OPINION NO. 80-096

Syllabus:

1. As recently amended by Am. Sub. H.B. No. 799 (eff. Jan. 23, 1981) and S.B. 62 (eff. Jan. 18, 1980), R.C. Chapter 1347, the Privacy Act, does not restrict access to records that are public under the terms of R.C. 149.43.

2. With respect to their accessibility by members of the public, Ohio law formally recognizes the existence of three separate classes of governmental records. One class, which is comprised of records pertaining to confidential law enforcement investigations, trial preparations, and adoptions, may be disclosed neither to the public at large nor to the person who is the subject matter of the information, except that adoption records may be disclosed with consent of the court. The second class, which is comprised of records otherwise made confidential by law and subject to the provisions of R.C. Chapter 1347, the Privacy Act, may not be disclosed to the public at large, but must, upon request, be disclosed to the person who is the subject of the information. The third class, which is comprised of records that are public, must, upon request, be disclosed to any member of the public for any reason.

3. 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.

4. Unless made confidential by law, all records maintained by a governmental agency that are necessary to the agency's

execution of its duties and responsibilities are public records under the terms of R.C. 149.43.

5. Pursuant to R.C. 1347.05(H), a governmental agency which is subject to the provisions of R.C. Chapter 1347, the Privacy Act, may collect, maintain and use personal information that is subject to the provisions of R.C. Chapter 1347 only if such information is necessary to the functions of the agency.

6. An assertion by a governmental agency which is subject to the provisions of R.C. Chapter 1347, the Privacy Act, that records maintained, which are subject to the provisions of R.C. Chapter 1347, are not "required to be kept" and, therefore, are not public records pursuant to R.C. 149.43, is an implicit admission that the agency has violated R.C. 1347.05(H).

7. Pursuant to R.C. 121.21, a state agency may make and preserve "only such records as are necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency."

8. An assertion by a state agency that records maintained are not necessary for the documentation of the agency's organizations, functions, policies, decisions, procedures and transactions is an implicit admission that the agency has violated R.C. 121.21.

9. Records maintained by the Director of the Department of Mental Retardation and Developmental Disabilities with respect to the responsibilities conferred upon him by R.C. 5123.18 are public records under R.C. 149.43 and, therefore, must, upon request, be disclosed to any member of the public without regard to any privacy interest which any individual may be deemed to have in such records.

To: Rudy Magnone, Ph.D., Director, Department of Mental Retardation and Developmental Disabilities, Columbus, Ohio

By: William J. Brown, Attorney General, December 23, 1980

I have before me a request from your predecessor for an opinion of this office regarding the accessibility of records accumulated in licensure files maintained by the Division of Mental Retardation and Developmental Disabilities (now the Department of Mental Retardation and Developmental Disabilities). The material included in such files arises from the responsibility placed upon the Department of Mental Retardation and Developmental Disabilities by R.C. 5123.18 to license facilities in which persons with developmental disabilities reside.

Although the question you pose is relatively narrow in scope, its resolution requires a full consideration of several complex issues of law. In determining the status of any governmental record in terms of its accessibility to members of the public, one must consider not only the public records statute, but the Privacy Act as well.

Of the many problems attending the resolution of whether a particular record should be subject to public disclosure, the most persistent and intractable have

arisen from the effects, both perceived and real, of Ohio's Privacy Act. Throughout the long history of this controversy, pending litigation and legislation[1] have prevented me from addressing these issues in a formal opinion. Now that I am able to do so, I think it appropriate to discuss very briefly the history of the controversy surrounding the public records statute and the Privacy Act.

I

R.C. 149.43, Ohio's public record statute, was originally enacted in 1963. 1963 Ohio Laws 155, 1644 (Am. Sub. H.B. No. 187, eff. Sept. 27, 1963). It codified a broad and historic common law right to inspect governmental records. See, e.g., State ex rel. Louisville Title Ins. Co. v. Brewer, 147 Ohio St. 161, 70 N.E. 2d 265 (1946). Although the operation of the statute will be discussed in greater detail below, it is sufficient at this juncture to note that it defined a public record as "any record required to be kept" by any governmental unit. The statute, as originally enacted, specifically exempted from its definition records pertaining to physical or psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which was prohibited by state or federal law. Under the last of these exceptions, a significant number of records remained confidential pursuant to specific statutory provisions. See, e.g., R.C. 102.06 (proceedings of and complaints made to the Ohio Ethics Commission); R.C. 122.42 (information submitted by applicants to the Ohio Development Financing Commission); R.C. 1321.09 (license reports filed with the Division of Securities). In addition, the application of certain common law principles required, under certain circumstances, that information remain confidential. See, e.g., 1971 Op. Att'y Gen. No. 71-053 (the case files of specific investigations made by the State Highway Patrol are not public records within the meaning of R.C. 149.43). Thus, under both the common law and the public records statute, any limitation upon the disclosure of information was a matter of either specific statutory provision or case law.

