OPINION NO. 99-012

Syllabus:

1. When a county office responds to a request to create a customized document by coordinating and compiling information from public records kept by that office, the customized document constitutes a copy of public records for purposes of R.C. 149.43(B). Pursuant to R.C. 149.43(B), the county office is authorized to make such a customized document available at cost.

2. For purposes of determining the fee that may be charged pursuant to R.C. 149.43(B) for a customized document created by coordinating and compiling information from public records, "at cost" means actual costs, exclusive of any charges for employee labor or computer programming time involved in either the preparation or actual production of the document.

To: David P. Joyce, Geauga County Prosecuting Attorney ,Chardon, Ohio
By: Betty D. Montgomery, Attorney General, February 2, 1999

You have requested an opinion regarding the charging of fees for preparation and production of specialized documents by county offices. The issues presented by your request are as follows:

1. If, in response to citizens' requests, a county office is willing to coordinate and compile information from public records kept by that office into individually-tailored, customized documents, does the office have authority to charge a fee for this service?

2. If so, what standards may be used to establish the amount of the fee for preparation and production of such documents?

Based on your letter, we understand the facts underlying this request to be as follows. You note that an individual is able to take documents obtained from public records requests to a private enterprise to have customized documents professionally prepared from the information contained therein. Some county offices, however, now have the technological capability to prepare information from public records in many varied formats. These offices are able to respond to a request for customized documents from a member of the public, even though the requested format is not one which the offices would ordinarily maintain or use for their own purposes. For example, the tax map office of the county auditor could compile information from various public records to produce a subdivision map that indicates all properties with homes valued in a certain range. Similarly, the county planning department could coordinate data from its various records to create maps indicating soil and geological information. County offices that have such technological capabilities often choose to prepare customized documents as a service to the public. You have requested our opinion, therefore, regarding the charging of fees for such a service.

The first issue presented by your request is whether a county office has authority to charge a fee for the described service. The authority of the county, its officers, and its agencies is limited to that conferred expressly by statute or by necessary implication therefrom. *Geauga County Bd. of Comm'rs v. Munn Rd. Sand and Gravel*, 67 Ohio St. 3d 579, 582, 621 N.E.2d 696, 699 (1993); *see also State ex rel. Shriver v. Bd. of Comm'rs*, 148 Ohio St. 277, 74 N.E.2d 248 (1947) (syllabus, paragraphs one and two) (board of county commissioners); *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 197 N.E.2d 112 (1935) (syllabus, paragraph one) (county auditor); 1996 Op. Att'y Gen. 96-043 at 2-161. In accord with this principle, a county office or officer may not charge a fee for any service absent express or implied statutory authority to do so. *See* R.C. 325.36 ("[n]o salaried county official ... shall collect a fee other than that prescribed by law"); *Railroad Co. v. Lee*, 37 Ohio St. 479 (1882) (county prosecuting attorney, who in response to a citizen request exercised discretionary authority to prosecute a case in magistrate's court, had no authority to require payment of a fee from the that citizen); *Debolt v. Trustees of Cincinnati Township*, 7 Ohio St. 237 (1857) (syllabus, paragraph one) ("[a]n officer whose fees are regulated by statute, can charge fees for those services only to which compensation is by law affixed"); *accord* 1982 Op. Att'y Gen. No. 82-075 (absent statutory authority, a county sheriff may not charge a fee for issuance of a permit).[1]

[1] In the early cases, the principle that statutory authority is necessary to charge a fee was articulated in the context of whether a public officer had authority to charge a fee for purposes of personal compensation. The principle applies equally, however, to fees that are

The compilation of information from public records into customized documents is a discretionary public service. *See State ex rel. Scanlon v. Deters*, 45 Ohio St. 3d 376, 379, 544 N.E.2d 680, 683 (1989) (holding that "the clerk could not be required to create a new 'document' by compiling material to facilitate review of the public records"), *overruled on other grounds by State ex rel. Steckman v. Jackson*, 70 Ohio St. 3d 420, 426-27, 639 N.E.2d 83, 89 (1994); *accord State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St. 3d 273, 274, 695 N.E.2d 256, 258 (1998) ("[a public office] has no duty to create a new document by searching for and compiling information from its existing records"); *State ex rel Margolius v. City of Cleveland*, 62 Ohio St. 3d 456, 461, 584 N.E.2d 665, 670 (1992) ("[t]here is no requirement on the part of public agencies to create records that are not already in their possession"); *see also State ex rel. Lanham v. Ohio Adult Parole Auth.*, 80 Ohio St. 3d 425, 427, 687 N.E.2d 283, 285 (1997) (R.C. 149.43 does not require public offices to search for and identify records that contain requested information). No statute expressly authorizes a county office or county officer to charge a fee for this particular discretionary service or for discretionary services in general. *Cf.* R.C. 317.32 (establishing fees for copying and other services associated with specifically listed documents in the county recorder's office). Nor is there any implied authority to charge a fee for the performance of discretionary services. *See, e.g., Railroad Co. v. Lee.* As a general rule, the authority to charge fees may be implied only in a situation where the fee is imposed for regulatory purposes in connection with an express grant of power to inspect or regulate a particular matter. *Prudential Co-Operative Realty Co. v. City of Youngstown*, 118 Ohio St. 204, 214, 160 N.E. 695, 698 (1928); *accord* 1986 Op. Att'y Gen. 86-081 at 2-456 to 2-457. Your request does not identify any regulatory purpose associated with the preparation and production of customized documents, however. Rather, the purpose appears to be that of providing a "user-friendly" response to public records requests. We turn, therefore, to an examination of the public records laws to determine whether they provide authority to charge a fee for the preparation and production of customized documents in response to individual requests.

