

Note from the Attorney General's Office:

1992 Op. Att'y Gen. No. 92-076 was overruled
by 1994 Op. Att'y Gen. No. 94-058.

OPINION NO. 92-076**Syllabus:**

1. Estate tax returns and other tax returns filed pursuant to R.C. Chapter 5731 are confidential and may be inspected or copied only as provided in R.C. 5731.90.
2. A township clerk has no authority to inspect or copy estate tax materials that are made confidential by R.C. 5731.90 except pursuant to court order for good cause shown.

To: William F. Schenck, Greene County Prosecuting Attorney, Xenia, Ohio
By: Lee Fisher, Attorney General, December 30, 1992

You have asked whether an elected township clerk may review estate tax returns to verify the domiciles of decedents for distribution of estate tax moneys. Your question arises in light of the fact that a particular township clerk undertook such a review approximately three years ago. At that time, the clerk believed that certain estate tax distributions had been improperly credited due to the difference between the "mailing address" and the actual jurisdiction of a decedent's domicile. The clerk found that over \$60,000 had been improperly apportioned to another jurisdiction, and the county auditor took the necessary action to have the money returned to the proper township. The township clerk recently attempted again to review certain estate tax returns to determine whether local distribution of the taxes was properly made. This time, however, the clerk's request to review the records was denied on the basis that the returns are now confidential.

The Confidentiality of Estate Tax Returns

Estate tax returns have been made confidential by the provisions of Sub. H.B. 286, effective November 8, 1990.¹ See 1989-1990 Ohio Laws, Part III, 4092 (Sub. H.B. 286, eff. Nov. 8, 1990). R.C. 5731.90, enacted by Sub. H.B. 286, establishes the confidentiality of estate tax returns, generation-skipping tax returns, and other tax returns filed pursuant to R.C. Chapter 5731; all documents and other records pertaining to the determination of a decedent's taxable estate that is the subject of such a return; and the amount of taxes paid or payable in

¹ The provisions enacted by Sub. H.B. 286 apply only to the estates of decedents who die on or after November 8, 1990. See 1989-1990 Ohio Laws, Part III, 4092, 4103 (Sub. H.B. 286, eff. Nov. 8, 1990; section 3, uncodified).

connection with such a return. R.C. 5731.90(A)(1) states that, when any of those items are in the possession of a probate court, the Department of Taxation, a county auditor or county treasurer, the Attorney General, or other authorized person as specified in R.C. Chapter 5731, the items and their contents:

are confidential; are not subject to inspection or copying as public records pursuant to [R.C. 149.43]; and may be inspected or copied by members of the general public only after the probate court of the county in which a return was filed pursuant to this chapter or, if none, another appropriate probate court, has issued an order, based on good cause shown, specifically authorizing the inspection or copying....

The statute provides an exception for inspection, copying, and use of the items by the Tax Commissioner, county auditors and treasurers, probate judges, the Attorney General, and other authorized persons as specified in R.C. Chapter 5731, "in connection with their duties and responsibilities as described in [R.C. Chapter 5731]." R.C. 5731.90(A)(2)(a). Exceptions also exist for disclosure to the Internal Revenue Service in accordance with federal law and in connection with its official business, and for disclosure under R.C. Chapter 1347 to persons who are the subject of personal information contained in the documents or records. R.C. 5731.90(A)(2)(b), (d).

In addition, certificates containing some of the information in an estate tax return are expressly excluded from the confidentiality provisions of R.C. 5731.90. See R.C. 5731.21(A)(5)(a), .90(A)(2)(c). R.C. 5731.21(A)(1)(b), also enacted by Sub. H.B. 286, requires that an estate tax return be accompanied by a certificate, in the form prescribed by the Tax Commissioner, that is signed by the executor, administrator, or other person required to file the return and that contains the following information: (1) the fact that the return was filed; (2) the date of the filing; (3) the fact that the estate taxes that are shown to be due in the return have been paid in full; (4) if applicable, the fact that real property listed in the inventory for the decedent's estate is included in the return; (5) if applicable, the fact that real property not listed in the inventory (including survivorship tenancy property as described in R.C. 5302.17) also is included in the return, and the description of that property. These certificates are not subject to the confidentiality provisions of R.C. 5731.90 but are, instead, public records subject to inspection and copying in accordance with R.C. 149.43. R.C. 5731.21(A)(5)(a), .90(A)(2)(c); see also Ohio Legislative Service Commission, *Summary of Enactments, July - December 1990*, 348 (1991) (listing among the purposes of Sub. H.B. 286: "requires the filing of certificates to provide a public record of certain estate tax matters otherwise made confidential by the act").

Collection and Distribution of Estate Tax Proceeds

Ohio Const. art. XII, §9 provides that "[n]ot less than fifty per cent of the income, estate, and inheritance taxes that may be collected by the state shall be returned to the county, school district, city, village, or township in which said income, estate, or inheritance tax originates, or to any of the same, as may be provided by law." R.C. 5731.48 provides for the distribution of revenues derived from taxes under R.C. Chapter 5731, stating that, for decedents dying on or after July 1, 1989, sixty-four per cent of the gross amount of such taxes "shall be for the use of the municipal corporation or township in which the tax originates." The remaining proceeds of taxes levied and paid under R.C. Chapter 5731, after the deduction of certain fees and costs, are paid into the state treasury to the credit of the general revenue fund. R.C. 5731.49. Tax on the transfer of real estate or tangible personal property within this state is deemed to have

originated in the municipal corporation or township in which the property is physically located. R.C. 5731.50. Tax on the transfer from a resident of this state of intangible property or tangible personal property not within this state is deemed to have originated in the municipal corporation or township in which the decedent was domiciled. R.C. 5731.51. Other provisions govern the transfer of intangible property of a nonresident. R.C. 5731.51.