This long-standing analytical framework for determining the status of governmental records was disrupted by the enactment of R.C. Chapter 1347, Ohio's Privacy Act, effective January 1, 1977.[2] One of the purposes of the original Privacy Act was "to regulate the use of personal information by state and local governments. . .and to protect the privacy of individuals from excessive record keeping by government." 1975-1976 Ohio Laws 236 (Am. Sub. S.B. No. 99, eff. Jan. 1, 1977). This purpose was perceived by many to be evidence of a legislative intent to withhold from public scrutiny many of the records maintained by government. See Wooster Republican Printing Co. v. City of Wooster, 56 Ohio St. 2d 126, 383 N.E. 2d 124 (1978). Limitations on the disclosure of information are, of course, a common feature of all privacy legislation. See, e.g., Cal. Civ. Code §§1798.1-.70 (West); Conn. Gen. Stat. §4-190-197; Minn. Stat. §15.162-.169, and Ohio's original Act did, indeed, include a provision that purported to limit disclosure. Moreover, the limits on disclosure set forth in the Privacy Act restricted access to governmental records to a much greater extent than had been recognized under statutory and common law exceptions to the public records statute. Nowhere, however, did the Act either expressly mention the issue of public records or attempt to formulate guidelines to be applied in reconciling the two statutes.

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[1] Am. Sub. H.B. No. 799 (eff. Jan. 23, 1981), amends several sections of the Privacy Act. Although these amendments do not directly affect the question you have posed, they have some bearing upon collateral issues considered herein. These amendments, where applicable, will be expressly mentioned in the text of the opinion.

[2] Although commonly known as the "Privacy Act," R.C. Chapter 1347 is, in actuality, a "personal information systems act." R.C. Chapter 1347 does not grant to the individual a right of privacy, as such, as is implied by the popular designation, but rather governs the maintenance of personal information systems by government agencies, and grants to the individual who is the subject of the information a right of inspection.

The need for some sort of legislative revision in the area of public records and privacy became immediately apparent. In the spring of 1977, the Ohio General Assembly, which had enacted privacy legislation without fully resolving its impact upon the public records statute, began the arduous process of legislative reconciliation.

A number of proposals designed to strike the necessarily fragile balance between the competing interests of personal privacy and public access were considered. See S.B. 143, 112th Gen. A. (sought to exclude from the definition of public records all "records that contain sensitive personal information disclosure of which would be a clearly unwarranted invasion of personal privacy"); S.B. 224, 112th Gen. A. (sought to exclude "highly sensitive information" from the definition of public record); S.B. 250, 112th Gen. A. (sought to add a provision to the Privacy Act stating that the Act would not be construed to "prohibit the release of public records or the disclosure of personal information in public records that are required to be kept open for inspection under section 149.43 of the Revised Code").

The Privacy Act was ultimately amended by Am. Sub. S.B. 224, 112th Gen. A. (1977), which became effective August 26, 1977, as an emergency measure. It repealed all of the provisions of the original Act that purported to limit disclosure and added a provision which stated, quite simply, that "[t]he provisions of Chapter 1347. of the Revised Code shall not be construed to prohibit the release of public records or the disclosure of personal information in public records that are required to be kept open for inspection by section 149.43 of the Revised Code. . . ." Am. Sub. S.B. 224.

The conflict between personal privacy and public access was thus resolved in favor of the latter. The Act, as amended, represented a retreat from limitations on disclosure. Consequently, the question of whether public access was to be granted to a particular item of information once again turned exclusively upon the provisions of the public records statute and any specific statutory provisions or case law requiring confidentiality.

The legislative reconciliation effected by the passage of Am. Sub. S.B. 224, however, was rather short-lived. In the case of Wooster Republican Printing Co. v. Wooster, 56 Ohio St. 2d 126, 383 N.E. 2d 124 (1978), the court rendered a decision that renewed with full vigor the controversy surrounding personal privacy and public access. The case arose when the City of Wooster, acting in accordance with what it believed to be the requirements of the original Privacy Act, closed to public inspection a number of records. The records withheld included the admission and discharge records of the community hospital, emergency squad records, fire alarm response records of the fire department and certain investigatory files of the police department. Soon thereafter, the newspaper instituted an action based upon R.C. 149.43 seeking a declaratory judgment regarding its right to inspect certain of these records and asking that the city be permanently enjoined from withholding these records from public access.

Although the newspaper argued that the amended version of the Privacy Act expressly exempted all public records from any sort of limitations on disclosure, the court nonetheless concluded that R.C. Chapter 1347 necessarily modified R.C. 149.43. In concluding that a number of the records in question were not subject to compulsory disclosure under R.C. 149.43, the court stated in the second paragraph of the syllabus as follows:

> In determining whether disclosure to the general public of personal information contained in an otherwise "public record" would constitute an improper use of personal information under the provisions of R.C. Chapter 1347, the interest of the public's "right to know," codified in R.C. 149.43, must be balanced against an individual's "right of personal privacy," codified in R.C. Chapter 1347. In the consideration of these respective interests, doubt should be resolved in favor of public disclosure of "public records" in order to insure the existence of an informed public.

The ad hoc balancing test mandated by the Wooster holding was quite similar to the approach specifically rejected by the General Assembly when it failed to adopt any of the several proposed amendments that would have required a case by case determination of whether disclosure involved an unwarranted invasion of privacy. It is not surprising, then, that legislation designed to overturn the Wooster holding was immediately considered.

The Privacy Act was amended for the second time by the passage of S.B. 62, 113th Gen. A. (1979). This Act, which became effective on January 18, 1980, added language to the Privacy Act which provided that "the disclosure to members of the general public of personal information contained in a public record, as defined in section 149.43 of the Revised Code, is not an improper use of personal information under this chapter." R.C. 1347.04(B).

