OPINION NO. 2000-046

Syllabus:

1. A county recorder who makes indexed public records available for inspection during regular business hours may grant the public additional access to such records through the Internet, provided that making the public records available in that manner neither endangers the records nor interferes with the discharge of the recorder's duties.

2. A county recorder may not charge and collect a fee for providing Internet access to indexed public records.

3. A county recorder may not charge and collect the fee prescribed by R.C. 317.32(I) for photocopying a document when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains.

4. A county recorder may not limit Internet access to indexed public records to real estate title companies.

To: Dennis Watkins, Trumbull County Prosecuting Attorney, Warren, Ohio
By: Betty D. Montgomery, Attorney General, December 29, 2000

You have requested an opinion concerning the posting of public records on the Internet[1] by a county recorder. Specifically, you ask:

1. May a county recorder post indexed public records on the Internet?

2. Must a county recorder charge and collect a fee for providing Internet access to indexed public records?

3. Must a county recorder charge and collect the fee prescribed by R.C. 317.32(I) when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains?

4. May a county recorder limit Internet access to indexed public records to real estate title companies?

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[1]The 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. *See* F. Lawrence Street & Mark P. Grant, *Law of the Internet*, xxviii, xxx-xxxi (1999); George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999).

Let us begin with your first question, which asks whether a county recorder may post indexed public records on the Internet. R.C. 149.43 establishes the public's right of access to "public records."[2] Pursuant to R.C. 149.43(B)(1), all public records in the custody of a county recorder are to "be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours." *Accord* 1994 Op. Att'y Gen. No. 94-006.

The Ohio Supreme Court has consistently held that the purpose of R.C. 149.43 is to promote open government by providing persons with full access to public records. *See State ex rel. Schneider v. Kreiner*, 83 Ohio St. 3d 203, 205, 699 N.E.2d 83, 84 (1998); *State ex rel. The Miami Student v. Miami Univ.*, 79 Ohio St. 3d 168, 171, 680 N.E.2d 956, 959 (1997), *cert. denied*, 522 U.S. 1022 (1997). *See generally State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d 619, 623, 640 N.E.2d 174, 178 (1994) ("[i]n Ohio, public records are the people's records, and officials in whose custody they happen to be are merely trustees for the people"). R.C. 149.43 thus should generally be construed to further broad access to public records, and any doubt in that regard should be resolved in favor of disclosure. *State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d at 621, 640 N.E.2d at 177; *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St. 3d 170, 173, 527 N.E.2d 1230, 1232 (1988), *reh'g denied*, 39 Ohio St. 3d 603, 529 N.E.2d 1271 (1988).

The Ohio Supreme Court has stated that a custodian of public records may grant greater access to those records than is prescribed by R.C. 149.43(B). As explained in *State ex rel. Fenley v. Ohio Historical Soc.*, 64 Ohio St. 3d 509, 512, 597 N.E.2d 120, 123 (1992), *reh'g denied*, 65 Ohio St. 3d 1436, 600 N.E.2d 679 (1992):

> R.C. 149.43(B) establishes a standard with which custodians of public records must comply: to make the records available for inspection during business hours and to make copies available at cost. But, the statute also affords a measure of discretion, which this court has held to govern the method of compliance. Thus, *a custodian of public records who complies with the access requirements specified in R.C. 149.43(B) should have some discretion to determine what if any additional access he or she will permit.* (Emphasis added and citations omitted.)

Accordingly, a county recorder who makes those indexed public records in his custody available for inspection to any person at all reasonable times during regular business hours is vested with discretion to determine whether he will permit additional access to such records through the Internet. *See id.*

A county recorder's exercise of discretion in this regard is not unlimited, however. Any exercise of discretion by a county recorder must be reasonable. *See generally State ex rel. Kahle v. Rupert*, 99 Ohio St. 17, 19, 122 N.E. 39, 40 (1918) ("[e]very officer of this state or any subdivision thereof not only has the authority but is required to exercise an intelligent discretion in the performance of his official duty"). Thus, before a county recorder may permit indexed public records in his custody to be accessed by way of the Internet, the recorder must ensure that making the records accessible in this manner will not endanger the safety of any records or unreasonably interfere with the discharge of his duties. *See State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d at 623, 640 N.E.2d at 178; *State*

