

OPINION NO. 91-021**Syllabus:**

1. Personal property taken as evidence remains the property of the person legally entitled to its possession prior to its seizure for evidence unless the property is contraband subject to the provisions of R.C. 2933.43, or has been lawfully seized pursuant to R.C. 3719.141, or is forfeited under R.C. 2925.41 through R.C. 2925.45, or has been lawfully seized in relation to a violation of R.C. 2923.32, or the right to the possession of the property is lost under R.C. 2933.41(C) or another provision of state or federal law.
2. Pursuant to R.C. 2933.41(A)(1), each law enforcement agency that has custody of any property that is subject to R.C. 2933.41 shall adopt a written internal control policy that addresses the procedures the agency will follow in disposing of property under R.C. 2933.41.
3. Pursuant to R.C. 2933.41(B), a law enforcement agency that has in its custody property kept for evidence must make reasonable efforts to return the property to the persons entitled to its

possession at the earliest possible time that it is no longer needed as evidence, provided that the persons entitled to possession have not lost the right to the possession of the property under R.C. 2933.41(C) or other statutory provision that operates as a forfeiture.

4. Pursuant to R.C. 2933.41(D), unclaimed and forfeited property held as evidence by a law enforcement agency under R.C. 2933.41, may be disposed of only after a court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities has determined that the unclaimed or forfeited property is no longer needed as evidence.
5. Pursuant to R.C. 2933.26 and R.C. 2933.27, property seized by warrant shall be kept as evidence until the accused is tried or the claimant's right to the property is otherwise ascertained by the court that issued the warrant.
6. Property introduced as evidence in a judicial proceeding and thereby placed in the custody of the court shall be kept by the court or an officer of the court until the court decides the property is no longer needed as evidence.
7. A law enforcement agency that keeps property for evidence may determine, in accordance with its written control policy adopted pursuant to R.C. 2933.41(A)(1), that such property is no longer needed as evidence and may thereafter dispose of it pursuant to R.C. 2933.41, provided that such property is not property seized pursuant to warrant, introduced as evidence in a judicial proceeding, or unclaimed or forfeited.

To: James J. Mayer, Jr., Richland County Prosecuting Attorney, Mansfield, Ohio
By: Lee Fisher, Attorney General, April 16, 1991

I have before me your letter to my predecessor requesting an opinion regarding the disposition of property held as evidence by law enforcement agencies pursuant to R.C. 2933.41.¹ Specifically, you ask:

1. When can the determination be made that evidence is no longer needed and can therefore be destroyed?
2. Who makes that determination?

I note at the outset that property held as evidence may come into the possession of a law enforcement agency in numerous ways. For example, property may be lawfully seized pursuant to warrant. U.S. Const. amend. IV; Ohio Const. art. I, §14; R.C. 2933.21. Similarly, property may be lawfully seized without a warrant if the seizure is reasonable. U.S. Const. amend. IV; Ohio Const. art. I, §14. See generally *State v. Andrews*, 57 Ohio St. 3d 86, 87, 565 N.E.2d 1271, 1272 (1991) (U.S. and Ohio Constitutions "prohibit any governmental...seizure...unless supported by an objective justification"); *Podner v. State*, 19 Ohio App. 82 (Stark County 1922) (contraband may be seized without a warrant); *State v. Abrams*, 322 N.E.2d 339 (Ct. App. Butler County 1974) (objects in plain view of an officer who has the

¹ Because your letter requesting an opinion refers only to R.C. 2933.41, I will confine my opinion to instances in which property is held as evidence under that section. Also, because your letter deals with property held as evidence by a law enforcement agency, I will further restrict my opinion to property in the custody of law enforcement agencies after the point in time the factual determination has been made that the property constitutes evidence.

right to be in a position to have that view are subject to seizure); *State v. Williams*, 19 Ohio App. 2d 234, 250 N.E.2d 907 (Trumbull County 1969) (property seized incident to arrest). Lost, abandoned or stolen property may also be taken into the custody of law enforcement agencies. *See, e.g.*, R.C. 737.29-.33 (property recovered by municipal police); R.C. 4513.60-.65 (abandoned motor vehicles).

