

March 4, 2014

The Honorable Dave Yost
Auditor of State
88 East Broad Street
Columbus, Ohio 43215

The Honorable James L. Peters
Monroe County Prosecuting Attorney
101 North Main Street, Room 15
Woodsfield, Ohio 43792

SYLLABUS:

2014-009

1. For purposes of R.C. 149.43, a county auditor makes a public record available for inspection when he provides access to the public record online through the county's website.
2. A county auditor may not charge and collect a fee for making public records available for inspection on a county website.



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OPINION NO. 2014-009

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Dear Auditor Yost and Prosecutor Peters:

You have requested an opinion regarding a county auditor's authority to charge a subscription fee for online access to the county auditor's public records.¹ You explain that the Monroe County auditor has contracted with a private company to build and maintain a portal through Monroe County's website to allow online access to the county auditor's public records. The county auditor charges online users of the portal a \$15 monthly subscription fee, which equates to the cost the county auditor is charged by the private company to maintain the portal.

First, you inquire whether providing online access to the public records of a county auditor's office constitutes providing a "copy" of the records or making the records "available for inspection"

¹ The ordinary meaning of "online" is "connected to, served by, or available through a system and esp. a computer or telecommunications system (as the Internet)." *Merriam-Webster's Collegiate Dictionary* 867 (11th ed. 2005). "Internet" is defined as "the international computer network of both federal and nonfederal interoperable packet switched data networks, including the graphical subnetwork known as the world wide web." R.C. 1.59(K); *see also* 2000 Op. Att'y Gen. No. 2000-046, at 2-279 n.1 ("[t]he Internet is a collection of interconnected networks of computers that permits and enables communications between individuals, universities, governments, organizations, and businesses. By way of the Internet, these entities can send information to one another in an instant. The Internet thus is a medium for transmitting information"). For the purposes of this opinion, when we use the term "online" we understand that term to refer to electronically accessing a visual image of a public record through the Internet.

for purposes of R.C. 149.43. You further inquire whether a county auditor may charge a fee to users of the online service that is sufficient to recoup the actual cost incurred by the county auditor in contracting with a private company to build and maintain the online service.

Ohio's Public Records Law

Ohio's public records law, R.C. 149.43, governs the availability of public records and establishes the public's right to inspect and request copies of public records. *See* 2000 Op. Att'y Gen. No. 2000-046, at 2-280. R.C. 149.43(B)(1) states:

[A]ll public records responsive to [a] request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.... [U]pon request, a public office or person responsible for public records shall make copies of the requested public record available at cost and within a reasonable period of time.

The requirements of R.C. 149.43(B)(1) apply to "records kept by any public office," including records kept by "state, county, city, village, township, and school district units, and records pertaining to the delivery of educational services by an alternative school in this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to [R.C. 3313.533]," unless the record is subject to one of the exclusions delineated in the statute. R.C. 149.43(A)(1); 2001 Op. Att'y Gen. No. 2001-012, at 2-67.

"The purpose of R.C. 149.43 is to promote open government by providing persons with full access to public records." 2002 Op. Att'y Gen. No. 2002-040, at 2-258; 2000 Op. Att'y Gen. No. 2000-046, at 2-280. The Ohio Supreme Court has recognized that "[t]he Public Records Act reflects the state's policy that open government serves the public interest and our democratic system." *State ex rel. Data Trace Info. Serv. v. Cuyahoga Cnty. Fiscal Officer*, 131 Ohio St. 3d 255, 2012-Ohio-753, 963 N.E.2d 1288, at ¶26 (internal quotation marks omitted). The public records law "reinforce[s] the understanding that open access to government papers is an integral entitlement of the people, to be preserved with vigilance and vigor." *Kish v. City of Akron*, 109 Ohio St. 3d 162, 2006-Ohio-1244, 846 N.E.2d 811, at ¶17. Accordingly, the provisions of R.C. 149.43 "should generally be construed to further broad access to public records, and any doubt in that regard should be resolved in favor of disclosure." 2000 Op. Att'y Gen. No. 2000-046, at 2-280.

Accessing Public Records Online

We now turn to your first question, which asks whether providing online access to the public records of a county auditor's office constitutes providing a "copy" of the records or making the records "available for inspection" for purposes of R.C. 149.43. This question was answered in 2000 Op. Att'y Gen. No. 2000-046, which considered, *inter alia*, whether a county recorder was authorized to "charge and collect a fee for providing Internet access to indexed public records." 2000 Op. Att'y Gen. No. 2000-046, at 2-281. In concluding that a county recorder did not have authority to charge

and collect such a fee, the opinion reasoned that providing access to public records online is tantamount to making public records “available for inspection” under R.C. 149.43. *Id.*

Since the issuance of 2000 Op. Att’y Gen. No. 2000-046, there have been no amendments to R.C. 149.43 that warrant us reaching a different conclusion. Just as a public office that posts a hard-copy public record on a bulletin board makes the public record available for inspection, providing access to a public record online in an electronic format makes the public record available for inspection. In either situation, in order for a person to obtain a copy of the public record, an additional step must be taken. In the bulletin board example, a person must make a photocopy of the public record or take a photograph of the public record on the bulletin board. With respect to the public record that is made available online, in order to obtain a copy, a person must download or print a copy of the public record. In either situation, a person may choose not to visit the bulletin board or website at all; or, upon visiting, a person may choose to only view or inspect the public record, or may choose to take extra steps to make his own copy. The public office does not transmit or deliver a copy even to a visitor, merely through the act of posting the record online.

