

ORIGINAL

IN THE SUPREME COURT OF OHIO

Original action in mandamus; case no. 2010-2029

STATE ex rel. DATA TRACE INFORMATION SERVICES, LLC, et al.,

Relators,

-v-

RECORDER OF CUYAHOGA COUNTY, OHIO,

Respondent.

Merits Brief of Relators Data Trace, Property Insight, Michael Stutzman &
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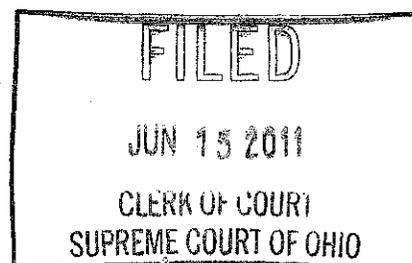


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Preliminary Statement

What Westlaw and Lexis do for the legal world, relators Property Insight and Data Trace do for the world of buying and selling land.

Using digital images of publicly-available deeds, mortgages, and other recorded instruments, sophisticated software, and tiers of personnel, they maintain and update databases of information about title to land. Title companies and professionals in the title field pay to use relators' databases and electronic search tools to find and evaluate records of title to land, much as lawyers and courts pay Westlaw and Lexis to use their databases and search tools to find and evaluate publicly-available appellate court opinions. (See affidavits of relators Stutzman and Carsella in Vols. 2 & 3 of relators' evidence.)

The respondent Cuyahoga County Recorder keeps its recorded deeds, mortgages, and similar title records as digital images on its computer system. It keeps back-up digital copies on individual compact discs – CDs – one for each business day.

For 11 years, from 1999 until 2010, the relators asked for duplicates of the back-up CDs, which the Recorder provided for \$50 apiece. But when the relators asked for duplicates of the CDs covering July and August, 2010, the Recorder demanded over \$208,000 from each relator firm, for a total of more than \$417,000.

Citing a budget crunch, the Recorder insisted that it would provide only paper copies instead of the CD, and tied the fee to a law that applies to recorded deeds and imposes a \$2/page fee for "photocopying a document." R.C. 317.32(I). Eventually the Recorder relented on the paper copies and agreed to "accommodate" the relators by

duplicating the Recorder's CDs. But the Recorder still insists on the same overwhelming \$417,000 fee. Which, of course, relators refuse to pay. That fee and the CDs lie at the heart of this suit.

The Recorder has struggled with the notion of "photocopying" and with whether the Recorder's office has a "photocopying machine." The head of the Recorder's information-technology group testified:

Q. During your tenure in the computer department at the Recorder's office, has the Recorder's office had photocopying machines?

Objection.

....

A. When you say "photocopying machine," what do you mean?

Q. You don't have an understanding of what a photocopying machine is?

A. No. I want to make sure that I answer your question correctly. . . . When you say "photocopying machine," what do you mean?

....

Q. [Y]ou can't picture in your mind what a photocopying machine is in an office setting?

A. I just want to make sure I answer your question correctly.

...

Q. How about this: Have you ever heard the term "photocopier" or "photocopy" used in the Recorder's office by anybody?

A. Photocopy? I'm sure in the time I've been there someone has used the term.

Q. And have you ever heard them use it in referencing a particular device or machine within the Recorder's office? By way of example, "can you photocopy that for me?" That's an example of office parlance.

A. That particular terminology I've not witnessed.

.....

Q. [D]o you have machines there where I can put in a paper documents, push a button or two, and out will come copies of that paper document also on paper? Do you have such a machine?

A. Yes, sir.

Q. What do you call that machine?

A. Xerox.

.....

Q. Have you ever heard it referred to as photocopying?

A. Not with my generation, no.¹

The same supervisor testified under oath that the Recorder keeps digital copies of its recorded deeds on CD.² But when a college student came to the office to ask for a duplicate of one of those CDs, the supervisor said that the Recorder does not keep any recorded instruments on CD.³

This Court should grant the writ that relators request.

Statement of Uncontradicted Facts

1. The Parties.

There are four relators: two unrelated companies, Data Trace Information Services, LLC, and Property Insight, LLC, and managers Michael Stutzman (Data Trace)

¹ (Patterson depo. 33: 7-18; 34:3-10; 36: 1-13; 38: 4-14; 39: 14-20; 40: 12-14, Vol. 1.)

² (Patterson depo. 31: 15-22; 32: 13-25, Vol. 1, tab E.)

³ (Gerbec Affid. ¶ 12, see ¶s 7, 8, Vol. 3, tab 27.)

and Michael Carsella (Property Insight).⁴

Data Trace and Property Insight do not sell any information to businesses for use in advertising or marketing, and do not sell digital images of recorded instruments to anyone in bulk.⁵

Property Insight has an office in Cleveland, Ohio, and is a subsidiary of Fidelity National Title Group, the nation's largest provider of title insurance through various subsidiaries.⁶ Relator Carsella is Property Insight's vice president of Midwest operations.⁷

Data Trace is a subsidiary of First American Title Insurance Company, one of the nation's largest title insurers.⁸ During the 1800s, the firm now called Data Trace opened an office in Cleveland to provide services to firms that insure and evaluate title to real estate.⁹ In the spring of 2011, Data Trace closed its Cleveland office.

Relator Michael Stutzman became manager of Data Trace's Cleveland office in 1998, and is now the firm's operations manager.¹⁰

Respondent is the Cuyahoga County Recorder. In January, 2011, a new structure of

⁴ All footnotes cite to evidence, pleadings, or to legal authorities; there is no text in the footnotes. Citation to "Vol. 1," "Vol. 3," or "Vol. 4" refers to a volume of evidence filed by relators. Citation to "6: 1-7" means page 6, Lines 1-7.

⁵ (Carsella Affid. ¶ 9, Vol. 2, tab 11; Stutzman Affid. ¶ 9, Vol. 3, tab 14.)

⁶ (Carsella Affid. ¶s 2, Vol. 2., tab 11.)

⁷ (Carsella Affid. ¶s 7, 8, Vol. 2, tab 11.)

⁸ (Stutzman Affid. ¶ 3, Vol. 3, tab 14.)

⁹ (Stutzman Affid. ¶ 3, Vol. 3, tab 14.)

¹⁰ (Stutzman Affid. ¶s 1, 5, Vol. 3, tab 14.)

government took effect in Cuyahoga County under a recently adopted charter.¹¹ As of January 15, 2011, the appointed Fiscal Officer assumed the duties of the formerly elected office of recorder.¹²

From July, 2008 through January 14, 2011, Lillian Greene held the elected office of Recorder.¹³ She was a Cuyahoga County Common Pleas judge for 21 years before that.¹⁴

2. Recording an instrument.

Ohio law requires all “deeds . . . and instruments of writing” for “the conveyance or encumbrance of lands” to be recorded in the office of the recorder of the county where the land sits. R.C. 5301.25(A). The law says that, until the county records an instrument evidencing ownership or encumbrance of title to land, the instrument is “fraudulent” to the extent that a “bona fide purchaser” acquires the land with no notice of the unrecorded instrument. R.C. 5301.25(A).

Among the kinds of instruments that the Recorder records are deeds; mortgages and releases of those mortgages; leases; liens on land and releases of those liens; and Uniform Commercial Code financing statements covering land within the county that secures a commercial loan.¹⁵

People and businesses present those deeds and other instruments to the

¹¹ *State ex rel. ACLU v. Cuya. Cty Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, 556, ¶ 2.

¹² (Answer to amended complaint, ¶ 13; amended complaint, ¶ 13.)

¹³ (Answer to amended complaint, ¶ 14; amended complaint, ¶ 14.)

¹⁴ (Greene depo. 6: 13-14, Vol. 1, tab C.) “6: 13-14” means page 6, lines 13-14.

¹⁵ (Answer to amended complaint ¶ 11; amended complaint ¶ 11.)

Recorder's cashier as paper records.¹⁶ (This brief uses "deed" as shorthand to encompass every recorded instrument.)

The cashier then collects the fee to record the deed.¹⁷ The Recorder assigns a unique number to the deed, called an AFN, which stands for Automated File Number.¹⁸

An AFN shows the date that the county recorded the deed and the sequence in which it was recorded that day.¹⁹

The Recorder puts the AFN and the time of day that it recorded the deed onto an adhesive label, which it sticks on the original paper deed.²⁰ Then the Recorder electronically scans the deed, and returns the original to the person who tendered it.²¹ The AFN and the date and time of recording appears on the digital copies of the recorded deed that the recorder keeps.²² See R.C. 317.12; R.C. 317.13; see example of quitclaim deed from the Recorder's website in the appendix to this brief.

3. Video showing how the Recorder uses its computer system to record a deed.

A digital forensics firm made a copy of the Recorder's website on CD.²³ That CD in Vol. 3, tab 18, shows the website's content as it existed in April, 2008 during Patrick

¹⁶ (Answer to amended complaint ¶ 16; amended complaint ¶ 15.)

¹⁷ (Martinez Affid. ¶ 4, Vol. 3, tab 26.)

¹⁸ (Martinez Affid., ¶ 4(b), Vol. 3, tab 26.)

¹⁹ (Martinez Affid., ¶ 4(b), Vol. 3, tab 26.)

²⁰ (Martinez Affid., ¶ 4(c), Vol. 3, tab 26.)

