

December 13, 2004

The Honorable Martin Frantz  
Wayne County Prosecuting Attorney  
115 West Liberty Street  
Wooster, Ohio 44691

SYLLABUS:

2004-045

1. Information of a personal nature contained in a court's criminal case files is a public record for purposes of R.C. 149.43, unless the information is not a "record" of that office or the information falls within one of the exceptions to the definition of the term "public record" set forth in R.C. 149.43(A)(1)(a)-(x).
2. Because individuals possess a constitutionally protected privacy right in their social security numbers, such numbers when contained in a court's criminal case files are not public records for purposes of R.C. 149.43.
3. Prior to releasing any information in its possession, a court has a duty to redact any information about an individual the release of which would violate the individual's constitutionally protected right of privacy and any information that is made confidential by law.
4. Whether information of a personal nature contained in a court's criminal case files is accessible to the public does not depend solely upon the terms of R.C. 149.43, but also depends upon whether the public possesses a constitutional right of access to the criminal proceedings. In proceedings to which the public possesses such right, public access to the proceedings and the information from such proceedings may be restricted, but only in order to preserve higher values, and any such restriction must be narrowly tailored to protect those higher values and to accommodate the public's right of access.
5. A court must redact information maintained in an electronic format to the same extent that it must redact information it maintains in any other medium.
6. If information in a court's electronic records must be redacted, R.C. 149.43 does not authorize either the court or the clerk of court to pass that cost on to anyone requesting to inspect the court's records.
7. In accordance with R.C. 149.43(B)(1), R.C. 9.01, and Sup. R. 26(D)(2)(b), although a court may make its public records available in a searchable format on a public web site, the court shall also provide machines and equipment necessary to inspect and reproduce such records.



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December 13, 2004

OPINION NO. 2004-045

The Honorable Martin Frantz  
Wayne County Prosecuting Attorney  
115 West Liberty Street  
Wooster, Ohio 44691

Dear Prosecutor Frantz:

You have submitted an opinion request in which you ask whether certain types of information contained in a court's criminal case file maintained by a clerk of court are public records for purposes of R.C. 149.43. You specifically ask:

1. Is there any information contained in a court record in a criminal case that is the subject of a public records request that would be considered "nonpublic" and subject to redaction? For example, records of criminal cases may contain the defendant's social security number and date of birth, as well as other information to enable a law enforcement officer to determine the identity of the person named; records of criminal cases may also contain the name and address of a victim in a rape case, the name and address of a child that is a victim in a crime and the account number of a bank account of a victim in a forgery or bad check case.
2. If a public record of a criminal court case contains some "nonpublic" information, subject to redaction, which is commingled with public information in an electronic format, does a public official have a duty to redact the nonpublic information electronically and disclose the public portion, while bearing the cost of the electronic redaction, in order to respond to a public records request?
3. If a [court] makes public records available in a searchable format on a public web site, is the [court] relieved of [its] duty to produce a machine readable electronic copy of a public record in connection with a public record request?

Your first question asks whether particular types of personal information contained in a court's criminal case files, *e.g.*, a defendant's social security number and date of birth, the names and addresses of adults and children who are victims of crime, and banking information of victims of certain crimes, *e.g.*, forgery, are public records for purposes of R.C. 149.43. For ease of discussion, this opinion will refer to such information as "personal information."

### **General Operation of R.C. 149.43**

Before answering your specific questions, it will be useful briefly to address the requirements of R.C. 149.43. Pursuant to R.C. 149.43(B)(1),<sup>1</sup> a public office must make its public records available for inspection at reasonable times during regular business hours. R.C. 149.43(B)(1) also requires a public office to make "copies available at cost, within a reasonable period of time," and to maintain its records in a manner that facilitates broad access to such records. *See State ex rel. Leonard v. White*, 75 Ohio St. 3d 516, 517, 664 N.E.2d 527 (1996) ("[i]n order to comply with R.C. 149.43, custodians need only make public records available for inspection at all reasonable times during regular business hours, and make copies available upon request at cost, within a reasonable period of time"). R.C. 149.43(B) contains additional provisions concerning the medium in which a public office must provide copies of its records and the transmittal of such copies through the United States mail.

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<sup>1</sup> R.C. 149.43(B) states, in pertinent part:

(1) Subject to division (B)(4) of this section [(limiting the duty of a public office to provide certain public records to incarcerated individuals)], all public records shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(4) of this section, upon request, a public office or person responsible for public records shall make copies available at cost, within a reasonable period of time. In order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.

As used in R.C. 149.43, the term “public record” means, with numerous exceptions,<sup>2</sup> “records kept by any public office, including, but not limited to, state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in Ohio kept by a nonprofit or for profit entity operating such alternative school pursuant to [R.C. 3313.533].” R.C. 149.43(A)(1). Thus, whether information held by a public office is subject to public inspection and copying under R.C. 149.43 depends upon whether the information is a “record”<sup>3</sup> of that office, and, if so, whether that “record” constitutes a “public record” of that office.

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<sup>2</sup> Within R.C. 149.43(A)(1), the General Assembly has established numerous exceptions to the definition of “public record,” in part, as follows:

(b) Records pertaining to probation and parole proceedings or to proceedings related to the imposition of community control sanctions and post-release control sanctions;

...

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under [R.C. 3705.12];

...

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

...

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to [R.C. 5120.21(E)];

...

(r) Information pertaining to the recreational activities of a person under the age of eighteen;

... [and]

(v) Records the release of which is prohibited by state or federal law.

In addition, the General Assembly has created separate exceptions from the public records requirements of R.C. 149.43 for certain types of information. *See, e.g.*, R.C. 1315.53(H) (reports, records, information, or analysis submitted to the Attorney General by money transmitters are not public records for purposes of R.C. 149.43); R.C. 1513.07(B)(3) (making certain information contained in a coal mining permit application confidential and not a public record); R.C. 4763.05(A)(1) (the current home address of applicants for initial certification, licensure, or registration with respect to real estate appraisal are not public records).

<sup>3</sup> *See generally* R.C. 149.011(G) (defining “records” for purposes of R.C. Chapter 149, as including “any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in [R.C. 1306.01], created or received by or coming under the

### Court as a “Public Office” for Purposes of R.C. 149.43

In order for a court to be subject to the requirements of R.C. 149.43, it must be included within the definition of a “public office.” For purposes of R.C. 149.43, the term “public office” includes “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.” R.C. 149.011(A). It is well settled that a court is a public office for purposes of R.C. 149.43.<sup>4</sup> Thus, “any record used by a court to render a decision is a record subject to R.C. 149.43.” *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St. 3d 406, 2004-Ohio-1497, 805 N.E.2d 1116 (2004), at ¶ 27. As summarized 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 ... 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. 149.43. Absent any specific statutory exclusion, such record must be made available for public inspection.”<sup>5</sup>

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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”); R.C. 1306.01(G) (defining “electronic record” as meaning “a record created, generated, sent, communicated, received, or stored by electronic means”).