The General Assembly, in light of the numerous ways a law enforcement agency may obtain possession of property for evidence purposes, has set forth a number of statutes regulating the retention of such property. R.C. 2933.41, the statute about which you ask, is the central statute in this framework. *See* Ohio Legislative Service Comm'n, *Analysis of Am. Sub. H.B. 632* (1984); *Ryals v. Collins*, 46 Ohio Misc. 25, 26, 345 N.E.2d 658, 659 (Shaker Hts. Mun. Ct. 1975) ("avowed purpose [of R.C. 2933.41], according to legislative analysis, was to clarify procedures available for disposition of various types of seized or forfeited items as well as unclaimed, abandoned, stolen or lost articles"). Various procedural rules adopted by the Ohio Supreme Court also supplement and implement the statutory directives of R.C. 2933.41. It is, therefore, appropriate to begin an examination of the legal framework by discussing R.C. 2933.41. R.C. 2933.41(A)(1) requires that law enforcement agencies both keep and dispose of evidence pursuant to the procedures set forth in R.C. 2933.41 by stating, in pertinent part, that:

Any property, other than contraband that is subject to the provisions of section 2933.43 of the Revised Code, other than property that is subject to section 3719.141 of the Revised Code, other than property forfeited under sections 2925.41 to 2925.45 of the Revised Code, and other than property that has been lawfully seized in relation to a violation of section 2923.32 of the Revised Code,² that has been lost, abandoned, stolen, seized pursuant to a search warrant, or otherwise lawfully seized or forfeited, and that is in the custody of a law enforcement agency, shall be kept safely pending the time it no longer is needed as evidence, and shall be disposed of pursuant to this section. (Emphasis and footnote added.)

R.C. 2933.26, however, requires that "property [seized under a warrant]...shall be kept by [a] judge, clerk, or magistrate [for] use as evidence," unless the court transfers such seized property to the law enforcement agency which executed the warrant. *See also* Ohio R. Crim. P. 41(D) ("[p]roperty seized under a warrant shall be kept for use as evidence by the court which issued the warrant or by the law enforcement agency which executed the warrant"). The terms of R.C. 2933.41, thus, apply to property seized by warrant and held by a law enforcement agency at the direction of a court pursuant to R.C. 2933.26 or Ohio R. Crim. P. 41(D), but would not apply to property seized under a warrant and held by the court.

Moreover, R.C. 2933.41(A)(1) requires that each law enforcement agency that has custody of any property that is subject to R.C. 2933.41 must adopt a written internal control policy that addresses several issues regarding the disposition of property held for evidence. R.C. 2933.41(A)(1) specifically provides, in pertinent part, that:

Each law enforcement agency that has custody of any property that is subject to this section shall adopt a written internal control policy that

² R.C. 2933.43 provides procedures for the seizure, forfeiture and disposition of contraband. R.C. 3719.141 details the procedures required in the sale of controlled substances by a peace officer in the performance of official duties. R.C. 2925.41-.45 sets forth forfeiture procedures for real and personal property directly connected to proceeds from felony drug abuse offenses and acts and property involved with the commission of such offenses or acts. R.C. 2923.31-.36 prescribes the procedures for forfeiture of property used in an enterprise that is part of a pattern of corrupt activity. Where a statute sets up forfeiture procedures separate from R.C. 2933.41, those procedures appear to control the methods employed. *See State v. Mateo*, 57 Ohio St. 3d 50, 565 N.E.2d 590 (1991).

addresses the keeping of detailed records as to the amount of property taken in by the agency, *that addresses the agency's disposition of the property under this section*, that provides for the keeping of detailed records of the disposition of the property, and that provides for the keeping of detailed financial records of the amount and disposition of any proceeds of a sale of the property under division (D)(8) of this section and of the general types of expenditures made out of the proceeds retained by the agency and the specific amount expended on each general type of expenditure. (Emphasis added).

Further, R.C. 2933.41(A)(2)(a) states that, "[e]very law enforcement agency that has any lost, abandoned, stolen, seized, or forfeited property as described in division (A)(1) of [R.C. 2933.41] in its custody shall comply with its written internal control policy adopted under that division relative to the property." R.C. 2933.41 includes few specifics, however, on precisely what is to be included in the internal control policy regarding "the agency's disposition of property."

