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COUNTY RECORDS COMMISSION REGARDING PUBLIC RECORDS, INVENTORY AND ANALYSIS—JURISDICTION—RETENTION PERIODS—INVENTORIES AND ANALYSIS DISPOSAL OF COPIES OF A RECORD—§149.38, R.C., OAG No. 5667-1955.

SYLLABUS:

1. Pursuant to the provisions of Section 149.38, Revised Code, a county records commission may require each county office which has control of public records to submit on forms provided by the commission a records inventory and analysis of all records created, received and maintained by such office.

2. Any public officer or body having control of public records of the county is subject to the jurisdiction of the county records commission established by Section 149.38, Revised Code.

3. Under the provisions of Section 149.38, Revised Code, a county records commission is authorized to adopt rules and regulations creating retention periods for those records of the county which do not have a retention period established by statute.

4. A county records commission is authorized under the provisions of Section 149.38, Revised Code, to employ a trained archivist who may administer, under its direction, a program of conducting records inventories and analyses, but a county records commission has no authority to operate either a records storage center for non-current records or a central microfilming service for all county offices.

5. County offices are not required under the provisions of Section 149.38, Revised Code, to secure the approval of the county records commission to dispose of copies of a record as long as the office retains the original, and in those cases where the office retains a copy in the first instance, then records commission approval is not necessary for the disposition of extra copies as long as the office retains the records copy.

6. County offices may dispose of any records which are microfilmed by applying to the county records commission and complying with the procedure outlined in Section 149.38, Revised Code. (Opinion No. 5667, Opinions of the Attorney General for 1955, page 371, approved and followed.)

7. Under Section 149.38, Revised Code, when an application for records disposal has been approved, and after the archivist of The Ohio Historical Society has been informed and given the opportunity for a period of sixty days to select for custody or disposal such records, then the county records commission shall provide for the disposal of such records by destroying them or transferring them to some institution or organization for the use and benefit of the public.

Columbus, Ohio, May 11, 1960

Hon. Bruce C. Harding, Archivist
The Ohio Historical Society, Columbus, Ohio

Dear Sir:

Your request for my opinion reads as follows:

“As provided in Section 149.31, Revised Code, I have been requested to provide advice and aid to several counties interested in taking action under Section 149.38, Revised Code, which sets forth a system of records disposal. Since some of the questions asked me were relative to the scope and degree of authority granted to County Records Commissions under Section 149.38, Revised Code, I am therefore requesting your opinion on the following items:

1. Section 149.38, Revised Code, states: ‘The functions of said commission shall be to provide rules and regulations for retention and disposal of public records of the county and to review records disposal lists submitted by county offices.’ Can the County Records Commission require each office to submit on forms it provides a records inventory and analysis of all records created, received and maintained by the office?

2. What offices in county government are subject to the jurisdiction of the County Records Commission established in Section 149.38 of the Revised Code?

3. Is the County Records Commission authorized to adopt rules and regulations creating retention periods for those records of the county which do not have a retention period established by statute?

4. Is the County Records Commission authorized to employ a trained archivist who would administer, under its direction, a program of conducting records inventories and analyses, operation of a records storage center for non-current records, and operation of a central microfilming service for all county offices?

5. Are county offices required to secure the approval of the County Records Commission to dispose of *all copies* of a record as long as the office maintains in its files a copy which is designated as the ‘records copy’?

6. May county offices dispose of *any records* which are microfilmed by applying to the County Records Commission as provided in Section 149.38 of the Revised Code?”

Your second request for opinion reads:

“As per your instructions of yesterday, I am adding the following question to my request for an opinion dated March 9, 1960:

“‘When an application for records disposal has been approved as provided in Section 149.38 Revised Code, are the records to be physically destroyed by burning, shredding, etc. or may they be given or sold to private individuals for their use or resale?’”

Section 149.38, Revised Code, creates a county records commission in each county, reading:

“There is hereby created in each county a county records commission, composed of the president of the board of county commissioners as chairman, the prosecuting attorney, the auditor, the recorder, and the clerk of the court of common pleas. The commission shall appoint a secretary who may or may not be a member of the commission and who shall serve at the pleasure of the commission. The commission may employ a trained archivist to serve under its direction. The commission shall meet at least once every six months, and upon call of the chairman.

“The functions of said commission shall be to provide rules and regulations for retention and disposal of public records of the county and to review records disposal lists submitted by county offices. The disposal lists shall contain those records which have been microfilmed or no longer have administrative, legal, or fiscal value to the county or to the citizens thereof. Such records may be disposed of by the commission pursuant to procedure hereinafter outlined.

“When county records have been approved for disposal, a list or description thereof shall be published in three successive issues of a local newspaper, and a copy of such records list shall be sent to the bureau of inspection and supervision of public offices of the auditor of state. If said bureau disapproves the action by the county commission in whole or in part it shall so inform the commission within a period of sixty days and these records shall not be destroyed. Before records are otherwise disposed of, the archivist of the Ohio historical society shall be informed and given the opportunity for a period of sixty days to select for custody or disposal such records as may be deemed to be of continuing historical value.”

