

June 16, 2008

The Honorable David W. Phillips
Union County Prosecuting Attorney
221 West Fifth Street
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Marysville, Ohio 43040-1111

SYLLABUS:

2008-019

An audio tape recording of a meeting of a board of township trustees that is created by the township fiscal officer for the purpose of taking notes to create an accurate record of the meeting, as required by R.C. 507.04(A), is a public record for purposes of R.C. 149.43. The audio tape recording must be made available for public inspection and copying, and retained in accordance with the terms of the township records retention schedule for such a record.



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OPINION NO. 2008-019

The Honorable David W. Phillips
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Dear Prosecutor Phillips:

You have requested an opinion whether personal audio tape recordings made by a township fiscal officer, which are used for note-taking purposes only and not as the official record of township proceedings, must be preserved and made available for inspection and copying under R.C. 149.43. For the reasons that follow, we conclude that a township fiscal officer's audio tape recording of the proceedings at a meeting of the board of township trustees is a public record that is subject to the provisions of R.C. 149.43.

You have presented the facts as follows:

The township fiscal officer, during official township meetings, has employed the use of a tape recorder to tape the monthly township meetings. The fiscal officer refers to that tape when preparing the official minutes. Following the meeting, the fiscal officer submits the minutes to the Trustees for their approval and adoption. Once the minutes are adopted, the fiscal officer destroys the tape or notes of the meeting. The trustees do not officially tape record their meetings nor do they purchase any of the tapes or equipment used by the fiscal officer for this purpose. The fiscal officer has posted a notice which indicates that he may tape the meetings and that the tapes will be destroyed once a written transcript has been prepared.

Interpreting Public Records Questions

We begin with the standard for interpreting the public records law. It is well established by Ohio courts that public records statutes should be construed "liberally to effectuate broad access to records." *Kish v. City of Akron*, 109 Ohio St. 3d 162, 167, 2006-Ohio-1244, 846 N.E.2d 811 (2006). *See also State ex rel. Plain Dealer v. Ohio Dept. of Ins.*, 80 Ohio St. 3d 513,

518, 687 N.E.2d 661 (1997); *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St. 3d 261, 264, 685 N.E.2d 1223 (1997); *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 621, 640 N.E.2d 174 (1994). Moreover, “any doubt is resolved in favor of disclosure of public records.” *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St. 3d 374, 376, 662 N.E.2d 334 (1996).

With that standard in mind, we turn to the definition of “[p]ublic record” as set forth in R.C. 149.43(A)(1). A “[p]ublic record” is a “[r]ecord[]” kept by any public office, including a township unit. *Id.* We must determine, therefore, what constitutes a “[r]ecord[].” A “[r]ecord[]” is defined in R.C. 149.011(G) to include:

any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, 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.

Insofar as it specifically includes devices, items, and electronic records, this definition clearly contemplates that an audio tape recording can be a record. *See State ex rel. Cincinnati Enquirer v. Hamilton Cty.* at 376 (holding that 911 tapes “are public records which are not exempt from disclosure”); *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 2004-Ohio-4354, 814 N.E.2d 55, at ¶17 (holding that a party is entitled to a copy of an audio tape of court proceedings). The definition of “[r]ecords” further requires that the audio tape recording be “created or received by or coming under the jurisdiction of [a] public office.” R.C. 149.011(G). “Public office” is defined by R.C. 149.011(A) to include “any state agency, public institution, *political subdivision*, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government.” (Emphasis added.) A township is a political subdivision, *see Tuber v. Perkins*, 6 Ohio St. 2d 155, 157, 216 N.E.2d 877 (1966), and thus is a “[p]ublic office” under R.C. 149.011(G). The audio tape recording is created by the township fiscal officer for use in compiling minutes of the meetings of the board of township trustees—one of his duties as the township fiscal officer, a position created by R.C. 507.01. R.C. 507.04(A) requires that “[t]he township fiscal officer shall keep an accurate record of the proceedings of the board of township trustees at all of its meetings.”

The definition of “[r]ecords” set forth in R.C. 149.011(G) also requires that the audio tape recording “serve[] to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.” You explain that the township fiscal officer uses the audio tape recording for his personal convenience in compiling the meeting minutes, and once the minutes are approved by the board of township trustees, he erases the tape.¹ Nonetheless, the