Thus, the controversy between personal privacy and public access was resolved, once again, in favor of public access. I am, therefore, able to conclude that the Privacy Act does not in any way restrict access to records that are public under the terms of R.C. 149.43.

II

This is not to say, however, that the provisions of the Privacy Act are without relevance in determining whether a particular record should be disclosed. R.C. 1347.08, an often overlooked, but nonetheless important, provision of the Privacy Act, states as follows:

> (A) Every state or local agency that maintains a personal information system, upon the request and the proper identification of any person who is the subject of personal information in the system, shall:
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> (1) Inform the person of the existence of any personal information in the system of which he is the subject;
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> (2) Except as provided in divisions (C) and (E)(2) of this section, permit the person, his legal guardian, or an attorney who presents a signed written authorization made by the person, to inspect all personal information in the system of which he is the subject; . . . .

Thus, R.C. 1347.08 confers a right of access to records maintained by state agencies upon the persons who are are the subjects of those records. It should be noted, however, that this right to access is limited to those agencies and those records that are subject to the provisions of R.C. Chapter 1347.

Although a majority of state agencies and a majority of personal information systems maintained by such agencies are subject to the terms of R.C. Chapter 1347, the Act, as amended by Am. Sub. H.B. No. 799, does include certain exceptions. Pursuant to R.C. 1347.04, certain agencies involved in law enforcement activities are expressly exempt from the operation of the Act. See Part IV, infra. If an agency is exempt from the provisions of the Act, a person who is the subject of information maintained by that agency cannot, of course, assert a right of access pursuant to R.C. 1347.08.

In addition to exempting certain agencies, R.C. 1347.04 exempts certain "information systems" from the provisions of the Act. See Part V, infra. R.C. 1347.04, as amended by Am. Sub. H.B. No. 799, provides as follows:

> (A)(1) Except as provided in division (A)(2) of this section, the following are exempt from the provisions of this chapter:
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> . . . .
>
> (e) Personal information systems that are comprised of investigatory material compiled for law enforcement purposes by

> agencies that are not described in divisions (A)(1)(a) and (A)(1)(d) of this section.

Thus, a system of information comprised of records that constitute investigatory material compiled for law enforcement purposes is exempt from the provisions of R.C. Chapter 1347.

Consequently, a person who is the subject of information maintained by a governmental agency can assert a right to access, pursuant to R.C. 1347.08, only if both the agency and the information sought are subject to the provisions of R.C. Chapter 1347.

Where both the agency and the information sought are subject to the provisions of R.C. Chapter 1347, R.C. 1347.08 recognizes only three exceptions to the right of access of an individual who is the subject of the information maintained. Two of these exceptions are set forth in R.C. 1347.08(E)(2) and relate to confidential law enforcement investigatory records and trial preparation records, as those terms are defined in R.C. 149.43(A)(2) and (A)(4).[3] The third, which is set forth in R.C. 1347.08(F), concerns records pertaining to an adoption, which under R.C. 3107.17 are subject to inspection only upon consent of the court.

It is immediately apparent that the right of access conferred by R.C. 1347.08 is considerably broader than that conferred by R.C. 149.43. With the exception of the specific documents previously enumerated, the subject of the information is statutorily entitled to examine all such information even if it must be withheld from the public at large pursuant to a particular statute.

In determining the status of a particular record, therefore, it is necessary that public officials consider the identity of the person seeking access. A right asserted by the subject of the information pursuant to R.C. 1347.08 is different from that asserted by a member of the public pursuant to R.C. 149.43. The latter is limited by all provisions of law that restrict access; the former is limited only by the prohibition regarding confidential law enforcement investigatory records, trial preparation records and records pertaining to adoptions.

It may thus be stated that, with respect to their accessibility by members of the public, Ohio law formally recognizes three distinct classes of records. One class, which is comprised of records pertaining to confidential law enforcement investigations, trial preparations, and adoptions, may be disclosed neither to the public at large nor to the person who is the subject matter of the information, except that adoption records may be disclosed with the consent of the court. The second class, which is comprised of records otherwise made confidential by law and subject to the provisions of R.C. Chapter 1347, the Privacy Act, may not be disclosed to the public at large, but must, upon request, be disclosed to the person who is the subject of the information. The third class, which is comprised of records that are public, must, upon request, be disclosed to any member of the public for any reason.

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[3]There are, in addition, certain limited restrictions placed upon access to a number of records. R.C. 1347.08(C) provides as follows:

> A state or local agency, upon request, shall disclose medical, psychiatric, or psychological information to a person who is the subject of the information or to his legal guardian, unless a physician, psychiatrist, or psychologist determines for the agency that the disclosure of the information is likely to have an adverse effect on the person, in which case the information shall be released to a physician, psychiatrist, or psychologist designated by the person or by his legal guardian.

Although it is a relatively simple task to enumerate the foregoing classes of records, the classification of a particular record has oftentimes proved considerably more difficult. Because the various types of records that are made confidential are the subject of specific statutory provision, the determination of their status rarely presents difficulty. Rather, the difficulty arises in attempting to define those records that are public.