²¹ (Martinez Affid., ¶ 4(e), (f), Vol. 3, tab 26; Patterson depo. 13: 24-25; 15: 3-11 & 19-22, Vol. 1, tab E.)

²² (Answer to amended complaint ¶ 18; amended complaint ¶ 17.)

²³ (Stipulation ¶ 3, Vol. 2, tab G; CD w/ source code, Vol. 2, tab 1; Greg Kelley Affid., Vol. 3, tab 19; Don McCann Affid., Vol. 2, tab 20.)

O'Malley's tenure as the recorder and a few months later, in June, 2008, at the beginning of Lillian Greene's tenure as the recorder.²⁴

Three videos from the website appear on the CD. Two of them show how the Recorder digitally copies and records deeds. Each video is a separate file within the folder called "Recorder Website 04-30-2008." Those videos are: "Why Record.wmv" and "Filing a Document.wmv."

Greg Kelley's affidavit, ¶ 13, explains step-by-step how to open each video on a PC. (The CD with the video is Ex. 18, Vol. 3; Kelley's instructions are Ex. 19, Vol. 3.)

4. Storing digital images of recorded deeds on CD.

The video called "Filing a Document" emphasizes the Recorder's use of CDs to store its collection of copies of recorded deeds, and shows how the Recorder scans paper deeds. The same video shows the Recorder using a CD burner with multiple CD drives to make digital copies of recorded deeds simultaneously.

The video also shows a CD that holds a "back-up" copy of those images. The Recorder refers to the "back-up" CD as a daily "master CD."²⁵ The Recorder limits each master CD to storing one digital copy of every deed recorded on a single day.²⁶ The master CDs are at the core of this suit.

5. Making a master CD.

To make the master CD, "you click on one button and bring all the information for

²⁴ (Stipulation ¶ 3 (a), (b), Vol. 2, tab G.)

²⁵ (Patterson depo. 32: 20-22, Vol. 1, tab E; Asfour depo., 14: 14-17, Vol. 1, tab A.)

that day, all the day, whatever we recorded, and we'll burn the master from that computer."²⁷ First the computer extracts from its database as many as 1,500 to 3,000 deeds recorded on one day.²⁸ Once extracted, it's just a matter of typing in a date and pressing a key.²⁹ An administrator testified:

Q. When you burn it, do you click then on an electronic button that will record it onto the CD?

A. I click on the keyboard, my keyboard, on my computer.

....

Q. And then that causes the data to be recorded on the CD?

A. I still have to type the date, the one I want to burn it for that date on my master, and then the machine does the job.

I don't have to worry about nothing.

(Asfour depo., 15: 23-25; 16: 1-9, Vol. 1 of evid., tab A.)

6. Making CD copies of the master CD for Data Trace, Property Insight, and others.

For about 11 years, beginning in May, 1999, the Recorder copied its master CDs onto blank CDs.³⁰ The Recorder provided the copies for \$50 apiece.³¹ The relator firms and at least one other firm regularly picked up those dubbed CDs at the Recorder's office,

²⁶ (Patterson depo. 59: 21-25; 31: 15-22; 32: 13-22, Vol. 1, tab E; Asfour depo., 12: 24-25; 13: 1-7; 14: 14-23, Vol. 1, tab A; Answer to amended complaint ¶ 20; amended complaint ¶ 19.)

²⁷ (Asfour depo. 15: 2-10, Vol. 1, tab A.)

²⁸ (Asfour depo. 20: 5-16; 16: 23-25; 17: 1-5; 12: 3-7; 13: 25; 14: 1-4, Vol. 1, tab A.)

²⁹ (Patterson depo. 54: 1-7, Vol. 1, tab E.)

³⁰ (Stutzman Affid. ¶ 13, Vol. 3, tab 14; Asfour depo., 21: 7-13; 9: 18-23, Vol. 1, tab A.)

³¹ (Stutzman Affid. ¶ 13, Vol. 3, tab 14.)

each paying the fee.³²

The Recorder used a CD burner with seven CD drives to make the copies.³³ The seven drives allowed the Recorder to make the copies “all at once.”³⁴

It took five to 10 minutes to make several copies of one master CD.³⁵ One administrator made the copies by starting the CD burner when leaving work, retrieving the copies the next morning, and then making them available for pick up.³⁶

Regardless of how much data is on a master CD, it costs about 32¢ for the Recorder to duplicate one.³⁷

7. Relators have served as backups for the Recorder.

When the Recorder began to manage its deeds by computer (1999), the Recorder discovered that some entire instruments and some pages of other instruments were missing from its collection.³⁸ Data Trace had copies of those records and supplied duplicates to the Recorder.³⁹

8. The Recorder’s grantor-grantee index.

Ohio law requires recorders to create indexes to its recorded deeds. The law says: “At the beginning of each day’s business, the county recorder shall make and keep up

³² (Stutzman Affid. ¶ 14, Vol. 3, tab 14; Carsella Affid. ¶ 11, Vol. 2, tab 11; answer to amended complaint ¶ 22; Asfour depo., 9: 15-23; 11: 21-25; 12: 1-2, Vol. 1, tab A.)

³³ (Asfour depo. 20: 22-25; 21: 1-6, Vol. 1, tab A.)

³⁴ (Asfour depo. 21: 7-10, Vol. 1, tab A.)

³⁵ (Asfour depo. 25: 16-17, Vol. 1, tab A.)

³⁶ (Martinez Affid. ¶s 8-10, Vol. 3, tab 26.)

³⁷ (Stipulation ¶ 6, Vol. 2, Ex. G.)

³⁸ (Stutzman Affid. ¶ 68, Vol. 3, tab 14.)

general alphabetical indexes, direct and reverse, of all the names of both parties to all instruments previously received for record by him.” R.C. 317.18.

The names of the grantors comprise the direct index. The names of the grantees comprise the reverse index. R.C. 317.18. The Recorder keeps and updates that index by computer.⁴⁰ The Recorder regularly provided digital copies of the index to Data Trace and Property Insight for an annual fee.⁴¹

9. Recorder Greene demands \$7,500 from relators for digital copies of its grantor-grantee index, while providing digital copies of the same index to a private university for free.

During Patrick O’Malley’s tenure, the Recorder regularly provided relators with updated, digital copies of the Recorder’s grantor-grantee index for \$5,000/year from each firm, which they used to cross-check their records.⁴²

Working for Case Western University, researcher Michael Schramm, asked to receive digital copies of the same index, but the university declined to pay the Recorder’s \$5,000 annual fee, so the Recorder did not provide it.⁴³

In mid-September, 2009, O’Malley’s successor, Lillian Greene, sent separate letters to Data Trace and Property Insight raising the fee for the index from \$5,000/year to \$7,500/year.⁴⁴ Greene said that the Recorder needed the money “to maximize income”

³⁹ (Stutzman Affid. ¶ 71, Vol. 3, tab 14.)

⁴⁰ (See Patterson depo. 7: 17-20; 9: 5-114; 12: 4-13; 13: 9-11, Vol. 1, tab E.)

⁴¹ (E.g., Darmstadt Affid. ¶s 11-12, Vol. 2, tab 9.)

⁴² (Darmstadt Affid. ¶s 11-12, Vol. 2, tab 9; Stutzman Affid. ¶s 72-73, Vol. 3, tab 14.)

⁴³ (Schramm depo. 28: 22-25; 29: 1-6, Ex. B of Recorder’s evidence.)

⁴⁴ (Stutzman Affid. ¶ 74, Vol. 3, tab 14; Darmstadt Affid. ¶s 13-14, Vol. 2, tab 9.)

because of the county's "budget crisis." Her letter said:

As you are aware, the recent county budget crisis has caused all agencies to re-evaluate their own budgets in an effort to maximize income and cut expenses.

Upon review, the previous annual fee of . . . \$5,000 has not been increased since its implementation in 2003.

As a result we must inform you that the annual subscription fee for computer disks of [the grantor-grantee index] will increase as of January 1, 2010 to . . . \$7,500.

(Lttrs, Vol. 3, tab 17; Vol. 2, tab 10.)⁴⁵

Greene then decided to provide Case Western Reserve University with the regularly-updated digital copies of the index for free.⁴⁶ From what Greene and her chief technology officer told him, Case's researcher concluded that relators had to pay \$7,500 because they are for-profit businesses, and Case is not.⁴⁷

10. Recorder Greene reverses herself on the CDs.

In the same letter that raised relators' fees for copies of the index, Greene assured the relators that the fee for CD copies of each day's collection of recorded deeds "will remain at the current rate of Fifty Dollars (\$50) per disk."⁴⁸

Greene's assurance lasted only a few months. In April, 2010, Greene changed her mind. She advised the firms that the Recorder would no longer provide CD copies to

⁴⁵ (Stutzman Affid. ¶s 72-75, Vol. 3, tab 14.)

⁴⁶ (Schramm depo. 31: 1-24; 33: 7-11, Ex. B of Recorder's evidence.)

⁴⁷ (Schramm depo., 31: 24-25; 32: 1-12 & 17-25; 33: 1-2, Ex. B of Recorder's evidence.)