<sup>4</sup> *State ex rel. Slagle v. Rogers*, 103 Ohio St. 3d 89, 2004-Ohio-4354, 814 N.E.2d 55 (2004), at ¶ 5; *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002), at ¶ 9 (“[p]ursuant to R.C. 149.43(A)(1), ‘public records’ are ‘records kept by any public office.’ ... [T]here is no dispute that the trial court is a ‘public office’ under R.C. 149.011(A)”).

<sup>5</sup> Numerous cases address the application of R.C. 149.43 specifically to court records. *See, e.g., State ex rel. Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094 (2004), at ¶ 6 (court records of criminal proceedings that have been properly sealed under R.C. 2953.52 fall within the exception for records the release of which is prohibited by state or federal law because “R.C. 2953.55(B) makes it a fourth-degree misdemeanor to release sealed records”); *State ex rel. Pennington v. Gundler*, 75 Ohio St. 3d 171, 661 N.E.2d 1049 (1996) (case file in small claims division of municipal court is a public record); *State ex rel. Thompson Newspapers, Inc. v. Martin*, 47 Ohio St. 3d 28, 546 N.E.2d 939 (1989) (syllabus, paragraph one) (“[c]onfidential law enforcement investigatory records do not become public records merely because they are submitted to a trial court to provide the factual basis for obtaining the appointment of a special prosecutor”); *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 527 N.E.2d 1230 (1988) (syllabus, paragraph 2) (“[a] report prepared by a court administrator from factual information contained in public records is a public record subject to disclosure under the Public Records Law, even though such compilations are made for the use of judges in sentencing”); *State ex rel. Miami Valley Broadcasting Corp. v. Davis*, 158

### **Personal Information as “Public Records”**

Your questions express concern that personal information is somehow different from other types of information for purposes of R.C. 149.43. As we will explain, however, the fact that information is personal in nature (*e.g.*, names and addresses) is not, in itself, determinative of whether the information is or is not a public record. *Compare State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St. 3d 580, 669 N.E.2d 835 (1996) (coroner’s list of the names of suicide victims is a public record) and *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St. 3d 141, 143, 647 N.E.2d 1374 (1995) (“public employee personnel records are generally regarded as public records, absent proof of an exception”) with *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002) (finding, in part, that juror names and addresses are not public records) and *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 725 N.E.2d 1144 (2000) (names and addresses of children collected for a city’s photo identification program are not public records). Rather, in those instances in which the Ohio Supreme Court has found personal information held by a public office, including a court, not to be “public records” for purposes of R.C. 149.43, it has found either (1) that the personal information was not a “record” of the public office for purposes of R.C. 149.43 and thus could not be a “public record” of that office, or (2) that the personal information fit within one of the statutory exceptions to the definition of “public record.”

### **Personal Information That Does Not Constitute a “Record” of a Public Office**

Let us now examine the line of cases in which the Ohio Supreme Court found that personal information held by a “public office” was not a “record,” as defined in R.C. 149.011(G), and thus not a “public record” of that office for purposes of R.C. 149.43. In *State ex rel. McCleary v. Roberts*, the Ohio Supreme Court determined that personal information collected by a city’s parks and recreation department concerning children participating in city programs were not “records” of the city and thus could not be “public records” of the city.<sup>6</sup>

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Ohio App. 3d 98, 2004-Ohio-3860, 814 N.E.2d 88 (Montgomery County 2004), at ¶ 14 (pleadings in a court file are public records unless coming within one of the exceptions set forth in R.C. 149.43(A)(1)); *State ex rel. Pauer v. Ertel*, 149 Ohio App. 3d 287, 2002-Ohio-4592, 776 N.E.2d 1173 (Cuyahoga County 2002) (judge’s personal trial notes that were inadvertently placed in the court’s case file were not public records of the court).

<sup>6</sup> The *McCleary* court described the nature of the information and the circumstances of its collection by the city, in part, as follows:

In May 1996, the city of Columbus (“City”) implemented a photo identification program for its Recreation and Parks Department (“Department”). The program was instituted primarily to combat the increased incidence of violent behavior and vandalism at City swimming pools. The photo identification program requires parents of children who use City pools and other recreation

The *McCleary* court noted that the fundamental characteristic of a “record,” as that word is used in R.C. 149.43, is its documentation of the organization, policies, activities, operations, or other aspects of government. With respect to the requested information at issue in the *McCleary* case, the court stated, “[s]tanding alone, that information, *i.e.*, names of children, home addresses, names of parents and guardians, and medical information, does nothing to document any aspect of the City’s Recreation and Parks Department.” 88 Ohio St. 3d at 368. As explained by the *McCleary* court:

We recognize that “[o]ne of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed.” *State ex rel. Strothers v. Wertheim* (1997), 80 Ohio St.3d 155, 158, 684 N.E.2d 1239, 1242. Inherent in Ohio’s Public Records Law is the public’s right to monitor the conduct of government. However, in the instant matter, disclosing the requested information would do nothing to further the purposes of the Act.

Moreover, the personal information requested is not contained in a *personnel* file. At issue here is information regarding children who use the City’s swimming pools and recreational facilities. The subjects of appellee’s public records request are not employees of the government entity having custody of the information. They are children—private citizens of a government, which has, as a matter of public policy, determined that it is necessary to compile private information on these citizens. It seems to us that there is a clear distinction between public employees and their public employment personnel files and files on private citizens created by government. To that extent the personal information requested by appellee is clearly outside the scope of R.C. 149.43 and not subject to disclosure. *See State ex rel. Dispatch Printing Co. v. Wells* (1985), 18 Ohio St.3d 382, 385, 18 OBR 437, 439, 481 N.E.2d 632, 634-635.

*Id.* at 369-70 (footnotes omitted).<sup>7</sup>

The *McCleary* court added that, even if the requested information were public records, such records would be exempt from disclosure as records the release of which is prohibited by the children’s constitutional rights to privacy under the Fourteenth Amendment to the United

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facilities to provide certain personal information regarding their children. Parents provide the Department with the names, home addresses, family information, emergency contact information, and medical history information of participating children and, in return, each child is provided a photographic identification card to present when using pools and recreation centers.

88 Ohio St. 3d at 365.

<sup>7</sup> The *McCleary* court expressly avoided answering whether it is an appropriate function of government to acquire and compile information and to create private files on individual citizens. 88 Ohio St. 3d at 369 n.3.

States Constitution. As explained by the court, “[b]ecause of the inherent vulnerability of children, release of personal information of this nature creates an unacceptable risk that a child could be victimized.” *Id.* at 372. Ultimately, the *McCleary* court concluded in the syllabus that, “[p]ersonal information of private citizens, obtained by a ‘public office,’ reduced to writing and placed in record form and used by the public office in implementing some lawful regulatory policy, is not a ‘public record’ as contemplated by R.C. 149.43.”

A similar analysis was utilized by the court in *State ex rel. Beacon Journal Publishing Co. v. Bond*, concerning a newspaper reporter’s request, in the middle of a criminal trial, for the names and addresses of jurors in that case, as well as questionnaires filled out by the jurors. The questionnaire inquired into various matters, including medical history, criminal record, and religious beliefs. Prior to filling out the questionnaires, the jurors had been assured by the judge that their responses would remain confidential.

