

OPINION NO. 81-038**Syllabus:**

1. The Ohio Civil Rights Commission is not expressly required to maintain in its files any specific information regarding Commission employees. In order to fulfill its statutory duties under R.C. Chapter 124 and R.C. 4112.04, however, the Commission should retain in its files employee information relating to sick leave, vacation time, health insurance, retirement, tax and payroll deductions, and civil service status, as well as any other employee information that is necessary and relevant to the functions that the Commission is required or authorized to perform.
2. With the exception of confidential law enforcement investigatory records, trial preparation records, records pertaining to adoption, probation and parole proceedings, medical records and records the release of which is prohibited by state or federal law, records which normally would be maintained by the Commission in employee personnel files constitute public records as defined by R.C. 149.43, and as such must be disclosed to members of the general public upon request.
3. In responding to a request made by a member of the general public, pursuant to R.C. 149.43, to inspect and copy information maintained in Commission employee personnel files, the Commission may refuse to disclose confidential law enforcement investigatory records, trial preparation records, records pertaining to adoption, probation and parole proceedings, medical

records and records the release of which is prohibited by state or federal law.

4. With the exception of confidential law enforcement investigatory records, trial preparation records and adoption records, the Commission, pursuant to R.C. 1347.08, must disclose to an employee who is the subject of such information all employee personnel information that is subject to the provisions of R.C. Chapter 1347 (the Privacy Act), including medical records and records the release of which is prohibited by state or federal law, unless state or federal law expressly prohibits disclosure of such information even to the person who is the subject of the information. If, however, it is determined that the disclosure of medical records to the employee may have an adverse effect upon the employee, the Commission must disclose the medical records to a physician, psychiatrist or psychologist designated by the employee, rather than to the employee himself.

To: Robert Brown, Executive Director, Ohio Civil Rights Commission, Columbus, Ohio

By: William J. Brown, Attorney General, July 10, 1981

I have before me the request of your predecessor for an opinion on the following questions:

1. Under what circumstances must the Commission disclose matters contained in the personnel files of its employees?
2. What privileges, if any, may the Commission rely on in refusing to disclose the contents of such files?
3. What matters, documents or records, if any, under law must be maintained by the Commission in employee personnel files?

You have not indicated in your request what information is now maintained by the Commission in its employee personnel files. In your third question, however, you have inquired what information must, by law, be kept in such personnel files. Therefore, in order to fully respond to your first two questions, I will first discuss your third question.

There is no statute which expressly requires the Commission to maintain employee personnel files, or which expressly designates what employee information must be kept. R.C. 4112.04(A)(3), however, provides that the Commission shall "[a]ppoint hearing examiners and other employees and agents as it may deem necessary and prescribe their duties subject to Chapter 124. of the Revised Code." Thus, one of the statutory duties of the Commission is the appointment and maintenance of a staff of necessary employees in accordance with the provisions of R.C. Chapter 124, Ohio's civil service statutes.

In order to fulfill this statutory duty, it is essential that the Commission maintain, in its files, certain information regarding employees. For example, records relating to sick leave used and accrued (R.C. 124.38), records relating to vacation time used and accrued (R.C. 121.161), records pertaining to health insurance (R.C. 124.82), records relating to the Public Employees Retirement System (R.C. Chapter 145), cumulative attendance records, tax and payroll deduction information, and cumulative records of the employees' civil service status directly relate to the Commission's duties as an appointing authority, and thus, should be included in Commission files. In addition, it may be necessary for the Commission to maintain in its files other information regarding employees, such as employee addresses and phone numbers.

The determination as to what other specific employee information need be compiled and maintained by the Commission is, of course, a factual determination which must be made by the Commission itself in light of its statutory duties and administrative needs. In collecting and maintaining such employee information, however, the Commission is subject to the provisions of R.C. Chapter 1347; Ohio's Privacy Act.

R.C. Chapter 1347 governs the collection, maintenance and use of "personal information" by a "state agency," which, by definition, includes a commission of the state.¹ R.C. 1347.01(A). R.C. 1347.05 provides, in pertinent part, as follows:

Every state or local agency that maintains a personal information system shall:

. . . .

(H) Collect, maintain, and use only personal information that is necessary and relevant to the functions that the agency is required or authorized to perform by statute, ordinance, code, or rule and eliminate personal information from the system when it is no longer necessary and relevant to those functions.