⁴⁸ (Greene Lttrs to Data Trace and Property Insight, Sept. 16, 2009, Vol. 3, tab 17, Vol. 2, tab 10.)

them because “there is no statutory authority for the CD you’ve been receiving.”⁴⁹

She told Stutzman that the Recorder would provide only “paper copies” of the deeds at the statutory fee of \$2 a page.⁵⁰ Greene testified:

A. . . . I know what my prior responses were [to Stutzman].

Q. Which were no CD.

A. Yes. And you pay \$2.

Q. You would have to get paper copies. ...

A. Yes.

(Greene depo., 34: 5-11, Vol. 1, tab C.) She elaborated:

Q. When you say \$2 per page, if it’s an electronic deed ... and downloaded onto a CD, and the deed is three pages, that would be \$2 for each of those three pages? Is that what you’re –

A. No. Because we don’t make electronic copies.

....

Q. How are you applying this notion of \$2 a page?

A. I’m applying it to paper copies of the document.

Q. So are you saying you will not provide it on a compact disc?

A. Yes. We don’t make them.

(Greene depo., 26: 20-24; 27: 20-24, Vol. 1, tab C.)

Greene didn’t know if the Recorder had the manpower and equipment to print

⁴⁹ (Greene depo. 25: 18-25; 26: 1-2 & 5-14; 39: 15-19, Vol. 1, tab C; Carsella Affid. ¶s 29, 30, Vol. 2, tab 11; Stutzman Affid. ¶s 76, 77, Vol. 3, tab 14; Patterson depo. 65: 4-8 & 13-17, Vol. 1, tab E.)

⁵⁰ (Greene depo. 29: 20-22, Vol. 1, tab C; R.C. 317.32(I).)

each page of 500 to 1,500 deeds recorded on any single day.⁵¹

The Recorder's chief of staff told Stutzman why the Recorder stopped providing the CDs: While the Recorder's employees were taking furlough days without pay, the title firms were getting copies of recorded deeds on CD without having to pay \$2/page, using the CDs to "get rich."⁵²

The Recorder's CD burner with seven drives now sits largely idle.⁵³

11. The Recorder's website.

Under Patrick O'Malley, the Recorder started a website through which anyone with a PC can conduct a search to see a digital image of a recorded deed.⁵⁴ The crux of what happens is this: you type in names or dates to search the Recorder's collection of digital images, which yields a list of one or more recorded deeds. To see a particular deed on the list, you click "view image." Your computer downloads a copy of that image and displays it on your screen.⁵⁵

You can save that image on your computer system, or you can print it. The Recorder doesn't charge a fee doing either.⁵⁶ The website, however, does not make available the image of any recorded instrument that exceeds a set number of imaged

⁵¹ (Greene depo. 34: 17-24; 36: 3-7, Vol. 1, tab C.)

⁵² (Stutzman Affid. ¶ 79, Vol. 3, tab 14.)

⁵³ (See Asfour depo. 22: 10-25; 23: 1-7, Vol. 1, tab A.)

⁵⁴ (Kandah depo. 46: 23-25; 22: 16-25; 23: 1, Vol. 1, tab D.)

⁵⁵ (Patterson depo. 50: 18-25; 51: 1-6 & 12-14, Vol 1, tab E.)

⁵⁶ (Patterson depo. 51: 15-22, Vol. 1, tab E.)

pages.⁵⁷

12. Erecting obstacles on the website that coincide with cutting off the CDs.

Shortly after the Recorder stopped providing CDs to relators, the Recorder added watermarks to the images on the website.⁵⁸ The watermarks are the word “Copy” in large letters appearing across the image of substance of the deed. The Recorder’s chief of staff testified that the purpose is to deter businesses from downloading those images in bulk for commercial use.⁵⁹

The Recorder also placed a series of changing “captcha” codes on the website. The site required you to type a different captcha code each time you wanted to locate and view a deed.⁶⁰ Examples of the captcha codes:



A DVD showing, step-by-step, what someone had to do to locate and view the first 3 deeds recorded on one day is Exhibit 29 in Volume 2 of relators’ evidence.⁶¹

As of May 2011, no other county recorder’s website in Ohio required people to type in a series of captcha codes to see deeds on the site.⁶² Shortly before the date for filing evidence in this case, the Recorder removed the codes.

⁵⁷ (Hayden Affid. ¶ 5, Vol. 3, tab 22.)

⁵⁸ (See Kandah depo. 23: 2-12, Vol. 1, tab D.)

⁵⁹ (Kandah depo. 30: 7-12 & 16-25; 31: 1-12 & 22-24; 32: 3-8 & 29-25; 33: 1-4, Vol. 1, D.)

⁶⁰ (Jayson Gerbec Affid. ¶s 3-5, Vol. 3, tab 27; Karl Idsvoog Affid., ¶s 18-23, Vol. 4, tab J; Kathy Idsvoog Affid., Vol. 3, tab 36.)

⁶¹ (See Idsvoog Affid. ¶s 18-23, Vol. 4, tab J.)

⁶² (Karl Idsvoog Affid., ¶ 24, Vol. 4, tab J.)

13. The requests that the relators seek to enforce.

On October 5, 2010, relators sent written requests to the Recorder for copies on CD of electronically-stored images of recorded deeds covering the months July and August, 2010. (Vol. 3, tab 15; Vol. 2, tab 12.)⁶³ The requests also said: “if it would be less work for you to provide us with electronic copies of only the first 100 documents publicly recorded on each day of July and August, 2010, we are willing to accept electronic copies of only those documents.” The requests asked the Recorder to provide the digital copies without the watermark.

The requests also asked the Recorder to “immediately amend its public record fee policy and practice” to comply with the “at cost” provision of the Public Records Act. Relators insisted that charging \$2/page, as though one CD was the same as thousands of individual paper pages, violated the Act.

14. Back-to-back suits: Case No. 10-1823 & this suit.

During the six weeks that passed after the relators made the requests, the Recorder did not acknowledge the requests.⁶⁴ About halfway through those six weeks, Data Trace and Property Insight sued to enforce them, filing Case No. 10-1823 in this Court.

On November 16, 2010, over two weeks after receiving the summons, the Recorder responded to relators’ requests for the first time.⁶⁵ The Recorder effectively affirmed its

⁶³ (Stutzman letter of Oct. 5, 2010, Vol. 3, tab 15; Stutzman Affid. ¶ 80, Vol. 3, tab 14; Carsella letter of Oct. 5, 2010, Vol. 2, tab 12; Carsella Affid. ¶ 32, Vol. 2, tab 11.)

⁶⁴ (Stutzman Affid. ¶s 81-84, Vol. 3, tab 14; Carsella Affid. ¶s 33-36, Vol. 2, tab 11.)

⁶⁵ (Stutzman Affid. ¶s 81-85, Vol. 3, tab 14; Carsella Affid. ¶s 33-36, Vol. 2, tab 11.)

earlier decision to offer paper printouts at \$2/page, but not to offer the requested CDs.⁶⁶

Two days later, the Recorder moved to dismiss the suit, asserting that Data Trace, which had been in Cleveland for over 100 years, had not registered with Ohio's secretary of state and, so, could not sue in any of Ohio's courts.⁶⁷ The Recorder claimed that the firms hadn't registered because they wanted to "dodge" the registration fee.

The registration fee was \$125.⁶⁸ Data Trace's parent, First American Title Insurance Company, was (and is) registered.⁶⁹ Data Trace and Property Insight then promptly registered online, paid the \$125 fee online, immediately applied to dismiss the suit voluntarily without prejudice, and then filed this suit the same day.⁷⁰

Like the first suit, this suit seeks to enforce the requests of October 5, 2010.⁷¹

15. Relators send follow-ups to their Oct. 5 requests.

From press accounts of this suit, it sounded like the Recorder thought that relators wanted personnel to scan paper records into the computer system and then put them on a CD.⁷²

To make it unmistakably clear what they wanted, Stutzman and Carsella each sent a follow-up letter to the county Fiscal Officer who had succeeded Lillian Greene's

⁶⁶ (Greene depo. 25: 25; 26: 1-4 & 20-24; 27: 20-24; 28: 2-12; 29: 20-22; 34: 5-11, Vol. 1, tab C; Stutzman Affid. ¶ 84-85, Vol. 3, tab 14; Carsella Affid. ¶s 36-37, Vol. 2, tab 11.)

⁶⁷ (Stutzman Affid. ¶s 89, 4, Vol. 3, tab 14.)

⁶⁸ (Stutzman Affid. ¶ 93, Vol. 3, tab 14.)

⁶⁹ (Stutzman Affid. ¶ 90, Vol. 3, tab 14.)

⁷⁰ (Stutzman Affid. ¶ 92-93, Vol. 3, tab 14; Carsella Affid. ¶s 42-44, Vol. 2, tab 11.)

⁷¹ Amended complaint ¶ 32.

⁷² (Stutzman Affid. ¶ 86, Vol. 3, tab 14.)

recording duties.⁷³ The follow-up letters said:

My request for digital copies of deeds, mortgages, and other instruments recorded in July and August, 2010 – onto CD and without the watermarks that appear on the recorder’s website – does not require your personnel to scan any paper record onto a compact disc.

The effect of my October 5 request is to ask your office to dub onto blank CDs the Master CDs covering July and August, 2010.

Your office has a CD writer with multiple CD drives that allow your office to dub onto several blank CDs simultaneously the contents of one Master CD.