The *Bond* court began by determining that because the jurors’ names, addresses, and questionnaire responses were not “records” of the court, they also were not “public records” of the court. In reaching this conclusion, the *Bond* court distinguished its holding in *State ex rel. Mothers Against Drunk Drivers v. Gosser* (syllabus, paragraph one), that “[a]ny document appertaining to ... the proceedings of a court, or any record necessary to the execution of the responsibilities of a governmental unit is a ‘public record.’” Instead, the *Bond* court found the juror information to be more akin to the information sought in the *McCleary* case, and stated:

The disclosure of information regarding prospective and impaneled jurors does little to ensure the accountability of government or shed light on the trial court’s performance of its statutory duties. As we noted in *McCleary*, disclosure of information about private citizens is not required when such information “‘reveals little or nothing about an agency’s own conduct’” and “‘would do nothing to further the purposes of the Act.’” 88 Ohio St.3d at 368 and 369, 725 N.E.2d 1144, quoting *United States Dept. of Justice v. Reporters Comm. for Freedom of the Press* (1989), 489 U.S. 749, 780, 109 S.Ct. 1468, 103 L.Ed.2d 774.

*State ex rel. Beacon Journal Publishing Co. v. Bond*, at ¶ 11. In addition, the *Bond* court found that the trial court had not used such juror information in rendering its decision, “but ... collected the questionnaires for the benefit of litigants in selecting an impartial jury and maintained the jurors’ names and addresses for the administrative purpose of identifying and contacting

individual jurors.” *Id.* at ¶ 12.<sup>8</sup> Accordingly, the jurors names, addresses, and questionnaire responses were neither “records” nor “public records” of the court.<sup>9</sup>

Reaching a different conclusion with respect to the questions contained in the questionnaires, the *Bond* court explained:

[W]e distinguish between the *responses* to the juror questionnaires and the actual *questions* from which such responses were solicited. Whereas responses to juror questionnaires are completed by individual jurors, the questions that elicit such responses are invariably written or approved by the trial court. As a result, such questions serve to document the activities of a public office and thereby satisfy the statutory definition of a “record” under R.C. 149.011(G). Accordingly, we hold that questionnaires without responses are subject to disclosure under the Public Records Act.

*Id.* at ¶ 13.

Thus, based upon *State ex rel. McCleary v. Roberts* and *State ex rel. Beacon Journal Publishing Co. v. Bond*, if personal information about private citizens in the possession of a public office does not serve “to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office,” R.C. 149.011(G), the information is neither a “record” of that office nor a “public record” of that office for purposes of R.C. 149.43.

### **Constitutional Right to Privacy Exception Under R.C. 149.43(A)(1)(v)**

In other situations, the courts have found personal information held by a public office not to be “public records” of that office, based upon the court’s determination that, in the particular circumstances, the subject of the information possessed a constitutional right of privacy in the information. Information in which such a right of privacy exists is excepted from the definition

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<sup>8</sup> The *Bond* court also cautioned that its holding was limited to “questions that elicit information used for juror identification and qualification; to extend our holding to information that may be used in determining the impartiality of jurors would suppress information protected by the First Amendment.” *State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St. 3d 146, 2002-Ohio-7117, 781 N.E.2d 180 (2002), at ¶ 25.

<sup>9</sup> Ultimately, however, the *Bond* court determined that, apart from R.C. 149.43, the public’s First Amendment right of access to judicial proceedings entitles it to view the names and addresses of jurors, unless the court determines that the public’s right of access is outweighed “by an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest,” *Id.* at ¶ 17 (quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 510 (1984) (“*Press-Enterprise I*”). The constitutional right of access to judicial proceedings will be discussed more fully below.

of “public records” by R.C. 149.43(A)(1)(v), *i.e.*, records the release of which is prohibited by state or federal law.

This line of reasoning has been adopted in a number of cases concerning whether social security numbers held by a public office are subject to release as public records. For example, in *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994), the court concluded that city employees possess a right under the United States Constitution to maintain the privacy of their social security numbers that are included in their personnel files, and that such numbers are not public records of the city. The *City of Akron* court explained that, because the city uses its employees’ social security numbers as taxpayer identification numbers in its master payroll files, such numbers serve “to document the organization, functions, [and] operations,” R.C. 149.011(G), of the city. As such, the employee social security numbers constitute “records” of the city for purposes of R.C. 149.43.

The *City of Akron* court then analyzed the privacy interest asserted by the city employees under the line of privacy cases protecting “the individual interest in avoiding disclosure of personal matters.” 70 Ohio St. 3d at 607. In determining whether the employees possessed such right of privacy in their social security numbers, the court employed a two-part analysis: “whether the city employees have a legitimate expectation of privacy in their [social security numbers] and then whether their privacy interests outweigh those interests benefited by disclosure of the numbers,” *Id.* at 608. The *City of Akron* court found that the federal legislative scheme governing the use of social security numbers gave the city employees a legitimate expectation of privacy in their social security numbers, and also that “the high potential for fraud and victimization caused by the unchecked release of city employee [social security numbers] outweighs the minimal information about governmental processes gained through the release of” those numbers. *Id.* at 612.<sup>10</sup> Accordingly, the court concluded that because the city employees possess a “federal constitutional right to privacy” in their social security numbers, and because of the high potential for victimization if such numbers were released as public records, such numbers are excepted from the definition of “public record” as “[r]ecords the release of which is prohibited by state or federal law,” R.C. 149.43(A)(1)(v).

Following the *City of Akron* case, the Ohio Supreme Court declared, without qualification, that social security numbers held by other public offices also are not public records for purposes of R.C. 149.43. *See, e.g., State ex rel. Highlander v. Rudduck*, 103 Ohio St. 3d 370, 2004-Ohio-4952, 816 N.E.2d 213 (2004), at ¶ 25 (finding that a court’s records of divorce proceedings are public records, but that the court “should promptly make any appropriate

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<sup>10</sup> *See* R.C. 149.011 (defining “records,” as used in R.C. 149.43, to include information that “serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office”). *See generally State ex rel. WHIO-TV-7 v. Lowe*, 77 Ohio St. 3d 350, 355, 673 N.E.2d 1360 (1997) (“the purpose of Ohio’s Public Records Act, R.C. 149.43, is to expose government activity to public scrutiny, which is absolutely essential to the proper working of a democracy”).

redactions, e.g., Social Security numbers, before releasing the records”); *State ex rel. WLWT-TV5 v. Leis*, 77 Ohio St. 3d 357, 361, 673 N.E.2d 1365 (1997) (stating that social security numbers contained in the files of a county sheriff or prosecuting attorney “are exempt under R.C. 149.43(A)(1) and the federal constitutional right to privacy”). *See also Bardes v. Todd*, 139 Ohio App. 3d 938, 944, 746 N.E.2d 229 (Hamilton County 2000) (concerning various types of personal information in a court’s files, the *Bardes* court stated that, “Social Security numbers are exempt from the Public Records Act under R.C. 149.43(A)(1) and subject to the federal constitutional right to privacy”).<sup>11</sup> These cases indicate, therefore, that the courts view social security numbers held by a public office to be excepted from the definition of “public record” for purposes of R.C. 149.43.<sup>12</sup>

The Ohio Supreme Court has also declared that, in certain circumstances, an individual’s constitutionally protected right of privacy may extend beyond one’s social security number to other types of personal information. For example, in *State ex rel. Keller v. Cox*, 85 Ohio St. 3d 279, 707 N.E.2d 931 (1999), the Ohio Supreme Court found that personal information contained in the personnel files of police officers concerning themselves and their families was not a public record for purposes of R.C. 149.43. The *Keller* case involved a defendant who, during his pending criminal case, requested all personnel and internal affairs reports of a particular deputy sheriff who was a potential witness in the defendant’s trial. Relying upon *Kallstrom v. City of*

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<sup>11</sup> *Cf. State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St. 3d 245, 247, 643 N.E.2d 126 (1994) (names and work addresses of animal research scientists at a state university serve “to document the organization, functions, and operations of OSU’s animal research activities” and are thus records of the university, but because the scientists possess no constitutionally protected right of privacy in that information, the names and addresses are public records. The *Thomas* court found neither a legislative scheme protecting the names and work addresses of the scientists nor the same high degree of potential victimization as with the release of social security numbers, and concluded that such names and work addresses were public records for purposes of R.C. 149.43).