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[2]For purposes of R.C. 149.43, the term "public record" means, with certain exceptions, "any record that is kept by any public office, including, but not limited to, state, county, city, village, township, and school district units." R.C. 149.43(A)(1).

ex rel. Patterson v. Ayers, 171 Ohio St. 369, 171 N.E.2d 508 (1960). If a county recorder determines that such access does not endanger the records and does not interfere with the discharge of his duties, the recorder may permit the public to access indexed public records through the Internet.

Your second question asks whether a county recorder must charge and collect a fee for providing Internet access to indexed public records. As a creature of statute, a county recorder possesses only those powers that are prescribed by statute, and such powers as may be necessarily implied in order to exercise an express power. *State ex rel. Preston v. Shaver*, 172 Ohio St. 111, 114, 173 N.E. 2d, 758, 760 (1961); 1989 Op. Att'y Gen. No. 89-051 at 2-216; 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451, at 452. In accordance with this principle, a county recorder may not charge a fee for a particular service absent express or implied statutory authority to do so. 1999 Op. Att'y Gen. No. 99-012 at 2-101.

No statute expressly or by necessary implication authorizes a county recorder to charge and collect a fee for providing Internet access to the indexed public records in his custody. *See generally* R.C. 317.32 (fees that a county recorder may charge and collect for services he renders). Instead, R.C. 149.43(B) provides that public records are to be "made available for inspection to any person at all reasonable times during regular business hours[,]" and a custodian of public records "shall make copies [of such records] available at cost." There is no indication in this language that a person must pay a fee in order for public records to be made available for inspection, regardless of whether the person is inspecting the original document or some reproduction thereof. *See generally State ex rel. Athens County Property Owners Ass'n v. Athens*, 85 Ohio App. 3d 129, 131-32, 619 N.E.2d 437, 439 (Athens County 1992) ("[a]ccess to public records is a matter of right"). To the contrary, it appears that a person may inspect public records for free, and must pay for any copies requested. *See State ex rel. The Warren Newspapers, Inc. v. Hutson*, 70 Ohio St. 3d at 624, 640 N.E.2d at 178 ("[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"). Therefore, a county recorder may not charge and collect a fee for providing Internet access to indexed public records.

Your third question asks whether a county recorder must charge and collect the fee prescribed by R.C. 317.32(I) when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains. R.C. 317.32, in general, sets forth the fees a county recorder is required to charge and collect for his services. R.C. 317.32(I) states that, except at the time of recording and indexing a document as provided in R.C. 317.32(A), a county recorder shall charge and collect one dollar per page for photocopying a document.

Prior opinions of the Attorneys General that have examined a county recorder's duty to charge and collect the fees prescribed in R.C. 317.32 have concluded that the language used in R.C. 317.32 indicates that the duties described in that statute are mandatory. 1994 Op. Att'y Gen. No. 94-006 at 2-22; 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451. A county recorder who performs the service described in R.C. 317.32(I) thus is required to charge the corresponding fee prescribed by statute for that service. 1994 Op. Att'y Gen. No. 94-006 at 2-22; *see* 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451. "Because R.C. 317.32(I) contains no exception to the charging of fees for the service described therein, the county recorder has no authority to create such exception." 1994 Op. Att'y Gen. No. 94-006 at 2-22; *see* 1936 Op. Att'y Gen. No. 5383, vol. I, p. 451. Accordingly, for photocopying a document, other than at the time of recording and indexing a document as provided in R.C. 317.32(A), a county recorder must charge and collect from all persons, without exception, the fee prescribed by R.C. 317.32(I).

