the named lessee therein, the right to use and occupy the waterfront at Buckeye Lake in front of Lot No. 138 of Bright's revised allotment at Summerland Beach. The reasons assigned by the lessee for the reductions requested in this application are that she has built a retaining wall in connection with the leased property at an expense to her of more than $500.00 and that she has suffered heavy financial losses in connection with this property, due to depressed financial conditions.

Acting upon this application, you have granted a reduction as to the delinquent rentals on this lease amounting to the sum of $30.00, which in effect is a remission or a cancellation of the full amount of such delinquent rentals. You have not, however, granted any reduction in the amount of the annual rental to be paid under this lease.

Upon examination of this application and the finding made by you upon the application, the same are approved by me as is evidenced by my approval endorsed upon your finding and upon the duplicate and triplicate copies thereof, all of which, together with the application, are herewith returned.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5423.

RECORDS—FEDERAL EMERGENCY RELIEF ADMINISTRATION AND CHARITABLE ORGANIZATIONS—MAY BE SUBPOENAED BY BOARD OF ELECTIONS OR GRAND JURY.

SYLLABUS:

1. A person having information or records desired by a grand jury or board of elections may be compelled by subpoena to appear or produce the same before such bodies, providing there is no statute enacted by either the state or federal government which prevents such witness or records from being subpoenaed. Whether the testimony of a witness or the documents subpoenaed by a grand jury or a board of elections are privileged is a question for a court and not for a witness to determine.

2. The files, records and employes of the Federal Emergency Relief Administration, the Works Progress Administration and charitable institutions and organizations may be subpoenaed by a grand jury or a board of elections.

COLUMBUS, OHIO, April 28, 1936.

HON. FRANK T. CULLITAN, *Prosecuting Attorney, Cleveland, Ohio.*

DEAR SIR: This will acknowledge receipt of your letter which reads as follows:

> "The Board of Elections of this county has requested me to ask you for an opinion on the question as to whether the files, records and employes of the Cuyahoga County Relief Administration, the F. E. R. A. and the W. P. A. are amenable to subpoena:
>
> 1. By the Board of Elections.
> 2. By the County Grand Jury.
>
> Do the same rules apply to private charitable organizations?
>
> It appears that instructions have been issued by the State-Federal Relief Headquarters in Columbus for the above mentioned relief agencies operating in this county to refuse to honor any requests for information about persons on relief, even by subpoena, applying the rule even to cases where the relief clients concerning whom information is sought are involved, or apparently involved, in some criminal matter."

A grand jury is invested by law with the power to inquire into the matter of whether the laws of this state have been violated in a county (Section 13436-6, General Code). This power of inquiry is accompanied by the power of causing process to issue for the production of books, records and documents, or for the appearance of witnesses (Section 13436-9, General Code). The issuance of subpoenas, the appearance of witnesses before the grand jury and the punishment of witnesses for refusing to appear or to testify before a grand jury is controlled and governed by Sections 13436-9, 13436-10, 13436-11 and 13436-12, General Code. These sections read as follows:

Sec. 13436-9:

> "When required by the grand jury, the prosecuting attorney or the judge, the clerk shall issue subpoenas and other process to any county to bring witnesses to testify before such court."

Sec. 13436-10:

"Before a witness shall be examined by the grand jury, an oath shall be administered to him by the foreman of the grand jury or by the judge or clerk of the Court of Common Pleas, truly to testify of such matters and things as may lawfully be inquired of before such jury, a certificate whereof shall be endorsed on the subpoena of the witness or otherwise made by the foreman of the grand jury, judge or clerk, certifying the attendance of said witness to the clerk of the court."

Sec. 13436-11:

"If a witness before a grand jury refuse to answer an interrogatory, the fact shall be communicated to the court in writing, in which such interrogatory shall be stated, with the excuse for the refusal, if any, given by the witness. Such court shall thereupon determine whether the witness is required to answer, and such grand jury shall be forthwith informed of such decision."

