

OPINION NO. 84-079

Syllabus:

Grand jury subpoenas, while in the possession of the clerk of courts prior to issuance in accordance with R.C. 2939.12, are not public records subject to disclosure under R.C. 149.43.

To: Gregory A. White, Lorain County Prosecuting Attorney, Elyria, Ohio
By: Anthony J. Celebrezze, Jr., Attorney General, December 18, 1984

I have before me your opinion request in which you ask whether subpoenas for grand jury witnesses are subject to public inspection and disclosure as public records pursuant to R.C. 149.43. Your letter states that your specific concern is whether grand jury subpoenas, when filed with the clerk of courts for issuance and service, constitute public records while in the clerk's possession.

R.C. 149.43 requires generally that public records be available for inspection by the general public at all reasonable times. For purposes of R.C. 149.43, a public record is defined in R.C. 149.43(A)(1) as:

any record^[1] that is required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law. (Footnote added.)

In State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology, 49 Ohio St. 2d 245, 361 N.E.2d 444 (1977), the court set forth a two-fold test to determine whether a record is a public record: 1) the record must be kept by a governmental unit, and 2) the record must be specifically required by law to be kept. Pursuant to R.C. 2939.12, "[w]hen required by the grand jury, prosecuting attorney, or judge of the court of common pleas, the clerk of the court of common pleas shall issue subpoenas and other process to any county to bring witnesses to testify before such jury." Furthermore, it seems clear that the clerk of courts is a governmental unit for purposes of R.C. 149.43. See State ex rel. Citizens' Bar Association v. Gagliardo, 55 Ohio St. 2d 70, 378 N.E.2d 153 (1978) (discussing judge's filing of financial disclosure statement with clerk of court in which he resides); 1982 Op. Att'y Gen. No. 82-104 (birth and death records kept by probate court are public records); 1974 Op. Att'y Gen. No. 74-097 (with certain exceptions, R.C. 149.43

¹ R.C. 149.40 defines a "record," as that term is used in R.C. 149.43, as "[a]ny 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 or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. . . ." See generally 1983 Op. Att'y Gen. No. 83-003 (discussing the types of materials which constitute records as defined in R.C. 149.40).

requires all court records to be available for inspection at all reasonable times). Thus, a grand jury subpoena in the possession of the clerk of courts prior to issuance constitutes a record kept by a governmental unit.

With respect to the second part of the Milo's Beauty Supply test, 1980 Op. Att'y Gen. No. 80-096 concluded in paragraph three of the syllabus that: "A record is 'required to be kept,' within the meaning of R.C. 149.43, where the agency's maintenance of such record is necessary to the execution of its duties and responsibilities." See 1983 Op. Att'y Gen. No. 83-003 (adopting interpretation used in Op. No. 80-096). Since R.C. 2939.12 requires the clerk of courts to issue grand jury subpoenas, such subpoenas, while in the clerk's possession prior to issuance, constitute records required by law to be kept.

Since grand jury subpoenas in the possession of the clerk of courts are records required to be kept by a governmental unit, it is necessary to determine whether any of the exceptions set forth in R.C. 149.43(A)(1) exempt such subpoenas from the definition of a public record. You specifically ask whether grand jury subpoenas come within the exception for confidential law enforcement investigatory records which are defined in R.C. 149.43(A)(2) as:

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 scope of this definition was discussed in 1981 Op. Att'y Gen. No. 81-014 at 2-53, as follows:

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.

...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 [records] in question would create one of the specified risks would depend on the particular circumstances and the particular [record] involved.

In order to determine whether grand jury subpoenas fall within the public records exception set forth in R.C. 149.43(A)(2), it is useful to examine generally the nature of grand juries. Pursuant to R.C. 2939.08, it is the duty of the grand jury to "inquire of and present all offenses committed within the county." The grand jury proceedings "are not a trial but are more in the nature of an inquest." Wickline v. Alvis, 103 Ohio App. 1, 6, 144 N.E.2d 207, 210 (Franklin County 1957). See State ex rel. Doerfler v. Price, 101 Ohio St. 50, 128 N.E. 173 (1920) (characterizing proceedings of grand jury, in part, as an inquiry or investigation); 1931 Op. Att'y Gen. No. 3100, vol. I, p. 471. In carrying out its duties, the grand jury may compel the attendance of witnesses and the presentation of documents. In re Klausmeyer, 24 Ohio St. 2d 143, 265 N.E.2d 275 (1970) (syllabus, paragraph 3). See

R.C. 2939.12 (concerning issuance of subpoenas). It is clear, therefore, that the purpose served by the grand jury is the investigation of offenses committed within the county, and that, in the course of its investigation, the grand jury may subpoena witnesses to testify before it.