"Personal information" is defined by R.C. 1347.01(E) as any information that "describes anything about a person, or that indicates actions done by or to a person, or that indicates that a person possesses certain personal characteristics, and that contains, and can be retrieved from a system by, a name, identifying number, symbol, or other identifier assigned to a person."

Information regarding employees of the Commission clearly constitutes "personal information" as defined by R.C. 1347.01(E). Consequently, if the Commission is to be in compliance with the provisions of R.C. 1347.05(H), the Commission may collect and maintain only such personal information regarding Commission employees as is necessary and relevant to the functions that the Commission is required or authorized by law to perform.

Such employee information would normally be kept in employee personnel files in order to promote administrative efficiency. As previously mentioned, however, there is no requirement that the Commission establish employee personnel files and keep employee information only in such files. Regardless of whether employee information is retained in a personnel file or elsewhere, the Commission, in order to comply with the provisions of R.C. Chapter 1347, may collect and maintain only that employee information that is necessary and relevant to the functions that the Commission is required or authorized to perform.

¹Pursuant to R.C. 1347.04(A)(1)(a), governmental agencies that perform as their "principal function any activity relating to the enforcement of the criminal laws" are exempt from the provisions of R.C. Chapter 1347. Pursuant to R.C. 1347.04(A)(1)(e), "personal information systems that are comprised of investigatory material compiled for law enforcement purposes by agencies that are not described in divisions (A)(1)(a) and (A)(1)(d) of the section" are exempt from the provisions of R.C. Chapter 1347. Since the Commission does not perform as its principal function any activity relating to the enforcement of the criminal laws, and since employee personnel information normally would not constitute investigatory material compiled for law enforcement purposes, R.C. 1347.04(A)(1)(a) would not serve to exempt the Commission from compliance with R.C. Chapter 1347, and R.C. 1347.04(A)(1)(e) would not serve to exempt employee personnel information from the provisions of R.C. Chapter 1347. See generally 1980 Op. Att'y Gen. No. 80-096.

In answer to your first question, then, it is my opinion that the Commission is not expressly required to maintain in its files any specific information regarding Commission employees. In order to fulfill its statutory duties under R.C. 4112.04 and R.C. Chapter 124, however, the Commission should retain in its files employee information relating to sick leave, vacation time, health insurance, retirement, tax and payroll deductions, and civil service status, and such other information as is necessary and relevant to the functions that the Commission is required or authorized to perform.

I turn now to a discussion of your first and second questions, in which you have inquired under what circumstances matters contained in employee personnel files must be disclosed, and upon what privileges the Commission may rely in refusing such disclosure.

Disclosure of records maintained by a governmental agency is governed primarily by R.C. 149.43, Ohio's public records statute, and R.C. Chapter 1347, Ohio's Privacy Act. R.C. 149.43 provides, in pertinent part, as follows:

(A) As used in this section:

(1) "Public record" means any record that is required to be kept by any governmental unit, including, but not limited to, state, county, city, village, township, and school district units, except medical records, records pertaining to adoption, probation, and parole proceedings, trial preparation records, confidential law enforcement investigatory records, and records the release of which is prohibited by state or federal law.

. . . .

(B) All public records shall be promptly prepared and made available to any member of the general public at all reasonable times for inspection. Upon request, a 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, governmental units shall maintain public records in such a manner that they can be made available for inspection in accordance with this division.

Pursuant to R.C. 149.43, the general public is entitled to access to all records in the possession of governmental agencies that are "required to be kept" and are not designated as confidential by law. Thus, if the employee records or information maintained by the Commission are "required to be kept," and are not made confidential by law, the general public is entitled to access to such records.

As I discussed in 1980 Op. Att'y Gen. No. 80-096, a determination of the precise meaning of the term "required to be kept" has proved difficult. In 1976, the Ohio Supreme Court, in Dayton Newspapers, Inc. v. Dayton Daily News, 45 Ohio St. 2d 107, 108-09, 341 N.E.2d 576, 577 (1976), concluded that the term, "required to be kept," included "any record which but for its keeping the governmental unit could not carry out its duties and responsibilities." The language employed by the court in subsequent cases, however, created some question as to the continued viability of the Dayton standard. See State ex rel. Citizens' Bar Association v. Gagliardo, 55 Ohio St. 2d 70, 378 N.E.2d 153 (1978); State ex rel. Milo's Beauty Supply Co. v. State Board of Cosmetology, 49 Ohio St. 2d 245, 361 N.E.2d 444 (1977).