A careful reading of the language employed by the General Assembly in mandating the essential elements of an internal control policy pursuant to R.C. 2933.41(A)(1) reveals that the portion of the policy "address[ing] the agency's disposition of the property" is separate and distinct from record keeping requirements. A proper internal control policy, therefore, must address not only the keeping of specified records about disposition of property but must also address the overall "disposition of the property." As such, the phrase "disposition of the property" refers to the entire process of keeping and disposing of evidence that R.C. 2933.41 contemplates. Therefore, an internal control policy pursuant to R.C. 2933.41(A)(1) must include policies and procedures to be followed when a law enforcement agency receives property for evidence under R.C. 2933.41. Such policies and procedures should embody the mechanisms to be employed for the determination of when property is no longer needed as evidence.

Implicit in the directives of R.C. 2933.41 is the basic principle that evidence remains the private property of the person legally entitled to its possession³ at the time of its seizure for evidence. This right continues despite the fact that the property is taken into custody for evidence by a law enforcement agency, unless the right to possession is lost as prescribed in R.C. 2933.41 or other statutory provision. R.C. 2933.41(B) provides that, "[a] law enforcement agency that has property in its possession that is required to be disposed of pursuant to this section shall make a reasonable effort to *locate the persons entitled to possession of the property* in its custody, to notify them of when and where it may be claimed, and to *return the property to them at the earliest possible time.*" (Emphasis added.) See also Ohio R. Crim. P. 12(F) ("[w]here a motion to suppress tangible evidence is granted, the court upon request of the defendant shall order the property returned to the defendant if he is entitled to lawful possession thereof"); Ohio R. Crim. P. 26

³ The right of possession referred to in R.C. 2933.41(B) has been construed to mean:

The detention and control, or the manual or ideal custody, of anything which may be the subject of property, for one's use and enjoyment, either *as owner or as the proprietor of a qualified right in it*, and either held personally or by another who exercises it in one's place and name. (Emphasis added.)

Village of Chagrin Falls v. Loveman, 34 Ohio App. 3d 212, 216, 517 N.E.2d 1005, 1009 (Cuyahoga County 1986) (citing *Black's Law Dictionary* 1047 (5th ed. 1979)). Possession, thus, may include a range of forms of ownership from merely holding the property for another to full ownership.

The right of possession may, however, be lost. For example, R.C. 2933.41(C) provides some of the circumstances under which "a person loses any right he may have to the possession of property." R.C. 2933.43 also provides the procedures for the forfeiture of contraband.

("[p]hysical property, other than contraband, as defined by statute, under the control of a Prosecuting Attorney for use as evidence in a hearing or trial should be returned to the owner at the earliest possible time"). Thus, even in the absence of information identifying the persons entitled to possession of property in custody for evidence purposes, the law enforcement agency must attempt to find the persons entitled to its possession. R.C. 2933.41(B) ("[i]n the absence of evidence identifying persons entitled to possession, it is sufficient notice to advertise in a newspaper of general circulation in the county, briefly describing the nature of the property in custody, and inviting persons to view and establish their right to it"). See also U.S. Const. amend IV; Ohio Const. art. 1, §14; *State v. Lilloock*, 70 Ohio St. 2d 23, 434 N.E.2d 723 (1982) (due process of law requires a full adversary hearing before property held as evidence may be lawfully forfeited under R.C. 2933.41); *State ex. rel. Luke v. Corrigan*, 61 Ohio St. 2d 86, 399 N.E.2d 1208 (1980) (replevin is an available remedy to obtain return of personal property taken as evidence); *Thurber v. Ohio State Highway Patrol*, 27 Ohio App. 3d 311, 500 N.E.2d 894 (Geauga County 1985) (in an action for replevin against the state for property seized as evidence in a criminal prosecution, plaintiff is entitled to that property to which he can prove ownership).

R.C. 2933.41(D) controls the disposition of property that is either unclaimed or forfeited under R.C. 2933.41(C).⁴ Inasmuch as it may divest private property rights, R.C. 2933.41 is strictly construed to avoid a forfeiture of property. *Lilloock*, 70 Ohio St. 2d at 25, 434 N.E.2d at 725. A disposition restoring custody of the property to its rightful owner is, thus, preferred and encouraged. In the limited cases where property is unclaimed or forfeited under R.C. 2933.41, disposition is "on application to and order of any court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities." R.C. 2933.41(D). The law enforcement agency holding property that is unclaimed or forfeited may play a central role in the decision to dispose of the property by applying to the court for an order allowing disposition. One reason for court participation in the disposition of property that is unclaimed or subject to forfeiture is to protect the interests of the owner who is being deprived of the right of possession of the property.