(Stutzman letter, Vol. 3, tab 16; Stutzman Affid. ¶ 87, Vol. 3, tab 14; Carsella letter, Vol. 2, tab 13; Carsella Affid. ¶ 39, Vol. 2, tab 11.)

16. The Recorder decides to provide the requested duplicates of the master CDs, but at a fee of over \$417,000.

Initially, Greene testified that she had decided to stop providing digital copies of recorded deeds on CD, and to provide only paper copies at \$2/page.⁷⁴ Relators’ counsel asked her if she’d provide the requested CDs for a fee. She testified:

Q. Will you provide Data Trace with electronic copies of the records recorded in July of 2010 and August of 2010 on a compact disc for some fee?

A. I can’t really answer that.

Q. Aren’t you the Recorder?

A. Yes.

Q. Don’t you set policy for the Recorder’s office?

A. Yes. But I’m not prepared to answer that question right here today

(Greene depo. 28: 13-22, Vol. 1, tab C.) That was two months after Greene had read

⁷³ (Stutzman Affid. ¶ 86, Vol. 3, tab 14.)

⁷⁴ (Greene depo. 25: 25; 26: 1-4 & 20-24; 27: 20-24; 28: 2-12, Vol. 1, tab C.)

relators' complaint.⁷⁵

Then, the Recorder's counsel met privately with Greene for about 10 minutes.⁷⁶ After they emerged, the deposition resumed, and Greene testified that she'd provide the CDs to "accommodate" the relators, but only for a fee of \$2/page.⁷⁷ Even though she had told relators in an earlier letter that she'd continue the 10-year practice of providing CDs, Greene testified that "it is not the custom or practice of our office to provide CDs."⁷⁸

The Recorder demands that Data Trace and Property Insight each pay over \$208,500 for duplicates of the master CDs covering July and August 2010 – a total of more than \$417,000 covering those two months.⁷⁹

17. The public-records policy in effect when Greene testified.

Earlier in Greene's tenure, the Recorder posted a policy on its website and at its office that advised the public about obtaining copies of the Recorder's records.⁸⁰ The policy advised that the Recorder would "strictly adhere to the state's Public Records Act" and specified how the Recorder would do that.⁸¹

The policy said that "routine" requests included asking for copies of "recorded documents."⁸² In the next sentence, the policy said that "if the records are readily

⁷⁵ (Greene depo. 10: 7-8 & 21-25; 11: 1-14, Vol. 1, tab C.)

⁷⁶ (Greene depo. 31: 3-23, Vol. 1, tab C.)

⁷⁷ (Greene depo. 33: 15-21; see 34: 5-11, Vol. 1, tab C.)

⁷⁸ (Greene depo. 33: 15-20, Vol. 1, tab C; letter is Vol. 3, tab 17.)

⁷⁹ (Responses to interrog. nos. 4, 3, Vol. 2, Exhibit F.)

⁸⁰ (Stipulation ¶s 1,2, Vol. 2, tab G.)

⁸¹ (Ex. 4 to Greene depo., Section 1, Vol. 2, tab 4.)

⁸² (Ex. 4 to Greene depo., Section 2.4, Vol. 2, tab 4.)

available in an electronic format that can be . . . downloaded easily, these should be made as quickly as the equipment allows.”⁸³

Under the heading “Costs for Public Records,” the policy said that “[t]hose seeking public records will be charged only the statutory cost of making copies.”⁸⁴ Under that, it listed the fees. One was \$1 per disc for downloading digital copies onto a CD. Thus:

Section 3.1 The charge for paper copies of recorded documents is \$2.00 per page.

Section 3.2 The charge for copies of administrative files and documents is \$.05 per page.

Section 3.3 The charge for downloaded computer files to a compact disc is \$1.00 per disc.

Section 3.4 There is no charge for documents e-mailed.

(Ex. 4 to Greene depo., Vol. 2, tab 4.)⁸⁵

18. Honesty is the best (public-records) policy.

When shown the public-records policy through a live hook-up to the Recorder’s website, relators asked Greene whether she would follow the “\$1.00 per disc” policy of Section 3.3 for their requested CDs. She answered that she would not.⁸⁶

The reason, she said, is twofold. First, the “Costs for Public Records” policy applies only to “public records” under the Public Records Act.⁸⁷ Second, recorded deeds are not

⁸³ (Ex. 4 to Greene depo., Section 2.4, Vol. 2, tab 4.)

⁸⁴ (Ex. 4 to Greene depo., Section 3, Vol. 2, tab 4.)

⁸⁵ (Stipulation ¶ 1, Vol. 2, Ex. G; ; see Greene depo. 69: 2-10; 68: 11-17, Vol. 1, tab C.)

⁸⁶ (Greene depo. 69: 1-8, see 65: 19-22; 67: 9-17, Vol. 1, tab C.)

⁸⁷ (Greene depo. 73: 19-25; 69: 9-15; 71: 25; 72: 1, Vol. 1, tab C.)

“public records” under the Act.⁸⁸

When asked how her rationale squares with section 3.1 under “Costs,” which lists a fee for “paper copies of recorded documents,” Greene said that section 3.1 didn’t belong there; it was misplaced on the policy.⁸⁹

She testified that the \$1-per-disc fee for computer downloads of records applies only to administrative records, such as personnel or payroll, because they qualify as “public records” under the Act.⁹⁰

Administrative records aren’t, however, kept on computer. Greene testified:

Q. [Y]our policy for downloaded computer files to a compact disc, Section 3.3, applies only to those records, those computer records that would document how you administer personnel in your office, but would not include downloading records that you record as the Recorder and index as the Recorder; is that true?

A. Yes.

....

Q. So none of your administrative records are on computer files; is that true?

A. Right.

Q. So your personnel records are paper records?

A. Exactly.

(Greene depo. 82: 6-13; 83: 6-10, Vol. 1, tab C.) She also testified that the Recorder’s internal memos, monthly departmental reports, contracts, and invoices are kept on

⁸⁸ (Greene depo. 77: 7-18; 78: 20-23; 71: 3-10; 74: 22-25; 75: 1; 33: 9-11, Vol. 1, tab C.)

⁸⁹ (Greene depo. 78: 5-25; 79: 1, Vol. 1, tab C.)

⁹⁰ (Greene depo. 80: 15-23; 81: 7-21; 82: 6-13, Vol. 1, tab C.)

paper, not computer.⁹¹

As for people or businesses who've asked for computer downloads of the Recorder's administrative records, Greene testified:

Q. Now, how many times has your office experienced, to your knowledge, either hearsay or otherwise, where somebody said, "Please download those administrative kinds of records, memos, personnel files, monthly reports, budgets, invoices, contracts, to CDs" –

A. Never.

(Greene depo. 87: 1-8, Vol. 1, tab C.)

Confining the policy to only administrative records left it saying nothing about downloading computer files of recorded deeds.⁹² Yet that's how the Recorder stores all of its recorded deeds.⁹³ And confining that policy only to administrative records, when no one ever asked to for a computer-download of those records, left the policy saying nothing about downloading recorded deeds to CD, even though the Recorder had done that almost every day for the past 11 years.⁹⁴

Greene cited *one* circumstance where the policy could apply to deeds. She testified:

Q. So is it your view that when section 3.3 says, "The charge for downloaded computer files to a compact disc is \$1 per disc," that only applies to records that are *not* recorded with the Recorder's office but otherwise kept by your office; is that right?

⁹¹ (Greene depo. 85: 13-21 & 24-25; 86: 1, Vol. 1, tab C.)

⁹² (See policy at Vol. 2, tab 4; Stipulation ¶ 1, Vol. 2, Exhibit G.)

⁹³ (See Recorder's video called "Filing a Document," Vol. 3, Ex. 18.)

⁹⁴ (Asfour depo. 9: 18-25; 10: 1-2; 11: 19-25; 12: 1-7, Vol. 1, tab A; Stutzman Affid. ¶s 13-14, Vol. 3, tab 14.)

[Objection]

A. They are records that meet the definition under the Public Records Act.

Q. Which would not be deeds?

A. Could be.

Q. How could it be deeds?

A. An example, if someone had a deed in their file.

Q. You mean in their personnel file?

A. Right.

(Greene depo. 79: 25; 80: 1-14, Vol. 1, tab C.) Greene didn't say how many times her managers have put deeds in employee personnel files.

19. The Recorder changes the public-records policy a few days after relators deposed Greene.

Relators deposed Greene on a Wednesday afternoon. By the following Monday, the Recorder had changed the public-records policy.⁹⁵ The Recorder deleted the fee of \$1 per CD fee for downloaded computer files.⁹⁶ The Recorder made this change to its fee for "paper copies" of recorded deeds: "The charge COST for paper copies IS \$2.00 PER PAGE FOR of recorded documents is ~~\$2.00 per page.~~"⁹⁷

Under the heading "Costs for Public Records," the new policy retained sections 3.2, 3.3, and 3.4, but replaced the fees listed in those sections with new terms that say nothing about fees. Thus:

⁹⁵ (Stipulation ¶ 1, Vol. 2, Ex. G & tab 5.)

⁹⁶ (New policy: Vol. 2, tab 5 = Ex. 5 to Kandah depo.; see Stip. ¶ 1, Vol. 2, Ex. G.)

⁹⁷ (Compare Vol. 2, tab 4 with Vol. 2, tab 5; Stipulation ¶ 1, Vol. 2, Ex. G.)

