

OPINION NO. 76-011**Syllabus:**

1. Cost reports filed by nursing homes with the Ohio Department of Public Welfare for reimbursement under the Medicaid program are records required to be kept and are public records within the meaning of R.C. 149.43. These cost reports, therefore, are open to public inspection without prior express authorization by the nursing homes.

2. Fiscal reviews of nursing home facilities by the Ohio Department of Public Welfare's Bureau of Fiscal Review are records required by law to be kept and are open for inspection pursuant to R.C. 149.43, subject, where applicable, to federal requirements that names of Medicaid recipients not be publicly released.

3. Periodic medical reviews of services rendered to nursing home patients under the Medicaid program are records required by law to be kept, however, the release of these records is prohibited by federal law. The periodic medical review, therefore, is not available for public inspection, and the alteration of these records or summary reports of them containing information, the release of which is prohibited by 45 CFR 205.50, is not required. R.C. 149.43 creates a public right of inspection only as to records the release of which is not prohibited by state or federal law.

**To: Raymond F. McKenna, Director, Ohio Department of Public Welfare,
Columbus, Ohio**

By: William J. Brown, Attorney General, February 24, 1976

I have before me your request for my opinion which reads as follows:

"The Ohio Department of Public Welfare hereby formally requests an opinion from your office concerning the applicability, if any, of the Ohio Public Records Law, R.C. 149.43, to certain documents concerning nursing

homes which participate in Ohio's Medicaid program.

"Can cost reports submitted by a facility in support of claims for Medicaid reimbursement be released without the prior express authorization of the facility? Are reviews conducted by the Department's Bureau of Fiscal Review 'public records' as defined by statute? Is the Department required to modify summary reports of periodic medical reviews by deleting the names of individual Medicaid recipients in order to make such reports available to the public?"

R.C. 149.43, which was enacted in 1963, defines a "public record" and creates a right to inspect such records in the following terms:

"As used in this section, 'public record' means any record required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except records pertaining to physical or psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which is prohibited by state or federal law.

"All public records shall be open 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."

R.C. 149.43 has created a broad mandate that public records are to be open for inspection. A number of questions, however, have arisen in respect to what is a "record required to be kept", as used in R.C. 149.43, and in regard to what records actually kept by governmental units are subject to the exceptions provided in the statute.

A requirement that a particular record be kept may be specifically stated in a statute. See, e.g., R.C. 3317.021, 3360.03, and 4121.10. The R.C. 149.43 mandate that public records be open for inspection is not, however, limited to the situation where there is a specific statutory requirement that a particular record be kept. The General Assembly provided further definition of "public record" in 1965 with the enactment of R.C. 121.21 and 149.40.

R.C. 121.21, which deals with records to be made and preserved by state offices, provides in pertinent part:

"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."

R.C. 149.40 further defines "public records", providing, in pertinent part:

"Any document, device, or item, regardless of physical form or characteristic, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office, is a record within the meaning of sections 149.31 to 149.44, inclusive, of the Revised Code."

It is clear from these provisions that the only records which are to be made and preserved by a state agency are those which document the agency's organization, functions, policies, decisions, transactions, etc. It is equally clear from the terms of 149.40 that records of this type are records "required to be kept" as used in R.C. 149.43.

Curran v. Board of Park Commissioners, 22 Ohio Misc. 197, (Lake County Court of Common Pleas 1970), reflected the conclusions that "records required to be kept," as statutorily defined, means more than a particular record required to be kept by a specific statute. In Curran, supra, public records were defined as "Those records which a governmental unit is required by law to keep or which it is necessary to keep in discharge of duties imposed by law." (Emphasis added.) Id. at 199.

Thus, in Opinion No. 74-097, I concluded that with the exception of physical and psychiatric examinations, adoption, probation, and parole proceedings, and records the release of which is otherwise prohibited by state or federal law, R.C. 149.43 requires all court records to be kept open at all reasonable times. See also, 1971 Op. Atty. Gen. No. 71-053; 1973 Op. Atty. Gen. No. 73-034. Further, the recent decision in Dayton Newspapers v. Dayton, 45 Ohio St.2d 107 (1976), indicates 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 unit's execution of its duties and responsibilities.

By your request you seek advice concerning three types of records: (1) cost reports, (2) fiscal reviews and (3) periodic medical reviews and summaries thereof.

It is my understanding from your request and from discussions between this office and yours, that the cost reports submitted by nursing home facilities for reimbursement under the Medicaid program are submitted pursuant to a "provider agreement" between the Department and the nursing homes. These reports are submitted to the Department on forms supplied by the Department pursuant to a general agreement to provide documentation as necessary. These reports specify expenses in treatment, but do not report recipients' names. I note that Curran, supra, held that independent appraisals

of land submitted to a park board, did not originate from the park board and thus were not public records. In the case of nursing home cost reports, however, the reports are filed as required by the Department on forms supplied by the Department, so that these records should be considered as originating from the Department. The cost reports are the basis on which payment is made to the facilities. They document costs incurred by the nursing home facilities and the transactions between the homes and the Department, and are therefore "required to be kept".