<sup>12</sup> *Cf. generally State ex rel. Cincinnati Enquirer v. Hamilton County*, 75 Ohio St. 3d 374, 378, 662 N.E.2d 334 (1996) (finding the tapes of calls made to 911 to be public records, and that: “The particular content of the 911 tapes is irrelevant. Therefore, it does not matter that release of the tapes might reveal the identity of an uncharged suspect or contain information which, if disclosed, would endanger the life or physical safety of a witness. *Cf. R.C. 149.43(A)(1), 149.43(A)(2)(a) and (d)*. Further, although less likely to occur, *it makes no difference that the disclosure of the tapes might reveal Social Security Numbers or trade secrets. Cf. State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 640 N.E.2d 164; *State ex rel. Seballos v. School Emp. Retirement Sys.* (1994), 70 Ohio St.3d 667, 640 N.E.2d 829” (emphasis added)).

*Columbus*,<sup>13</sup> the *Keller* court denied the release of the police officer's personal information, stating:

Police officers' files that contain the names of the officers' children, spouses, parents, home addresses, telephone numbers, beneficiaries, medical information, and the like should not be available to a defendant who might use the information to achieve nefarious ends. This information should be protected not only by the *constitutional right of privacy*, but, also, we are persuaded that there must be a "good sense" rule when such information about a law enforcement officer is sought by a defendant in a criminal case. On the other hand, any records needed by a defendant in a criminal case that reflect on discipline, citizen complaints, or how an officer does her or his job can be obtained, if any exist, through internal affairs files in accordance with previous decisions of this court.

85 Ohio St. 3d at 282 (emphasis added).

Based upon *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, and *State ex rel. Keller v. Cox*, whether any other type of personal information held by a public office is included within an individual's constitutional right of privacy, and thus excepted from the definition of a "public record" under R.C. 149.43(A)(1)(v), depends upon whether the individual has a legitimate expectation of privacy in that information, and, if so, whether that privacy interest outweighs the public's interest in monitoring the policies, activities, and operations of government that would be revealed by the release of that information.

The court in *State ex rel. Keller v. Cox*, also found that personal information that concerns a police officer and his family and that is contained in the officer's personnel file is shielded from disclosure to a criminal defendant not only by the officer's constitutional right to privacy, but also by a "good sense" rule. The *Keller* court's description of the particular

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<sup>13</sup> In *Kallstrom v. City of Columbus*, 136 F.3d 1055 (6th Cir. 1998), the court considered whether R.C. 149.43 required the city to release to defense counsel personal and familial information in the personnel files of undercover police officers who participated in the investigation of illegal drug activities by the defendants. The *Kallstrom* court found that the police officers possessed a right in the personal security and bodily integrity of their families and themselves that was protected by substantive due process under the Fourteenth Amendment to the United States Constitution. As stated by the court, where the government's release of personal information from an officer's personnel files "places an individual at substantial risk of serious bodily harm, possibly even death, from a perceived likely threat," 136 F.3d at 1064, such release is justified "only where the governmental action furthers a compelling state interest, and is narrowly drawn to further that state interest." *Id.* The *Kallstrom* court concluded that the public's interest in obtaining information about its government was not served by the release of this information and that the city's release of the officers' personal and familial information had not been narrowly tailored to serve the public interest.

circumstances compelling the application of this rule, *i.e.*, “when such information about a law enforcement officer is sought by a defendant in a criminal case,” makes it difficult to predict other circumstances in which a court may apply this “good sense” rule. For example, in *State ex rel. Beacon Journal Publishing Co. v. Bodiker*, 134 Ohio App. 3d 415, 430, 731 N.E.2d 245 (Franklin County 1999), the court of appeals did not apply the *Keller* court’s “good sense rule” to prevent the post-proceeding release of financial and time records related to a public defender’s representation of a criminal defendant. Commenting on this rule, the *Bodiker* court stated, “to the extent *Keller* suggests a ‘good sense’ rule regarding the release of public records, that rule appears to be inextricably intertwined with the facts of *Keller*, which involved requests by criminal defendants for personal information about law enforcement personnel.” See *State ex rel. Conley v. Correctional Reception Center*, 141 Ohio App. 3d 412, 417, 751 N.E.2d 528 (Pickaway County 2000) (finding that *Keller*’s “good sense” rule did not except from disclosure information concerning a correctional officer’s identity and prior work schedules, “[a]bsent a showing of some substantial threat to personal security”). On the other hand, after finding that personally identifying information about children in the possession of a public office was not a “record” for purposes of R.C. 149.43, the Ohio Supreme Court in *McCleary* noted, in dicta, that even if such information were records, *Keller*’s “good sense” rule would prohibit the release of the information because “a release of the requested information by the Department in this matter places those who are the subject of the records request at risk of irreparable harm.” 88 Ohio St. 3d at 371.

It appears, therefore, that there may be instances in which a court’s release of certain personal information in its case files will place the subject of the information at substantial risk of irreparable harm, and would, therefore, be excepted from release under R.C. 149.43 by the *Keller* court’s “good sense” rule. Any such determination, however, will depend upon both the nature of the information and the specific circumstances involved in its release. Such determinations cannot, therefore, be made in the abstract, but must be made on a case-by-case basis.

#### **Application of R.C. 149.43 to Particular Types of Personal Information Contained in a Court’s Criminal Case Files**

With the foregoing general discussion in mind, we note that your first question lists several types of information, such as a criminal defendant’s social security number and birth date, the names and addresses of crime victims, whether adults or children, and banking information of a victim of a crime such as forgery. Concerning a criminal defendant’s social security number, it appears that, based upon *State ex rel. Beacon Journal Publishing Co. v. City of Akron*, as well as *State ex rel. Highlander v. Rudduck*, *State ex rel. WLWT-TV5 v. Leis*, and *Bardes v. Todd*, because individuals possess a constitutionally protected privacy interest in their social security numbers, those records fall within the exception for “[r]ecords the release of which is prohibited by state or federal law,” R.C. 149.43(A)(1)(v), and are not, therefore, “public records” for purposes of R.C. 149.43. *But see generally State v. Hall*, 141 Ohio App. 3d 561, 752 N.E.2d 318 (Lawrence County 2001) (rejecting criminal defendant’s argument that his generalized right to privacy under R.C. Chapter 1347 outweighs the public’s interest in

disclosure of his court-ordered psychiatric evaluation). Our research has revealed nothing that establishes a similar right of privacy in a defendant's birth date.

