

OPINION NO. 2003-030**Syllabus:**

1. R.C. 2303.26 requires the clerk of courts to carry out her duties "under the direction of [her] court."
2. Once the judges of a court of common pleas have delegated to the judges of a division of that court authority to determine whether to make that division's records available to the public through the Internet, and the judges of that division have ordered that its records are not to be accessible to the public through the Internet, the clerk of courts must obey that order, unless a court of competent jurisdiction reverses that order or prohibits its enforcement.

To: Robin N. Piper, Butler County Prosecuting Attorney, Hamilton, Ohio
By: Jim Petro, Attorney General, September 29, 2003

You have requested an opinion concerning the relative authority of the judges of the domestic relations division of the Butler County Court of Common Pleas and the clerk of courts regarding the manner in which the records of the domestic relations division are made available to the public. In your request, you describe the rather lengthy background leading to the current dispute, in part, as follows:

Over the last 10-15 years, the Butler County Clerk of Courts office has, with the approval of the Court, maintained an electronic docket, and

index (neither of which was, initially, accessible from the internet) while also maintaining case files in paper form. Within the last five years, the Clerk began scanning all court entries into an electronic format, and converted the “journal” to electronic form; the Court no longer makes a journal in paper form. In conjunction with the implementation of the electronic “journal,” the Clerk of Courts linked the scanned image of each court entry to the docket listing for that entry. At the same time, the Clerk’s software was modified to allow the docket, index, and journal to be accessible by the public via the internet. The Clerk implemented a system wherein public access (other than by her staff) to the docket, index, and journal was only available through the internet; the Clerk indicates this was a decision which reduced the software licensing costs associated with providing access to these records by persons outside of the Clerk’s staff. Although the Clerk has provided me with documentation that the conversion of the journal, and the web-integration, was approved by the General Division of the Court, I have not seen a similar approval from the Administrative Judge of the Domestic Relations Division.

At some time after images of court entries became available on the internet, the judges of the Domestic Relations Division became concerned about personal information regarding litigants being available in entries from the Domestic Relations Division....

....

By entry dated June 26, 2003, the Judges of the Court of Common Pleas delegated to the judges of the Domestic Relations Division the authority to decide “what portion, if any, of the Court’s records, for cases in the Domestic Relations Division, shall be accessible via the internet.” By entry filed July 1, 2003, the judges of the Domestic Relations Division ordered the Clerk of Courts to “remove all Domestic Relations cases from the Internet,” and to restore internet accessibility for any specific case only upon the written request of both parties to the action. The administrative judge, by letter dated July 2, 2003, subsequently clarified this order by informing the Clerk of Courts that the Court’s intent was to deny internet access only to images of the entries of the Domestic Relations Division.

The Clerk of Courts immediately complied with the Court’s order. However, in doing so, she has denied all public internet access to the docket, index, and journal for all records of the Domestic Relations Division. At first, the Clerk’s position was that access to the images of court entries is so integrated with internet access to the docket and index that she cannot limit access to the images without also limiting access to the docket and index. It is my understanding that recently, the Clerk has indicated the records stored electronically can be viewed by the public in the staff portion of her office until the software is modified to conform to the Court’s intention.¹ The Clerk

¹As concluded in *State ex rel. Mothers Against Drunk Drivers v. Gosser*, 20 Ohio St. 3d 30, 485 N.E.2d 706 (1985) (syllabus, paragraph one), “[a]ny document appertaining to, or recording of, the proceedings of a court, or any record necessary to the execution of the responsibilities of a governmental unit is a ‘public record’ ... within the meaning of R.C.

does not like the manner in which these records are temporarily being made accessible to the public. The Court is in the process of instituting software modifications with a permanent solution expected within 60 days.

While the Clerk of Courts apparently agrees that compliance with the Court's order is technically feasible, she disagrees that the Court has the legal authority to order her to make these changes to what, she characterizes, as her records and the operations of her office. (Footnote added.)