It is my understanding from discussions between this office and yours that the fiscal reviews conducted by the Department's Bureau of Fiscal Review are in the nature of informal audits and are made in general terms, but that recipient names may at times, be included. Formal audits of nursing homes are conducted by the Auditor of State. The reviews conducted by the Department's Bureau of Fiscal Review, however, serve to document and authenticate transactions between the Department and the nursing homes providing services to Medicaid recipients.

It is worthy of note that in the context where preliminary investigation is made by a law enforcement agency such as the State Highway Patrol, the preliminary investigation file, which may be the basis of a report to the proper authority, is not a public record. In 1971 Op. Atty. Gen. No. 71-053, I recognized an established rule of criminal law against pre-trial discovery of the State's evidence in a criminal case. The situation in Opinion No. 71-053, however, involved the Highway Patrol's statutory duty to investigate pursuant to possible criminal prosecution. While criminal prosecution might conceivably be the ultimate result of reviews initiated by the Department of Public Welfare's Bureau of Fiscal Review, such reviews are not undertaken primarily in discharge of duties to investigate as a law enforcement function. The essential nature of these reviews is one which ensures proper operation of the welfare programs involved. The reviews document and authenticate transactions undertaken by the Department in discharge of its duties. These reviews are, therefore, records "required to be kept."

Pursuant to 45 Code of Federal Regulations 250.24, the Department of Public Welfare is required to obtain independent professional reviews of services rendered to Medicaid applicants or recipients who are patients in intermediate care facilities. As specified by this federal regulation, comprehensive medical/social evaluations of services rendered to Medicaid applicants or recipients who are nursing home patients are to be undertaken periodically. In Ohio, these periodic medical reviews are currently conducted by the Department of Public Welfare through two different independent medical review services, with review teams consisting of a physician, a nurse and social worker. The reviews represent a comprehensive assessment of medical treatment rendered, social circumstances and recommended treatment. Each review is accompanied by a summary report, which is usually a 2-page encapsulation of the evaluation. Some of the summary reports so submitted contain patient names and care recommendations, while others summarize the facility and patient care only in general terms, without mention of patient names.

In light of the statutory provisions of R.C. 121.21, 149.40 and the Dayton Newspapers' definition of public records as those records necessary in the discharge of duties imposed by law, it is my opinion that both the reviews and their summaries are "records required to be kept" as used in R.C. 149.43.

R.C. 149.43 does not, however, create an absolute right of inspection of all records required to be kept. The statute specifically excludes records of physical or psychiatric examinations, adoption, probation and parole proceedings and records the release of which is prohibited by state or federal law.

The cost reports filed by nursing homes, the fiscal reviews of nursing home facilities providing services under the Medicaid program, and the periodic medical reviews and their summaries would not be subject to the specifically enumerated exceptions of R.C. 149.43. The primary consideration, however, in respect to all three records in question here, must be whether, under the provisions of R.C. 149.43, they constitute records the release of which is "prohibited by state or federal law".

There are a number of specific statutory provisions in the Ohio Revised Code which prohibit the release of certain records. See, e.g., R.C. 109.57, 5119.87, 5757.18, 4507.25, 4732.19, 4123.88. See also, 1975 Op. Atty. Gen. Nos. 75-047, 75-062. There are no Ohio statutes which specifically prohibit the release of the records of the Ohio Department of Public Welfare in question. These records, however, document transactions pursuant to the Department's administration of the federal Medicaid program. Federal regulations (45 CFR 205.50) set forth federal requirements of confidentiality of information obtained by a state in administering various titles of the Social Security Act. The State plan requirements for the medical assistance programs include the restriction that disclosure of information shall be limited to purposes directly connected with the administration of the program. Types of information so limited include, but are not limited to: the names of recipients, information related to the social and economic conditions or circumstances of a particular individual, medical data and agency evaluation of information about a particular individual.

The federal confidentiality requirements apply in the situation where a fiscal review of nursing home facilities conducted by the Department's Bureau of Fiscal Review identifies a particular Medicaid recipient. It is, however, my understanding that fiscal reviews of nursing home facilities do not generally contain information of the type protected by 45 CFR 205.50 and the federal confidentiality requirements are not, therefore, applicable to these records. The same is true for the cost reports filed by nursing home facilities, since cost reports do not contain information identifying recipients.