Sec. 13436-12:

"If the court determine that the witness is required to answer and he persists in his refusal, he shall be brought before the court, which shall proceed in a like manner as if such witness had been interrogated and refused to answer in open court."

These statutes were no doubt enacted to more effectually promote the comprehensive terms of Section 13436-6, General Code, empowering a grand jury to inquire into and investigate criminal offenses committed in a county.

A board of election, by Section 4785-13, General Code, is empowered:

"* * * * * * * * *

(j) To investigate irregularities, nonperformance of duties, or violations of laws by election officers and other persons; to administer oaths, issue subpoenas, summon witnesses, and compel the production of books, papers, records, and other evidence in connection with any such investigation; and to report the facts to the prosecuting attorney.

* * * * * * * * *."

The failure to report as a witness or to produce books, records or documents in response to a subpoena issued by a board of elections or to refuse to testify before such board is made a misdemeanor by Section 4785-227, General Code, which reads:

> "Whoever, having been duly subpoenaed or ordered to appear before a grand jury, court, board or officer in a proceeding or prosecution upon complaint, information, affidavit or indictment, for an offense under an election law, fails to do so, or having appeared, refuses to answer a question pertinent to the matter under inquiry or investigation; or refuses to produce, upon reasonable notice, any material, books, papers, documents or records in his possession or under his control shall, unless he claims his constitutional rights, upon conviction thereof, be fined not less than one hundred nor more than one thousand dollars, or imprisoned in the county jail not less than thirty days, nor more than six months."

Thus, under express legislative enactments a person may be compelled by subpoena to attend and appear as a witness before a grand jury or a board of elections. Likewise, the production of books, records or documents before such bodies can be compelled by the issuance of a subpoena duces tecum.

There is no provision in the laws of this state which precludes the records of a federal agency or a federal officer or employe from being subpoenaed before a grand jury, and I find no statute which provides that no officer or employe of the federal government may be subpoenaed. This is likewise true in respect to employes of the state and its political subdivisions, as well as charitable organizations. In other words, any person irrespective of his employment or position having information or records desired by a grand jury or by a board of elections, may be compelled to appear as a witness or to produce such records before either a grand jury or a board of elections. Whether the testimony of the witness or the records, or documents in his possession are privileged communications, is a matter for a court to determine and not the witness. State, ex rel. Tune, et al., v. Falkenhainer, et al., 231 S. W., 257.

A witness can refuse to answer questions or produce records or documents which involve privileged communications. However, the refusal of the witness to produce such records or to give testimony in reference to information obtained by virtue of the occupancy of a public position or employment or a position of confidence, can be made the basis of a contempt proceeding commenced in the Court of Common Pleas against such witness if his refusal to appear, to testify or to produce records occurs before a grand jury. Sections 13436-11 and 13436-12,

General Code. If a witness refuses to produce records, to testify or to appear before a board of elections or a grand jury, the witness can be charged with a criminal offense. Section 4785-227, General Code. In either event the question of whether the record or testimony desired to be given or produced either before a grand jury or a board of elections, is a privileged communication, can be raised and determined either in the contempt proceedings or the criminal proceedings.

If a court found that the information or the answer to a question or the documents desired were privileged communications, the citation for contempt or the criminal charge would be dismissed since a witness cannot be compelled to answer questions or produce a document or record which is privileged. Ex Parte Schoepf, 74 O. S., 1. Moreover, courts will not compel the disclosure of state secrets by other departments of government. 42 Ohio Jurisprudence, 238; 28 R. C. L., 519. The rule is stated in Wharton's Criminal Evidence, 11th Edition, Vol. III, page 2072:

> "While the privilege of secrecy as to state and official communications is very rigidly enforced under the English Law, the privilege cannot be so broad under our own institutions. Our national and state officials, as well as the inferior officers, hold office in rotation, and to prohibit a disclosure in many instances would be to prohibit investigation. It is true that during the pendency of diplomatic communications or the investigation of local conditions, national and state officers should be protected from disclosure, as, under these conditions, they have not yet reached conclusions upon which to base their actions, and to this extent such matters, both national and state, should be rigidly protected. However, these matters are not definitely settled, either by decision or by thorough discussion. It has been held, as we have seen, that the state official himself is the proper party to judge of the propriety and advisability of his testimony as to any such fact, but the better opinion, and that supported by the most convincing reason, is that such matters should be left to the trial judge for his own determination, in the furtherance of justice, in the concrete case in which the matter might be called into question. In some states it is even held that the rule which protects privileged communcations has no application to public records."