R.C. 149.43(B) provides that "[u]pon request, a person responsible for public records shall make copies available at cost." This statute authorizes charging a fee that is limited to costs. By its terms, however, this provision applies to copies of public records. Accordingly, it is necessary to determine whether the customized documents you have described can be characterized as copies of public records.

A "public record" is defined, in pertinent part, as "any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units." R.C. 149.43(A)(1). The term "records" is further defined to include "any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office _ which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). The term "copies" is not defined by statute and, thus, should be construed according to its common usage. R.C. 1.42. In common usage, a "copy" is understood to be a reproduction or duplicate of an original work, or, as in the case of books or

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paid into the public treasury. *See generally State ex rel. Attorney General v. Judges of the Court of Common Pleas*, 21 Ohio St. 1 (1871) (syllabus, paragraph three) ("[i]t is not essential to the exaction of fees that they should inure to the personal benefit of the officer .... [I]t is immaterial to those receiving their services whether the sum to be paid therefor goes to the officer or into the public treasury"), *overruled on other grounds by State ex rel. Guilbert v. Lewis*, 69 Ohio St. 202, 69 N.E. 132 (1903).

magazines, one of a series produced from the same template. *See generally Webster's Third New International Dictionary* 504 (unabridged ed. 1993).

In applying these definitions, it has been established that a compilation of information gathered from pre-existing public records is itself a separate public record. *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 527 N.E.2d 1230 (1988) (syllabus, paragraph one); *accord State ex rel. Margolius*, 62 Ohio St. 3d at 459; 584 N.E.2d at 669; *State ex rel. Fant v. Tober*, No. 71616, 1997 Ohio App. LEXIS 5312 at *4 n.2 (Ct. App. Cuyahoga County Nov. 26, 1997); 1994 Op. Att'y Gen. 94-006 at 2-23. Thus, any reproduction of such a compilation, once it has been created, would be a copy of a public record for purposes of R.C. 149.43(B).

The status of the original compilation document as a copy is less clear cut. Case law indicates that a document created by searching for and compiling information from existing records is a "new document." *See State ex rel. Kerner*, 82 Ohio St. 3d at 275-76, 695 N.E.2d at 258; *State ex rel. Scanlon*, 45 Ohio St. 3d at 379, 544 N.E.2d at 683; *see also State ex rel. Fant v. Mengel*, 62 Ohio St. 3d 455, 584 N.E.2d 664 (1992). This new document could be characterized as an original in the sense that the organization and format of the information therein is new. The information itself is not original, however. The compilation document is composed of selected pieces of information reproduced from other public records. R.C. 149.011(G) provides that the term "records" includes items, as well as entire documents. *See generally State ex rel. Beacon Journal Publ'g Co. v. City of Akron*, 70 Ohio St. 3d 605, 606, 640 N.E.2d 164, 166 (1994) (holding that social security numbers within payroll files are "records" for purposes of R.C. 149.011(G)). Thus, the compilation document, although original in one sense, can also be characterized as a copy of multiple "items" of information that qualify as records under R.C. 149.011(G). We note further, the statement by the court in *State ex rel. Scanlon*, that "if the ... computer were already programmed to produce the desired printout, the 'document' would already exist for the purpose of an R.C. 149.43 request." *Id.* at 379, 544 N.E.2d at 683. Under this view, the "original" public record exists inchoate in the programming and database of the public office. Once a program is created, any printout produced by that template, regardless of whether it is the first or last, is a "copy."

Accordingly, with respect to the first issue raised by your request, we conclude that when a county office responds to a request to create a customized document by coordinating and compiling information from public records kept by that office, the customized document constitutes a copy of public records for purposes of R.C. 149.43(B). Pursuant to R.C. 149.43(B), the county office is authorized to make such a customized document available at cost.

