

OPINION NO. 81-019**Syllabus:**

1. The academic and nonacademic personnel inventory maintained by the Ohio Board of Regents is a public record under the terms of R.C. 149.43. This inventory must, therefore, be open to public inspection and copies must be made available at cost.
2. The faculty inventory and the report on faculty service maintained by the Ohio Board of Regents on computer tapes are not public records within the meaning of R.C. 149.43 and, therefore, need not be made available for public inspection. The public release of the reports is restricted by 20 U.S.C. §1232g(b)(1), which provides for a potential loss of federal funds.

To: Edward Q. Moulton, Chancellor, Ohio Board of Regents, Columbus, Ohio
By: William J. Brown, Attorney General, April 20, 1981

I have before me your predecessor's request for my opinion concerning the applicability of R.C. 149.43, Ohio's public records law, to certain data collected by the Board of Regents from publicly supported institutions of higher education.

From information you have supplied, it is my understanding that your questions concern three specific reports, each of which constitutes an extensive collection of data from each state-assisted college and two-year campus. I understand that the first of these, the academic and nonacademic personnel inventory, consists of a compilation of reports which each institution is required to submit annually by the first of December. The reports are submitted on printed forms prescribed by the Board and each report is essentially a full-time equivalent count of staff for each department within each institution. The prescribed form requires that the number of full-time equivalent faculty, faculty support, and administrative staff members in each of several sub-categories within these three classes of employees be listed for each department. It is my understanding that the Board maintains this first report in the printed form in which it is received from each institution.

The second report, the faculty inventory, is also compiled from reports which are required to be submitted annually by each institution by the first of December. These reports are normally submitted in the form of a single punched card for each faculty member or a single magnetic computer tape containing data on all of the faculty members of an institution. While the data submitted on the cards and tapes does not include the names of the faculty members, it does include the institution number code assigned by the Board to each institution and the faculty employee number assigned by the institution to each faculty member. The following information is reported with respect to each faculty member: rank, full-time equivalency, sex, state where born, year of birth, and the location of the college where the faculty member received his or her first degree. The cards and tapes also include information as to the highest degree the faculty member has earned, the year conferred, the conferring college, the program in which the degree was earned, the faculty member's annual salary, the term of his or her contract and the year of appointment. It is my understanding that the Board of Regents takes the data contained in these reports and puts it on a magnetic computer tape. If the data was submitted on cards, the Board then destroys the cards. If the data was

submitted on a computer tape, the tape is returned to the institution which submitted it.

The third report in question is the report on faculty service which is compiled from reports which the Board requires be filed biannually by the institutions at about the midpoint of the summer and fall terms. These reports are also normally submitted in the form of a single punched card for each faculty member or a single magnetic computer tape containing data on all of the faculty members of an institution and include the institution number assigned by the Board to the reporting institution and the faculty employee number assigned by the institution to the faculty member. The reports contain data on the institutional calendar and the academic period involved. They also include information as to the rank of the faculty member, his or her salary, his or her full-time equivalency, and credit hours of courses assigned and taught, as well as detailed information as to the allocation of the faculty member's time. As with the second report, the Board puts this information on magnetic computer tapes and then destroys the punched cards and returns any tapes on which data was submitted.

In your request, you pose the following specific questions concerning these reports:

(1) Are the above described data and information "public records" which are "required to be kept" by the Board of Regents, or the publicly-supported institutions of higher education, within the meaning of O.R.C. 149.43 and the Ohio Supreme Court's opinion in State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology et al., 49 Ohio St. 2d 245 (1977)?

(2) Is any of the above described data or information protected by state or federal confidentiality laws, and what, if any, legal risks arise for the Board of Regents or the institutions if this is made public?

R.C. 149.43 defines a public record as "any record that is required to be kept by any governmental unit. . .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." R.C. 149.43 then requires that all public records be open at all reasonable time for inspection and that, upon request, a person responsible for public records make copies available at cost, within a reasonable period of time.

Accordingly, your first question initially requires a determination of whether the reports in question may be properly regarded as records. R.C. 149.40 defines a record for the purposes of R.C. 149.31 to 149.44 as follows:

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.

Because you have indicated that the three reports take a physical form and are

created for the purpose of furthering the preparation of the budget, there can be no question that the reports described above are records.

The next consideration is whether such records are "required to be kept" as that term is used in R.C. 149.43. As I discussed at length in 1980 Op. Att'y Gen. No. 80-096, the prevailing test for making that determination is the one which was enunciated in Dayton Newspapers, Inc. v. Dayton Daily News, 45 Ohio St. 2d 107, 341 N.E.2d 576 (1976). In that case, the court held that a record is "required to be kept" within the meaning of R.C. 149.43 where the agency's maintenance of such records is necessary to the execution of its duties and responsibilities.