No statute defines "photocopying," for purposes of R.C. 317.32, and so we shall construe it according to its plain and ordinary meaning. *See* R.C. 1.42. The dictionary defines the noun "photocopy" as "a copy of printed or other graphic material made by a device (**photocopier**) which photographically reproduces the original." *Webster's New World Dictionary* 1072 (2nd college ed. 1986) (bold in original). As a transitive verb, "photocopy" means "to make a photocopy of." *Id.* Thus, used in R.C. 317.32(I) as a gerund, "photocopying" is the making of a copy of printed or other graphic material by way of a photocopier or other device that photographically reproduces the original. Accordingly, a county recorder may charge and collect the fee prescribed by R.C. 317.32(I) only when he makes a copy of a record in his custody by way of a photocopier or other device that photographically reproduces the original record. *See generally* 1999 Op. Att'y Gen. No. 99-012 at 2-101 (a county officer may not charge a fee for a particular service unless he has express or implied authority to do so).

When a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains, the county recorder does not provide the service of photocopying the original indexed public record for the person. No photocopier or similar device, photocopying supplies, or personnel of the county recorder's office are used in making a copy of the record. Instead, the record is converted electronically into a digital format that is then separated into small data packets. *See* F. Lawrence Street & Mark P. Grant, *Law of the Internet*, xxxiv (1999); George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999). The data packets are then transmitted via a telecommunication line from the recorder's office to their intended destination. *See* F. Lawrence Street & Mark P. Grant, *Law of the Internet*, xxxiv (1999); George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999). When all of the data packets reach their intended destination, they are reassembled,[3] and the printer attached to the destination computer produces a copy of the original indexed public record in printed or typewritten form. *See* George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999).

A county recorder thus does not make a photocopy of an original indexed public record when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains. In that situation, therefore, a county recorder is not entitled to charge and collect the fee that is prescribed by R.C. 317.32(I) for photocopying a document. *See* 1999 Op. Att'y Gen. No. 99-012 at 2-101.

This conclusion is buttressed further by the fact that when the language of R.C. 317.32(I) requiring a county recorder to charge and collect a fee for photocopying a document was enacted in 1994, *see* 1993-1994 Ohio Laws, Part IV, 7622, 7629 (Am. Sub. H.B. 790, eff. Sept. 12, 1994), the technology for transmitting digital data from one location to another via the Internet was not common or widespread. *See* F. Lawrence Street & Mark P. Grant, *Law of the Internet*, xxxii (1999); George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999). Since 1994, however, use of the Internet to gain access to information has grown tremendously. *See* F. Lawrence Street & Mark P. Grant, *Law of the Internet*, xxxii (1999); George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999). It has been estimated that sixty-six million people worldwide currently use the Internet and that the

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[3]If a data packet does not arrive or is corrupted, the destination computer will request the originating computer to retransmit the data packet. George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999).

number of people using the Internet will double each year. George B. Delta & Jeffrey H. Matsuura, *Law of the Internet* § 1.02 (1999).

Thus, in 1994, the number of people accessing information via the Internet was relatively small. The reasonable presumption, therefore, is that the General Assembly, when it enacted R.C. 317.32(I), did not contemplate that indexed public records in the custody of a county recorder would be accessed by way of the Internet. *See generally Miller v. Fairley*, 141 Ohio St. 327, 48 N.E.2d 217 (1943) (syllabus, paragraph two) ("[s]tatutes are to be read in the light of attendant circumstances and conditions, and are to be construed as they were intended to be understood, when they were passed"). Moreover, as explained above, the purpose of R.C. 317.32(I) is to authorize county recorders to charge and collect a fee for providing photocopying services. When a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains, a county recorder is not required to perform any services in relation to the making of the copy of the record for that person. It thus appears that the General Assembly did not intend for a county recorder to collect in that circumstance the fee prescribed in R.C. 317.32(I) for photocopying a document. *See generally Rice v. CertainTeed Corp.*, 84 Ohio St. 3d 417, 419, 704 N.E.2d 1217, 1218 (1999) (when determining legislative intent, a court examines the statute's language and purpose).[4] Therefore, a county recorder may not charge and collect the fee prescribed by R.C. 317.32(I) for photocopying a document when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains.