Disposition of evidence, whether pursuant to a court order or otherwise under R.C. 2933.41(D), may be carried out only according to the options provided therein. Various classes of property may be retained for law enforcement or other governmental uses. See, e.g., R.C. 2933.41(D)(1) (drugs may be placed in the custody of the Secretary of the Treasury of the United States for medical or scientific purposes); R.C. 2933.41(D)(2) (firearms and dangerous ordnance may be given to a law enforcement agency for police work). Destruction of property held as evidence, however, is limited to five circumstances: (1) drugs, pursuant to R.C. 3719.11 or by transfer to the Secretary of the Treasury of the United States for disposal; (2) firearms and dangerous ordnance not suitable for police work, sporting use, as museum pieces or collector's items; (3) obscene materials; (4) beer, intoxicating liquor, or alcohol determined by the department of liquor control as unfit for sale; and (5) vehicle parts from which a vehicle identification number or derivative therefrom has been removed, defaced, covered, altered or destroyed, and that are not suitable for police work or incorporation into an official vehicle. R.C. 2933.41(D).

While R.C. 2933.41(D) outlines the various disposition options, it is not self-executing. Discretion must still be applied to determine if a particular option is

⁴ If the property being held as evidence is subject to the forfeiture provision of R.C. 2933.41(C), the application to the court for authorization to dispose of the property required by R.C. 2933.41(D) should be made as soon as it is apparent under the circumstances that the person from whose possession it was taken has lost the right of possession under R.C. 2933.41(C). Inasmuch as the absence of a determination under R.C. 2933.41(C) would serve to make R.C. 2933.41(A) and (B) the controlling statutory provisions, a timely determination under R.C. 2933.41(C) should be sought to avoid the return of the property under R.C. 2933.41(A) or (B).

appropriate as applied to particular property. Since one of the aims of the internal control policy under R.C. 2933.41(A)(1) appears to be to systematize the disposition of property held as evidence, a proper internal control policy should set forth a detailed set of procedures to be followed regarding how and when the determination is to be made as to the disposition of such property. Further, the policy should set forth the method of disposition to be used under varying circumstances as applied to the different types of property referred to in R.C. 2933.41.

Having discussed the general scheme of disposition of property held as evidence by law enforcement agencies, I turn now to a discussion of the issue raised in your first question, to wit, the time at which the determination must be made that evidence is no longer needed and can, therefore, be destroyed. Determining the answer to this question requires an examination of the terms of R.C. 2933.41 which refer to time.

Property may only be "kept...pending the time it no longer is needed as evidence." R.C. 2933.41(A). R.C. 2933.41(B), however, requires a law enforcement agency "to return the property to [persons entitled to possession of property held as evidence] at the earliest possible time." The express language of R.C. 2933.41, thus, dictates that disposition of property held by law enforcement agencies as evidence be accomplished at the earliest time it is no longer needed as evidence. To discharge this duty, the internal control policy of a law enforcement agency should provide for the ongoing monitoring of the status of the cases for which it holds property as evidence. When the prosecution, including any appeal, of a case terminates, any property utilized as evidence during that case is no longer needed as evidence, and, thus, is required at that point in time to be disposed of pursuant to the procedures set forth in R.C. 2933.41.⁵

Your second question asks who determines that evidence is no longer needed. Close scrutiny of R.C. 2933.41 does not reveal any express language that designates a particular agency or official to make that determination under all circumstances. R.C. 2933.41(D) does, however, require that unclaimed or forfeited property "be disposed of on application to and order of" the relevant court of record, according to the further disposition options granted by R.C. 2933.41(D). Therefore, the proper disposition of that unclaimed or forfeited property is within the province of the court. Before the court may order the disposition of unclaimed or forfeited property, however, the court must determine that the property is no longer needed as evidence. This requirement is a condition precedent to ordering disposition due to the requirement of R.C. 2933.41(A)(1) that requires that property "shall be kept safely pending the time it no longer is needed as evidence." Therefore, a finding that unclaimed or forfeited property may be disposed of requires a finding that it is no longer needed as evidence. In other circumstances, R.C. 2933.41 gives little explicit direction.