¹ Under Ohio law a township must have a records retention schedule for all township records. R.C. 149.42 addresses the process whereby a township fiscal officer and a board of

audio tape recording documents the proceedings at the meetings of the board of township trustees and is used by the township fiscal officer in carrying out his statutory responsibility of preparing the minutes of those meetings. The audio tape recording thus comes within the language of R.C. 149.011(G) because it documents, as the case may be, the “functions, policies, decisions, procedures, operations, or other activities” of the board of township trustees in carrying out its statutory responsibilities.² Accordingly, the audio tape recording is a “[r]ecord[.]” as defined in R.C. 149.011(G).³

township trustees shall establish a records retention schedule that will address audio tape recordings of the board’s meetings. R.C. 149.42 states that “[t]here is hereby created in each township a township records commission, composed of the chairperson of the board of township trustees and the fiscal officer of the township. The commission shall meet at least once every twelve months and upon call of the chairperson.” Duties of the township records commission include “review [of] applications for one-time disposal of obsolete records and schedules of records retention and disposition submitted by township offices.” *Id.* See also “Ohio Township Records Manual: Suggested Records Retention Periods,” compiled and published by the Ohio Historical Society’s Local Government Records Program, Archives/Library Division. December 1990, Slight Text Revisions—March 1997, February 1998, June 2000, *available at* <http://www.ohiohistory.org/resource/lgr/Township2.2001.pdf>.

² Courts have broadly construed R.C. 149.011(G)’s definition of “[r]ecord[.]” See *State ex rel. Beacon Journal Publ’g Co. v. Whitmore*, 83 Ohio St. 3d 61, 63-64, 697 N.E.2d 640 (1998) (emphasizing the “*Jacobs* test of ‘anything a governmental unit *utilizes* to carry out [its] duties and responsibilities’” to determine whether an item meets the R.C. 149.011(G) definition of record); *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St. 3d 37, 40, 550 N.E.2d 464 (1990) (“construing R.C. 149.011(G) to include any material on which a public office could or did rely ... regardless of where [the records] are physically located, or in whose possession they may be”).

³ In *State ex rel. Calvary v. City of Upper Arlington*, 89 Ohio St. 3d 229, 729 N.E.2d 1182 (2000), the court held that “[e]ven if a record is not in final form, it may still constitute a ‘record’ for purposes of R.C. 149.43 if it documents the organization, policies, functions, decisions, procedures, operations, or other activities of a public office.” *Id.* at 232, citing *State ex rel. Wadd v. City of Cleveland*, 81 Ohio St. 3d 50, 53, 689 N.E.2d 25 (1998) (granting access to preliminary, unnumbered accident reports not yet processed by Cleveland into final form); *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 527 N.E.2d 1230 (1988) (granting access to preliminary work product that had not reached its final stage or official destination); *State ex rel. Dist. 1199, Health Care & Social Serv. Union v. Gulyassy*, 107 Ohio App. 3d 729, 734, 669 N.E.2d 487, (Franklin County 1995) (granting access to drafts of proposed changes to collective bargaining statutes prepared by a state agency).

Having established that the audio tape recording in question is indeed a “[r]ecord[]” for purposes of R.C. 149.011(G), we now turn to the second part of R.C. 149.43(A)(1)’s definition of “[p]ublic record,” which requires that the audio tape recording be “kept by any public office,” including a township unit. R.C. 149.43(A)(1). The township fiscal officer is a township unit for the purpose of this definition. Consequently, an audio tape recording of what occurs at a meeting of the board of township trustees that is kept by the township fiscal officer is a “[p]ublic record” as defined in R.C. 149.43(A)(1).

Public Records Exceptions

In R.C. 149.43(A)(1)(a) through (z), the General Assembly iterates exceptions, *i.e.*, what “[p]ublic record” does not mean.” An audio tape recording of proceedings that occur at meetings of a board of township trustees does not fall within any of the public records exceptions listed in R.C. 149.43(A)(1).

In your letter you question whether the township fiscal officer’s audio tape recordings are not public records because they are more closely akin to personal notes. In support of that position you refer us to the decisions in *State ex rel. Cranford v. Cleveland*, 103 Ohio St. 3d 196, 2004-Ohio-4884, 814 N.E.2d 1218 (2004), *State ex rel. Steffen v. Kraft*, 67 Ohio St. 3d 439, 619 N.E.2d 688 (1993), and *Int’l Union v. Voinovich*, 100 Ohio App. 3d 372, 654 N.E.2d 139 (Franklin County 1995). We reject that argument for the following reasons.

The courts have found that “personal notes, as well as telephone messages and daily appointment calendars, are not public records because, in general, they are created solely for the individual’s convenience, are maintained in a way indicating a private purpose, are not circulated or intended for distribution within agency channels, are not under agency control, and may be discarded at the writer’s sole discretion.” *Int’l Union v. Voinovich*, 100 Ohio App. 3d at 378. In *Int’l Union*, the court noted that the Governor’s personal calendars and appointment books were not required to be kept by any statutory or constitutional duty or power of the Governor; rather, the Governor maintained a personal calendar and appointment book for his convenience and individual use. Only his separate, public calendar circulated and documented his official activities.

While the township fiscal officer creates the audio tape recordings for his personal convenience, he does so in fulfilling his statutory duty to keep a record of the proceedings of the meetings of the board of township trustees. *See* R.C. 507.04(A). Furthermore, the audio tape recordings document official, public township activities and functions.