III

As indicated previously, the compulsory disclosure to the general public of governmental information is governed by R.C. 149.43, which provides in pertinent part as follows:

> (A) As used in this section:
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> (1) "Public record" means any record 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.
>
> . . . .
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> (B) All public records shall be promptly prepared and made available to any member of the general public at all reasonable times for inspection. Upon request, a person responsible for public records shall make copies available at cost, within a reasonable period of time. (Emphasis added.)

It may thus be said that the general public possesses a right of access to all records in the possession of governmental officials that are "required to be kept" and that are not made confidential by law.

Of these two characteristics, the one more difficult to delineate is the "required to be kept" standard. The test most often applied in determining the meaning of that term is that set forth in Dayton Newspapers, Inc. v. Dayton Daily News, 45 Ohio St. 2d 107, 341 N.E. 2d 576 (1976). At issue in the Dayton case was the status of a city jail log. The city argued that the term "required to be kept" should be construed to "mean required by statute (or at least by the official policy of the unit of government) to be kept." The court noted that it would be more inclined to accept the city's position if R.C. 149.43 included a provision stating that public records are those "required by law to be kept." Instead, the court adopted the position advanced by the newspaper that the term should include "any record which but for its keeping the governmental unit could not carry out its duties and responsibilities; that the raison d'etre of such record is to assure the proper functioning of the unit." Id. at 108-09, 341 N.E. 2d at 577. In concluding that the city jail log was a public record, the court stated as follows in the syllabus of the case: "A record is "required to be kept" by a governmental unit within the meaning of R.C. 149.43, where the unit's keeping of such record is necessary to the unit's execution of its duties and responsibilities." Although the foregoing standard is relatively clear, subsequent cases have cast considerable doubt upon its continued viability.

Shortly after its decision in Dayton Daily News, the court decided the case of State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology, 49 Ohio St. 2d 245, 361 N.E. 2d 444 (1977). Milo's Beauty Supply Co. had requested access to the records of the State Board of Cosmetology listing licensed cosmetologists and their addresses and the names and addresses of all beauty salons in the state. The board refused relator's request. In a per curiam opinion, the court stated as follows:

> This court has thus enunciated a twofold test to determine the existence of "public records": (1) the records must be kept by a governmental unit, and (2) the records must be specifically required to be kept by law. Affirmative application of these two elements in a given circumstance mandates that the records be available for inspection and copying.

Id. at 246, 361 N.E. 2d at 445.

Noting the existence of R.C. 4713.02, which expressly requires the board to maintain the information requested, the court concluded that the records in question were public records.

The most recent occasion the court had to consider the meaning of the term "required to be kept" arose in the case of State ex rel. Citizens' Bar Association v. Gagliardo, 55 Ohio St. 2d 70, 378 N.E. 2d 153 (1978). In that case relators sought a writ of mandamus to compel the clerk of the Juvenile Division of the Court of Common Pleas to allow them to inspect the financial disclosure statement there on file of a judge in that court. After restating the two-part test set forth in Milo Beauty Supply, the court noted the existence of a statute requiring that a financial disclosure statement be filed with the Board of Commissioners on Grievances and Discipline. Conceding the public nature of the document in the possession of the board, the court proceeded to note the absence of a statute requiring that the document be filed with the clerk.[4] The court concluded, therefore, that the financial disclosure statement filed with the Cuyahoga County Juvenile Court was not a public record.

One might conclude from the foregoing analysis that since its pronouncement in Dayton Daily News the court has taken an increasingly less expansive view in its attempt to define the realm of public records. This apparent retreat commenced in the case of Milo Beauty Supply, in which the court intimated that public records in the possession of a governmental agency were defined not by that which was necessary to the proper execution of the agency's duties and responsibilities, but by that which the agency was affirmatively required by law to keep. An even more restrictive approach was implicit in the court's disposition of the Gagliardo case. Overlooking the operation of an express provision of the Code of Judicial Conduct—a provision that arguably qualified as "law"—the court concluded that since the document was not required to be kept by statute, it was not public. One might thus conclude that the only records that are public are those that an agency is affirmatively required by statute to keep.

If the foregoing statement is, indeed, a correct statement of the law of public records, several rather serious consequences obtain. Such an interpretation sanctions the existence of a fourth, and heretofore undefined, class of governmental records. This class of records, which would occupy an uncertain status under Ohio law, is neither public nor confidential. The records of which this class is comprised are not public because they are not statutorily required to be kept; they are not confidential because disclosure is not statutorily restricted. Although the analysis employed by the courts in determining the scope of public records has at times implicitly assumed the existence of records that are neither public nor confidential, it is my opinion that the recognition of such a class is no longer tenable as a result of recent changes in the law.[5] The difficulties attending the proper treatment of this class of records is exacerbated by the fact that it embraces the majority of all records maintained by governmental agencies. This interpretation would thus transform the issue of accessibility to most governmental records from a matter regulated by statute to one vested in the discretion of the persons maintaining them.

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[4]The financial disclosure statement was filed with the clerk pursuant to Canon 6, Code of Judicial Conduct, which provides that an additional report be filed with the clerk of the court where the judge presides.

[5]See Part IV, infra.