Whether official communications or documents are privileged is a question for a court to determine and not the witness. If a witness refuses to appear or testify or produce records before a grand jury or board of elections in obedience to a subpoena on the ground that the testimony or the documents are privileged communications, he must

chance the risk that his refusal will be sustained by a court. However, the fact that a record or document or an answer to a question may be privileged, does not deny to a grand jury or to a board of elections their authority to subpoena a person occupying a public position or employment, or the records or documents of a governmental department, agency or charitable institution, providing there is no statute enacted by either the state or federal government which prevents such witness or records from being subpoenaed.

It is a well established rule of law that the federal government has the power to provide that documents or papers in its possession and information obtained by its officials and employes in their official capacity, shall not be produced or revealed by such officers or employes. A statute of such a nature protects an officer or employe against criminal prosecution or commitment for contempt for refusal to produce such documents or to testify about such documents on subpoena by a grand jury, board of elections or a court.

By an Act of Congress (U. S. C. A., Title 5, Section 22, Revised Statutes, 161), the head of each department in the federal government is empowered to make rules concerning the custody, use and preservation of papers and documents of the department. Section 22, U. S. C. A., Title 5, reads:

> "The head of each department is authorized to prescribe regulations, not inconsistent with law, for the government of his department, the conduct of its officers and clerks, the distribution and performance of its business, and the custody, use and preservation of the records, papers, and property appertaining to it."

The term "department" as used therein is defined in Section 2, Title 5, U. S. C. A., which reads:

> "The word 'department' when used alone in this chapter, and chapters 2, 3, 4, 5, 6, 7, 8, 9, 10, and 11 of this title, means one of the executive departments enumerated in the preceding section."

Section 1, Title 5, U. S. C. A., reads as follows:

"The provisions of this chapter shall apply to the following executive departments:

First. The Department of State.
Second. The Department of War.

Third. The Department of the Treasury.
Fourth. The Department of Justice.
Fifth. The Post Office Department.
Sixth. The Department of the Navy.
Seventh. The Department of the Interior.
Eighth. The Department of Agriculture.
Ninth. The Department of Commerce.
Tenth. The Department of Labor."

Regulations promulgated by the heads of the executive departments in the federal government prohibiting employes from producing records or documents in response to a subpoena duces tecum or appearing and testifying as a witness about such documents or information obtained in their official capacity, have been sustained in many cases. Boshe v. Comingin, 177 U. S., 459, 44 L. Ed., 846; Ex Parte Sackett, 74 Fed. (2nd), 922; In Re Huttman, 70 Fed., 699; In Re Weeks, 82 Fed., 729, and Steegall v. Thurman, 175 Fed., 813. The federal courts have held that such a regulation promulgated pursuant to Section 22, U. S. C. A., Title 5, has the authority of law. See In Re Huttman and Ex Parte Sackett, supra.

A regulation of the Treasury Department prohibiting the Collector of Internal Revenue from producing records in his office in the trial of a civil or criminal case without consent of the Department, has been invoked many times as grounds for refusing to answer questions in a state court. In the case of Steegal v. Thurman, 175 Fed., 813, it was held that a United States Storekeeper and Gauger at a distillery could not be compelled to answer questions before a state grand jury as to information concerning a distillery obtained by him in his official capacity. In Re Huttman, 70 Fed., 699, it was held:

> "A deputy collector of internal revenue cannot be compelled to testify, in a criminal proceeding in a state court, as to statements made to him by an applicant for a special retail liquor dealer's tax stamp, which statements were made for the purpose of being reduced to writing and embodied in the records of the internal revenue office. To divulge such statements would be to divulge the contents of the records themselves, which is forbidden by the internal revenue regulations."