With respect to the names and addresses of crime victims, we assume that such information "serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the [court]," R.C. 149.011(G), in the trial of an accused, and are, therefore, "records" of the court. Given that assumption, whether or not these names and addresses are "public records" for purposes of R.C. 149.43 depends upon whether, in a particular situation, the names and addresses fall within any of the exceptions to the definition of "public record" set forth in R.C. 149.43(A)(1)(a)-(x). *See, e.g.*, R.C. 149.43(A)(1)(a) (medical records exception); R.C. 149.43(A)(1)(v) (records "the release of which is prohibited by state or federal law"); R.C. 149.43(A)(2)(a) (confidential law enforcement investigatory records the release of which would create a high probability of disclosure of, among other things, "[t]he identity of ... an information source or witness to whom confidentiality has been reasonably promised"); R.C. 149.43(A)(2)(d) (confidential law enforcement investigatory records the release of which would create a high probability of disclosure of "[i]nformation that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source").

There are also specific statutory provisions that allow the victims of crime, under certain circumstances, to maintain the confidentiality of personally identifying information. *See, e.g.*, R.C. 2907.11 (allowing victim or accused offender in sexual assault prosecution under R.C. 2907.02-.07 to request temporary suppression of name and details of alleged offense); R.C. 2930.07 (procedure for protecting identity of crime victim who has reasonable basis for fearing acts or threats of violence or intimidation).<sup>14</sup> Thus, in those instances in which personally

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<sup>14</sup> R.C. 2930.07, which establishes a procedure for maintaining the confidentiality of victim identification information, states:

(A) If the prosecutor in a case determines that there are reasonable grounds for the victim in a case to be apprehensive regarding acts or threats of violence or intimidation by the defendant or alleged juvenile offender in the case or at the defendant's or alleged juvenile offender's direction against the victim, the victim's family, or the victim's representative, the prosecutor may file a motion with the court requesting that the court issue an order specifying that the victim and other witnesses in the case not be compelled in any phase of the criminal or delinquency proceeding to give testimony that would disclose the victim's or victim's representative's address, place of employment, or similar identifying fact without the victim's or victim's representative's consent. The court shall hold a hearing on the motion in chambers, and a court reporter shall make a record of the proceeding.

(B) If the court, pursuant to division (A) of this section, orders that the victim's or victim's representative's address, telephone number, place of

identifying information, *e.g.*, name and address, of a crime victim is made confidential by statute, that information is not a “public record” for purposes of R.C. 149.43 because its release is prohibited by state law.

The final category of information about which you ask relates to a crime victim’s personal finances. While we appreciate the potential harm to an individual whose personal financial information is subject to inspection by the public, neither the language of R.C. 149.43 nor any judicial decisions interpreting that language have determined that information concerning an individual’s personal finances is, by its nature, excepted from the definition of “public record” for purposes of R.C. 149.43. *See generally In re Estate of Engelhardt*, 127 Ohio Misc. 2d 12, 2004-Ohio-825, 804 N.E.2d 1052 (Prob. Ct. Hamilton County 2004) (denying a request that the court, which posts all of its records on its website, not include sensitive financial information in such posting). Rather, as recently emphasized by the court in *State ex rel. WBNS TV, Inc. v. Dues*, at ¶ 31, the Ohio Supreme Court “has not authorized courts or other records custodians to create new exceptions to R.C. 149.43 based on a balancing of interests or *generalized privacy concerns*,” (emphasis added). Thus, personal financial information held by a court is a “public record” of the court, unless the information is not a “record” of the court or the information falls within one of the exceptions to the definition of “public record” set forth in R.C. 149.43(A)(1)(a)-(x), *e.g.*, information that is protected by an individual’s constitutional right of privacy.

In answer to your first question, we conclude that information of a personal nature contained in a court’s criminal case files is a public record for purposes of R.C. 149.43, unless the information is not a “record” of that office or the information falls within one of the exceptions to the definition of the term “public record” set forth in R.C. 149.43(A)(1)(a)-(x). Because individuals possess a constitutionally protected privacy right in their social security numbers, however, such numbers when contained in a court’s criminal case files are not public records for purposes of R.C. 149.43.

### **Sealed Court Records**

We must also note that should the record of a judicial proceeding be closed by proper order of the court, the record falls within the exception set forth in R.C. 149.43(A)(1)(v), and thus is not a public record for purposes of R.C. 149.43. *See note 14, supra. See State ex rel. Highlander v. Rudduck*, at ¶ 11 (“[a]lthough properly sealed court records are excepted from disclosure and releasing sealed records is a fourth-degree misdemeanor pursuant to R.C. 2953.55(B), the records here were not sealed under R.C. 2953.52 or other applicable statutory authority,” and were, therefore, subject to release as public records of the court); *State ex rel.*

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employment, or other identifying fact shall be confidential, *the court files or documents shall not contain that information unless* it is used to identify the location of the crime or specified delinquent act. The hearing shall be recorded, and the court shall order the *transcript sealed*. (Emphasis added.)

*Cincinnati Enquirer v. Winkler*, 101 Ohio St. 3d 382, 2004-Ohio-1581, 805 N.E.2d 1094 (2004), at ¶ 6 (“once the court records were sealed under R.C. 2953.52, they ceased to be public records”).

### **Qualified Right of Public Access to Criminal Proceedings Under the United States and Ohio Constitutions**

You have asked about the availability to the public of certain personal information contained in a court’s criminal case files only under R.C. 149.43. Our analysis of the public’s right of access to a court’s criminal case files would be incomplete, however, without a discussion of several constitutional provisions that must be considered in determining whether information in a court’s criminal case files is available for public inspection.

In addition to its right of inspection under R.C. 149.43, the public also possesses a separate, qualified right of access, under both the federal and state constitutions, to criminal proceedings that have historically been open to the public and in which public access plays a significant, positive role. *State ex rel. Nat’l Broadcasting Co. v. Lake County Court of Common Pleas*, 52 Ohio St. 3d 104, 108, 556 N.E.2d 1120 (1990) (“[c]riminal trials have historically been open to the public, and public access has always been considered essential to the fair and orderly administration of our criminal justice system”).<sup>15</sup> This right of access extends to the documents and information that are part of such proceedings. *See, e.g., State ex rel. Cincinnati Post v. Second Dist. Court of Appeals*, 65 Ohio St. 3d 378, 604 N.E.2d 153 (1992); *State ex rel. Mothers Against Drunk Drivers v. Gosser*.

The public’s right of access to such proceedings is not absolute, and may be restricted in limited situations in which “closure is essential to preserve higher values and is narrowly tailored to serve an overriding interest.” *State ex rel. Scripps Howard Broadcasting Co. v. Cuyahoga County Court of Common Pleas*, 73 Ohio St. 3d 19, 20, 652 N.E.2d 179 (1995) (quoting *Press-Enterprise Co. v. Superior Court*, 478 U.S. 1, 9 (1986) (“*Press-Enterprise II*”).