This discretion must, moreover, be exercised by officials mindful of the balancing test set forth by Wooster Republican Printing Co. v. City of Wooster, supra. In that case, the court concluded that certain records, which it had not determined to be otherwise public, could not be released because their release would violate a right to personal privacy, which the court believed was conferred on all individuals by R.C. Chapter 1347. As previously mentioned, the General Assembly enacted legislation designed specifically to overturn the Wooster holding and to express with greater clarity its intent not to permit the Privacy Act to limit in any way disclosure under the public records statute. This amendment, however, refers only to records that are public. The existence of this new class of records, which is neither public nor confidential, infuses new vitality into the Wooster decision. Because this class of records is not addressed in the amendatory legislation enacted subsequent to the court's decision in Wooster, the balancing test set forth in that case is arguably applicable in determining whether release of a particular record is appropriate.

I am not convinced, however, that the Milo Beauty Supply and Gagliardo cases do, in fact, represent a modification of the law as stated in Dayton Daily News. Even when the pronouncement of the law is clear, as it is in a syllabus or an opinion per curiam, that pronouncement must be interpreted with reference to the facts and questions involved in that case. Masheter v. Kebe, 49 Ohio St. 2d 148, 359 N.E. 2d 74 (1976); Williamson Heater Co. v. Radich, 128 Ohio St. 124, 190 N.E. 2d 403 (1934).

An examination of the facts and questions involved in these cases indicates that they are not as contradictory to the position expressed in Dayton Daily News as they may, on first impression, appear.

In Milo Beauty Supply, the court did, after all, determine that the records there in question were public records. The result was compelled by the existence of a statute requiring the State Board of Cosmetology to maintain the records that relator sought. The court did not have occasion to consider the status of records that were not required by statute to be kept but were, nonetheless, necessary to the proper execution of an agency's duties or responsibilities. The status of such records was clearly defined in the syllabus of Dayton Daily News and that status, therefore, remains unaffected by the court's decision in Milo Beauty Supply.

For different reasons, the same result obtains with respect to the court's decision in the Gagliardo case. The court held therein that although the records in question were public while in the possession of the Board of Commissioners on Grievances and Discipline, they did not so qualify while in the possession of the clerk of courts. It should be noted, however, that these records, while in the possession of the clerk of courts, occupied a rather curious status. The clerk acted as a mere repository for the records pursuant to a provision of the Code of Judicial Conduct; the records bore no real relationship to the duties and responsibilities of the clerk's office. Thus, in the Gagliardo case the respondent argued that R.C. 149.40, which provides in part that a record for purposes of R.C. 149.31 to R.C. 149.44 is "[a]ny document. . .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," was not broad enough to include within its scope a financial disclosure record in the possession of the clerk of courts. Such a record, respondent argued, in no manner documents the organization, operation or other activities of the office of the Clerk of Juvenile Court. If the financial statement did not qualify as a record for purposes of R.C. 149.40, it obviously could not qualify as a public record pursuant to R.C. 149.43. The court in the Gagliardo case, therefore, did not have occasion to consider the status of a record the maintenance of which documented the agency's duties and responsibilities.

It is thus my opinion that neither Milo Beauty Supply nor Gagliardo necessarily modifies the statement of the law set forth in Dayton Daily News. In addition, there are less substantive, but nonetheless relevant, indications that the court intended no such modification.

I am aware that as recently as 1977, subsequent to the decision in Milo Beauty Supply, the court continued to cite with approval its holding in Dayton Daily News. In the case of State ex rel. Plain Dealer Publishing Co. v. Krouse, 51 Ohio St. 2d 1, 364 N.E. 2d 854 (1977), the court, in concluding that a newspaper was entitled to a writ of mandamus directing the Bureau of Workers' Compensation to permit access to and inspection of Remittance Advice Forms, stated in the first paragraph of an opinion per curiam as follows:

> In Dayton Newspapers v. Dayton (1976), 45 Ohio St. 2d 107, 110, 341 N.E. 2d 576, 578, the court stated "[w]e believe that doubt should be resolved in favor of disclosure of records held by governmental units. Aside from the exceptions mentioned in R.C. 149.43, records should be available to the public unless the custodian of such records can show a legal prohibition to disclosure." See, also, State ex rel. Beacon Journal Pub. Co. v. Andrews, (1976), 48 Ohio St. 2d 283, 358 N.E. 2d 565.

Although the court did not directly address the "required to be kept" standard (respondents conceded that the records in question satisfied that standard), the foregoing language clearly belies any intention to limit public access to only those records that an agency is affirmatively required by law to maintain. In stating that a record should be available for inspection "unless the custodian. . .can show a legal prohibition to disclosure," the court obviously had a broader standard in mind.

Most recently, in Wooster Republican Printing Co. v. Wooster, supra, the court expended considerable effort in distinguishing the case there under consideration from Dayton Daily News. The opinion in Wooster does not suggest that the records that were at issue in that case were affirmatively required by law to be kept. The absence of such a requirement would certainly have provided a basis for refusing access if a standard other than that set forth in Dayton Daily News were to apply. Instead, the assumption plainly implicit in the Wooster decision is that a public record is to be determined with reference to that which is necessary to the execution of an agency's duties and responsibilities.