You have posed a series of questions concerning the relative authority of the Butler County Court of Common Pleas, the various divisions of the court, and the clerk of courts with regard to the maintenance and release of the court's records, in particular, those of the domestic relations division. Because the clerk of courts' maintenance and release of the records of the domestic relations division is now the subject of an order of that division's judges, it would be inappropriate to address specific matters that are the subject of that order.² Accordingly, we will attempt to respond to your concerns by discussing in a general

149.43. Absent any specific statutory exclusion, such record must be made available for public inspection." The duty to provide access to public records under R.C. 149.43 was summarized in *State ex rel. Fenley v. Ohio Historical Soc'y*, 64 Ohio St. 3d 509, 511, 597 N.E.2d 120 (1992), in part, as follows: "A custodian of public records who makes those records available for inspection, and who makes copies available upon request at the governmental unit's place of business, fulfills the responsibilities placed upon him or her by R.C. 149.43." See generally *State ex rel. Martinelli v. Corrigan*, 71 Ohio App. 3d 243, 245, 593 N.E.2d 364 (Cuyahoga County 1991) (finding the clerk of courts to be the person from whom to obtain official court records under R.C. 149.43).

Because the clerk of courts continues to allow public access to the court's records, through computer terminals located in the clerk's office, during regular business hours, it cannot be argued that the provision of additional access to such records through the Internet is required by R.C. 149.43. As a general rule, however, the Ohio Supreme Court has stated that R.C. 149.43(B) "also affords a measure of discretion, which this court has held to govern the method of compliance. Thus, a custodian of public records who complies with the access requirements specified in R.C. 149.43(B) should have some discretion to determine what if any additional access he or she will permit." *State ex rel. Fenley v. Ohio Historical Soc'y*, 64 Ohio St. 3d at 512 (various citations omitted).

²Because the Attorney General is part of the executive branch of government, we can advise only that the clerk of courts obey that order, seek clarification or modification of the order from the issuing court, or pursue modification or reversal of the order from a higher judicial authority. See 1988 Op. Att'y Gen. No. 88-077 at 2-383 ("if a particular order is unclear as to the duties it imposes upon the clerk of courts, it may be appropriate to seek modification or clarification of the order from the court which issued the order"). As stated in *State ex rel. Beil v. Dota*, 168 Ohio St. 315, 322, 154 N.E.2d 634 (1958), "[t]he interests of orderly government demand that respect and compliance be given to orders issued by courts possessed of jurisdiction of persons and subject matter. One who defies the public authority and willfully refuses his obedience, does so at his peril," (quoting *United States v. United Mine Workers of America*, 330 U.S. 258, 303 (1947)). See, e.g., *Board of Educ. v. Hamilton Classroom Teachers Ass'n*, 5 Ohio App. 3d 51, 53, 449 N.E.2d 26 (Butler County 1982) ("[a]n order issued by a court with jurisdiction must be obeyed until it is reversed by orderly and proper proceedings"); 1990 Op. Att'y Gen. No. 90-009 at 2-39 ("an opinion of the Attorney General regarding a court's authority cannot authorize a public official to disregard any

manner the authority of the clerk of courts vis-à-vis the judges of the court of common pleas with respect to the maintenance of the court's records and the provision of access to such records through the Internet.

Let us begin by examining the office of clerk of courts. In accordance with R.C. 2303.01, in each county there is a clerk of courts, who is an independently elected officer. As characterized by the Ohio Supreme Court, "[t]he duties of a clerk of the court of common pleas are ministerial and non-judicial." *State ex rel. Glass v. Chapman*, 67 Ohio St. 1, 65 N.E. 154 (1902) (syllabus). See *State ex rel. Dawson v. Roberts*, 165 Ohio St. 341, 342, 135 N.E.2d 409 (1956) (the clerk of courts is a ministerial officer of the court); *State ex rel. McKean v. Graves*, 91 Ohio St. 23, 24, 109 N.E. 528 (1914) (stating that the clerk of the Ohio Supreme Court "is vested with no discretion in any respect," and "is only an arm of the court for issuing its process, entering its judgments and performing like duties which the court itself might perform," and "[h]is services are employed only for the more convenient performance of those functions of the court which are clerical in their nature"). See also *State ex rel. Wanamaker v. Miller*, 164 Ohio St. 176, 177, 128 N.E.2d 110 (1955) ("[i]t is the duty of the clerk of this court, in the absence of instructions from the court to the contrary, to accept for filing any paper presented to him, provided such paper is not scurrilous or obscene, is properly prepared and is accompanied by the requisite filing fee. The power to make any decision as to the propriety of any paper submitted or as to the right of a person to file such paper is vested in the court, not the clerk" (emphasis added)).