When an estate tax return is filed with the probate court, the court forwards a copy to the Tax Commissioner and gives notice of the return to the county auditor. The auditor makes a charge based upon the notice and certifies a duplicate of the charge to the county treasurer for collection. R.C. 5731.21(A), .23. The Tax Commissioner is responsible for determining the correctness of the return. R.C. 5731.26, .27, .30. The Tax Commissioner may designate employees of the county auditor or the probate court as his agents to assist him in accepting filings of returns in the county and determining their correctness. R.C. 5731.26(A).

The county treasurer has been given the duty of collecting taxes and interest under R.C. Chapter 5731. See R.C. 5731.21(A), .23, .27(C), .33. Collections of estate tax are credited to the undivided estate tax fund. R.C. 319.14, 321.08. Twice each year the county treasurer settles with the county auditor for taxes and interest received under R.C. Chapter 5731. R.C. 5731.46. The county auditor certifies to the auditor of another county a statement of any taxes due to a municipal corporation or township within that other county. R.C. 5731.49. The amount due upon settlement to each municipal corporation or township is paid upon the warrant of the county auditor to the county treasurer or other proper officer of the municipal corporation or township. R.C. 5731.49.

R.C. 321.341 provides that, immediately upon receipt of payment for any taxes due under R.C. Chapter 5731, the county treasurer shall notify the taxing authority of the township or municipal corporation entitled to share in the proceeds. In the case of a township, notice goes to the board of township trustees, see R.C. 5705.01(C), identifying the estate for which the tax was paid and the portion of the estate's total tax credited to the township in the undivided estate tax fund. R.C. 321.341. At any time prior to a settlement under R.C. 5731.46, the fiscal officer of the municipal corporation or township may request that the county auditor pay the subdivision up to seventy-five percent of the taxes standing to the credit of the subdivision in the undivided estate tax fund. Within five days of receipt of the request, the auditor must draw a warrant for such amount, payable to the subdivision. R.C. 321.341. The township clerk is the fiscal officer of the township. See R.C. 507.07, .11(B); R.C. 5705.01(D). The township clerk is, therefore, the person with authority under R.C. 321.341 to request payment of estate taxes prior to settlement.

Powers and Duties of a Township Clerk with Respect to Estate Taxes and Estate Tax Returns

As discussed above, the Tax Commissioner, county treasurer, and county auditor have various duties with respect to the determination, collection, and distribution of taxes under R.C. Chapter 5731; a township clerk has no such duties. In general, a township clerk is elected as provided in R.C. 507.01 and carries out the responsibilities established by R.C. Chapter 507 and related provisions. As fiscal officer of a township, the township clerk has powers and duties relating to the receipt and expenditure of township moneys. See, e.g., R.C. 319.51, 321.31-.32; R.C. 507.07, .11(B). In particular, R.C. 321.341, mentioned above, permits the township clerk to request that amounts of estate taxes credited to the township be paid to the township prior to a settlement under R.C. 5731.46. The township clerk is, however, given no statutory

responsibility for determining the amount of estate tax proceeds that should be credited to the township.

As previously noted, R.C. 5731.90 states expressly that tax returns filed pursuant to R.C. Chapter 5731 are confidential, with certain exceptions. A township clerk does not have any statutory duties or responsibilities that require access to the confidential documents, and no other exceptions operate to grant a township clerk a right to see confidential materials in the circumstances that you have described. It follows that, with regard to the items made confidential pursuant to R.C. 5731.90, a township clerk has no rights of access that exceed those of any other member of the general public. *See generally, e.g., Collins v. Ferguson*, 48 Ohio App. 2d 255, 357 N.E.2d 51 (Franklin County 1976) (denying the Auditor of State access to confidential records of the Department of Taxation where there was no demonstration that the records were needed for a purpose established by statute); 1990 Op. Att'y Gen. No. 90-102 (syllabus, paragraph 2) ("[w]here a provision of state law prohibits the release of a record, the express terms of the statute control the nature and extent of the prohibition"). Like other members of the general public, the township clerk does have access to the certificates described in R.C. 5731.21(A)(1)(b), *see* R.C. 5731.21(A)(5)(a), .90(A)(2)(c), and also to other records that are public records under R.C. 149.43. *See generally, e.g., State ex rel. Mothers Against Drunk Drivers v. Gossler*, 20 Ohio St. 3d 30, 485 N.E.2d 706 (1985) (absent specific statutory exclusion, court records are public records that must be made available for public inspection pursuant to R.C. 149.43); 1991 Op. Att'y Gen. No. 91-053.

The facts outlined in your letter suggest that the township clerk may have served a useful function by examining the distribution of estate taxes and seeking to assure their proper apportionment. The enactment of Sub. H.B. 286 does, however, restrict the township clerk's access to records that were previously available. If the township clerk is not able to obtain the desired information from records to which the clerk currently has access, the township clerk may, in accordance with R.C. 5731.90(A)(1), seek issuance of a court order granting access to estate tax returns on the basis of good cause shown.

Conclusion

It is, therefore, my opinion, and you are advised, as follows:

1. Estate tax returns and other tax returns filed pursuant to R.C. Chapter 5731 are confidential and may be inspected or copied only as provided in R.C. 5731.90.
2. A township clerk has no authority to inspect or copy estate tax materials that are made confidential by R.C. 5731.90 except pursuant to court order for good cause shown.