When property has been seized by warrant, the property may be kept by the court that issued the warrant or by a law enforcement agency that executes the warrant. See R.C. 2933.26; Ohio R. Crim. P. 41(D). Since the law enforcement agency operates under the authority of the court in seizing the property, its retention of the property seized by a warrant is also under the supervision of the court. The court, thus, retains the power to decide when the property is no longer needed as evidence. To this end, R.C. 2933.27, titled "Disposition of property before trial," states:

If, upon examination, the judge or magistrate is satisfied that the offense charged with reference to the things seized under a search warrant has been committed, he shall keep such things or deliver them to the sheriff of the county, to be kept until the accused is tried or the claimant's right is otherwise ascertained.

⁵ If the prosecution of a case terminates while the evidence may still be needed in another case, for example in the separate prosecution of a co-conspirator, the property would still be "needed as evidence" in the other case.

See also Ohio R. Crim. P. 12(F); Ohio R. Crim. P. 26. R.C. 2933.27 serves as an extension of the common law regarding the court's inherent power to supervise the aspects of its proceedings. The court, "having jurisdiction to hear and decide issues of fact, has as a part of that jurisdiction the power and authority to control and dispose of tangible property introduced in evidence and thereby placed in its custody for the purposes of the action." *City of Cincinnati v. Flaherty*, 71 Ohio App. 539, 541, 50 N.E.2d 373, 374 (Hamilton County 1943). Such power further extends to those law enforcement officers serving as officers of the court. *Id.*, 71 Ohio App. at 542-43, 50 N.E.2d at 375. Particular law enforcement officers are frequently obligated to serve as officers of the court. See R.C. 311.07 (county sheriff shall attend upon the court of common pleas and the court of appeals during their session and, when required, upon the probate court); R.C. 1901.32 (municipal court may appoint the chief of police of the municipal corporation or a member of the police force as bailiff; every police officer of any municipal corporation and police constable of a township within the territory of the court is ex officio a deputy bailiff of the court); R.C. 1907.53 (the county sheriff and constables of townships within the territorial jurisdiction of the county court shall be ministerial officers of the county court). Thus, local law enforcement officers may keep evidence as officers of the court. Therefore, property held as evidence, that has been either seized by warrant or introduced into evidence in a judicial proceeding, remains under the supervisory powers of the court.⁶ As such, the law enforcement agency holding the property pursuant to R.C. 2933.27 or Ohio R. Crim. P. 41(D) lacks discretion over the disposition of the property; rather, the discretion is vested in the court. Inasmuch as the court has substantial power over the disposition of property in these circumstances, the court has the power to determine that such property is no longer needed as evidence.

Briefly summarized, the discretion to order the disposition of property held as evidence is vested in the court where such property is unclaimed or forfeited property under R.C. 2933.41(D), or where property is seized pursuant to warrant, or where it is introduced into evidence in a judicial proceeding. Now it must be determined in whom the discretion to dispose of other property held as evidence is vested.

Property in the custody of a law enforcement agency that is *not* unclaimed, forfeited, seized pursuant to warrant, or introduced into evidence in a judicial proceeding may consist of property that has been "lost, abandoned, stolen...or otherwise lawfully seized." R.C. 2933.41(A). "Lost, abandoned, or stolen" property is subject to the provisions of R.C. 2933.41(B) that require the law enforcement agency with custody of the property to attempt, using reasonable effort, to locate the persons entitled to its possession. See *Doughman v. Long*, 42 Ohio App. 3d 17, 536 N.E.2d 394 (Butler County 1987). If the law enforcement agency is able to locate the person entitled to the possession of the property, the provisions of R.C. 2933.41(B) apply to generally require the return of property held under R.C. 2933.41 to the persons entitled to its possession. If the law enforcement

⁶ The court in *City of Cincinnati v. Flaherty*, 71 Ohio App. 539, 544, 50 N.E.2d 373, 375 (Hamilton County 1943), emphasizes that the court's supervisory power over police officers and departments is not general; instead, it states that the court's jurisdiction "to control and direct them" is only when they act in the capacity of officers of the court. See generally *City of Cincinnati v. Jasper*, 46 Ohio App. 2d 276, 349 N.E.2d 332 (Hamilton County 1975) (property lawfully seized by law enforcement personnel without a warrant that is not introduced in evidence is not subject to the court's supervisory power to dispose of property in evidence); *State v. Johnson*, 112 Ohio App. 124, 165 N.E.2d 814 (Cuyahoga County 1960) (R.C. 2933.26 which permits a judge, clerk or magistrate to control evidence seized pursuant to warrant does not extend to property seized by law enforcement officers without a warrant); 1990 Op. Att'y Gen. No. 90-101, at 2-448 (juvenile court is given only the limited authority granted specifically by statute over juvenile records maintained by local law enforcement agencies). But see Ohio R. Crim. P. 12(F); Ohio R. Crim. P. 26.

agency is unable to locate the persons entitled to possession, the provisions of R.C. 2933.41(D) apply, because the property is unclaimed. *See also* R.C. 737.29-.33 (containing analogous procedures for disposition of stolen or other property recovered by members of the police force of a municipal corporation). Again, I note that by statute no particular entity is vested with the discretion to determine that these types of property are no longer needed as evidence.