That the court intended to leave undisturbed its holding in Dayton Daily News is in my opinion further supported by its otherwise inexplicable employment of a per curiam opinion as the proper vehicle for deciding subsequent cases. Although Ohio law recognizes that an opinion per curiam is entitled to the same weight as a syllabus, see, e.g., Masheter v. Kebe, supra, such an opinion seems a singularly inappropriate manner by which to announce a major shift in the law. The appearance of a per curiam opinion generally announces that all of the justices of the court are of one mind regarding the same, and that the case is so clear as to render discussion thereof unnecessary. See, e.g., Newmons v. Lake Worth Drainage District, 87 So. 2d 49 (Fla. Sup. Ct. 1956); Minor v. Fike, 77 Kan. 806, 93 P.264 (1908). It would indeed be anomalous to conclude that a decision that was intended to effect a major modification in the law is "so clear as to render discussion thereof unnecessary."

For the foregoing reasons, I must conclude that the statement of the law set forth in the syllabus of Dayton Daily News still applies, and that a record is "required to be kept" by a governmental unit, within the meaning of R.C. 149.43, where the unit's keeping of such record is necessary to the execution of its duties and responsibilities.

IV

At this point, I would like to discuss an additional provision of the Privacy Act and the impact of its operation upon the broader issues herein considered. This provision, the effect of which has never been the subject of a reported case, is crucial to the proper classification of records under Ohio law. R.C. 1347.05 provides in pertinent part as follows:

> Every state or local agency that maintains a personal information system shall:
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> . . . .
>
> (H) Collect, maintain, and use only personal information that is necessary and relevant to the functions that the agency is required or authorized to perform by statute, ordinance, code, or rule and eliminate personal information from the system when it is no longer necessary and relevant to those functions.

It is important at the outset to realize precisely how comprehensive the term "personal information" was intended to be. "Personal information" is defined by R.C. 1347.01(E) as any information that "describes anything about a person, or indicates actions done by or to a person, or that indicates that a person possesses certain personal characteristics, and that contains and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person." The Act does not include a specific definition of "person." The operation of R.C. Chapter 1347, may, therefore, turn upon the general definition of a "person" set forth in R.C. 1.59. This definition includes not only individuals, but corporations, business trusts, estates, trusts, partnerships and associations as well.

Thus, the provisions of the Privacy Act require that all state agencies collect, maintain and use only personal information that is necessary or relevant to the functions that the agency is required or authorized by law to perform. Conversely, each such agency is affirmatively required by the same provision to rid itself of such information once it becomes irrelevant or unnecessary to those functions.

In addition, R.C. 121.21 limits the authority of state agencies to create and preserve records in the following terms:

> The head of each department, office, institution, board, commission, or other state agency shall cause to be made and preserved 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. (Emphasis added.)

The similarity of the standards set forth in R.C. 1347.05 and R.C. 121.21 to the "required to be kept" standard as interpreted by Dayton Daily News is immediately apparent. Thus, if a record is necessary to an agency's functions and responsibilities, it is, assuming the absence of law to the contrary, a public record. If, in the face of a request to inspect records, a governmental agency attempts to argue that the record is not required to be kept, the assertion is an implicit admission that the agency may have violated R.C. 1347.05(H), R.C. 121.21, or both.

There are, of course, certain governmental agencies exempted from the terms of the Privacy Act. As amended by Am. Sub. H.B. No. 799, R.C. 1347.04, which sets forth these exceptions, provides in part as follows:

> (A)(1) Except as provided in division (A)(2) of this section, the following are exempt from the provisions of this chapter:
>
> (a) Any state or local agency, or part of a state or local agency, that performs as its principal function any activity relating to the enforcement of the criminal laws, including police efforts to prevent, control, or reduce crime or to apprehend criminals;
>
> (b) the criminal courts;
>
> (c) prosecutors;
>
> (d) any state or local agency or part of any state or local agency that is a correction, probation, pardon, or parole authority;
>
> . . . .

> (2) A state agency is not exempt from complying with section 1347.03 of the Revised Code. A part of a state or local agency that does not perform, as its principal function, an activity relating to the enforcement of the criminal laws is not exempt under this section.

In addition to exempting certain agencies and parts of agencies, R.C. 1347.04(A)(1)(e)[6] exempts the following information from the provisions of the Privacy Act: "personal information systems that are comprised of investigatory material compiled for law enforcement purposes by agencies that are not described in divisions (A)(1)(a) and (A)(1)(d) of this section."

For those agencies and parts of agencies exempt from the Privacy Act pursuant to R.C. 1347.04(A)(1)(a) through (A)(1)(d) and for those agencies maintaining systems that are exempt pursuant to R.C. 1347.04(A)(1)(e), the resolution of what records qualify as public may be slightly more difficult. Because either such an agency or the information system of which a particular record is part is not subject to the terms of R.C. 1347.05(H), such an agency must, when confronted with a request for the inspection of records in its possession, distinguish between those records that are necessary to the proper execution of its duties and those that are not. Those state agencies that are exempt or that maintain systems that are exempt from the Privacy Act, however, are still subject to the provisions of R.C. 121.21. Exemption from the Privacy Act should, therefore, have little, if any, effect upon the nature and extent of the records that a state agency maintains; only records necessary to the proper documentation of the agency's functions should be maintained. Thus, if a state agency is in compliance with R.C. 121.21, all records maintained will be public records, pursuant to R.C. 149.43, unless otherwise designated as confidential by law.

V

Before specifically addressing the questions you have posed, I feel it is necessary to discuss the exception for "investigatory material compiled for law enforcement purposes" provided in R.C. 1347.04(A)(1)(e). Because the proper application of this exception may prove somewhat difficult, it warrants more careful consideration.