Thus, although a particular item of personal information in a court’s criminal case files may not constitute a “public record” to which the public is entitled to access under R.C. 149.43, the public may, nonetheless, possess a right of access to that information under its constitutional right of access to a court’s criminal proceedings. *See generally State ex rel. Beacon Journal Publishing Co. v. Bond*, at ¶ 17 (analysis of the public’s qualified right of access to judicial proceedings and setting forth the procedure and standards for a court’s determining whether that

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<sup>15</sup> *See, e.g., State ex rel. Repository v. Unger*, 28 Ohio St. 3d 418, 421, 504 N.E.2d 37 (1986) (“[f]reedom of the press includes the right to ‘gather, write and publish the news’ including events occurring in open court. *State, ex rel. Dayton Newspapers, v. Phillips*, at 467. The First Amendment right to open proceedings in criminal trials extends to voir dire examinations, *Press-Enterprise Co. v. Superior Court* (1984), 464 U.S. 501, preliminary hearings, *Press-Enterprise Co. v. Superior Courts*, (92 L.Ed. 2d 1), and pretrial suppression hearings” (various citations and footnote omitted)). *See generally* note 9, *supra*.

right is outweighed by “an overriding interest based on findings that closure is essential to preserve higher values and is narrowly tailored to serve that interest,” quoting *Press-Enterprise Co. v. Superior Court*, 464 U.S. 501, 508 (1984) (“*Press-Enterprise I*”).

### **Constitutional Limitations Upon Public Access to Criminal Proceedings**

The courts have recognized certain constitutional rights that may, depending upon the circumstances, outweigh the public’s constitutional right of access to criminal proceedings. One such right is a criminal defendant’s constitutional right to receive a fair and public trial. *See, e.g., State ex rel. Beacon Journal Publishing Co. v. Kainrad*, 46 Ohio St. 2d 349, 348 N.E.2d 695 (1976). *See also State v. Sanders*, 130 Ohio App. 3d 92, 719 N.E.2d 619 (Hamilton County 1998) (examining a defendant’s right to receive a public trial and the limited circumstances in which that right may be outweighed by a superior interest that can be protected only by closure of such proceedings).<sup>16</sup>

This issue was raised in *State ex rel. Beacon Journal Publishing Co. v. Bond*, discussed above, in which the public, through the press, sought access to the names, addresses, and questionnaire responses of jurors in a criminal trial. The *Bond* court set forth the following standards for resolving the conflict between the public’s right of access to criminal proceedings and a defendant’s right to receive a fair trial:

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<sup>16</sup> The court in *State v. Sanders*, 130 Ohio App. 3d 92, 96-97, 719 N.E.2d 619 (Hamilton County 1998), explained the historical context and policy behind this guarantee, as follows:

The right to a public trial has historically been recognized as a safeguard against possible infringements by the court against the accused. An open courtroom is necessary to preserve and support the fair administration of justice because it encourages witnesses to come forward and be heard by the public, discourages perjury by the witnesses, and ensures that the judge and prosecutor will carry out their duties properly. Also, a public trial benefits the accused in that “the public may see he is fairly dealt with and not unjustly condemned, and that the presence of interested spectators may keep his triers keenly alive to a sense of their responsibility and to the importance of their functions.” The right to a public trial is so important that a criminal defendant is not required to show specific prejudice to obtain relief from the constitutional violation.

The right to a public trial is not an absolute right. A trial judge has the authority to exercise control over the proceedings. A judge may exclude those members of the audience whose conduct is likely to interfere with the administration of justice or to denigrate the protection of public health, safety and morals. However, an abridgment of a defendant’s right to a public trial shall only occur when necessary, and any abridgment must be applied sparingly. (Footnotes omitted.)

The United States Supreme Court has observed that “[n]o right ranks higher than the [Sixth Amendment] right of the accused to a fair trial.” *Press-Enterprise I*, 464 U.S. at 508, 104 S.Ct. 819, 78 L.Ed.2d 629. Nevertheless, the court has conceded that “the primacy of the accused’s right is difficult to separate from the right of everyone in the community to attend the voir dire which promotes fairness.” *Id.* In drawing the proper balance between the Sixth Amendment right to a fair trial and the First Amendment right of access, the court set forth a two-part inquiry to determine whether the presumption of openness has been rebutted:

“If the interest asserted is the right of the accused to a fair trial, the \* \* \* hearing shall be closed only if specific findings are made demonstrating that, first, there is a substantial probability that the defendant’s right to a fair trial will be prejudiced by publicity that closure would prevent and, second, reasonable alternatives to closure cannot adequately protect the defendant’s fair trial rights.” *Press-Enterprise II*, 478 U.S. at 14, 106 S.Ct. 2735, 92 L.Ed.2d 1.

98 Ohio St. 3d at 154-55. The *Bond* court thus recognized that questions concerning whether a defendant’s constitutional right to receive a fair trial, in a particular situation, outweighs the public’s constitutional right of access to criminal proceedings must be resolved in accordance with the two-part balancing test set forth in *Press-Enterprise II*.

The court in *State ex rel. Beacon Journal Publishing Co. v. Bond*, addressed another constitutional limitation upon the public’s constitutional right of access to criminal proceedings: a juror’s privacy interest in information the juror may disclose during the voir dire process. As explained by the *Bond* court, although the presumption of openness applies to the voir dire portion of a criminal proceeding, and thus includes the responses to the prospective jurors’ questionnaires, “[t]he jury selection process may, in some circumstances, give rise to a compelling interest of a prospective juror when interrogation touches on deeply personal matters that person has legitimate reasons for keeping out of the public domain,” 98 Ohio St. 3d at 152 (quoting *Press-Enterprise I*, 464 U.S. at 511). Under such circumstances, the juror possesses a constitutionally protected privacy interest in such information.

In determining which of these competing interests prevails, the *Bond* court concluded that a juror’s personal privacy interest prevails over the public’s right of access to the proceedings only if the trial court makes specific findings that the information is deeply personal to the juror and something the juror wishes to keep out of the public domain, and that there are no less restrictive alternatives to closure that would protect that information. The *Bond* court further noted that claims of juror privacy must be addressed by the trial court individually for each juror who asserts such a claim.

### **Summary of Public Access to a Court’s Criminal Case Files**

As a general rule, therefore, whether information of a personal nature contained in a court's criminal case files is accessible to the public does not depend solely upon the terms of R.C. 149.43, but also depends upon whether the public possesses a constitutional right of access to the criminal proceedings. In proceedings to which the public possesses such right, public access to the proceedings and the information from such proceedings may be restricted, but only in order to preserve higher values, and any such restriction must be narrowly tailored to protect those higher values and to accommodate the public's right of access.

### **Redaction of Nonpublic Information from a Court's Criminal Case Files**

Your second question asks:

If a public record of a criminal court case contains some "nonpublic" information, subject to redaction, which is commingled with public information in an electronic format, does a public official have a duty to redact the nonpublic information electronically and disclose the public portion, while bearing the cost of the electronic redaction, in order to respond to a public records request?