In Op. No. 80-096, I had the opportunity to consider, in detail, the question of the continued viability of the Dayton standard. In that opinion, I concluded, after a thorough analysis of the foregoing cases, that "the statement of the law set forth in the syllabus of Dayton Daily News still applies, and that a record is 'required to be kept' by a governmental unit, within the meaning of R.C. 149.43, where the unit's keeping of such record is necessary to the execution of its duties and responsibilities." Op. No. 80-096. Consequently, the records and information regarding employees maintained by the Commission must be deemed to be

"required to be kept," as that term is used in R.C. 149.43, if such records are necessary to the execution of the Commission's duties and responsibilities.

As I previously discussed, in order for the Commission to fulfill its statutory duties under R.C. Chapter 124 and R.C. 4112.04, the maintenance of certain employee information is essential. Moreover, as I concluded in response to your third question, the information concerning Commission employees constitutes "personal information" as defined in R.C. Chapter 1347. R.C. 1347.05 requires those government agencies that are subject to the provisions of R.C. Chapter 1347 to maintain only that personal information "that is necessary and relevant to the functions that the agency is required or authorized to perform by statute." R.C. 121.21 further requires a state agency to create and preserve "only such records as are necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency" (emphasis added). As I discussed in Op. No. 80-096, the similarity of the standards set forth in R.C. 1347.05 and R.C. 121.21 to the "required to be kept" standard as interpreted in Dayton Daily News is readily apparent. Thus, if a record is necessary to an agency's functions and duties, it is, unless otherwise designated as confidential, a public record. Therefore, if, in the face of a request to inspect records, a governmental agency attempts to argue that the record is not required to be kept, such an assertion is an implicit admission that the agency has violated R.C. 1347.05, R.C. 121.21, or both.

On the basis of these two observations, I must conclude that the records concerning Commission personnel are necessary and relevant to the performance of the Commission's statutory duties, and, therefore, are records "required to be kept" within the meaning of R.C. 149.43. As such, each record so maintained is a public record unless it is specifically made confidential by law.

Pursuant to R.C. 149.43, records required to be kept by a governmental unit are not public records if the records are medical records, trial preparation records, confidential law enforcement investigatory records, records pertaining to adoption, probation or parole, or records designated as confidential by state or federal law. Personnel records which would normally be maintained by the Commission in its files usually would not constitute "trial preparation records," "law enforcement investigatory records" or "records pertaining to adoption, probation, or parole proceedings," as those terms are defined in R.C. 149.43.² It is possible, however, that employee "medical records" would be maintained by the Commission in its files.

R.C. 149.43(A)(3) defines a "medical record" as "any document or combination of documents, except births, deaths, and the fact of admission to or discharge from a hospital, that pertains to the medical history, diagnosis, prognosis, or medical condition of a patient and that is generated and maintained in the process of medical treatment." Such "medical records" do not constitute public records and, therefore, are not required to be disclosed to members of the general public pursuant to R.C. 149.43(B). Thus, the Commission may refuse to disclose to a member of the general public any employee record which constitutes a "medical record" as defined by R.C. 149.43(A)(3).

²If for some reason the Commission does maintain in its employee personnel files records which constitute "trial preparation records," "confidential law enforcement investigatory records" or "records pertaining to adoption, probation, or parole proceedings," as defined in R.C. 149.43, such records would not constitute public records and would not be subject to disclosure to the general public. However, it should be noted, as was discussed in answer to your third question, that, pursuant to R.C. Chapter 1347, the Commission should collect and maintain only information that is necessary and relevant to the functions the Commission is required or authorized to perform.

Additionally, the Commission may refuse to disclose to the general public any employee record, "the release of which is prohibited by state or federal law." I am not aware of any state or federal law which would restrict or prohibit the release of employee information or records such as records relating to sick leave, vacation time, health insurance or civil service status. I am unable to conclude in the abstract, however, that there may never be any employee information maintained by the Commission in its personnel files, the release of which is expressly prohibited by state or federal law. Clearly, if such information is ever maintained by the Commission in its personnel files, such information is excepted from disclosure as a public record under R.C. 149.43. Consequently, it is my opinion that, with the exception of confidential law enforcement investigatory records, trial preparation records, records pertaining to adoption, probation or parole proceedings, medical records and records the release of which is prohibited by state or federal law, the employee information or records maintained by the Commission constitute public records pursuant to R.C. 149.43, and as such must be disclosed to members of the general public upon request.