When the 103rd General Assembly amended Section 149.38, Revised Code, (Amended Substitute House Bill No. 737—1959) the county records commissions were for the first time given power to provide rules and regulations for retention and disposal of public records of their respective counties. Such amendment is silent, however, with regard to the method to be used in adopting such rules and regulations. Nevertheless, the power to make rules necessarily implies the power to ascertain the facts upon which such rules will operate. As stated in 42 American Jurisprudence, Public Administrative Law, Section 94, at page 423:

“The first step in rule-making procedure is an investigation, and this is of primary importance, especially when later conferences and hearings are not held.”

Investigatory power includes, among other things, requiring written answers to questionnaires. 42 American Jurisprudence, Public Administrative Law, Section 31, page 323.

Section 149.38, *supra*, is also silent with regard to the particular county offices which may be subject to the jurisdiction of the county records commission, but definitely gives the commission broad power to provide rules and regulations for retention and disposal of public records *of the county*. Records "of the county" are obviously those records which are kept by county officers. Accordingly, any public officer or body having control of public records of the county is subject to the jurisdiction of the county records commission.

Further, it will be noted that a state records commission is created by Section 149.32, Revised Code, a city records commission by Section 149.39, Revised Code, and a township records commission by Section 149.42, Revised Code, with similar powers over the retention and disposal of state, city, and township records respectively. Apparently the General Assembly's purpose was to provide a plan for the retention or disposal of all public records in this state. It follows, therefore, that any public officer or body who has control of public records is subject to the jurisdiction of one of these records commissions, in the case of county officers, the county records commission being the controlling agency.

Fortunately, Section 149.38, *supra*, is not silent with regard to the authority of the county records commission to adopt rules and regulations for retention of county records, the section providing, *inter alia*, as follows:

"The functions of said commission *shall be* to provide rules and regulations for *retention* and disposal of public records of the county * * *."

(Emphasis added)

The county records commission is, therefore, authorized to adopt rules and regulations creating retention periods for those records of the county which do not have a retention period established by statute.

There can be no doubt that the county records commission is authorized to employ a trained archivist. Section 149.38, *supra*, provides, *inter alia*, as follows:

"The commission may employ a trained archivist to serve under its direction."

We have already discussed the power of the commission to require each county office having control of public records to answer questionnaires. The question now is whether the commission may authorize a trained archivist to administer, under its direction, a program of conducting records inventories and analyses. While it is a general principle of law, expressed in the maxim "*delegatus non potest*," that a delegated power may not be further delegated by the person to whom such power is delegated, this principle does not preclude one from utilizing, as a matter of practical administrative procedure, the aid of subordinates directed by him to investigate and report the facts and make recommendations in relation to the advisability of the order, and also to draft such order in the first instance. *School District v. Callahan*, 237 Wisc., 560, 297 N.W. 407. It would seem, therefore, that a county records commission may employ a trained archivist to administer, under its direction, a program of conducting records inventories and analyses.

It is a well known fact that many county offices do not have adequate storage space for all the records which they are required to keep. No doubt a records storage center for noncurrent records would be helpful to those county offices by allowing them to utilize their available space for current records. Section 149.38, *supra*, as it now stands, however, does not empower a county records commission to operate a records storage center. Furthermore, many county officers are required by statute to keep their records in their own offices, or under their possession or control. See Sections 311.13 (Sheriff), 313.90 (Coroner), 315.25 (Engineer), 317.07 (Recorder), and 319.08 (Auditor), Revised Code. The commission, therefore, is without power to authorize a trained archivist to operate such a center.

Section 9.01, Revised Code, authorizes any county officer who is charged with the duty to keep records to do so by means of any photostatic process. Section 9.01, Revised Code, further provides in pertinent part as follows:

"Any such officer, office, court, commission, board, institution, department, agent, or employee of the state, a county, or any political subdivision may purchase or rent required equipment for any such photographic process. * * *"

The above quoted language was the subject of the following comment by a predecessor of mine in Opinion No. 6935, Opinions of the Attorney General for 1956, at page 616:

“In these circumstances I feel constrained to hold that a county recorder who elects to exercise this discretionary statutory authority to photostat instruments for record, must do so as an incident of the operation of his own office by the use of equipment purchased or rented for that purpose, rather than by contracting with a private person or firm to accomplish such function for him and in his stead.”

In view of the above opinion and the fact that Section 149.38, Revised Code, does not expressly authorize a county records commission to operate a central microfilming service for all county offices, such commission, therefore, cannot authorize a trained archivist to operate such service.

Neither Section 149.38 nor 149.40, Revised Code, defines whether a public record includes copies of the same. Prior to the 1959 amendments, Section 149.31, Revised Code, defined “records” as used in Section 149.38, Revised Code, as including originals or copies. A predecessor of mine in commenting on Section 149.31, Revised Code, stated as follows in Opinion No. 7632, Opinions of the Attorney General for 1956, at page 947:

“As you have undoubtedly observed the term ‘records’ as defined in this section includes both originals and copies of various written documents. This does not mean that every copy of a document—and, as you know, innumerable copies are made of some documents—is a ‘record.’ The inclusion of copies in the terms of this section was obviously intended to cover such cases as that of ordinary correspondence where the original of a document is sent out of a state office and a copy is retained. In such a case the retained copy is the ‘record.’ In the situation outlined in your request the department retains the original, and therefore the carbon copies are not ‘records’ and may be disposed of as the department wishes.”