The statutory powers and duties of a clerk of courts are set forth primarily in R.C. Chapter 2303.³ See e.g., R.C. 2303.05 (appointment of deputy clerks); R.C. 2303.07 (authority to administer oaths and to take and certify affidavits and other written instruments); R.C. 2303.08 (requiring the clerk, in part, to "indorse on each pleading or paper in a cause filed in the clerk's office the time of filing, enter all orders, decrees, judgments, and proceedings of the courts of which such individual is the clerk, make a complete record when ordered on the journal to do so, and pay over to the proper parties all moneys coming into the clerk's

order of that court"). See generally, e.g., *State ex rel. Finley v. Pfeiffer*, 163 Ohio St. 149, 126 N.E.2d 57 (1955) (syllabus, paragraph one) ("[t]he legislative, executive and judicial branches of government are separate and distinct and neither may impinge upon the authority or rights of the others; such branches are of equal importance; and each in exercising its prerogatives and authority must have regard for the prerogatives and authority of the others"); 1992 Op. Att'y Gen. No. 92-038 (syllabus, paragraph three) (stating, in part, "[t]he Attorney General is a member of the executive branch of government, and it is inappropriate for the Attorney General to presume to review determinations made by members of the judicial branch of government").

³See also generally R.C. Chapter 4505 (imposing upon the clerk of courts various duties with respect to certificates of title for motor vehicles). Additional duties are imposed upon the clerk of courts by various rules of court. See generally, e.g., *Atkinson v. Grumman Ohio Corp.*, 37 Ohio St. 3d 80, 523 N.E.2d 851(1988) (Ohio Supreme Court adopted rules requiring, among other things, that the clerk of courts serve upon non-defaulting parties notice of entry of final judgment, in any manner provided in Ohio R. Civ. P. 5, to ensure that parties' property interest in right to file appeal is not taken without due process of law.); *Cobb v. Cobb*, 62 Ohio St. 2d 124, 403 N.E.2d 991 (1980) (clerk of courts' duties under Ohio Rules of Appellate Procedure); *Gibbs v. Lemley*, 33 Ohio App. 2d 220, 221, 293 N.E. 324 (Lawrence County 1972) ("[t]he Rules of Civil Procedure changed the duties of attorneys and clerks of courts. The burden now lies upon the clerk of courts to issue proper summons").

hands as clerk”); R.C. 2303.09 (duty to “file together and carefully preserve in his office all papers delivered to him for that purpose in every action or proceeding”); R.C. 2303.14 (duty to “keep the journals, records, books, and papers appertaining to the court and record its proceedings”).

Pursuant to R.C. 2303.12:

The clerk of the court of common pleas shall keep at least four books. They shall be called the appearance docket, trial docket and printed duplicates of the trial docket for the use of the court and the officers thereof, journal, and execution docket. He shall also keep a record in book form or he may prepare a record by using any photostatic, photographic, miniature photographic, film, microfilm, or microphotographic process, electrostatic process, perforated tape, magnetic tape, or other electromagnetic means, electronic data processing, machine readable media, graphic or video display, or any combination thereof, which correctly and accurately copies or reproduces the original document, paper, or instrument in writing. He shall use materials that comply with the minimum standards of quality for permanent photographic records prescribed by the National Bureau of Standards. He shall keep an index to the trial docket and to the printed duplicates of the trial docket and of the journal direct, and to the appearance docket, record, and execution docket, direct and reverse. *All clerks keeping records and information by the methods described in this section shall keep and make readily available to the public the machine and equipment necessary to reproduce the records and information in a readable form.* (Emphasis added.)