As a general rule, R.C. 149.43(B) requires a public office to make available for public inspection and copying all of its public records. While R.C. 149.43 imposes no duty upon a public office to disclose information in its possession that does not constitute a "public record," R.C. 149.43 also does not require the redaction of such information. Whether information that is not a public record must be redacted from the information maintained by a public office depends upon whether federal or state law makes the information confidential, 2001 Op. Att'y Gen. No. 2001-041 at 2-252,<sup>17</sup> or whether a provision of state or federal law requires the redaction of such information, *see, e.g.*, R.C. 2930.07 (note 14, *supra*). *See generally State, ex rel. Nat'l. Broadcasting Co. v. City of Cleveland*, 38 Ohio St. 3d 79, 526 N.E.2d 786 (1988) (syllabus, paragraph four) ("[w]hen a governmental body asserts that public records are excepted from disclosure and such assertion is challenged, the court must make an individualized scrutiny of the records in question. If the court finds that these records contain excepted information, this information *must be redacted* and any remaining information must be released" (emphasis added)).

Specifically concerning the duty of a court to redact information from its records, the court in *State ex rel. Highlander v. Rudduck*, at ¶ 25, recently stated that, before a judge released the requested court files, he "should promptly make any appropriate redactions, e.g., Social

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<sup>17</sup> *See, e.g.*, R.C. 9.312 (requiring the state or a political subdivision to keep confidential certain financial information submitted to it in conjunction with the competitive bidding process, "except under proper order of a court"); R.C. 339.81 (stating, in part, "[a]ny information, data, and reports with respect to a case of tuberculosis that are furnished to, or procured by, a county or district tuberculosis control unit or the department of health shall be confidential and used only for statistical, scientific, and medical research for the purpose of controlling tuberculosis in this state").

Security numbers.”<sup>18</sup> See *State ex rel. Beacon Journal Publishing Co. v. Bond*. It appears, therefore, that a court has a duty to redact information that is not a public record and that is protected by an individual’s right of privacy, or if the release of such information is prohibited by state or federal law. See, e.g., *State ex rel. Yant v. Conrad*, 74 Ohio St. 3d 681, 684, 660 N.E.2d 1211 (1996) (finding that the identities of sexual harassment victims who have been promised confidentiality are excepted from disclosure and ordering the public office holding such information to “redact those portions which disclose the identities of bureau employees who were promised confidentiality and may have been sexually harassed”); *State ex rel. Master v. City of Cleveland*, 75 Ohio St. 3d 23, 661 N.E.2d 180 (1996) (redaction of information concerning an uncharged suspect);<sup>19</sup> *State, ex rel. Nat’l. Broadcasting Co. v. City of Cleveland*, (syllabus, paragraph four); 1999 Op. Att’y Gen. No. 99-006 (syllabus, paragraph four) (“[p]ursuant to the federal constitutional right of privacy, a county EMS organization responding to a public records request for run sheets is prohibited from disclosing an individual’s social security number or any information that identifies an individual as having a stigmatizing medical condition. Pursuant to the federal constitutional right of privacy and R.C. 149.43(A)(1)(p), this information is not a public record and must be redacted from a run sheet prior to its disclosure pursuant to R.C. 149.43(B)”)<sup>20</sup>.

Part of your concern appears to be that the court maintains its documents in an electronic format. The definition of the term “records,” as used in R.C. 149.43, includes, among other things, “any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in [R.C. 1306.01].”<sup>21</sup> R.C. 149.011(G). The Supreme Court’s

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<sup>18</sup> See *Bardes v. Todd*, 139 Ohio App. 3d 938, 944, 746 N.E.2d 229 (Hamilton County 2000) (“[w]hen it is ordered under the Public Records Act to disclose documents containing a Social Security number, the appropriate remedy is for the concerned party to move the court to direct the clerk of courts to redact the Social Security number”).

<sup>19</sup> The courts have recognized an exception to the duty to redact confidential information from public records in a situation in which the confidential information is “inextricably intertwined” with public records so that redaction would not protect the secrecy of the confidential information. Under such circumstances, neither the confidential nor public information may be made available to the public. See, e.g., *State ex rel. Master v. City of Cleveland*, 76 Ohio St. 3d 340, 667 N.E.2d 974 (1996).

<sup>20</sup> *But cf.* 1996 Op. Att’y Gen. No. 96-034 (syllabus) (“[t]he decision of the Ohio Supreme Court in *State ex rel. Beacon Journal Publ. Co. v. City of Akron*, 70 Ohio St. 3d 605, 640 N.E.2d 164 (1994), does not impose an obligation upon a county recorder to remove or obliterate social security numbers that appear on mortgages, mortgage releases, veterans discharges, and financing statements before he records those instruments”).

<sup>21</sup> See generally R.C. 1306.01(G) (defining “electronic record” as meaning “a record created, generated, sent, communicated, received, or stored by electronic means”).

Rules of Superintendence for the Courts of Ohio similarly authorize a court to maintain its records in various media. *See* Sup. R. 26(D)(1) (stating, 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”).<sup>22</sup> The Rules of Superintendence also address the maintenance of court records in a manner suitable for inspection and copying. *See* 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)); 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”).

As stated in 2001 Op. Att’y Gen. No. 2001-012 at 2-68, “the fact that the information may constitute electronic data that is stored digitally has no bearing on whether it is a public record.” Thus, a court must redact information maintained in an electronic format to the same extent that it must redact information it maintains in any other medium. *See State ex rel. Highlander v. Rudduck* (court’s duty to redact social security numbers from court records before making them available to the public).

Part of your second question concerns who must bear the cost of such redaction. This issue was recently addressed in 2004 Op. Att’y Gen. No. 2004-011 at 2-86, as follows:

Although R.C. 149.43 authorizes a public office to pass on the cost of making copies of public records to the requester, it does not authorize an agency to charge a fee for making public records available for inspection. *See State ex*

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<sup>22</sup> *See also, e.g.,* 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”); 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”); Sup. R. 26.03 (stating, in part, “[a]s used in this rule, ‘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.... 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.... 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”). *See generally* Sup. R. 27 (process for “establishing uniform, minimum standards for the use of electronic documents and records in the courts of Ohio”).

*rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 624, 640 N.E.2d 174 (1994) (“[t]he right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under R.C. 149.43,” and thus, the financial burden of making a redacted copy of a public record that can be inspected by the requester may not be passed on to the requester); *State ex rel. Lemke v. Columbiana County Prosecutor’s Office*, Case No. 93-C-56, 1996 Ohio App. LEXIS 521 (Columbiana County Feb. 16, 1996) at \*3-\*4 (R.C. 149.43 “does not require payment of any sort for inspection of those public records. Hence, there certainly can be no cost of preparation passed on to the public for inspecting public records”); 2000 Op. Att’y Gen. No. 2000-046 at 2-281 (“a county recorder may not charge and collect a fee for providing Internet access to indexed public records”).