Costs for Public Records

* * *

Section 3.2 ~~The charge for copies of administrative files and documents is \$.05 per page.~~ WILL PERMIT PROMPT INSPECTION OF PUBLIC RECORDS AND PROVIDE COPIES OF SUCH RECORDS WITHIN A REASONABLE AMOUNT OF TIME. . . .

Section 3.3 ~~The charge for downloaded computer files to a compact disc is \$1.00 per disc.~~ PUBLIC RECORDS REQUESTS PERTAIN TO ANY DOCUMENTS THAT DOCUMENT THE ORGANIZATION, FUNCTIONS, POLICIES, DECISIONS, PROCEDURES AND OPERATIONS OF THE OFFICE, SUBJECT TO CERTAIN EXCEPTIONS

Section 3.4 ~~There is no charge for documents e-mailed.~~ PUBLIC RECORDS REQUESTS SHOULD BE DIRECTED TO THE CUYAHOGA COUNTY RECORDER AT

(Compare Vol. 2, tab 4 with Vol. 2, tab 5; Stipulation ¶ 1, Vol. 2, Ex. G.)

20. Relators' amended complaint.

Relators then filed an amended complaint alleging that the new policy is a sham; that the former policy's fee of \$1 per CD for downloaded computer files applied to recorded deeds with no added "per-page" fee, which is consistent with Ohio law.

The amended complaint asks the Court to issue a writ of mandamus to compel the Recorder to:

- to comply with the relators' requests for duplicates of the master CDs covering July and August, 2010, charging a fee no greater than "cost" under the Public Records Act;⁹⁸
- to amend its policy and practice to conform to the Public Records Act by limiting its fee for digital copies of recorded deeds on CD to the Recorder's "cost" under the Public Records Act;⁹⁹

⁹⁸ (Amended complaint ¶s 18, 19, 21, 41, 44-47.)

⁹⁹ (Amended complaint ¶s 37, 44-47.)

- to restore the \$1 per CD policy that the Recorder deleted a few days after relators deposed recorder Greene, with no per-page fee.¹⁰⁰

The amended complaint also asks the Court to treat both of relators' suits as one continuous suit for the purpose of awarding costs, statutory damages, and attorneys' fees under the Public Records Act, R.C. 149.43.¹⁰¹ This Court should grant all of that relief.

Argument

Proposition of Law No. 1: Mandamus is the appropriate remedy to enforce the Public Records Act.

Mandamus is *the* appropriate remedy to enforce a duty under the Public Records Act, R.C. 149.43. "Relators in public-records mandamus cases need not establish the lack of an adequate remedy in the ordinary course of law." State ex rel. American Civil Liberties Union of Ohio, Inc. v. Cuya. Cty Bd. of Commrs, 128 Ohio St.3d 256, 261, 2011-Ohio-625, 943 N.E.2d 553, 560, ¶ 24.

Proposition of Law No. 2: The clear legal rights and clear legal duties necessary for mandamus are those inferred from the facts after the court has resolved issues of law.

Where, as here, mandamus is the appropriate remedy, the Court should issue a writ upon concluding that the respondent public office must perform the clear legal duty at issue, and that the relator has a corresponding clear legal right to that performance.¹⁰²

The terms "clear legal right" and "clear legal duty" are terms of art in mandamus law. The word "clear" does not refer to the clarity of the law itself. The terms "clear legal right" and "clear legal duty" refer instead to those rights and duties that arise from the

¹⁰⁰ (Amended complaint ¶s 49-54.)

¹⁰¹ (Amended complaint ¶s 58-65.)

facts *after* the court has resolved the legal issues. See, e.g., State ex rel. Findlay Publishing Co. v. Hancock Cty Bd. of Commrs., 80 Ohio St. 3d 134, 139, 1997-Ohio-353, 684 N.E.2d 1222, 1226.

That a statutory question is one of first impression has no bearing on whether a clear legal duty exists. E.g., White v. Clinton Cty Commrs, 77 Ohio St.3d 1267, 1268, 1997-Ohio-250, 675 N.E.2d 471, 471; White v. Clinton Cty Commrs, 76 Ohio St.3d 416, 423-424, 1996-Ohio-380, 667 N.E.2d 1223, 1229.

The Court “has a duty to construe statutes, if necessary, and thereafter evaluate the clear right or duty.” State ex rel. Ashbrook v. Brown (1988), 39 Ohio St.3d 115, 117, 529 N.E.2d 896, 898; accord State ex rel. Melvin v. Sweeney (1950), 154 Ohio St. 223, 226, 94 N.E.2d 785, 787.

Here, the Court need only construe the statutes at issue to find that the clear legal duty and corresponding clear legal right flow naturally from the undisputed facts.

Proposition of Law No. 3: County recorders and recording laws exist to organize a public repository of instruments that stake claims to land, enabling land to move freely in commerce.

A. Chief Justice John Marshall: how recording laws give us confidence to rely on land to back loans.

In the 1800s, this country was beginning to resolve disputes about how state recording laws were supposed to work. Court opinions from that era offer special insight into the fundamental purpose of county recorders and recording laws.

In an opinion by Chief Justice John Marshall in 1834, the United States Supreme

¹⁰² *E.g., State ex rel. Scripps Howard Broadcasting Co. v. Cuya. Cty Ct of Common Pleas, Juv. Div.* (1995), 73 Ohio St. 3d 19, 20, 23, 652 N.E.2d 179, 181.

Court rejected an argument by a widow, Elizabeth Peter, to disregard a mortgage that an acquaintance held on a home that she'd just bought. The acquaintance, Thomas Beale, sued to foreclose on his mortgage, forcing the sale of the widow's home. To stop the sale, Mrs. Peter argued that Beale had concealed his mortgage because he'd known that she was buying the home, but didn't tell her about his mortgage.¹⁰³

Beale, however, had recorded his mortgage with the county recorder. Recording the mortgage defeated Mrs. Peter's argument. Writing for the Court, Chief Justice Marshall explained:

But the mortgage deed was recorded, and this is considered in law as notice to the world, and dispenses with the necessity of personal notice to purchasers.

A deed cannot with any propriety be said to be concealed, which is placed upon the public record as required by law....

Dick v. Balch (1834), 33 U.S. 30, 38-39.

If the Court had ruled against Mr. Beale, how many of us would loan money if we had to rely on the debtor's pledge of land to secure repayment? Mrs. Peter's case illustrates a key function of recording laws: to encourage commerce by giving lenders confidence to rely on land to secure repayment of their loans.

B. The United States Supreme Court's reasoning in 1881 further exposes why recording laws foster commerce in land.

In 1881 the United States Supreme Court highlighted another vital function of recording laws. A landowner in Utah territory gave a mortgage in his land to Wells, Fargo bank to secure repayment of the loan. Later, he gave a man named Neslin a mortgage in

¹⁰³ Dick v. Balch (1834), 33 U.S. 30, 38.

the same land to secure a loan from Neslin.¹⁰⁴ Wells, Fargo never recorded its mortgage. Neslin, however, recorded his later mortgage and didn't know about Wells, Fargo's mortgage.

Recording mortgages or deeds was optional under Utah law. Utah's law did not bar a lender from foreclosing on an unrecorded mortgage.¹⁰⁵

When Wells, Fargo sued to foreclose on its mortgage, Neslin claimed that his mortgage took priority because Wells, Fargo hadn't recorded its mortgage. The bank countered that, because Utah's laws made recording optional, it shouldn't be penalized for *not* recording its mortgage. The Supreme Court ruled for Neslin.

The Court started by raising a rhetorical question about the purpose of opening recorded instruments to the public. The Court asked:

If, without recording, the conveyance is not only valid between the parties, but good also as against the world ... of what public value or use is the provision for keeping such a record and declaring it to be public, open to the examination of all persons?

Neslin v. Wells (1881), 104 U.S. 428, 436.

The Court answered by explaining that a prospective buyer usually can't tell from reading a seller's deed whether a stranger has a mortgage on the land. So, if a stranger could enforce a mortgage even though the stranger had not recorded it, the buyer would gain little by inspecting the county recorder's collection of recorded instruments. The buyer would have to rely most on the seller's assurances that no one has a lien on the

¹⁰⁴ *Neslin v. Wells*, 104 U.S. 428, 430-432.

¹⁰⁵ *Neslin v. Wells* (1881), 104 U.S. 428, 435.

property.¹⁰⁶ If the seller's assurances turned out to be false, the buyer would have paid thousands of dollars for land that the buyer would lose if the stranger foreclosed on his unrecorded mortgage.

If recording laws condoned that effect, the Court deduced, "land should cease generally to be the subject of sale; for no amount of diligence on the part of a purchaser would insure his title."¹⁰⁷ Thus, recording laws enable land to move freely in commerce by blunting some of the legal and economic risk that otherwise would deter people and businesses from buying land.

C. An 1897 Allen County opinion highlights why the ministerial act of recording a deed depends upon the recorder providing public notice of it.

An Allen County judge's analysis in 1897 illustrates why recording a deed or mortgage has no purpose without its instant availability to the public. In that case, Ed Wise became insolvent and had a variety of unsecured creditors. To secure debts that he owed separately to three men, Wise gave separate mortgages in his land to each, one of whom was Gus Kalb.