Your final question asks whether a county recorder may limit Internet access to indexed public records to real estate title companies. As explained above, R.C. 149.43(B) vests a county recorder with the discretion to determine whether he will permit the public additional access to indexed public records through the Internet. This statute does not, however, vest a county recorder with the authority to make distinctions as to who is to be granted such additional access.

To the contrary, R.C. 149.43(B) states that public records "shall be promptly prepared and made available for inspection to *any* person at all reasonable times during regular business hours." (Emphasis added.) Where a statute uses the word "any" to modify a noun without selection, distinction, or limitation, it is presumed that the legislative intent is that the noun modified by "any" be treated as a whole class without division into smaller classes, and that "any" may be equated to mean "all" or "every" in that context, especially where the statute uses mandatory language. 1991 Op. Att'y Gen. No. 91-033 at 2-181; 1990 Op. Att'y Gen. No. 90-085 at 2-366; 1990 Op. Att'y Gen. No. 90-050 at 2-209; *see Motor Cargo, Inc. v. Board of Township Trustees of Richfield Township*, 52 Ohio Op. 257, 259, 117 N.E.2d 224, 227 (C.P. Summit County 1953).

The Ohio Supreme Court has held that the language of R.C. 149.43(B) is mandatory in nature. Thus, a county recorder is required to make public records in his custody available for inspection to the public. *State ex rel. The Warren Newspapers, Inc. v. Hutson*; *State ex rel.*

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[4]*But cf.* 1933 Op. Att'y Gen. No. 167, vol. I, p. 194, at 196 ("[e]ven though the ordinary conception of printing at the time of the enactment of section 2778 [now R.C. 317.32] involves reproduction by the use of pressure, it does not follow that a new and different method of obtaining the same result is not within the meaning of the term. It is a well settled principle that the law becomes applicable to new inventions as new inventions come into use, without the same being especially included").

Fenley v. Ohio Historical Soc. See generally Dorrian v. Scioto Conservancy Dist., 27 Ohio St. 2d 102, 271 N.E.2d 834 (1971) (syllabus, paragraph one) ("[i]n statutory construction ... the word 'shall' shall be construed as mandatory unless there appears a clear and unequivocal intent that [it] receive a construction other than [its] ordinary usage"). Accordingly, "any" modifying "person" in R.C. 149.43(B)(1) should be read to mean "all" or "every." *See* 1990 Op. Att'y Gen. No. 90-050 at 2-209 and 2-210 ("[t]he express statement of intent of the Public Records Act, as stated in R.C. 149.43(B), 'to facilitate broader access to public records,' coupled with the lack of a definition of 'person' more restrictive than that in R.C. 1.59, allows any or all persons ... to inspect and receive copies of public records").

Because R.C. 149.43(B) requires a county recorder to permit all persons access to public records, a county recorder is granted no discretion in determining who is entitled to additional access to such records through the Internet. Once a county recorder chooses to grant additional access to indexed public records through the Internet, he is required by R.C. 149.43(B) to grant such additional access to all persons. *See generally* 1990 Op. Att'y Gen. No. 90-050 at 2-210 (the public's right to inspect public records may not be restricted as to the purpose of the inspection or the use to be made of the records); 1982 Op. Att'y Gen. No. 82-104 at 2-285 (same); 1974 Op. Att'y Gen. No. 74-097 (same). Accordingly, a county recorder may not limit Internet access to indexed public records to real estate title companies.

In conclusion, it is my opinion, and you are hereby advised as follows:

1. A county recorder who makes indexed public records available for inspection during regular business hours may grant the public additional access to such records through the Internet, provided that making the public records available in that manner neither endangers the records nor interferes with the discharge of the recorder's duties.

2. A county recorder may not charge and collect a fee for providing Internet access to indexed public records.

3. A county recorder may not charge and collect the fee prescribed by R.C. 317.32(I) for photocopying a document when a person accesses an indexed public record by way of the Internet and prints a copy of the record on a computer printer that the recorder neither operates nor maintains.

4. A county recorder may not limit Internet access to indexed public records to real estate title companies.