In *State ex rel. Dayton Newspapers, Inc. v. Rauch*, 12 Ohio St. 3d 100, 465 N.E.2d 458 (1984), the court considered whether autopsy reports of homicide victims are public records subject to disclosure under R.C. 149.43 or whether such reports come within the exception for confidential law enforcement records the release of which would disclose "specific confidential investigatory techniques or procedures or specific investigatory work product." R.C. 149.43(A)(2)(c). The court concluded that the autopsy reports were exempt from disclosure under R.C. 149.43 as specific investigatory work product under R.C. 149.43(A)(2)(c).² The court reasoned that an autopsy is, in itself, an investigation, and that it is necessary to keep confidential the contents of the autopsy report in order to use such report effectively in further investigation by law enforcement personnel.

Because a grand jury subpoena contains the name of the person called to testify before the grand jury and may also contain a list of documents which the witness is required to produce for the grand jury in the course of the investigation, it appears that disclosure of the contents of the subpoena would create a high probability of disclosure of either the work product of the grand jury or the procedures used by the grand jury. See *Krause v. Rhodes*, 535 F. Supp. 338, 349-350 (N.D. Ohio 1979), *cert. denied*, 459 U.S. 823 (1982), (state-imposed secrecy of those "matters occurring before the Grand Jury" extends to identities of persons appearing before the grand jury; names of witnesses and scheduling of appearances before grand jury are part of "the grand jury's investigative process"). Thus, R.C. 149.43(A)(2)(c) exempts grand jury subpoenas which are held by the clerk of courts prior to issuance from the disclosure requirement of R.C. 149.43.³ In addition, I note that in certain circumstances the disclosure of grand jury subpoenas may lead to the high probability of disclosure of one of the matters otherwise set forth in R.C. 149.43(A)(2), and may, thus, be exempt from the definition of a public record for that reason. See generally Op. No. 81-014.

You also ask whether grand jury subpoenas are "cloaked with the secrecy required by Ohio Criminal Rule 6," and, as such, are exempt from the disclosure requirement of R.C. 149.43. One of the exceptions from the definition of a "public record" is any record "the release of which is prohibited by state or federal law." R.C. 149.43(A)(1). I note that, pursuant to Ohio Const. art. IV, §5(B), the Supreme Court has promulgated the Criminal Rules. Since the Criminal Rules operate to supersede analogous statutes to the extent of any conflict, *State v. Tate*, 59 Ohio St. 2d 50, 391 N.E.2d 738 (1979), *cert. denied*, 444 U.S. 967 (1979), it is clear that the Criminal Rules constitute state law for purposes of R.C. 149.43.

Ohio R. Crim. P. 6(E), concerning grand jury secrecy, states:

Deliberations of the grand jury and the vote of any grand juror shall not be disclosed. Disclosure of other matters occurring before the grand jury may be made to the prosecuting attorney for use in the performance of his duties. A grand juror, prosecuting attorney,

² Citing *State ex rel. Beacon Journal Publishing Co. v. University of Akron*, 64 Ohio St. 2d 392, 415 N.E.2d 310 (1980), the court in *Rauch* noted that "routine factual reports" do not fall within the exception set forth in R.C. 149.43(A)(2)(c). In *Beacon Journal* the records at issue were police reports prepared by university police who "were simply fulfilling the duty imposed upon all law enforcement agencies to generate ongoing offense reports, chronicling factual events reported to them." 64 Ohio St. 2d at 397, 415 N.E.2d at 314.