Although the definition of “records” was eliminated from Section 149.31, Revised Code, by the 1959 amendments, the rationale of Opinion No. 7632, *supra*, is still valid. County offices, therefore, are not required to secure the approval of the county records commission to dispose of copies of a record as long as the office retains the original, or in those cases where the office retains a copy in the first instance, then they are not required to secure such approval to dispose of extra copies.

In regard to your question whether county offices may dispose of any records which are microfilmed by applying to the county records commission as provided in Section 149.38, Revised Code, your attention

is directed to Opinion No. 5667, Opinions of the Attorney General for 1955, page 371, the syllabus of which reads as follows:

“A Probate Court may make up a record in so far as same is required by Sections 2101.12, 3107.14, 5123.37, 5123.38 and 5731.48, Revised Code, by microfilming or other duplication process as authorized by Section 9.01, Revised Code, provided the original documents are maintained on file and until their eventual destruction is accomplished only in accordance with the provisions of Section 149.38, Revised Code. Opinion No. 1389, Opinions of the Attorney General for 1950, page 39, overruled.”

In accordance with the provisions of Section 149.38, Revised Code, county offices submit “disposal lists” to the county records commission. Section 149.38, Revised Code, then provides in part as follows:

“* * * *The disposal lists shall contain those records which have been microfilmed* or no longer have administrative, legal, or fiscal value to the county or to the citizens thereof. Such records may be disposed of by the commission pursuant to procedure hereinafter outlined.” (Emphasis added)

County offices, therefore, may dispose of any records which are microfilmed, by applying to the county records commission and complying with the procedure outlined in Section 149.38, *supra*.

Section 149.38, *supra*, does not state how the commission is to dispose of records. The commission is simply given power to provide rules and regulations for their disposal. That one method of disposal could be destruction is evidenced by the General Assembly’s statement in Section 149.38, *supra*, as follows:

“If said bureau disapproves the action by the county commission in whole or in part it shall so inform the commission within a period of sixty days and these records shall not be *destroyed*.” (Emphasis added)

The term “destroy” is defined in Webster’s New International Dictionary (2d Ed.) as follows:

“To ruin completely or to injure or mutilate beyond possibility of use, as by tearing, breaking, burning, erosion, etc., as to *destroy* a document, a dress, a work of art, a river bank.”

The term “destroy” is defined in Black’s Law Dictionary (4th Ed.) as follows:

“In relation to wills, contracts, and other documents, the term ‘destroy’ does not import the annihilation of the instrument or its resolution into other forms of matter, but a destruction of its legal efficacy, which may be by cancellation, obliterating, tearing into fragments, etc. In re Kapp’s Estate, 317 Pa. 253, 176 A. 501, 502.”

Section 149.381, Revised Code, which was repealed in 1959, provided in part as follows :

“A commission may decide that, in lieu of their destruction, records shall be transferred to an educational institution, library, museum, historical, research or patriotic organization in this state, if such transfer is requested by the receiving institution or organization.”

Although the above section of the code was repealed, it is significant that the General Assembly did not mention a sale or gift of these records to private individuals. Inasmuch as these are *public* records, it would not be in keeping with public policy to dispose of those records to private individuals.

Accordingly, it is my opinion, and you are so advised that :

1. Pursuant to the provisions of Section 149.38, Revised Code, a county records commission may require each county office which has control of public records to submit on forms provided by the commission a records inventory and analysis of all records created, received and maintained by such office.

2. Any public officer or body having control of public records of the county is subject to the jurisdiction of the county records commission established by Section 149.38, Revised Code.

3. Under the provisions of Section 149.38, Revised Code, a county records commission is authorized to adopt rules and regulations creating retention periods for those records of the county which do not have a retention period established by statute.

4. A county records commission is authorized under the provisions of Section 149.38, Revised Code, to employ a trained archivist who may administer, under its direction, a program of conducting records inventories and analyses, but a county records commission has no authority to operate either a records storage center for non-current records or a central microfilming service for all county offices.

5. County offices are not required under the provisions of Section 149.38, Revised Code, to secure the approval of the county records commission to dispose of copies of a record as long as the office retains the original, and in those cases where the office retains a copy in the first instance, then records commission approval is not necessary for the disposition of extra copies as long as the office retains the records copy.

6. County offices may dispose of any records which are microfilmed by applying to the county records commission and complying with the procedure outlined in Section 149.38, Revised Code. (Opinion No. 5667, Opinions of the Attorney General for 1955, page 371, approved and followed.)

7. Under Section 149.38, Revised Code, when an application for records disposal has been approved, and after the archivist of The Ohio Historical Society has been informed and given the opportunity for a period of sixty days to select for custody or disposal such records, then the county records commission shall provide for the disposal of such records by destroying them or transferring them to some institution or organization for the use and benefit of the public.

Respectfully,

MARK McELROY

Attorney General