Because R.C. 2933.41 lacks a clear designation vesting some person or agency with authority to determine when evidence may be disposed of, the statute is ambiguous. Therefore, resort must be had to principles of statutory construction. *See Caldwell v. State*, 115 Ohio St. 458, 154 N.E. 792 (1926). Proper construction of a statute requires it to be interpreted in conformity with the purpose sought to be accomplished by its enactment. R.C. 1.49(A); *Humphrys v. Winous Co.*, 165 Ohio St. 45, 133 N.E. 780 (1956); *Caldwell v. State*. As already extensively discussed, the purpose of R.C. 2933.41 is to provide procedures for the disposition of property held by law enforcement agencies, providing foremost for the expeditious return of property to its rightful possessor or, if subject to forfeiture, a speedy determination that the property has been forfeited. A concomitant purpose of R.C. 2933.41 is to keep evidence available for use in the prosecution of legal actions. Thus, the speedy return of property is measured from the point in time the property is no longer needed as evidence.

Despite the lack of a clearly designated agent to determine disposition issues in all cases, the General Assembly assuredly intended someone to exercise that duty. It is a basic tenet of statutory construction that "the General Assembly is not presumed to do a vain or useless thing, and that when language is inserted in a statute it is inserted to accomplish some definite purpose." *State ex rel. The Cleveland Electric Illuminating Co. v. City of Euclid*, 169 Ohio St. 476, 479, 159 N.E.2d 756, 759 (1959); *see also* R.C. 1.47 ("[i]n enacting a statute, it is presumed that: ... (B) [t]he entire statute is intended to be effective; (C) [a] just and reasonable result is intended; (D) [a] result feasible of execution is intended"); *Scott v. Reiner*, 58 Ohio St. 2d 67, 388 N.E.2d 1226 (1979) (every part of a statute's language is to be given effect). Furthermore, the various divisions of a statutory provision are to be read *in pari materia*, or together harmoniously, to give full effect to the entire statute. *See State v. Berry*, 25 Ohio St. 2d 255, 267 N.E.2d 775 (1971).

The responsibility for determining when property is no longer needed as evidence may be deduced by reading the various subsections in R.C. 2933.41 together, in light of related statutes and the aims ascertained in the statutory scheme. R.C. 2933.41 fixes control over property kept as evidence, depending on the nature of the property and in whose custody it is at a particular point in time. The duty of the court is readily apparent in the circumstances previously discussed. The duty in other situations may be drawn from implications in R.C. 2933.41. While a statutorily created agency of the state may generally exercise only those powers expressly granted by statute, authority to accomplish acts necessary and incidental to the functions expressly imposed upon it by statute may be implied from the language employed by the legislature. *See e.g., State ex rel. Locher v. Memming*, 95 Ohio St. 97, 115 N.E. 571 (1916). Where a duty is expressly set forth by statute, but without an explicit assignment of a person to perform it, a determination must be made whether the particular duty is reasonably related to another responsibility assigned by statute which may include the unassigned duty. To imply power from an express grant of authority requires that the implied power be reasonably related to the express duties of the entity. *See generally Waliga v. Kent State Univ.*, 22 Ohio St. 3d 55, 488 N.E.2d 850 (1986); *State ex rel. Corrigan v. Seminatore*, 66 Ohio St. 2d 459, 423 N.E.2d 105 (1981); *In re Anderson*, 57 Ohio Misc. 2d 31, 566 N.E.2d 714 (Ct. Claims 1989) (where statute requires filing of report with a law enforcement officer without specifying any officer particularly, it is intended that the appropriate agency is one with law enforcement duties over the incident). Applying this rationale to the question of who is to make the decision that property is no longer needed as evidence, in circumstances where the law enforcement agency is not subject to the control of a court in keeping property for evidence, the duty to keep the evidence includes the duty to determine that the property is no longer needed as evidence and therefore may be disposed of pursuant to R.C. 2933.41.