At night, a courier took the three mortgages to the county recorder for filing, but the office was closed. So the courier went to the county recorder's home, but he wasn't there. The recorder's wife, who worked as the recorder's assistant, endorsed two of the mortgages as recorded at 7:15 and 7:35 p.m. and kept them. Then, the courier took Gus Kalb's mortgage to the probate court, where it was filed 10 minutes later, at 7:45 p.m.

When the recorder came home later, he took the mortgages from his wife, went to

¹⁰⁶ *Neslin v. Wells* (1881), 104 U.S. 428, 436.

his office, and left them there. When Kalb filed a petition in probate court for an order to sell Wise's land to pay the mortgage, questions arose about whether the two mortgages dropped off at the recorder's home had priority. The court ruled that they did not.

The court emphasized that county recorders exist to provide public notice of claimed stakes in land, not just to keep track of those stakes. The court reasoned:

It would be inconsistent with the objects for which records are kept in the office of the recorder . . . [if] he might perform a portion of his duties upon the streets, or at any place outside of his office, which should be notice to the public or those making inquiry at the recorder's office, when no such record existed in that office. . . .

The conclusion seems irresistible that . [the mortgage] must be delivered at the office of the recorder and deposited in such office where it can be inspected; and that a delivery to the recorder, when not in his office, is not effectual until the same is placed on file in the office of the recorder.

Kalb v. Wise (Allen C.P. 1897), 5 Ohio Dec. 535, 5 Ohio N.P. 5, 1897 WL 748 at *6, *7.

Fundamentally, recording laws exist to further commerce among citizens and businesses by removing major deterrents to trading in land. They do that through the public office of county recorder. Its organic purpose is to administer a repository where the public can examine organized records that show who has staked claims in local land, when they staked those claims, and the substance and time span of those claims.

Proposition of Law No. 4: Recorded instruments are “records” and “public records” because their presence in a county recorder’s public repository is the *raison d’etre* for that public office, serving “to document” the “functions” and “activities” of the county recorder.

A. Information kept by a public office on a fixed medium is a “record” and “public record” where it documents the office’s function and activities.

The Public Records Act commands that “all public records” are open to the public

¹⁰⁷ *Neslin v. Wells* (1881), 104 U.S. 428, 436.

for inspection and copying, and defines “public record” as “records kept by any public office.” R.C. 149.43(B)(1), (A)(1).

A related statute describes what a “record” is. Broken apart for ease of reading, that law says:

“Records” includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code,

created or received by or coming under the 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. 149.011(G). The definition of “record” covers electronic records under R.C. 1306.01, which says: “Electronic record’ means a record created, generated, sent, communicated, received, or stored by electronic means.”

Because of the expansive word “includes,” the legislature’s definition of “record” is not confined to a strict mechanical formula. This Court has ruled:

[T]he General Assembly’s use of “includes” in R.C. 149.011(G) as a preface to the definition of “records” is an indication of expansion rather than constriction, restriction, or limitation....

There can be no dispute that there is great breadth in the definition of “records” for the purposes here.

Kish v. City of Akron, 109 Ohio St.3d 162, 167, 2006-Ohio-1244, 846 N.E.2d 811, 817, ¶ 20.

Indeed, the word “includes’ implies that there is more than what is listed.” Oxford American Writer’s Thesaurus at 458 (2d ed. 2008).

The recorded deeds at issue here are “records” and “public records” under the Public Records Act and R.C. Chapter 149.

B. The deeds that the respondent recorded in July and August, 2010, are “records” and “public records.”

The digital copies of the deeds recorded in July and August, 2010, are “records” under the statutory definition, R.C. 149.011(G).

When presented, the Recorder accepted those deeds as satisfying the statutory criteria for recording.¹⁰⁸ The Recorder then recorded them, affixed the Recorder’s stamp identifying the time and date of recording along with a unique Automated File Number, scanned the originals to create digital copies, and then organized and indexed those digital copies as Ohio’s recording laws require.¹⁰⁹ R.C. 317.08; R.C. 317.12; R.C. 317.13; R.C. 317.18.

Decades ago the Public Records Act depended on essentially the same definition of “record” that it depends on today.¹¹⁰ But the Act defined “public record” more restrictively than it does now, limiting “public records” only to those “*required to be kept.*”¹¹¹

Under that narrower definition, information was a public record and, therefore, also a “record,” where: “but for its keeping, the governmental unit could not carry out its duties and responsibilities; that the *raison d’etre* of such record is to assure the proper functioning of the unit.” Dayton Newspapers, Inc. v. City of Dayton (1976), 45 Ohio St.2d

¹⁰⁸ R.C. 317.114, R.C. 317.112, and R.C. 317.13(B); (Martinez Affid. ¶ 4, Vol. 3, tab 26; Patterson depo. 15: 3-11, Vol. 1, tab E.)

¹⁰⁹ (Martinez Affid. ¶ 4, Vol. 3, tab 26; Patterson depo. 13: 24-25; 14: 1-13; 15: 3-11, Vol. 1, tab E.)

¹¹⁰ The statutory definition of “record” was in R.C. 149.40: *State ex rel. Beacon Journal Pub. Co. v. Andrews* (1976), 48 Ohio St.2d 283, 286, 358 N.E.2d 565, 567.

¹¹¹ *State ex rel. Beacon Journal Pub. Co. v. Andrews* (1976), 48 Ohio St.2d 283, 286, 358 N.E.2d 565, 567.

107, 108-109, 341 N.E.2d 576, 577.

Here, collecting and organizing recorded deeds is the *raison d'être* for the Recorder, as Proposition of Law No. 3 shows. And putting the AFN and time stamp on a recorded deed documents precisely the carrying out of the Recorder's public duty. Thus, the very presence of recorded deeds in the Recorder's public repository "serves to document the . . . functions, . . . decisions, procedures, operations, or other activities" of the Recorder. Those deeds, therefore, are "records" and "public records" under R.C. Chapter 149.

Proposition of Law No. 5: Where a public office selects specific public records to copy and store separately from its main collection, the compilation of selected copies is a separate "record" and "public record."

This Court has ruled repeatedly that compiling information from public records creates a new and separate "public record." State ex rel. Margolius v. City of Cleveland (1992), 62 Ohio St.3d 456, 456-457 459, 460, 584 N.E.2d 665, 667, 669; Kish v. City of Akron, 109 Ohio St.3d 162, 163, 168, 170, 2006-Ohio-1244, 846 N.E.2d 811, 814, 818, 819 ¶s 2, 5, 24, 26 and ¶ 1 of syllabus; State ex rel. Cincinnati Post v. Schweikert (1988), 38 Ohio St.3d 170, 172, 173-174, 527 N.E.2d 1230, 1231, 1232, 1233 and ¶s 1, 2 of syllabus.

In Margolius, for example, the Cleveland police department "compiled . . . records . . . by taking specific information from a sample of dispatch tickets and storing the information on the requested [computer] tapes."¹¹² This Court ruled that the computer tapes were a separate "record" and "public record."

¹¹² State ex rel. Margolius v. City of Cleveland (1992), 62 Ohio St.3d 456, 456-457, 584 N.E.2d 665, 667.

Here, the Recorder selected digital copies of the deeds that it recorded, extracting only those filed on a particular day, and copied them onto a master CD.¹¹³ That makes each master CD a unique compilation of recorded deeds. The Recorder's self-made video touted the master CDs as fail-safes against losing recorded deeds stored in its main data base.¹¹⁴

Each master CD, therefore, documents a separate function of the county recorder: storing and organizing duplicates of the recorded deeds copied from the Recorder's main data base. Also, if a master CD revealed a gap in the sequence of deeds' AFNs, or deeds with duplicate AFNs, the master CD would serve to document a breach of the Recorder's duty (negligence or otherwise). Because of those functions, and because each master CD is a unique compilation of instruments recorded on a specific date, each master CD is a separate "record" and "public record" under R.C. Chapter 149.

Proposition of Law No. 6: The Ohio legislature treats "photocopying a document" as a discrete means of duplicating a record and therefore a subset of the general word "copy."

- A. The Recorder contends that, in prescribing a fee of \$2/page for "photocopying a document," R.C. 317.32 applies to duplicating a master CD, and requires charging an overwhelming fee.

The Recorder relies on R.C. 317.32, which applies specifically to county recorders and prescribes a fee of \$2/page for "photocopying a document." This brief calls R.C. 317.32 "the recorders' law."

The Recorder insists that the recorders' law requires it to charge over \$208,500 to

¹¹³ (Patterson depo. 32: 20-22; 59: 21-25; 31: 15-22; 32: 13-22, Vol. 1, tab E; Asfour depo., 14: 14-17; 12: 24-25; 13: 1-7; 14: 14-23, Vol. 1, tab A.)

Data Trace for CD copies of the master CDs covering July and August, 2010, and to charge the same fee to Property Insight for its set of CD copies.¹¹⁵ The Recorder bases those overwhelming fees on the number of paper pages of the recorded deeds whose digital images are stored on each master CD. The Recorder multiplies those paper pages by \$2 and applies that figure to duplicating one CD. This Court should rule that the Recorder is incorrect.