R.C. 149.43(B)(7) provides that, “[u]pon a request made in accordance with [R.C. 149.43(B)] ... a public office ... shall *transmit* a copy of a public record *to* any person by United States mail or by any other means of delivery or transmission within a reasonable period of time after receiving the request for the copy.” (Emphasis added.) This language indicates that, when so requested, a public office must directly transmit a copy of a particular public record to the person who requested the copy. When the image of a public record is accessed online, the public office does not transmit a particular copy of a public record to a particular person. Rather, in posting a public record online, the public office has made the public record available for inspection by the public-at-large. *But see State ex rel. Patton v. Rhodes*, 129 Ohio St. 3d 182, 2011-Ohio-3093, 950 N.E.2d 965, at ¶15-20 (recognizing that R.C. 149.43(B)(1) does not require a public office to post public records online, yet holding that where the requester gave posting the records online as an acceptable response, the court of appeals did not abuse its discretion in denying a request for attorney’s fees and damages under R.C. 149.43(C)(1) because “the county auditor satisfied [the requester’s] request for copies of the financial reports – by posting them online – within the ‘reasonable period of time’ specified in R.C. 149.43(B)(1)”).

Thus, the actions that are necessary for a person to obtain a copy of a public record from a county website originate with and must be undertaken by the requester. Accordingly, we conclude that for purposes of R.C. 149.43, a county auditor makes a public record available for inspection when he provides access to the public record online through the county’s website.

County Auditor’s Authority to Charge a Fee for Accessing Public Records Online

We now turn to your second question, which asks whether a county auditor may charge a fee to individuals who access public records online. A county auditor is a creature of statute and may “exercise only such powers as are expressly delegated by statute, together with such implied powers as are necessary to carry into effect the powers expressly delegated.” *State ex rel. Kuntz v. Zangerle*, 130 Ohio St. 84, 89, 197 N.E. 112 (1935). “[T]he powers of a county auditor are fixed by statute, and

the auditor ‘may not exceed the authority granted that office by the General Assembly.’” 2012 Op. Att’y Gen. No. 2012-035, at 2-311 (quoting 1984 Op. Att’y Gen. No. 84-005, at 2-15). Moreover, “‘absent statutory authority, a county official may not charge a fee for services that he or his office provides.’” 2012 Op. Att’y Gen. No. 2012-035, at 2-311 (quoting 2006 Op. Att’y Gen. No. 2006-036, at 2-333). Insofar as making public records available for inspection is a service of a county auditor’s office, we must determine whether a statute authorizes a county auditor to charge a fee for making public records available for inspection online through the county’s website.

R.C. 149.43(B)(1) requires a public office upon request to promptly prepare and make available for inspection all public records that are responsive to a request and to “make copies of the requested public record available at cost and within a reasonable time.” As we have determined above, a county auditor that offers access to public records on his office’s website makes a public record available for inspection. R.C. 149.43(B) does not authorize a county auditor to charge and collect a fee for that service. An important distinction exists between providing a “copy” of a public record and making a public record “available for inspection.” “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.” *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 624, 640 N.E.2d 174 (1994); 2004 Op. Att’y Gen. No. 2004-011, at 2-86 (“[a]lthough 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”).² No other statutory provision authorizes a county auditor to charge a fee for making public records available for inspection on a county website. *See* R.C. 319.54 (fees to compensate the county auditor for services); R.C. 319.61(C)(4) (county auditor’s authority to charge a fee for each copy of a resolution, ordinance, entry, order, or certificate filed in the county auditor’s office that relates to special assessments imposed for public improvement projects). Therefore, a county auditor may not charge and collect a fee for making public records available for inspection on a county website.

² A person who inspects a public record posted on the website of a public office may decide to save an electronic image of the public record within a memory component of his computer, print an image of the public record by means of a printer attached to his computer, or both. We reject the idea that, in either of those instances, the person, by his actions, makes a request for a copy of a public record, and further, that the public office makes and furnishes to him a copy of the public record, as understood by R.C. 149.43(B). *See* 2004 Op. Att’y Gen. No. 2004-011, at 2-86 (“[r]eading R.C. 317.32(I) [now R.C. 317.32(G)] and R.C. 149.43 together, we conclude that, a county recorder has no authority to impose a fee upon a member of the public who is using his own digital camera or imaging equipment to make copies of documents in the recorder’s office”).

Conclusions

It is, therefore, my opinion, and you are hereby advised that:

1. For purposes of R.C. 149.43, a county auditor makes a public record available for inspection when he provides access to the public record online through the county's website.
2. A county auditor may not charge and collect a fee for making public records available for inspection on a county website.

Very respectfully yours,

A handwritten signature in blue ink that reads "Michael Dewine". The signature is written in a cursive style with a large initial 'M' and a long, sweeping tail.

MICHAEL DEWINE
Ohio Attorney General