records, affidavits, and documents upon any complaint, inquiry, or investigation relating to the proceedings of the commission shall be sealed and are private and confidential, except as otherwise provided in this section." The question thus arises as to whether this language encompasses documents or papers relating to the Commission's rendering of advisory opinions pursuant to R.C. 102.08. For the reasons set forth below, I do not believe that the above-quoted language of R.C. 102.06 applies to papers or documents held by the Ohio Ethics Commission for purposes of rendering an advisory opinion as authorized by R.C. 102.08.

Those items which are to be sealed and which are private and confidential under R.C. 102.06 are "[a]ll papers, records, affidavits, and documents upon any complaint, inquiry, or investigation relating to the proceedings of the commission" (emphasis added). None of the terms, as used in R.C. 102.06, is defined by statute. The phrase "complaint, inquiry, or investigation" is modified, however, by the term "relating to the proceedings of the commission." Although the Ohio Ethics Commission has various statutory powers and duties, see, e.g., R.C. 102.02(B), R.C. 102.06, R.C. 102.08, the Commission conducts "proceedings" only pursuant to R.C. 102.06. See 1976 Op. Att'y Gen. No. 76-009 at 2-25 (concluding that, "the confidentiality provisions of R.C. 102.06 apply to Commission...investigations, and do not apply to financial statements required to be filed under R.C. 102.02, wherein it is specifically provided that such statements are to be open to public inspection"). See generally Black's Law Dictionary 1083 (5th ed. 1979) (defining "proceeding," in part, as, "[i]n a general sense, the form and manner of conducting juridical business before a court or judicial officer....Term also refers to administrative proceedings before agencies, tribunals, bureaus, or the like"). Thus, the records, as that term is defined in R.C. 149.011(G), upon complaints, inquiries, or investigations which must be kept confidential under R.C. 102.06 are those that relate to the investigative and hearing functions of the Commission set forth in that section. I conclude, therefore, that R.C. 102.06 does not require that the request letter and other documents relating to an advisory opinion of the Commission be kept confidential.

R.C. 102.07 sets forth another provision with regard to the disclosure of information by the Ohio Ethics Commission and states:

No member, employee, or agent of the Ohio ethics commission...shall divulge any information or any books, papers, or documents presented to the commission...without the consent, in writing, of the appropriate ethics commission, unless such books, papers, or documents were presented at a public hearing, except as provided in [R.C. 102.06].

I am aware of no judicial decisions or opinions of this office interpreting R.C. 102.07. In State ex rel. Plain Dealer Publishing Co. v. Krouse, 51 Ohio St. 2d 1, 364 N.E.2d 854 (1977), the court examined R.C. 4123.88 which contains language similar to that set forth in R.C. 102.07 and determined that R.C. 4123.88 does not prohibit the release of certain forms used by the Bureau of Workmen's Compensation. R.C. 4123.88

states in part: "[n]o person shall, without prior authority from a member of the commission, the claimant, or the employer, examine or directly or indirectly cause or employ another person to examine any claim file or any other file pertaining thereto." The court concluded that, "R.C. 4123.88 does not...prohibit the release of such files, but only requires prior authorization by a member of the commission, the claimant, or the employer." 51 Ohio St. 2d at 3, 364 N.E.2d at 856. Similarly, I conclude that the language contained in R.C. 102.07 does not prohibit the release of any information, books, papers or documents, which relate to an advisory opinion and which are presented to the Ohio Ethics Commission other than at a public hearing; but merely requires the written authorization of the Commission prior to the release of any such data by a member, employee, or agent of the Commission.

Having found no state law which prohibits the release of the request letter or other documents relating to the issuance of an advisory opinion by the Ohio Ethics Commission under R.C. 102.08, I turn to the exception from the definition of a public record for "confidential law enforcement investigatory records." R.C. 149.43(A)(2) defines that term as meaning:

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

The application of the exception set forth in R.C. 149.43(A)(2) was addressed in 1981 Op. Att'y Gen. No. 81-014. At issue in Op. No. 81-014 was the question whether complaints filed with the Division of Real Estate concerning violations of R.C. Chapter 4735 are public records within the meaning of R.C. 149.43. Concerning the scope of the exception for confidential law enforcement investigatory records, the opinion states at 2-53:

[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.