B. “Photocopying a document” is a discrete means of producing a copy: one physical paper page at a time.

Anyone who has worked in an office or been to Kinko’s knows that “photocopying a document” ordinarily refers to using a machine to duplicate records under at least three conspicuous and defining norms. First: it uses paper. Second: it produces one physical page at a time with the copied information on one or both sides of the page. Third: the copy relies on a special dry “ink,” often called toner, to display the copied information.

Relators have filed as evidence an affidavit and report of technology historian Peter Shulman, a professor at Case Western Reserve University. (Vol. 3, tabs 32-24). He explains fundamentals about the information technologies at the heart of this case.

The phrase “photocopying a document” first appeared in the recorders’ law, R.C. 317.32, in mid-1959.¹¹⁶ From about that time through today, “photocopying” typically has employed xerography, also known as electron photography.¹¹⁷ Xerography relies on the

¹¹⁴ (Ex. 18, Vol. 3: the video called “Filing a Document.”)

¹¹⁵ (Responses to interrog. nos. 4, 3, Vol. 2, Ex. F.)

¹¹⁶ Am.H.B. No. 9, 128 Laws of Ohio 542.

¹¹⁷ (Shulman report at 11, Vol. 3, tab 34.)

properties of static electricity.¹¹⁸

Printing a paper copy of a computer-stored record one page at a time with a laser printer also uses xerography, except that the attached computer provides the “original” through its instructions to the printer.¹¹⁹ And when you receive a fax, it prints one paper page at a time also using a xerographic process.¹²⁰

Photocopying, faxing, and printing copies of computer-stored records share the same fundamental qualities:

- They “rely on the creation or duplication of individual pieces of paper.”
- They “rely on essentially the same xerographic technology,” which produces copies “one page of paper at a time.”

(Shulman report at 13, Vol. 3, tab 34.) *An individual paper page, therefore, is the basic unit of the copies produced by photocopying, printing from a computer, and faxing.*

C. Copying a CD is organically different from photocopying.

Copying a CD is innately different from photocopying. CDs store information using “digital” technology, which refers to the digits one and zero. Sequences of those two digits comprise every word, image, or command used to store data on a CD or a computer system.¹²¹

The bottom side of a plastic CD has the data. Typically, a laser burns away a

¹¹⁸ (Shulman report at 10-12, Vol. 3, tab 34; Marshall Brain “*How Stuff Works*,” Vol. 3, tab 35 and referred to in Shulman’s report at 11.)

¹¹⁹ (Shulman report at 12, Vol. 3, tab 34.)

¹²⁰ (Shulman report at 13, Vol. 3, tab 34; Marshall Brain “*How Stuff Works*,” Vol. 3, tab 35 and referred to in Shulman’s report at 13.)

¹²¹ (Shulman report at 13, Vol. 3, tab 34.)

portion of the underside so that it physically represents a series of 1s and 0s.¹²² When a CD burner duplicates a CD, a laser in the burner reads the original disc's sequence of 1s and 0s, and another laser burns the same pattern of 1s and 0s onto the blank CD.¹²³

When a photocopier produces a copied page, you don't need any special device to see and read the copied data. But to see and read data on a CD, you need a CD player or computer with a CD drive. The device's laser "reads" the burned and unburned parts of the CD's underside as a sequence of 1s and 0s, and translates those sequences into words, images or sounds that we can understand on a computer screen.¹²⁴

Copying data directly from a computer hard-drive onto a blank CD is essentially the same process except that it skips starting with an original CD, and proceeds directly to burning the digital data onto the blank CD based on the computer's instructions.¹²⁵

While churning out one page at a time is the conventional unit of photocopying a multi-page report, that is not the conventional unit of duplicating a CD. The basic unit for copying a CD is copying the entire set of digital data that it contains.¹²⁶

Photocopying or printing 3,000 pages – a volume in deeds that the Recorder sometimes records in one day – would require exponentially more labor, time, expense, and use of machines than would duplicating one CD containing digital images of those

¹²² (Shulman report at 15, Vol. 3, tab 34.)

¹²³ (Shulman report at 15, Vol. 3, tab 34; Marshall Brain "How Stuff Works," Vol. 3, tab 35 and referred to in Shulman's report at 15.)

¹²⁴ (Shulman report at 14-15, Vol. 3, tab 34.)

¹²⁵ (Shulman report at 15, Vol. 3, tab 34.)

¹²⁶ (Shulman report at 16-17, Vol. 3, tab 34.)

same deeds.¹²⁷

It would take less than 5 minutes for one standard CD burner to copy digital images that represent 3,000 paper pages from one optical disc to another – using either one DVD or a CD with sufficient storage space. And on the copied disc, each deed already would be separated from every other deed.¹²⁸

D. The legislature recognizes “photocopying” as a discrete means of duplicating recorded information.

The legislature uses the word “copies” in the Public Records Act broadly to encompass every medium upon which a public office duplicates public records. R.C. 149.43(B)(1), The Act requires each office to comply with a requesting citizen’s choice to receive copies “upon paper” or upon:

- “the same medium upon which the public office . . . keeps” the record, or
- “upon any other medium” that the office reasonably can provide “as an integral part of the normal operations of the public office.”

R.C. 149.43(B)(6).

But the legislature did not use the general term “copy” when setting the fee at \$2/page for duplicating a recorded deed. Instead, the recorders’ law, R.C. 317.32, limited that \$2/page fee to two specific technologies that copy recorded deeds onto paper. First, the law says that a recorder must charge \$2/page when providing a duplicate by “photocopying” it. R.C. 317.32(I). In the very next provision, the law says that a recorder must charge \$2/page when providing a duplicate by “facsimile.” R.C. 317.32(J). Thus, the

¹²⁷ (Shulman report at 17, Vol. 3, tab 34.)

¹²⁸ (Shulman report at 17, Vol. 3, tab 34.)

very law at issue here distinguishes between photocopying and faxing as discrete and independent means of providing a copy of a recorded deed.

Earlier in the same law, part (A) of R.C. 317.32 sets a fee for recording a deed where the recorder uses “photocopy or any similar process” to record it. But the provision that imposes the fee demanded here, part (I), applies only to “photocopying” a recorded deed, but drops the expansive phrase “or any similar process.” R.C. 317.32(I) thus confines itself to only one method of reproducing information: “photocopying,” which displays the copied information on paper, one physical page at a time.

In the same statutory chapter for county recorders, the legislature distinguishes between a “photographic” record and an “electronic” record. That law, R.C. 317.13, requires county recorders to use any of a variety of copying methods to record a deed: handwriting, typewriting, printing, “or by any authorized photographic or electronic process.” R.C. 317.13(A). This Court’s own rules distinguish between a “photocopy” and an “electronically generated copy.” S.Ct. Prac. R. 8.4(B)(1) & (2).

In an unrelated statute, the legislature describes “duplicating services using photocopy machines” as a “xerographic” process, which it distinguishes from “digital imaging.” Compare R.C. 5733.09(D)(1)(a) with (D)(1)(b).

Thus, the legislature has not used the specific term “photocopying” as a generic substitute for the general word “copy.” Instead, the legislature accurately recognizes that “photocopy” is a discrete means of duplicating recorded information – a subcategory of “copy” – and distinguishes between “photocopying” and “electronic” and “digital” copies.

Proposition of Law No. 7: Where a county recorder compiles selected digital copies of recorded instruments on a compact disc (CD), the Public Records Act controls the fee for providing a CD copy of that disc.

A. Where a specific statute addressing public records does not conflict irreconcilably with the Public Records Act, both laws apply.

Because the Ohio Revised Code is an “interrelated body of law,” laws that address the same subject matter go together unless the conflict is “irreconcilable.”¹²⁹ Each of those statutes gets “full meaning and effect if they can be reconciled.”¹³⁰

That rule applies to Ohio’s open government laws. Franklin Cty Sheriff’s Dept. v. State Employment Rtns Bd. (SERB) (1992), 63 Ohio St.3d 498, 501-502, 589 N.E.2d 24, 27-28; State ex rel. Rea v. Ohio Dept. of Ed., 81 Ohio St.3d 527, 533, 1998-Ohio-334, 692 N.E.2d 596, 602; White v. Clinton County Commrs, 76 Ohio St.3d 416, 1996-Ohio-380, 667 N.E.2d 1223.

In SERB, a state law, R.C. 4117.17, applied only to the State Employment Relations Board. It decreed that specific records kept by the board were “public records and available for inspection and copying.”¹³¹ When a sheriff invoked the Public Records Act to see records that weren’t on the statutory list, the board refused, insisting that the specific statute displaced the general Public Records Act.¹³²

¹²⁹ *Bd. of Ed. of Gahanna-Jefferson Local Sch. Dist. v. Zaino*, 93 Ohio St.3d 231, 234-235, 2001-Ohio-1335, 754 N.E.2d 789, 792; *Summerville v. City of Forest Park*, 128 Ohio St.3d 221, 226, 2010-Ohio-6280, 943 N.E.2d 552, 528, ¶ 24; R.C. 1.51.

¹³⁰ *Thomas v. Freeman*, 79 Ohio St.3d 221, 225, 1997-Ohio-395, 680 N.E.2d 997, 1001.

¹³¹ *Franklin Cty Sheriff’s Dept. v. State Employment Rltns Bd. (SERB)* (1992), 63 Ohio St.3d 498, 501, 589 N.E.2d 24, 27.

¹³² *SERB*, 63 Ohio St.3d 498, 501, 589 N.E.2d 24, 27.