R.C. 2303.12 thus specifies certain records a clerk of courts must keep. R.C. 2303.12 also authorizes the clerk to maintain court records in forms other than paper, and requires a clerk who uses any of such alternative methods to “keep and make readily available to the public” any equipment necessary to reproduce such records in a readable form.⁴

⁴In the Rules of Superintendence for the Courts of Ohio, the Ohio Supreme Court has also addressed the maintenance of court records through electronic media. C.P. Sup. R. 26(D)(1) states in pertinent part, “[a] court may create, maintain, record, copy, or preserve a record on traditional paper media, electronic media, including text or digital images, or microfilm, including computer output to microfilm,” (emphasis added). Other aspects of the maintenance and preservation of the records of a court by electronic means are addressed elsewhere in these rules. *See, e.g.*, C.P. Sup. R. 26(A)(1) (stating, in part, “[t]his rule and Sup. R. 26.01 to 26.05 are intended to provide minimum standards for the maintenance, preservation, and destruction of records within the courts and to authorize alternative electronic methods and techniques”); C.P. Sup. R. 26(C) (stating, in part, “[a] court may replace any paper bound books with an electronic medium or microfilm in accordance with this rule”); C.P. Sup. R. 26(D)(2)(b) (stating, in part, “[r]ecords shall be maintained in conveniently accessible and secure facilities, and *provisions shall be made for inspecting and copying any public records in accordance with applicable statutes and rules.* Machines and equipment necessary to allow inspection and copying of public records, including public records that are created, maintained, recorded, copied, or preserved by an alternative records and information management process in accordance with division (D)(2) of this rule, shall be provided” (emphasis added)); C.P. Sup. R. 26(D)(2)(c) (“[i]n accordance with applicable law and purchasing requirements, a court may acquire equipment, computer software, and related supplies and services for records and information management processes authorized by division (D)(2) of this rule”); C.P. Sup. R. 26.03 (stating, in part, “[a]s used in this rule,

In most instances, the General Assembly has not prescribed a specific method by which the clerk is to execute these duties. Rather, pursuant to R.C. 2303.26, “[t]he clerk of the court of common pleas shall exercise the powers conferred and perform the duties enjoined upon [her] by statute and by the common law; and in the performance of [her] duties [s]he shall be *under the direction of [her] court*,” (emphasis added). We must, therefore, determine which division or divisions or judge or judges of the Butler County Court of Common Pleas constitute “the court” under whose direction the clerk of courts must perform her duties.

A similar issue concerning the authority of a single division or judge of the Butler County Court of Common Pleas to act on behalf of that court was addressed in 2000 Op. Att’y Gen. No. 2000-041. That opinion concerned the authority vested in “the court” by R.C. 2303.201(A)(2) and in “the court of common pleas” by R.C. 2301.201(B) to disburse funds collected from various fees imposed by the court. That opinion described the nature of a court of common pleas as a single “entity made up of constituent parts.” 2000 Op. Att’y Gen. No. 2000-041 at 2-250 (citation omitted). Based upon the principle set forth in *State ex rel. Hawke v. LeBlond*, 108 Ohio St. 126, 140 N.E. 510 (1923),⁵ 2000 Op. Att’y Gen. No. 2000-041 concluded at 2-252 that, “it is within the discretion of all of the judges of the Butler County Court of Common Pleas, in the formulation of rules for their government, to determine the manner in which they, as ‘the court,’ R.C. 2303.201(A)(2), or ‘the court of common pleas,’ R.C. 2301.201(B)(1), will exercise the court’s power to order the disbursement of funds under those statutory provisions.” Similarly, we find that the authority to act as “the court” for purposes of R.C. 2303.26 is not defined by statute, and may, therefore, be determined by all the judges of the court, regardless of the divisions in which they serve.