Having concluded that, under certain circumstances, R.C. 2933.41 assigns the responsibility for determining that property is no longer needed as evidence to the local law enforcement agency keeping the property, an examination of the perimeters of the discretion is required. Such discretion must be exercised so as to protect the various interests present in the property. While the interest of the persons with the right to possession of the property is the speedy return of the property, the controlling consideration while it is needed as evidence is that it be kept available for use at adjudication *as evidence*. Therefore, the discretion must be exercised to preserve the evidentiary value of property.

The rationale for preservation of property held as evidence holds that such preservation is fundamental to the American justice system. As explained by one commentator:

The arguments for controlling destruction of evidence are most keen when legal proceedings are ongoing, imminent, or reasonably foreseeable. Three policies might justify strictly regulating the circumstances under which individuals and businesses may destroy evidence. First, rules ensuring that relevant evidence survives until trial promote truthseeking. Second, for the adversary system to perform its function of ensuring equal access to justice, relevant evidence must survive to the time of settlement or trial. Third, the integrity of the judicial system is bolstered by restricting the destruction of evidence; the fundamental principle that litigants may not by their own acts deprive the court of its ability to adjudicate a controversy is contravened when one party destroys evidence central to a lawsuit.

J. Gorelick, S. Marzen & L. Solum, *Destruction of Evidence* §1.10 (1989). These reasons are particularly acute where the judicial proceedings are criminal in nature. In an *extreme* case, destruction of evidence may become a problem of constitutional dimensions⁷ if the right to a fair trial is sufficiently impaired. *See, e.g., U.S. v. Augenblick*, 393 U.S. 348 (1969). Regardless of whether the harm is based on a violation of constitutional rights, the government "flirt[s] with the danger of reversal any time evidence is lost or inadvertently destroyed." *U.S. v. Heiden*, 508 F.2d 898, 903 n.1 (9th Cir. 1974). However, the factors present in a particular case require the balancing of "the quality of the government's conduct and the degree of prejudice to the accused." *U.S. v. Loud Hawk*, 628 F.2d 1139, 1152 (9th Cir. 1979)

⁷ Due process of law under the U.S. Constitution and the Ohio Constitution requires that criminal defendants be afforded a meaningful opportunity to present a complete defense. *See California v. Trombetta*, 467 U.S. 479 (1984); *State v. Purdon*, 24 Ohio App. 3d 217, 494 N.E.2d 1154 (Brown County 1985). If exculpatory evidence in the hands of a law enforcement agency is destroyed, due process may be denied a defendant. *Id.* Despite constitutional concerns, the fact that almost everything is evidence of something does not mean that no property held for evidence can ever be destroyed. *Killian v. U.S.*, 368 U.S. 231 (1961). As stated in *Trombetta* at 488-89:

Whatever duty the Constitution imposes on the States to preserve evidence, that duty must be limited to evidence that might be expected to play a significant role in the suspect's defense. To meet this standard of constitutional materiality,...evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means. (Footnote and citations omitted).

(Kennedy, J., concurring). Destruction of evidence, thus, may be authorized only when there is no significant effect on the constitutional rights of an accused.⁸

In addition to the constitutional considerations, there are several statutory limitations which must be considered. For example, destruction or other disposition of evidence generally may not proceed when "an official proceeding or investigation is in progress, or is about to be or likely to be instituted." R.C. 2921.12. To "[a]fter, destroy, conceal, or remove any record, document or thing, with purpose to impair its value or availability as evidence in such proceeding or investigation" constitutes the crime of "tampering with evidence." *Id.* Similarly, "[n]o person, with purpose to hinder the discovery, apprehension, prosecution, conviction, or punishment of another for crime, or to assist another to benefit from the commission of a crime, shall...[d]estroy or conceal physical evidence of the crime." R.C. 2921.32. Destruction of or concealment of evidence under R.C. 2921.32 is the crime of "obstructing justice." Furthermore, if the property held as evidence is a record of a public office, *see* R.C. 149.011(G), destruction of the record is limited to the procedures of R.C. 149.351.