Op. No. 81-014 further sets forth a two-part analysis for determining whether a record comes within the definition of a

"confidential law enforcement investigatory record." First, the record must relate to a law enforcement matter, and second, the disclosure of such record must create a significant risk of disclosing one of the matters enumerated in R.C. 149.43(A)(2)(a)-(d). With respect to the complaints at issue in Op. No. 81-014, the opinion concludes that since such complaints "trigger investigations," which may lead to civil or criminal proceedings, they are records which pertain to law enforcement matters.

Unlike the complaints at issue in Op. No. 81-014, the records related to formal and informal advisory opinions of the Ohio Ethics Commission are unrelated to the Commission's investigative duties under R.C. 102.06 and, therefore, do not constitute records related to law enforcement matters. Cf. State ex rel. Beacon Journal Publishing Co. v. University of Akron, 64 Ohio St. 2d 392, 415 N.E.2d 310 (1980) (routine factual reports generated by university police personnel are not confidential law enforcement investigatory records under R.C. 149.43(A)(2)(c), since such reports are not "specific investigatory work product" (emphasis in original)). As stated in your opinion request, the Commission renders advisory opinions "only with regard to prospective or hypothetical facts." Ohio Ethics Commission, Advisory Opinion No. 75-037 (syllabus, paragraph one) ("[t]he Ohio Ethics Commission renders advisory opinions only when the facts presented in a request are hypothetical or the conduct in question prospective"). Since advisory opinions concern only hypothetical or prospective conduct, at the time the Commission renders an advisory opinion, there is no conduct subject to being investigated. While it is true that the conduct addressed in an advisory opinion may occur and subsequently become conduct alleged to be in violation of R.C. Chapter 102, R.C. 2921.42, or R.C. 2921.43, and, thus, subject to administrative or criminal proceedings, see R.C. 102.06, 102.99, 2921.42(D), 2921.43(D), the process of rendering an advisory opinion does not involve the investigation of actual conduct. The records related to such an opinion, therefore, are not related to law enforcement matters. Thus, I conclude that an advisory opinion rendered by the Ohio Ethics Commission and the underlying documents related to the opinion concerning merely hypothetical or prospective conduct do not constitute confidential law enforcement investigatory records, as defined in R.C. 149.43(A)(2). See generally State ex rel. Dayton Newspapers, Inc. v. Rauch, 12 Ohio St. 3d 100, 465 N.E.2d 458 (1984) (exemptions from the public records law are to be strictly construed against the custodian of the records); State ex rel. Beacon Journal Publishing Co. v. University of Akron.

The final issue to be addressed is whether the documents about which you ask constitute trial preparation records, as defined in R.C. 149.43(A)(4), which defines that term 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, including the independent thought processes and personal trial preparation of an attorney" (emphasis added).

1980 Op. Att'y Gen. No. 80-103 at 2-423 sets forth the following analysis of the scope of the exception for trial preparation records, as follows:

[I]n 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.

See State ex rel. Beacon Journal Publishing Co. v. University of Akron. As set forth above, documents relating to the Commission's rendering of an advisory opinion are not specifically compiled in reasonable anticipation of any civil, criminal, or administrative proceedings. Cf. Op. No. 81-014 (a complaint filed with the Division of Real Estate does not automatically result in a hearing and, therefore, such complaints are not specifically compiled in anticipation of such hearings). The mere possibility of a future administrative or criminal proceeding concerning conduct arising after the issuance of an advisory opinion, which, at the time issued, concerned only hypothetical or prospective conduct, cannot be said to qualify the records relating to such an opinion as trial preparation records.

Based on the foregoing, it is my opinion, and you are advised that, a letter requesting an advisory opinion from the Ohio Ethics Commission under R.C. 102.08 and the documents held by the Commission concerning such advisory opinion are public records for purposes of R.C. 149.43.