Pursuant to R.C. 1347.08, however, the Commission must disclose even medical records and records the release of which is prohibited by state or federal law to an employee who is the subject of such records. R.C. 1347.05 provides, in pertinent part, as follows:

(A) Every state or local agency that maintains a personal information system, upon the request and the proper identification of any person who is the subject of personal information in the system, shall:

. . . .

(2) Except as provided in divisions (C) and (E)(2) of this section, permit the person, his legal guardian, or an attorney who presents a signed written authorization made by the person, to inspect all personal information in the system of which he is the subject;

. . . .

(C) A state or local agency, upon request, shall disclose medical, psychiatric, or psychological information to a person who is the subject of the information or to his legal guardian, unless a physician, psychiatrist, or psychologist determines for the agency that the disclosure of the information is likely to have an adverse effect on the person, in which case the information shall be released to a physician, psychiatrist, or psychologist who is designated by the person or by his legal guardian.

. . . .

[E](2) This section does not provide a person who is the subject of personal information maintained in a personal information system, his legal guardian, or an attorney authorized by the person, with a right to inspect or have copied, or require an agency that maintains a personal information system to permit the inspection of or to copy, a confidential law enforcement investigatory record or trial preparation record, as those terms are defined in divisions (A)(2) and (4) of section 149.43 of the Revised Code.

(F) This section does not apply to the papers, records, and books pertaining to an adoption, which under section 3107.17 of the Revised Code are subject to inspection only upon consent the court. (Emphasis added.)

There is no provision in R.C. Chapter 1347, similar to that found in R.C. 149.43(A)(1), which prohibits access to information otherwise made confidential under state or federal law. Thus, with the exception of confidential law enforcement records, trial preparation records and adoption records, the Commission must disclose all employee information which is subject to the

provisions of R.C. Chapter 1347, including medical records and records the release of which is prohibited by state or federal law,³ to an employee who is the subject of such information. It should be noted, however, that R.C. 1347.08(C) provides that if a physician, psychiatrist or psychologist determines that the disclosure of medical, psychiatric or psychological information to the individual who is the subject of such information would have an adverse effect upon the individual, such information shall be released to a physician, psychiatrist, or psychologist designated by the individual, rather than to the individual himself.

In specific answer to your questions, then, it is my opinion, and you are so advised, that:

1. The Ohio Civil Rights Commission is not expressly required to maintain in its files any specific information regarding Commission employees. In order to fulfill its statutory duties under R.C. Chapter 124 and R.C. 4112.04, however, the Commission should retain in its files employee information relating to sick leave, vacation time, health insurance, retirement, tax and payroll deductions and civil service status, as well as any other employee information that is necessary and relevant to the functions that the Commission is required or authorized to perform.
2. With the exception of confidential law enforcement investigatory records, trial preparation records, records pertaining to adoption, probation and parole proceedings, medical records and records the release of which is prohibited by state or federal law, records which normally would be maintained by the Commission in employee personnel files constitute public records as defined by R.C. 149.43, and as such must be disclosed to members of the general public upon request.
3. In responding to a request made by a member of the general public, pursuant to R.C. 149.43, to inspect and copy information maintained in Commission employee personnel files, the Commission may refuse to disclose confidential law enforcement investigatory records, trial preparation records, records pertaining to adoption, probation and parole proceedings, medical records and records the release of which is prohibited by state or federal law.
4. With the exception of confidential law enforcement investigatory records, trial preparation records and adoption records, the Commission, pursuant to R.C. 1347.08, must disclose to an employee who is the subject of such information all employee personnel information that is subject to the provisions of R.C. Chapter 1347 (the Privacy Act), including medical records and records the release of which is prohibited by state or federal law, unless state or federal law expressly prohibits disclosure of such information even to the person who is the subject of the information. If, however, it is determined that the disclosure of medical records to the employee may have an adverse effect upon the employee, the Commission must disclose the medical records to a physician, psychiatrist or psychologist designated by the employee, rather than to the employee himself.

³Of course, if state or federal law expressly prohibits the release of the information even to the person who is the subject of the information, such information may not be disclosed pursuant to R.C. Chapter 1347 to the person who is the subject of the information.