

**OPINION NO. 79-023****Syllabus:**

As used in R.C. 149.99, "each offense" means each transaction which results in the removal, destruction, mutilation, transfer, or other disposal of records, or other damage to records, in violation of R.C. 149.351.

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**To: Frank R. Levstik, Secretary, State Records Commission, Ohio Historical Society, Columbus, Ohio**  
**By: William J. Brown, Attorney General, May 24, 1979**

I have before me your request for my opinion which raises the following question:

O.R.C. 149.99 provides that "whoever violates section 149.43 or 149.351 of the Revised Code shall forfeit not more than one hundred dollars for each offense to the state. The Attorney General shall collect the same by civil action." The question is: What constitutes "each offense" to the state? Is it the removal, destruction, mutilation, or transfer of a single document, device or item or does it constitute a larger amount of records disposal?

R.C. 149.351 prohibits the destruction or damage of government records in the following terms:

All records as defined in section 149.40 of the Revised Code and required by section 121.21 of the Revised Code are the property of the agency concerned and shall not be removed, destroyed, mutilated, transferred, or otherwise damaged or disposed of, in whole or part, except as provided by law or under the rules and regulations adopted by the state records commission provided for under sections 149.32 to 149.42, inclusive, of the Revised Code. Such records shall be delivered by outgoing officials and employees to their successors and shall not be otherwise removed, transferred, or destroyed unlawfully.

As you have noted in your request, R.C. 149.99 specifies a penalty for the violation of this provision of not more than one hundred dollars for each offense. Your question centers upon the issue of whether any particular unlawful removal, destruction, mutilation or transfer of records should be viewed as giving rise to one offense for each document involved.

It is, of course, axiomatic that, where the language of an enactment is plain and unambiguous, there is no occasion for resort to the rules of statutory construction. See, e.g., Wheeling Steel Corp. v. Porterfield, 24 Ohio St. 2d 24 (1970); In re McTaggart, 4 Ohio App. 2d 359 (Cuyahoga County 1965). As you have suggested, however, the use of the term "each offense" in R.C. 149.99 is ambiguous, since it is susceptible of at least two meanings. For this reason, the rules of statutory construction applicable to enactments imposing a penalty of the type specified by R.C. 149.99 must govern the analysis of your question.

R.C. 2901.04 provides for the construction of statutes defining offenses and penalties in the following terms:

(A) Sections of the Revised Code defining offenses or penalties

shall be strictly construed against the state, and liberally construed in favor of the accused.

(B) Rules of criminal procedure and sections of the Revised Code providing for criminal procedure shall be construed so as to effect the fair, impartial, speedy, and sure administration of justice.

This statutory provision codified, in 1974, a long settled common law rule of construction. See, e.g., State v. Wenterich, 157 Ohio St. 414 (1952); State v. Meyers, 56 Ohio St. 340 (1897); Denbow v. State, 18 Ohio 11 (1849); State v. Cantu, 27 Ohio App. 2d 55 (Athens County 1971).

A strict construction of the terms of R.C. 149.351 against the state suggests that the act therein proscribed is the act of removing, destroying, mutilating, transferring, or otherwise damaging or disposing of records in a manner which does not comply with law. Neither the terms of R.C. 149.351 nor those of R.C. 149.99 suggest that the nature of the offense therein delineated is in any way contingent upon the number of records involved in any particular act of removal or disposal. A conclusion that the acts prohibited under R.C. 149.351 constitute a separate offense as to each document within a group of records unlawfully damaged, destroyed or disposed of would, in my view, contravene the liberal construction in favor of an offender mandated by R.C. 29G.04.

Consequently, I am of the opinion that the offense proscribed by R.C. 149.351 is any one transaction involving the destruction, disposal or damaging of records. Ohio cases provide support for the view that "each offense" for the purpose of R.C. 149.99 is comprised of each transaction which results in the unlawful removal, destruction, mutilation, transfer, or other disposal of records, whether the actual number of records involved in each transaction is one, one hundred, or one thousand. In State v. Botta, 27 Ohio St. 2d 196 (1971), the Court considered the question whether one convicted of a theft offense could also be guilty of the separate offense of receiving or concealing the same property which had been stolen. The Court noted, at 202-203, that it is well established in Ohio that one act may constitute several offenses and that an individual may at the same time and in the same transaction commit several separate and distinct crimes. This principle is, however, contingent upon the existence of distinct statutory provisions creating separate offenses, and the Court, at 203, noted further that where, in substance and effect, but one offense has been committed, a court may not impose more than one sentence. Similarly, in Overmyer v. Sacks, 174 Ohio St. 129 (1962), the Court concluded that one act may constitute several offenses, where the legislature has seen fit to carve out of a single act or transaction several distinct offenses. The terms of R.C. 149.35 and 149.99 do not, in my opinion, operate to carve out of a single prohibited act separate offenses; moreover, I am aware of no other statutory provision which could be said to give rise to a separate offense arising from a single transaction which results in the destruction or disposal of records proscribed by R.C. 149.351.

The conclusion that the offense proscribed by the terms of R.C. 149.35 and 149.99 is any one transaction which results in unlawful damage to, or destruction or disposal of, records in no way implies, however, that an individual who has engaged in a series of such transactions has committed only one offense. In Bainbridge v. State, 30 Ohio St. 264 (1876), the Court considered a situation where one individual had, over a period of several months, knowingly delivered and sold to a cheese factory milk skimmed of cream in violation of a specific statutory provision. The individual in question had been indicted for an offense of this type which was alleged to have occurred on one specified date. He was acquitted by a jury verdict; thereafter, indictments for similar transactions on other dates were brought against him. He attempted to raise the acquittal on the first indictment as a bar to the later indictments. The Court concluded, however, that each of the transactions in question gave rise to a separate offense and that the acquittal on the first indictment operated as a bar only to subsequent indictment for the transaction which was the subject of the first indictment. Applying this reasoning to your question, I am of the opinion that a series of transactions resulting in damage to, or

disposal of, records in violation of R.C. 149.351 may constitute separate offenses for the purpose of R.C. 149.99. The question whether more than one transaction has occurred in such a situation is, of course, a factual determination which can be made only in light of the facts and circumstances surrounding a particular situation.

In specific answer to your question, it is my opinion, and you are advised, that, as used in R.C. 149.99, "each offense" means each transaction which results in the removal, destruction, mutilation, transfer, or other disposal of records, or other damage to records, in violation of R.C. 149.351.