We turn now to the second issue raised by your request, what standards may be used to determine the amount to be charged for the preparation and production of these customized documents? As indicated in the discussion above, R.C. 149.43(B) requires that copies of public records be made available "at cost." There is no countervailing statutory authority for the county or any of its various offices and officers to establish a fee in excess of costs. *Cf.* R.C. 1501.01 (authorizing the Director of Natural Resources to "sell ... data, reports, and information"); 31 U.S.C. §167; 9701(b) (1994) (authorizing federal agencies to establish charges based on, not only actual costs, but also "the value of the service or thing to the recipient [and] public policy or interest served").

In *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 625, 640 N.E.2d 174, 180 (1994), the court held that, for purposes of R.C. 149.43, "at cost" means

"actual cost." *Accord* 1989 Op. Att'y Gen. 89-073 at 2-336 to 2-337. The court reasoned that "[s]ince [public officers] are already compensated for performing their duties, and responding to public records requests is merely another duty, the cost set forth in R.C. 149.43(B) should not include labor costs regarding employee time." *State ex rel. Warren Newspapers, Inc.*, 70 Ohio St. 3d at 626, 640 N.E.2d at 180; *accord State ex rel. Lemke v. Columbiana County Prosecutor's Office*, No. 93-C-56, 1996 Ohio App. LEXIS 521 (Ct. App. Columbiana County Feb. 16, 1996) (excluding the costs of attorney review and preparation time from actual cost of making copies available). The service you have described differs from that in *State ex rel. Warren Newspapers, Inc.*, in that there is no absolute duty to create customized documents in response to public records requests. As we have already established, however, a public office has no more power to charge individuals for the performance of discretionary services than for the performance of mandatory services. *See Railroad Co. v. Lee.*

The lack of general authority to charge a fee in excess of "actual costs" for the preparation and production of customized documents is also highlighted by the provisions of R.C. 149.43(E). Pursuant to R.C. 149.43(E), the Bureau of Motor Vehicles is expressly authorized to charge fees in addition to actual cost for responses to public record requests designated as "bulk commercial special extraction requests." A bulk commercial special extraction request is defined, *inter alia*, as a request, made for commercial purposes, for "copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base." R.C. 149.43(E)(2)(b). The charge for responding to such a request may include, not only the "actual cost," but also "special extraction costs, plus ten per cent." R.C. 149.43(E)(1). "Actual cost" is defined as "the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services." R.C. 149.43(E)(2)(a). "Special extraction costs" are "the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or *the actual cost incurred to create computer programs to make the special extraction.*" R.C. 149.43(E)(2)(d) (emphasis added).

As did the court in *State ex rel Warren Newspapers, Inc.*, R.C. 149.43(E) excludes labor and preparation costs from the calculation of "actual cost."[2] However, R.C. 149.43(E) expressly authorizes the Bureau of Motor Vehicles to charge an additional fee for labor, including computer programming, and also to impose a surcharge, when responding to requests for public information in customized formats. This express grant of authority to the Bureau of Motor Vehicles implies that public offices generally do not have authority to charge fees in excess of actual costs when responding to such requests. *See generally Thomas v. Freeman*, 79 Ohio St. 3d 221, 224-25, 680 N.E.2d 997, 1000 (1997) (recognizing the principle of statutory construction that "the expression of one thing is the exclusion of the other"); *Kroger Co. v. Bowers*, 3 Ohio St. 2d 76, 78, 209 N.E.2d 209, 211 (1965).

Accordingly, in response to the second issue raised by your request, we conclude that for purposes of determining the fee that may be charged under R.C. 149.43(B) for a customized document created by coordinating and compiling information from public records, "at cost" means actual costs, exclusive of any charges for employee labor or computer programming time involved in either the preparation or actual production of the document.

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[2] The statutory definition of "actual cost" at R.C. 149.43(E)(2)(a) applies only to division (E)(1), but it is consistent with judicial interpretation of the term generally. Thus, it provides a useful guide to the factors that may be considered in other circumstances.

Therefore, it is my opinion, and you are hereby advised that:

1. When a county office responds to a request to create a customized document by coordinating and compiling information from public records kept by that office, the customized document constitutes a copy of public records for purposes of R.C. 149.43(B). Pursuant to R.C. 149.43(B), the county office is authorized to make such a customized document available at cost.

2. For purposes of determining the fee that may be charged pursuant to R.C. 149.43(B) for a customized document created by coordinating and compiling information from public records, "at cost" means actual costs, exclusive of any charges for employee labor or computer programming time involved in either the preparation or actual production of the document.