Inasmuch as R.C. 2921.12 explicitly applies to the time period when "an official proceeding or investigation is in progress or about to be or likely to be instituted" and R.C. 2921.32 applies to the "prosecution" phase of a criminal investigation, the attorney prosecuting the case has a significant influence on the exercise of the discretion of the law enforcement agency. *See* R.C. 309.08 (prosecuting attorney *may inquire* into the commission of crimes...[and] shall *prosecute*, on behalf of the state, all complaints...in which the state is a party) (emphasis added); R.C. 733.52 (city director of law as prosecuting attorney of the mayor's court shall *prosecute* all cases brought before the court) (emphasis added). A prudent law enforcement agency would consult with the attorney prosecuting the criminal action instituted or likely to be instituted, arising out of the law enforcement agency's investigation, before disposing of evidence to be used in an official proceeding. To dispose of evidence prematurely may well interfere with, obstruct, or even prevent, the prosecution. The concurrence of the attorney prosecuting the criminal charges with the decision that evidence is no longer needed, thus, would appear a practical and legal necessity.

As a final matter, it must be noted that the procedures for the disposition of evidence also apply to the attorney prosecuting the case for which property is held as evidence. The definition in R.C. 2901.01(K) that expressly defines "law enforcement officer" as including a "prosecuting attorney, assistant prosecuting attorney, secret service officer, or municipal prosecutor" makes this conclusion inescapable. Inasmuch as the prosecuting attorney often has custody of evidence, *see, e.g.* R.C. 2925.141; Ohio Rule Crim. P. 26, the discretion to dispose of evidence granted by R.C. 2933.41 to law enforcement agencies is also a grant of discretion to an attorney prosecuting a case who holds property as evidence pursuant to R.C. 2933.41.

Based on the foregoing discussion, it is my opinion, and you are hereby advised that:

⁸ The government's conduct is judged by a determination

whether the evidence was lost or destroyed while in its custody, whether the Government acted in disregard for the interests of the accused, whether it was negligent in failing to adhere to established and reasonable standards of care for police and prosecutorial functions, and, if the acts were deliberate, whether they were taken in good faith or with reasonable justification...It is relevant also to inquire whether the government attorneys prosecuting the case have participated in the events leading to loss or destruction of the evidence, for prosecutorial action may bear upon existence of a motive to harm the accused. *U.S. v. Loud Hawk*, 628 F. 2d 1139, 1152 (9th Cir. 1979) (Kennedy, J., concurring).

1. Personal property taken as evidence remains the property of the person legally entitled to its possession prior to its seizure for evidence unless the property is contraband subject to the provisions of R.C. 2933.43, or has been lawfully seized pursuant to R.C. 3719.141, or is forfeited under R.C. 2925.41 through R.C. 2925.45, or has been lawfully seized in relation to a violation of R.C. 2923.32, or the right to the possession of the property is lost under R.C. 2933.41(C) or another provision of state or federal law.
2. Pursuant to R.C. 2933.41(A)(1), each law enforcement agency that has custody of any property that is subject to R.C. 2933.41 shall adopt a written internal control policy that addresses the procedures the agency will follow in disposing of property under R.C. 2933.41.
3. Pursuant to R.C. 2933.41(B), a law enforcement agency that has in its custody property kept for evidence must make reasonable efforts to return the property to the persons entitled to its possession at the earliest possible time that it is no longer needed as evidence, provided that the persons entitled to possession have not lost the right to the possession of the property under R.C. 2933.41(C) or other statutory provision that operates as a forfeiture.
4. Pursuant to R.C. 2933.41(D), unclaimed and forfeited property held as evidence by a law enforcement agency under R.C. 2933.41, may be disposed of only after a court of record that has territorial jurisdiction over the political subdivision in which the law enforcement agency has jurisdiction to engage in law enforcement activities has determined that the unclaimed or forfeited property is no longer needed as evidence.
5. Pursuant to R.C. 2933.26 and R.C. 2933.27, property seized by warrant shall be kept as evidence until the accused is tried or the claimant's right to the property is otherwise ascertained by the court that issued the warrant.
6. Property introduced as evidence in a judicial proceeding and thereby placed in the custody of the court shall be kept by the court or an officer of the court until the court decides the property is no longer needed as evidence.
7. A law enforcement agency that keeps property for evidence may determine, in accordance with its written control policy adopted pursuant to R.C. 2933.41(A)(1), that such property is no longer needed as evidence and may thereafter dispose of it pursuant to R.C. 2933.41, provided that such property is not property seized pursuant to warrant, introduced as evidence in a judicial proceeding, or unclaimed or forfeited.