Thus, if information in a court’s electronic records must be redacted, R.C. 149.43 does not authorize either the court or the clerk of court<sup>23</sup> to pass that cost on to anyone requesting to inspect the court’s records. *See State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 624, 640 N.E.2d 174 (1994) (“the right of inspection, as opposed to the right to request copies, is not conditioned on the payment of any fee under R.C. 149.43,” and thus, the financial burden of making a redacted copy of a public record that can be inspected by the requester may not be passed on to the requester). Rather, had the General Assembly intended to authorize public offices to charge a member of the public the cost of redaction, it could easily have included language indicating that intention. *Cf.* R.C. 149.43(E)(1) (authorizing the Bureau of Motor Vehicles to adopt rules concerning bulk commercial special extraction requests and to “charge for expenses for redacting information, the release of which is prohibited by law”).

Your final question asks: “If a [court] makes public records available in a searchable format on a public web site, is the [court] relieved of [its] duty to produce a machine readable electronic copy of a public record in connection with a public record request?”

Pursuant to R.C. 149.43(B)(1), “[i]n order to facilitate broader access to public records, public offices shall maintain public records in a manner that they can be made available for inspection in accordance with this division.” A similar requirement is imposed upon public entities, including courts, by R.C. 9.01, which states, in part:

When any officer, office, [or] court ... charged with the duty or authorized or required by law to record, preserve, keep, maintain, or file any record, document, plat, *court file*, paper, or instrument in writing, or to make or furnish copies of any of them, deems it necessary or advisable, when recording or making

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<sup>23</sup> *See State ex rel. Highlander v. Rudduck*, 103 Ohio St. 3d 370, 2004-Ohio-4952, 816 N.E.2d 213 (2004) (finding that both the clerk of court and the judge who improperly ordered the sealing of the court’s records were persons responsible for those records for purposes of R.C. 149.43).

a copy or reproduction of any of them or of any such record, for the purpose of recording or copying, preserving, and protecting them, reducing space required for storage, or any similar purpose, to do so by means of any photostatic, photographic, miniature photographic, film, microfilm, or microphotographic process, or perforated tape, magnetic tape, other magnetic means, electronic data processing, machine readable means, or graphic or video display, or any combination of those processes, means, or displays, which correctly and accurately copies, records, or reproduces, or provides a medium of copying, recording, or reproducing, the original record, document, plat, court file, paper, or instrument in writing, such use of any of those processes, means, or displays for any such purpose is hereby authorized....

....

Such photographs, microphotographs, microfilms, or films shall be placed and kept in conveniently accessible, fireproof, and insulated files, cabinets, or containers, and *provisions shall be made for preserving, safekeeping, using, examining, exhibiting, projecting, and enlarging them whenever requested, during office hours.*

All persons utilizing the methods described in this section for keeping records and information *shall keep and make readily available to the public the machines and equipment necessary to reproduce the records and information in a readable form.* (Emphasis added.)

Specifically concerning the maintenance of records by a court, Sup. R. 26(D)(2)(b) states:

Records 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.)

*See also* R.C. 2303.12 (stating, in pertinent part, “[a]ll clerks [of court] 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”).

We are aware of no exception in these statutes or the Rules of Superintendence that excuses a court that makes its public records available in a searchable format on a public web site from providing any machines or equipment necessary to inspect or copy its records. Thus, in accordance with R.C. 149.43(B)(1), R.C. 9.01, and Sup. R. 26(D)(2)(b), although a court may

make its public records available in a searchable format on a public web site, the court shall also provide machines and equipment necessary to inspect and reproduce such records.<sup>24</sup>

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<sup>24</sup> As a final matter, we note that the General Assembly has created the Ohio Privacy/Public Record Access Study Committee consisting of twenty-three members from all branches and levels of government, as well as representatives of various types of media, businesses, and the legal community. *See* Sub. H.B. 204, 125th Gen. A. (2004) (eff. Nov. 5, 2004), uncodified § 3, which describes the work of this committee, in part, as follows:

(B) The Committee shall study all of the following:

(1) The concerns associated with the dissemination of personal information contained in public records, including, but not limited to, identity theft, misuse, harassment, and fraud;

(2) The legitimate uses of personal information contained in public records by businesses, governments, the legal community, and others, including, but not limited to, its use in combating identity theft and fraud;

(3) The costs to state and local governments associated with placing restrictions on access to personal information contained in public records;

(4) The impact, including costs, on legitimate businesses, law enforcement, the legal community, government agencies, and others of access restrictions placed on personal information contained in public records;

(5) The impact of protecting the disclosure of personal information contained in public records through the sealing of documents by court rule;

(6) Electronic, internet, and bulk access to personal information contained in public records;

(7) Current and potential future misuse, fraud, harassment, and identify theft prevention and detection efforts, including programs to educate the public on ways to avoid becoming victims, as well as procedures to streamline recovery;

(8) Existing criminal and civil penalties for misuse of personal information contained in public records and an examination of whether those penalties should be increased as a deterrent.

(C) The Committee shall develop a unified approach to preventing theft, fraud, and the misuse of personal information contained in public records while maintaining access and use of public records for lawful purposes. The Committee shall consult with the Supreme Court Advisory Committee on Technology and the Courts on issues relating to access to and use of court records and shall make use of work product and recommendations developed by the Advisory Committee with regard to access to and use of court records.

Uncodified § 3(D) of Sub. H.B. 204 requires the Committee to prepare a report for the General Assembly, the Chief Justice of the Supreme Court, and the Governor, describing its findings, conclusions, and recommendations. It is possible, therefore, that the Committee, in

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

1. Information of a personal nature contained in a court's criminal case files is a public record for purposes of R.C. 149.43, unless the information is not a "record" of that office or the information falls within one of the exceptions to the definition of the term "public record" set forth in R.C. 149.43(A)(1)(a)-(x).
2. Because individuals possess a constitutionally protected privacy right in their social security numbers, such numbers when contained in a court's criminal case files are not public records for purposes of R.C. 149.43.
3. Prior to releasing any information in its possession, a court has a duty to redact any information about an individual the release of which would violate the individual's constitutionally protected right of privacy and any information that is made confidential by law.
4. Whether information of a personal nature contained in a court's criminal case files is accessible to the public does not depend solely upon the terms of R.C. 149.43, but also depends upon whether the public possesses a constitutional right of access to the criminal proceedings. In proceedings to which the public possesses such right, public access to the proceedings and the information from such proceedings may be restricted, but only in order to preserve higher values, and any such restriction must be narrowly tailored to protect those higher values and to accommodate the public's right of access.
5. A court must redact information maintained in an electronic format to the same extent that it must redact information it maintains in any other medium.
6. If information in a court's electronic records must be redacted, R.C. 149.43 does not authorize either the court or the clerk of court to pass that cost on to anyone requesting to inspect the court's records.
7. In accordance with R.C. 149.43(B)(1), R.C. 9.01, and Sup. R. 26(D)(2)(b), although a court may make its public records available in a searchable format on a public web site, the court shall also provide machines and equipment necessary to inspect and reproduce such records.

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consultation with the Supreme Court Advisory Committee on Technology and the Courts, will develop a mechanism for "preventing theft, fraud, and the misuse of personal information contained in [court and other] public records while maintaining access [to] and use of public records for lawful purposes," Sub. H.B. 204, uncodified § 3(C).

The Honorable Martin Frantz

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Respectfully,

A handwritten signature in black ink, appearing to read "Jim Petro". The signature is fluid and cursive, with a prominent loop at the end.

JIM PETRO