We do not view the audio tape recording at issue as a draft of a record. It meets the requirements of a “record” on its own merits, and it therefore should be analyzed as a record, not as a draft of a record.

The court found in *State ex rel. Steffen v. Kraft* that “[a] trial judge’s personal handwritten notes made during the course of a trial are not public records.” *Id.* at 439. The court held that, “if R.C. 149.43 were interpreted to mandate public access to a trial judge’s personal notes, that result could be construed as an unconstitutional legislative encroachment upon the independence of the judiciary.” *Id.* at 440. Furthermore, “permitting a litigant access to a judge’s personal trial notes would intrude upon a judge’s subjective thoughts and deliberations, threatening the orderly administration of justice.” *Id.* And finally, “[n]either litigants nor any other persons lose any information as a result of this holding.” *Id.* at 441. Rather, “the general public [has] free and unrestricted access to the complete transcript of what occurred at trial.” *Id.*

State ex rel. Steffen v. Kraft is distinguishable by its facts and its subject public officer—a judge. In the present matter, there is no separation of powers issue and no intrusion upon the subjective deliberations of a member of the judiciary. A township fiscal officer is not a judge, and does not carry out adjudicatory functions or responsibilities. Rather, a township fiscal officer is a part of the executive branch of township government whose statutory duties include documentation of township proceedings. *See* R.C. 507.04(A).⁴ In *Steffen*, the court explains that the judge’s notes “are no substitute for the transcript,” which the general public could freely access. *State ex rel. Steffen v. Kraft*, 67 Ohio St. 3d at 441. In the present matter, the audio tape recording exactly records, verbatim, what occurs at the township trustees’ meetings.

The court’s holding in *State ex rel. Cranford v. Cleveland* closely followed *Steffen*. In *Cranford*, a city planning commission director, during a predisciplinary conference with a city employee, took notes that were kept “for his own convenience to recall events and were not kept as part of the city’s or the planning commission’s official records,” nor was there any evidence or argument that other city officials “had access to or used the notes.” *State ex rel. Cranford v. Cleveland*, 103 Ohio St. 3d at 198–99. While the township fiscal officer makes the audio recording in question for his own convenience and does not provide access to that recording to other township officeholders as a matter of practice, the audio tape recording nevertheless differs from the facts in *Cranford* on a key matter. The format of an audio tape recording is fundamentally different from the handwritten notes at issue in *Cranford*. Handwritten notes often memorialize subjective thoughts and impressions of the note-taker, and such notes are made for a number of purposes, including future recollection. While the fiscal officer’s intent may be the same—to take notes for future recollection when compiling minutes—the fiscal

⁴ Other duties of the township fiscal officer include “attend[ing] at least one meeting of the board during each quarter of every year,” *see* R.C. 507.04(A), hiring assistants as necessary, *see* R.C. 507.021(A), “notify[ing] the board of elections of all vacancies caused by death, resignation, or otherwise in the elective offices of the township,” *see* R.C. 507.051, administering oaths and taking and certifying affidavits that pertain to the business of the township, *see* R.C. 507.06, providing an annual “detailed statement of the receipts and expenditures of the township for the preceding year,” *see* R.C. 507.07, and recording the official bonds of constables after approval by the board of township trustees, *see* R.C. 507.08.

officer essentially creates an audio transcript of the proceedings. There is no subjective thought component to an audio tape recording. The recording's resemblance to a written transcript in its content greatly differentiates the audio tape recording from a page of subjective, handwritten notes.

In summary, the judicially-created personal notes exception has been applied to records that are (1) created for one's convenience, (2) not kept as official records of an office or agency, (3) limited to one's personal use, and (4) not widely circulated or available to other officials. While one or more of these factors may be descriptive of the audio tape recordings here, those factors are not sufficient to bring these recordings within the personal notes exception. The audio tape recordings do not reflect the fiscal officer's subjective impressions or thoughts; rather, these recordings audibly memorialize the proceedings that transpire at the township trustees' meetings. In other words, the tape recordings are audio transcripts of the proceedings. Because a township fiscal officer serves within the executive branch of township government, there is no concern about "unconstitutional legislative encroachment upon the independence of the judiciary" or "intru[sion] upon a judge's subjective thoughts and deliberations, threatening the orderly administration of justice." *State ex rel. Steffen v. Kraft*, 67 Ohio St. 3d at 440. Finally, the audio tape recordings serve to document official township functions and the township fiscal officer uses the tape in fulfilling the duties of his office.

Conclusion

Based on the foregoing, it is my opinion, and you are hereby advised that, an audio tape recording of a meeting of a board of township trustees that is created by the township fiscal officer for the purpose of taking notes to create an accurate record of the meeting, as required by R.C. 507.04(A), is a public record for purposes of R.C. 149.43. The audio tape recording must be made available for public inspection and copying, and retained in accordance with the terms of the township records retention schedule for such a record.

Respectfully,



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