³ Although the court in *Hammond v. Brown*, 323 F. Supp. 326 (N.D. Ohio 1971), *aff'd*, 450 F.2d 480 (6th Cir. 1971), stated that the names of witnesses who were subpoenaed or who appeared before an Ohio grand jury could be obtained from "the public court records," *id.* at 339, the court did not specify which records contained such information and made no mention of the grand jury subpoenas themselves.

interpreter, stenographer, operator of a recording device, or typist who transcribes recorded testimony, may disclose matters occurring before the grand jury, other than the deliberations of a grand jury or the vote of a grand juror, but may disclose such matters only when so directed by the court preliminary to or in connection with a judicial proceeding, or when permitted by the court at the request of the defendant upon a showing that grounds may exist for a motion to dismiss the indictment because of matters occurring before the grand jury. No grand juror, officer of the court, or other person shall disclose that an indictment has been found against a person before such indictment is filed and the case docketed. The court may direct that an indictment shall be kept secret until the defendant is in custody or has been released pursuant to Rule 46. In that event the clerk shall seal the indictment, the indictment shall not be docketed by name until after the apprehension of the accused, and no person shall disclose the finding of the indictment except when necessary for the issuance of a warrant or summons. No obligation of secrecy may be imposed upon any person except in accordance with this rule.

R. Crim. P. 6(E) specifically states that the deliberations and vote of the grand jury shall not be disclosed. The rule, however, allows limited disclosure of "other matters occurring before the grand jury." See State v. Greer, 66 Ohio St. 2d 139, 420 N.E.2d 982 (1981).

It is well settled that, pursuant to R. Crim. P. 6(E), grand jury testimony is a matter occurring before the grand jury. Id. I am, however, unaware of any cases in Ohio discussing the application of R. Crim. P. 6(E) to the disclosure of grand jury subpoenas. In United States v. White Ready-Mix Concrete Co., 509 F. Supp. 747 (N.D. Ohio 1981), the court interpreted a provision analogous to Ohio R. Crim. P. 6(E) and concluded that witnesses' names appearing on grand jury subpoenas constitute "matters occurring before the grand jury" within the meaning of Fed. R. Crim. P. 6(e)⁴, and, as such, are entitled to secrecy under that rule. The court stated: "The weight of authority holds that witnesses' names are matters occurring before the grand jury and are so entitled to secrecy for the same reasons and on the same basis as transcripts of testimony." Id. at 750.⁵ I see no reason to distinguish

⁴ Since the decision in White Ready-Mix Concrete Co., Federal R. Crim. P. 6(e) has been amended, and now provides that: "Records, orders and subpoenas relating to grand jury proceedings shall be kept under seal to the extent and for such time as is necessary to prevent disclosure of matters occurring before a grand jury." Federal R. Crim. P. 6(e)(6). As stated in the notes of the Advisory Committee on Rules, the above-quoted language was added to expressly authorize a procedure already in use in many, but not all, of the districts.

⁵ The rationale for the requirement of grand jury secrecy is set forth in Petition for Disclosure of Evidence Presented to Franklin County Grand Juries, 63 Ohio St. 2d 212, 219, 407 N.E.2d 513, 518-519 (1980), quoting United States v. Rose, 215 F.2d 617, 628-629 (3d Cir. 1954), as follows:

"(1) To prevent the escape of those whose indictment may be contemplated; (2) to insure the utmost freedom to the grand jury in its deliberations, and to prevent persons subject to indictment or their friends from importuning the grand jurors; (3) to prevent subornation of perjury or tampering with the witnesses who may testify before the grand jury and later appear at the trial of those indicted by it; (4) to encourage free and untrammelled disclosures by persons who have information with respect to the commission of crimes; (5) to protect innocent accused who is exonerated from disclosure of the fact that he has been under investigation, and from the expense of standing trial where there was no probability of guilt."

between the former federal rule and the state rule concerning the inclusion of grand jury subpoenas within the category of "matters occurring before the grand jury." Thus, I must conclude that, for purposes of Ohio R. Crim. P. 6(E), grand jury subpoenas are "matters occurring before the grand jury" which may be disclosed only in accordance with the provisions of Ohio R. Crim. P. 6(E). See generally State v. Greer (discussing generally the circumstances in which grand jury testimony must be disclosed and the procedure for making such determination and disclosure). Thus, to the extent that Ohio R. Crim. P. 6(E) limits the disclosure of grand jury subpoenas, such subpoenas constitute "records the release of which is prohibited by state . . . law" under R.C. 149.43(A).

It is, therefore, my opinion and you are advised, that grand jury subpoenas, while in the possession of the clerk of courts prior to issuance in accordance with R.C. 2939.12, are not public records subject to disclosure under R.C. 149.43.