R.C. 1347.04(A)(1)(e) expressly exempts from the provisions of R.C. Chapter 1347 "personal information systems that are comprised of investigatory material compiled for law enforcement purposes by agencies that are not described in divisions (A)(1)(a) and (A)(1)(d) of this section." R.C. 149.43(A)(1), on the other hand, provides that "confidential law enforcement investigatory records," as defined in R.C. 149.43(A)(2), are not public records pursuant to R.C. 149.43. R.C. 149.43(A)(2) defines a "confidential law enforcement investigatory record" as follows:

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

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[6] See Part V, infra.

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

It is obvious that the exception embodied in R.C. 1347.04(A)(1)(e) for "investigatory material compiled for law enforcement purposes" neither refers to nor repeats the language of R.C. 149.43(A)(2) regarding confidential law enforcement investigatory records. Indeed, the langauge of R.C. 1347.04(A)(1)(e), which is free of the many qualifications set forth in R.C. 149.43(A)(2), would seem to be considerably broader in scope. The disparity in the apparent breadth of these two provisions is quite capable of precipitating considerable confusion with respect to the status of certain records. If all records comprised of investigatory material compiled for law enforcement purposes are exempt from the provisions of R.C. Chapter 1347, it follows that the person who is the subject of that information possesses no statutory right of access thereto pursuant to R.C. 1347.08. One might well argue then that if this information can be withheld from the person who is the subject of that information, it can certainly be withheld from the public at large.

I am, however, of the opinion that it was not the intent of the General Assembly in inserting this provision to restrict access in any way to records that are otherwise public. As fully discussed in previous sections, the General Assembly has on two separate occasions in the very recent past expressed with utmost clarity its intent not to restrict access in any way to records that are public under the terms of R.C. 149.43. Indeed, the provision that prohibits construing the terms of R.C. Chapter 1347 so as to restrict access to records that are public is itself set forth in R.C. 1347.04. The provision was, of course, reenacted as part of the most recent version of R.C. 1347.04. It would be anomalous to conclude that the controversy between privacy interests and public access--a controversy that the tenor and thrust of all amendatory legislation since the enactment of the original Act was designed to eliminate--would be so casually renewed. This is particularly true in light of the fact that a detailed analysis prepared by the Legislative Service Commission includes no mention whatsoever of this issue.

I am of the opinion that the exception set forth in R.C. 1347.04 has nothing to do with the sensitivity of the information contained in records described therein. An understanding of the legislative history of the statute indicates that it was intended to serve quite another purpose. Prior to the enactment of Am. Sub. H.B. No. 799, the Department of Administrative Services and the Privacy Board were authorized to exempt, by rule adopted pursuant to the Administrative Procedure Act, certain types of information systems from the Act for a period of five years. Included among those systems qualifying for such an exemption were ones "comprised of investigatory material compiled for law enforcement purposes by agencies" other than those agencies specifically enumerated in the statute. The need for such an exemption with respect to records of this type is apparent to anyone cognizant of the full extent of the requirements imposed by R.C. Chapter 1347.

The statute, as amended, abolishes the Privacy Board and restricts the rule-making powers of the Department of Administrative Services. It was still felt, however, that records pertaining to law enforcement investigations should be exempt from the extensive and rather rigorous requirements of R.C. Chapter 1347. The exemption was, therefore, created by statute. "Consequently," in the language of the Legislative Service Commission analysis, "the Bill would 'statutorily' and 'permanently' (not just for five years) exempt these personal information systems from Personal Information Systems Law." The change in the law was, quite obviously, intended merely to transform the manner by which the exemption was recognized. It has nothing to do with the perceived sensitivity of the records in question.

Thus, investigatory material compiled for law enforcement purposes need not be verified, as is required of other information under R.C. 1347.09, and its collection, use and maintenance is not subject to the limitations set forth in R.C.

1347.05. It is, in short, not subject to any of the provisions of R.C. Chapter 1347. Such material, however, remains subject to the provisions of R.C. 149.43. Thus, it cannot be withheld from the public unless it qualifies, as well, as a confidential law enforcement investigatory record as defined in R.C. 149.43(A)(2) or some other type of record the confidentiality of which is required by law. To conclude otherwise would render futile recent legislative efforts at defining with sufficient specificity those law enforcement investigatory records considered too sensitive for public disclosure. See R.C. 149.43(A)(2). Thus, whatever significance may arise from the fact that the person who is the subject of the information does not, strictly speaking, possess a right of access thereto pursuant to R.C. 1347.08 is effectively nullified by the fact that, as a member of the public, he possesses a right to inspect these records under R.C. 149.43.

VI

Now that I have explained with sufficient specificity the manner in which records should be classified under Ohio law, I can direct my attention to the questions you have posed.

R.C. 5123.18 requires that every person desiring to operate a residential facility shall apply for licensure of the facility to the Director of the Department of Mental Retardation and Developmental Disabilities. Pursuant to this same section, the Director is authorized to license and inspect the operation of residential facilities and to review and revoke such licenses. This function, quite naturally, generates considerable information. Included among the records so maintained are applications submitted by prospective licensees and inspection reports prepared by department employees. These records may include financial and educational information regarding a home operator and letters of reference written by third parties on behalf of prospective licensees.