From your description of the periodic medical review, however, it appears that disclosure of this record would violate the provisions of 45 CFR 205.50, since these evaluations involve names of recipients, medical data, agency evaluation of information about an individual and information related to an individual's circumstances or social/economic condition. The release of these records would be prohibited by federal law; under 149.43, therefore, there is no public right of inspection. It has been generally concluded that the right to inspection created by R.C. 149.43 does not involve an agency duty to collect, collate or analyze any data or information. See generally, 1967 Op. Atty. Gen. No. 67-018. It is my opinion, therefore, that since the release of the periodic medical review is prohibited by federal law, there is no public right of inspection of these records and since there is no right of inspection, the Department is not required to modify these records in order to make them available to the public.

It is my understanding, however, that some of the summary reports of periodic medical reviews are in general terms concerning the quality of care and adequacy of facilities and do not contain information concerning or identifying Medicaid recipients. The release of summary reports which do not contain information protected by 45 CFR 205.50 would not, therefore, be prohibited by law. I again note, however, that, as in the case of the entire periodic medical review, the Department is under no duty to modify summary reports which do contain information the release of which is prohibited under 45 CFR 205.50 in order to make them available to the public.

Broader principles of privacy may well be an important consideration where the release of certain records is not specifically prohibited by a particular law. A substantial invasion of personal privacy, however, has been held to be necessary to outweigh the public right of inspection. In Getman v. NLRB, 450 F.2d 67 (1971), the privacy of employees - a list of whose names and addresses was sought - was balanced against the public interest in having public records open for inspection. The conclusion in Getman was that if no "clearly unwarranted" invasion of privacy had occurred, some loss of privacy was permissible in the face of the public interest in having public records open for inspection. By this standard, any invasion of privacy of the nursing home facilities providing services pursuant to a provider agreement which might occur by reason of disclosure of cost reports or fiscal reviews would not appear a sufficient invasion of personal privacy to abridge the public interest and right to have public records available for inspection. Such nursing home facilities are rendering services pursuant to a general agreement with a public agency, and I am aware of no specific provisions of law or general concepts which would require express authorization by such facilities prior to the release of such records.

At common law, there was a requirement that one seeking inspection of public records have some demonstrable interest in the subject of the inspection. This view, however, was not accepted in Ohio, even prior to the enactment of R.C. 149.43 in 1963. The decision in Sullivan v. Wilson, 24 Ohio L.Abs. 208 (1937) suggests that the public interest in having public records open is a sufficient demonstration of interest in the subject matter. The enactment of R.C. 149.43 in 1963 also seems to overcome any possibility that a lack of direct interest can limit the public right of inspection thereby created. In 1974 Op. Atty. Gen. No. 74-097, I concluded that the purpose of an inspection - even where the purpose may be commercial or even malicious - cannot limit the public right to inspect public records.

This right to inspect public records is subject to the limitation that such inspection does not endanger the safety of the record or unreasonably interfere with the discharge of the duties of the officer having custody of the records. State, ex rel. Patterson v. Ayers, 171 Ohio St. 369 (1960). I note, however, that a very recent decision, State, ex rel. Akron Beacon Journal v. Andrews (Franklin County Court of Appeals, No. 74, AP-148, January 15, 1976) indicated that the duty to make public records available for inspection is one of the duties of public office. Such inspection does not occur as a matter of grace by the public officer, but is one of his public duties. An officer in custody of records can make reasonable

regulations aimed at ensuring the safety of records and minimizing the interference with other duties, but he may not cut off public access to public records. Regulations as to the time of day, number of records to be inspected at one time, number of persons that may be involved in inspection at one time and place of inspection could be used to minimize any danger to the records or interference with other duties. This decision suggests that inconvenience and the fact the public records not available for inspection were comingled in computer storage with those available for inspection were not sufficient as a basis to bar the public right of access to public records. This reasoning is applicable to public access to the records presently under consideration. Further, I note that the Dayton Newspapers' decision, supra, indicated that, 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.

In summary, therefore, it is my opinion, and you are so advised that:

1. Cost reports filed by nursing homes with the Ohio Department of Public Welfare for reimbursement under the Medicaid program are records required to be kept and are public records within the meaning of R.C. 149.43. These cost reports, therefore, are open to public inspection without prior express authorization by the nursing homes.
2. Fiscal reviews of nursing home facilities by the Ohio Department of Public Welfare's Bureau of Fiscal Review are records required by law to be kept and are open for inspection pursuant to R.C. 149.43, subject, where applicable, to federal requirements that names of Medicaid recipients not be publicly released.
3. Periodic medical reviews of services rendered to nursing home patients under the Medicaid program are records required by law to be kept, however, the release of these records is prohibited by federal law. The periodic medical review, therefore, is not available for public inspection, and the alteration of these records or summary reports of them containing information, the release of which is prohibited by 45 CFR 205.50, is not required. R.C. 149.43 creates a public right of inspection only as to records the release of which is not prohibited by state or federal law.