As I also noted in Op. No. 80-096, this test was not modified by the court's subsequent decision in State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology, 49 Ohio St. 2d 245, 361 N.E.2d 444 (1977), to which you specifically refer in your first question. In Milo's Beauty Salon, the court limited its discussion to the status of records which an agency is affirmatively required by statute to keep and did not consider the status of records which are not required by statute to be kept, but are, nonetheless, necessary to the proper execution of an agency's duties or responsibilities. It is, therefore, inappropriate to use the limited analysis set forth in Milo's Beauty Salon, as you implicitly suggest in your question, as a basis for determining the status of the reports at issue as public records.

Under the test set forth in Dayton Daily News, the three reports about which you have inquired appear to be records "required to be kept" within the meaning of R.C. 149.43. From information your predecessor supplied, it is my understanding that the data collected for the three reports in question is required by the Board in performing its various duties under R.C. Chapter 3333 in supervising programs of higher education. In particular, your predecessor indicated that a large part of the data is necessary to the preparation of a budget for higher education, a duty assigned to the Board under R.C. 3333.04(J). Thus, one may conclude that the records in question are necessary and relevant to the Board's performance of its statutory duties and are, therefore, records "required to be kept" within the meaning of R.C. 149.43.

Moreover, the information contained in the reports is of such a nature that the records could not lawfully be kept by the Board unless they were necessary and relevant to the execution of its duties and responsibilities. The information contained in the second and third reports, the faculty inventory and faculty service reports, comes within the definition of "personal information" as that term is used in R.C. Chapter 1347, the Privacy Act. Under the terms of R.C. 1347.05(H), a state or local governmental agency which is subject to the Act may maintain only

¹For purposes of the Privacy Act, R.C. 1347.01(E) defines "personal information" as "any information that describes anything about a person, or indicates actions done by or to a person, or 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." From the information you have provided, it is my understanding that information which can be identified as relating to a particular person is contained in the faculty inventory and faculty service reports.

such personal information which is subject to the Act as is "necessary and relevant to the functions that the agency is required or authorized to perform by statute."² Similarly, R.C. 121.21 limits the authority of state agencies to making and preserving "only such records as are necessary for the adequate and proper documentation of the agency's organizations, functions, policies, decisions, procedures and essential transactions of the agency." As I noted in Op. No. 80-096, the standards set forth in R.C. 1347.05 and R.C. 121.21 are nearly identical to the test for determining if a record is "required to be kept" under R.C. 149.43. Consequently, if it is permissible under R.C. 1347.05 and R.C. 121.21 for the Board to maintain such reports, the reports are necessarily "required to be kept" within the meaning of R.C. 149.43; an assertion by the Board that the reports are not required to be kept would be tantamount to an admission that it is in violation of R.C. 1347.05, R.C. 121.21, or both. Op. No. 80-096.

In light of the above facts, I am of the opinion that the reports in question must be regarded as records required to be kept for the purposes of R.C. 149.43. As such, the reports constitute public records unless they come within one of the exceptions expressly enumerated in R.C. 149.43.

R.C. 149.43 specifically excepts the following from the definition of public records: medical records, trial preparation records, law enforcement investigatory records, records pertaining to adoption, probation, or parole, and records made confidential by state or federal law. The reports at issue obviously do not come within the exception for medical, trial preparation, or law enforcement records; nor do they relate to adoption, probation, or parole matters. However, the reports may come within the catch-all exceptions under R.C. 149.43 for records otherwise made confidential by law. Under federal law, there are restrictions on access to records containing information relating to students. 20 U.S.C. §1232g (1978). Your description of the three reports indicates that they each contain some information about students in the form of data regarding graduate teaching assistants. For this reason, an analysis of the provisions of 20 U.S.C. §1232g (1978), the Family Education Rights and Privacy Act (hereafter FERPA), will be necessary in order to determine whether the records come within the catch-all exception under R.C. 149.43.

² Certain agencies as well as certain types of personal information are exempt from the Privacy Act. R.C. 1347.04(A)(1), except as provided in division (A)(2) of the section, exempts the following agencies:

- (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;

In addition, R.C. 1347.04(A)(1)(e) 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. . . ." Inasmuch as the Board of Regents is clearly not among the agencies exempt from the Act and the reports at issue are not compiled for law enforcement purposes, the Board is subject to the mandate of R.C. 1347.05(H) with respect to the two reports containing personal information.

Under the FERPA, an educational agency or institution is required to obtain the written consent of the parent of a student or of an eligible student before disclosing personally identifiable information from the education records of the student. 20 U.S.C. §1232g(b)(1) (1979); 45 C.F.R. §99.3 (1979). The penalty for failing to comply with this requirement is the loss of all federal assistance administered by the U.S. Office of Education. 20 U.S.C. §1232g(h)(1). For purposes of the Act, an "educational agency or institution" is defined as "any public or private agency or institution which is the recipient of [federal] funds under any applicable program." It is my understanding that the Board of Regents is the recipient of federal funds under several different grants. The Board of Regents, thus, appears to be an educational agency or institution within the meaning of the FERPA.