You inquire specifically what, if any, such information may be disclosed to members of the public. Application of the principles set forth in the preceding sections of this opinion provides a relatively simple response to your inquiry.

One must begin with a recognition that the information generated by the Director's licensing function is used by the Department in carrying out its statutory duties pursuant to R.C. 5123.18. Additionally, it must be recognized that such information comes within the definition of "personal information" as used in R.C. 1347. Pursuant to R.C. 1347.05, a governmental agency that is subject to the provisions of R.C. Chapter 1347 may maintain personal information that is subject to the provisions of R.C. Chapter 1347 only if such information is necessary and relevant to the agency's functions. See Part IV, infra. The Department is clearly not an agency which performs as its principal function an activity relating to the enforcement of the criminal laws as defined in R.C. 1347.04. Therefore, if the licensure information maintained by the Department is not exempt from the provisions of R.C. Chapter 1347, then in order for the Department to be in compliance with R.C. 1347.05, such information must be necessary and relevant to the Department's functions.

R.C. 5123.18(C) authorizes the Director of the Department of Mental Retardation and Developmental Disabilities to grant, renew and revoke licenses for the operation of residential facilities. A license is presumably revoked for failure to comply with applicable provisions of law. Information compiled by the Department may thus be deemed to generally qualify as "information. . .comprised of investigatory material compiled for law enforcement purposes." As such, it may well qualify under the exemption set forth in R.C. 1347.04(A)(1)(e).

It is not necessary for the purposes of this analysis, however, to delimit precisely the scope of the foregoing exception. I mention it only for the purpose of

considering whether the Department is affirmatively prohibited by R.C. 1347.05 from maintaining information that is not necessary and relevant to its functions. As discussed in Part IV, infra, even if the Department is exempt from the provisions of R.C. 1347.05 with respect to the maintenance of these records, the Department is bound by R.C. 121.21. If the Department is in compliance with R.C. 121.21, the Department will have in its possession only those records that are necessary to its functions.

From the above analysis, one may conclude that the records in question are necessary and relevant to the Department's performance of its statutory duties. The status of records that are maintained by a state agency and that are necessary to that agency's performance of its statutory duties is clearly defined in the syllabus of Dayton Daily News, supra. That syllabus holds that a record is "required to be kept" where the agency's maintenance of the record is necessary to the unit's execution of its duties and responsibilities. Thus, it follows ineluctably that each of the records in question is "required to be kept," within the meaning of R.C. 149.43. As such, each record is a public record unless it is specifically made confidential by law.

The information described in your request quite obviously fails to qualify as any one of the exceptions to public records set forth in R.C. 149.43. Nor is there any other statutory provision or case law that would in any way limit disclosure of these records.

I must, therefore, conclude that records that are maintained by the Director of the Department of Mental Retardation and Developmental Disabilities as a result of the powers and duties conferred upon him by R.C. 5123.18 are public records under R.C. 149.43.

In specific answer to your question, it is my opinion, and you are hereby advised, that:

1. As recently amended by Am. Sub. H.B. No. 799 (eff. Jan. 23, 1981) and S.B. 62 (eff. Jan. 18, 1980), R.C. Chapter 1347, the Privacy Act, does not restrict access to records that are public under the terms of R.C. 149.43.

2. With respect to their accessibility by members of the public, Ohio law formally recognizes the existence of three separate classes of governmental records. One class, which is comprised of records pertaining to confidential law enforcement investigations, trial preparations, and adoptions, may be disclosed neither to the public at large nor to the person who is the the subject matter of the information, except that adoption records may be disclosed with consent of the court. The second class, which is comprised of records otherwise made confidential by law and subject to the provisions of R.C. Chapter 1347, the Privacy Act, may not be disclosed to the public at large, but must, upon request, be disclosed to the person who is the subject of the information. The third class, which is comprised of records that are public, must, upon request, be disclosed to any member of the public for any reason.

3. 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.

4. Unless made confidential by law, all records maintained by a governmental agency that are necessary to the agency's execution of its duties and responsibilities are public records under the terms of R.C. 149.43.

5. Pursuant to R.C. 1347.05(H), a governmental agency which is subject to the provisions of R.C. Chapter 1347, the Privacy Act, may collect, maintain and use personal information that is subject to the provisions of R.C. Chapter 1347 only if such information is necessary to the functions of the agency.

6. An assertion by a governmental agency which is subject to the provisions of R.C. Chapter 1347, the Privacy Act, that records maintained, which are subject to the provisions of R.C. Chapter 1347, are not "required to be kept" and, therefore, are not public records pursuant to R.C. 149.43, is an implicit admission that the agency has violated R.C. 1347.05(H).

7. Pursuant to R.C. 121.21, a state agency may make and preserve "only such records as are necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures and essential transactions of the agency."

8. An assertion by a state agency that records maintained are not necessary for the documentation of the agency's organizations, functions, policies, decisions, procedures and transactions is an implicit admission that the agency has violated R.C. 121.21.

9. Records maintained by the Director of the Department of Mental Retardation and Developmental Disabilities with respect to the responsibilities conferred upon him by R.C. 5123.18 are public records under R.C. 149.43 and, therefore, must, upon request, be disclosed to any member of the public without regard to any privacy interest which any individual may be deemed to have in such records.