A similar regulation promulgated by the Department of Justice was sustained as a valid ground for an employe of the Department of Justice in refusing to testify in a civil case about matters and information secured in his official capacity as an employe of the Department of Justice. Ex Parte Sackett, supra. See also In Re Valecia Condensed Milk Co., 240

Fed., 310; Ex Parte Turner, 24 Fed. Cases, 14246; In Re Weeks, supra and Ex Parte Sackett, supra.

It is therefore apparent that under Section 22, U. S. C. A., Title 5, the head of an executive department of the federal government may, by rule, prohibit his subordinates from producing in court any record, document or paper of the department in obedience to a subpoena duces tecum or to appear or testify concerning such record or document or information obtained in his official capacity. A court cannot punish the subordinate for obeying such a regulation.

The officers and employes and the records of the Federal Emergency Relief Administration and the Works Progress Administration are entitled to this immunity if a similar regulation has been lawfully promulgated by the Federal Emergency Relief Administration or the Works Progress Administration under authority granted by Congress. The authority conferred by Section 22, U. S. C. A., Title 5, does not apply to the Federal Emergency Relief Administration or the Works Progress Administration, since the term "department" as used therein is defined in Sections 1 and 2 of Title 5, U. S. C. A. Sections 1 and 2 of Title 5, U. S. C. A., apply only to the executive departments of the federal government enumerated in Section 1 of Title 5, U. S. C. A. The Federal Emergency Relief Administration was created by the Federal Emergency Act of 1933 (May 12, 1933, Chapter 30, Section 8, 48 Statutes, 58, Section 712, 728, Title 15, U. S. C. A.), and continued in force until June 10, 1936, by Section 10 of the Emergency Relief Appropriation Act of 1935 (Act of August 24, 1935, Chapter 64, Section 55, 49 Statute, 781). There is no provision in the act creating the Federal Emergency Relief Administration which places it in any of the departments enumerated in Section 1, Title 5, U. S. C. A., nor does the Act itself contain any provision similar to that contained in Section 22, Title 5, U. S. C. A. In view of the lack of such congressional authority it follows that the Federal Emergency Relief Administration does not have the power to adopt a rule similar to the regulation adopted by the Treasury Department and the Department of Justice by virtue of Section 22, Title 5, U. S. C. A. The same is true in respect to the Works Progress Administration, inasmuch as the Act of Congress creating that agency does not confer upon it or the head of such agency the power to adopt a regulation similar to the regulations adopted by the Treasury Department and the Department of Justice.

The Works Progress Administration was created by an Act of Congress entitled "An Act for the relief of unemployment through the performance of useful public work and for other purposes." Approved March 31, 1933, 48 Statute, U. S. C. A., Title 15, Cumulative Supplement, page 140, and continues in force until March 31, 1937, by Section 14 of the Emergency Relief Appropriation Act of 1935, supra.

Concluding it is my opinion that:

1. A person having information or records desired by a grand jury or board of elections may be compelled by subpoena to appear or produce the same before such bodies, providing there is no statute enacted by either the state or federal government which prevents such witness or records from being subpoenaed. Whether the testimony of a witness or the documents subpoenaed by a grand jury or a board of elections are privileged is a question for a court and not for a witness to determine.

2. The files, records and employes of the Federal Emergency Relief Administration, the Works Progress Administration and charitable institutions and organizations may be subpoenaed by a grand jury or a board of elections.

Respectfully,
JOHN W. BRICKER,
Attorney General.

5424.

APPROVAL—BONDS OF VILLAGE OF BYESVILLE, GUERNSEY COUNTY, OHIO, $5,200.00.

COLUMBUS, OHIO, April 28, 1936.

State Employes Retirement Board, Columbus, Ohio.

5425.

APPROVAL—BONDS OF NILES CITY SCHOOL DISTRICT, TRUMBULL COUNTY, OHIO, $28,000.00.

COLUMBUS, OHIO, April 28, 1936.

State Employes Retirement Board, Columbus, Ohio.