"Education records" are defined for purposes of the FERPA to mean those records, files, documents, and other materials which contain personally identifiable information directly related to a student. 20 U.S.C. §1232g(a)(4)(A) (1978). 45 C.F.R. §99.3 (1979). Any information which would make a student's identity easily traceable is personally identifiable. 45 C.F.R. §99.3 (1979). From your description of the first report, the academic and nonacademic personnel inventory, it appears the information contained in that report which relates to students is not personally identifiable. Accordingly, the report does not constitute an education record to which access is restricted by 20 U.S.C. §1232g. On the other hand, you have indicated that the second and third reports, the faculty inventory and faculty service reports, do contain personally identifiable information about students. The information in both reports is clearly made personally identifiable by the inclusion of the employee number assigned to each faculty member. Because the faculty service and faculty inventory reports contain personally identifiable information about students, the reports constitute education records. As education records, the reports are subject to the confidentiality provisions contained in the FERPA and, thus, may not be released without proper consent.

Because the personnel inventory is a record that is required to be kept and its release is not prohibited by state or federal law, it must be regarded as a record for purposes of R.C. 149.43. On the other hand, inasmuch as the faculty service and faculty inventory reports are made confidential under the FERPA, they come within the exception contained in R.C. 149.43 for "records the release of which is prohibited by state or federal law." Accordingly, the two reports as a whole do not constitute public records within the meaning of R.C. 149.43 and thus, need not be made available for public inspection. Moreover, the Board is not under a duty to modify those reports in order to make them available to the public. See 1976 Op. Att'y Gen. No. 76-011. In Op. No. 76-011, I addressed the question of whether certain records required to be kept by the Ohio Department of Public Welfare had to be made available to public inspection. Although release of the records themselves was not specifically prohibited by state or federal law, there were federal regulations prohibiting the release of certain information contained in the records. It was my conclusion that the Department of Public Welfare was not obligated to delete that confidential information from the records in order to allow their release to the public. Similarly, it is my opinion that the Board of Regents is not required to delete confidential information about students from the reports at issue to permit public access to those reports.

Although R.C. 149.43 would require the release of the individual punch cards on non-student faculty members from which the faculty inventory and faculty

service reports are compiled,³ it is my understanding that the Board does not keep those records. As I noted earlier, I have been informed that the Board destroys the punch cards on which the data for the reports is submitted. It is also my understanding that the Board does not have a computer program to retrieve the individual reports and that the Board uses the tapes as an aggregate data base for producing various statistical reports. Thus, once the data is put on the magnetic computer tapes, the individual cards submitted for each faculty member no longer exist as independent records. Nor does the information from a single card exist as a discrete record on the tape. Just as the Board is not under a duty to edit any of its records in order to make them available for public inspection, I am of the opinion that the Board is not required to recreate a record it no longer keeps.

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

1. The academic and nonacademic personnel inventory maintained by the Ohio Board of Regents is a public record under the terms of R.C. 149.43. This inventory must, therefore, be open to public inspection and copies must be made available at cost.
2. The faculty inventory and the report on faculty service maintained by the Ohio Board of Regents on computer tapes are not public records within the meaning of R.C. 149.43 and, therefore, need not be made available for public inspection. The public release of the reports is restricted by 20 U.S.C. §1232g(b)(1), which provides for a potential loss of federal funds.

³The term "record" is defined very broadly for the purpose of Ohio's public records law. As noted above, the definition encompasses "[a]ny document, device, or item, regardless of physical form or characteristic." R.C. 149.40. In light of this broad definition of "record," I am of the opinion that each of the punched cards from which the reports are compiled may be treated as a record in itself. Since those institutions which submit data for the reports on punched cards submit a separate card for each faculty member, only some of the cards contain information regarding students. Consequently, those cards on non-student faculty members would not be confidential educational records under the FERPA nor would they come within the purview of confidentiality restrictions of R.C. 3319.321. Thus, those particular cards would not fall outside the scope of R.C. 149.43 on the basis that their release is prohibited by state or federal law, and the cards would, therefore, qualify as public records.

The same analysis, however, would not apply to the individual computer tapes on which the data for the reports is submitted by some of the institutions. Although I am of the opinion that each such individual tape also constitutes a record in itself, none of these tapes would be a public record under R.C. 149.43. Unlike a situation in which information for the reports is submitted on punched cards, a separate tape is not submitted for each faculty member; only a single tape is used by an institution to report the required data on all of its faculty members. Thus, any given tape would invariably contain at least some confidential information about students and, therefore, would not constitute a public record under R.C. 149.43.