As described in your opinion request, “[b]y entry dated June 26, 2003, the Judges of the Court of Common Pleas delegated to the judges of the Domestic Relations Division the authority to decide ‘what portion, if any, of the Court’s records, for cases in the Domestic Relations Division, shall be accessible via the internet.’” Thus, whether the decision to allow Internet access to records of the domestic relations division of the Butler County Court of Common Pleas is a power that may be exercised by an individual judge or division of that court or only collectively by all of the court’s judges, the judges of the Butler County Court of

‘docket’ means the record where the clerk of the division enters all of the information historically included in the appearance docket, the trial docket, the journal, and the execution docket.... (1) Each division shall maintain an index, docket, journal, and case files in accordance with Sup. R. 26(B) and divisions (A) and (C) of this rule.... (C) Content of docket. The docket of a division shall be programmed to allow retrieval of orders and judgments of the division in a chronological as well as a case specific manner. Entries in the docket shall be made as events occur”).

⁵The court in *State ex rel. Hawke v. LeBlond*, 108 Ohio St. 126, 135, 140 N.E. 510 (1923), stated:

[C]ourts have the inherent right to formulate rules for their government, so long as such rules are reasonable and not in conflict with general laws. The right to make rules must be held to come within the implied powers of courts of justice. The Legislature has never prescribed in minute detail all of the procedure necessary in conducting courts of justice in an orderly manner, and many things must necessarily be left to the sound discretion of the court, and it is, of course, desirable that as far as possible those details be carried out in an orderly manner and according to a published rule.

Common Pleas have delegated to the domestic relations judges any authority the former may possess to make that decision. While we appreciate that compliance with the order issued to the clerk by the domestic relations division will now involve added expense and inconvenience to the clerk and her staff, we are constrained to conclude that because R.C. 2303.26 requires the clerk of courts to carry out her duties "under the direction of [her] court," the clerk has a duty to comply with the order of the domestic relations division that restricts Internet access to the records of that division, unless a court of competent jurisdiction reverses that order or prohibits its enforcement. *See generally* note two, *supra*.⁶

The conclusion that the clerk of courts has a duty to comply with the order of the domestic relations division's judges regarding the records of that division is consistent with the principle that, "[a] court of record has general custody of and authority over its own records and files." *Ex parte Thayer*, 114 Ohio St. 194, 150 N.E. 735 (1926) (syllabus, paragraph one). As explained by the *Thayer* court, the authority of a court over its records and files "extends to the files of all cases which have ever been instituted therein, whether dismissed, disposed of, or pending. This power of the court is inherent and takes precedence even of the statutory power of a clerk over court records and files." *Id.*, 114 Ohio St. at 201 (citation omitted).

Based upon the foregoing, it is my opinion, and you are hereby advised that:

1. R.C. 2303.26 requires the clerk of courts to carry out her duties "under the direction of [her] court."
2. Once the judges of a court of common pleas have delegated to the judges of a division of that court authority to determine whether to make that division's records available to the public through the Internet, and the judges of that division have ordered that its

⁶Should the clerk of courts continue to question the authority of the domestic relations division judges in ordering her to cease making that division's documents accessible through the Internet, she may wish to consider challenging that order as was done in *State ex rel. Krakowski v. Stokes*, 16 Ohio App. 3d 62, 474 N.E.2d 695 (Cuyahoga County 1984). In the *Krakowski* case, the clerk of courts brought an action for a writ of prohibition against a municipal court judge to prohibit the enforcement of certain orders issued to the clerk by that judge. After examining the content of the particular orders challenged in that action, the *Krakowski* court issued the writ, having determined that the orders were unreasonable and arbitrary and were not authorized by law.

Information provided with your request raises concerns about the reasonableness of the domestic relations division's judges' order to the clerk to restrict Internet access to that division's records. As explained in your letter, the planning and implementation of the new record-keeping system has taken over two years, during which time the portion of the plan to make court records available to the public through the Internet was known. It is arguably unreasonable, therefore, for the domestic relations division to have waited until after implementation of the system to decide that its records should not be accessible through the Internet. It is estimated that reconfiguration of the new record-keeping system in order to accommodate the domestic relations division's order may require an additional expenditure of roughly twenty percent of the original cost of the system. We caution, however, that the clerk of courts must continue to obey the order of the domestic relations division regarding Internet access to that division's records until a court of competent jurisdiction determines otherwise.

records are not to be accessible to the public through the Internet, the clerk of courts must obey that order, unless a court of competent jurisdiction reverses that order or prohibits its enforcement.

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