This Court rejected SERB's argument, ruling that both statutes applied.¹³³ The Court decided that the Public Records Act "must be applied to SERB's records not specifically designated [as public] in R.C. 4117.17."¹³⁴ The Court treated the Public Records Act as supplementing the specific statute's list of public records. The Court ruled:

Effect may be given to both statutes because a determination of whether certain of SERB's records are public begins with R.C. 4117.17.

If there remains a question, R.C. 149.43 must be applied.

We must assume that had the General Assembly intended R.C. 4117.17 to be exclusive of other public records statutes, one or both of the statutes would reflect that intention.

SERB, 63 Ohio St.3d at 501, 589 N.E.2d at 27.

Here, no irreconcilable conflict exists between the recorders' law, R.C. 317.32, and the Public Records Act. They can, and must be read together to give full effect to both.

B. The Public Records Act's "at cost" provision controls the fee for duplicating the Recorder's master CD onto a blank CD.

In requiring public offices to provide "copies of the requested public record," the Public Records Act also mandates that each office comply with the requesting citizen's choice of medium for the copies. R.C. 149.43(B)(1).

The office must comply if the citizen wants "to have the public record duplicated upon paper," or "upon the same medium upon which the public office . . . keeps it," or "upon any other medium" that the public office reasonably can produce "as an integral part of the normal operations of the public office." R.C. 149.43(B)(6).

The Act imposes one constraint on the fee that public offices can charge for copies.

¹³³ SERB, 63 Ohio St.3d 498, 501, 502, 589 N.E.2d 24, 27, 28.

No matter which medium the office uses for the “copies,” the fee can’t exceed the office’s “cost.” R.C. 149.43(B)(1).

This Court has equated “cost” with depleted supplies and ruled that “cost” does not include employee time. State ex rel. Warren Newspapers, Inc. v. Hutson (1994), 70 Ohio St.3d 619,625-626, 640 N.E.2d 174, 180.

For three reasons, the \$2/page for “photocopying a document” of the recorders’ law, R.C. 317.32(I), does not displace the Public Records Act in setting the fees for the CD duplicates at issue here.

First, “photocopying a document” is just one discrete method of duplicating a record, as shown in Proposition of Law No. 6. It produces paper copies one physical page at a time. The Public Records Act, however, is broader. It uses the word “copies” to cover duplicating records on every medium that the office has the capacity to produce, regardless of what duplicating method the office uses.

This Court has recognized that copying a record on one medium does not equate with copying the same information on some other medium. In that case, State ex rel. Dispatch Printing Co. v. Morrow Cty Prosecutor, a newspaper asked for a copy of a 911 audio tape. The respondent prosecutor refused, but allowed a reporter to listen to the tape on a speaker, and offered to provide a transcript. This Court declined to equate either of those media with the requested medium, a copy of the tape itself, and ordered

¹³⁴ SERB, 63 Ohio St.3d 498, 501, 589 N.E.2d 24, 27.

the prosecutor to duplicate the tape.¹³⁵

Second, making a duplicate of a CD is not “photocopying a document,” which Proposition of Law No. 6 and Professor Shulman’s report (Vol. 3, Tab 34) also shows.

Third, the Public Records Act uses the word “copies” as specifically applying to providing a copy “upon the same medium upon which the public office . . . keeps it.” So the Act targets precisely what the relators seek here: duplicates of a public office’s CDs. In that sense the Act applies more specifically to the “copies” at issue here than does the recorders’ law.

Therefore, the Public Records Act confines the Recorder’s fee for duplicating a master CD to the Recorder’s “cost.” The \$2/page fee in the recorders’ law applies only to paper copies of recorded deeds produced by “photocopying a document,” which includes printing paper copies from the Recorder’s computer system.¹³⁶

This Court adopted a similar analysis when it applied the “at cost” provision of the Public Records Act in State ex rel. Slagle v. Rogers, 103 Ohio St.3d 89, 2004-Ohio-4354, 814 N.E.2d 55. There, Jim Slagle asked a common pleas court to provide photocopies of portions of a transcript filed in a criminal case. He also asked for a copy of the audio tape recording of a court hearing in another case.¹³⁷

The court’s administrative judge denied the request because Slagle refused to pay

¹³⁵ *State ex rel. Dispatch Printing Co. v. Morrow Cty Prosecutor’s Office*, 105 Ohio St.3d 172, 172, 173-174, 2005-Ohio-685, 824 N.E.2d 64, 64, 66, 67, ¶s 1, 12, 14, 18.

¹³⁶ (Shulman report at 12, 13, Vol. 3, tab 34.)

¹³⁷ *State ex rel. Slagle v. Rogers*, 103 Ohio St.3d 89, 90, 2004-Ohio-4354, 814 N.E.2d 55, 56, ¶ 2.

more than “cost” under the Public Records Act.¹³⁸ The judge, however, relied on a different statute, R.C. 2301.23, which allowed a court to fix a fee for “copies” of hearing “transcripts.”¹³⁹ Under that law, the fee was “\$2.60 per page” if the “transcript” was “prepared from audio tape.”¹⁴⁰ As for the audio tape, the judge argued against providing a copy under the Public Records Act because that would circumvent the \$2.60/page fee for the verbatim record in transcript form.¹⁴¹

This Court ruled that the specific statute, R.C. 2301.23, applied only to “photocopies” of the “transcript,” but that the Public Records Act applied to copying the audio tape.¹⁴²

The Court thus gave effect to both statutes. The \$2.60/page fee of the specific law displaced the Public Records Act *only* to the extent that the requested record matched the statutorily prescribed medium: “transcripts.” But when the verbatim record was an audio tape, and thus a different medium than the one specified in the narrower law, the Public Records Act applied and its “at cost” fee controlled.

So here, the law imposing the \$2/page fee, R.C. 317.32(I), displaces the Public Records Act only to the extent that the relators asked to receive a copy of each recorded deed as individual pages displayed on paper: “photocopying.” But because relators have asked for duplicates on, and of, a different medium – duplicates of master CDs – the

¹³⁸ *Slagle*, 103 Ohio St.3d 89, 90, 2004-Ohio-4354, 814 N.E.2d 55, 56, ¶ 2.

¹³⁹ *Slagle*, 103 Ohio St.3d 89, 90, 91, 2004-Ohio-4354, 814 N.E.2d 55, 56-57, ¶s 1, 8.

¹⁴⁰ *Slagle*, 103 Ohio St.3d 89, 91, 2004-Ohio-4354, 814 N.E.2d 55, 57, ¶ 9.

¹⁴¹ *Slagle*, 103 Ohio St.3d 89, 92, 2004-Ohio-4354, 814 N.E.2d 55, 58, ¶ 16.

Public Records Act's "cost" limit controls. The \$2/page fee of the recorders' law doesn't apply. Every county recorder in Ohio that claims the capacity to put copies of recorded deeds on CD appears to follow that same analysis – including the respondent here until it changed course after nearly 11 years.

C. Of more than 60 Ohio counties that claim the capacity to put digital copies of recorded deeds on CD, none charges the \$2/page fee for "photocopying a document" that Cuyahoga County now demands.

In March and April, 2011, Kent State University Professor Karl Idsvoog asked every county recorder in Ohio except the respondent to provide a CD of digital copies of every instrument recorded on August 25, 2010.¹⁴³ He received the requested CD from 61 counties, which was every county that claimed the technical ability to provide one, except Licking County.¹⁴⁴ Idsvoog chose not to obtain a CD from Licking County because of time constraints for this case.¹⁴⁵

No county demanded a fee based on the number of paper pages comprising the deeds whose digital images are stored on the CD.¹⁴⁶ The most common fee that Idsvoog paid was \$1.¹⁴⁷ The highest fee that he paid was \$20 to Franklin County.¹⁴⁸ A color map showing county-by-county the fees that Idsvoog paid for the CDs is Vol. 4, tab H of

¹⁴² *Slagle*, 103 Ohio St.3d 89, 90, 91-92, 2004-Ohio-4354, 814 N.E.2d 55, 56, 57-58, ¶s 4, 9-13, 15-18.

¹⁴³ Idsvoog Affid. ¶ 4, Vol. 4, tab J.

¹⁴⁴ Idsvoog Affid. ¶s 6, 7, 8, Vol. 4, tab J.

¹⁴⁵ Idsvoog Affid. ¶s 7, 8, Vol. 4, tab J.

¹⁴⁶ Idsvoog Affid. ¶ 10, Vol. 4, tab J.

¹⁴⁷ Idsvoog Affid. ¶ 10, Vol. 4, tab J.

¹⁴⁸ Idsvoog Affid. ¶ 10, Vol. 4, tab J.

relators' evidence. The map derives from a table listing each fee paid to each county: Vol. 2, tab 7 of relators' evidence.

A summary of the most common fees + the fees that were highest is next:

Fee for one CD	No. of counties that charged that fee
\$1	29 counties
\$2	10 counties
less than \$1	7 counties
\$11	1 county (Stark)
\$15	1 county (Marion)
\$20	1 county (Franklin)

Thus, respondent appears to be alone among the state's counties in applying the \$2/page provision to CDs. Indeed, for 11 years – until the spring of 2010 – respondent also did not apply the \$2/page fee when duplicating its master CDs.¹⁴⁹ Had respondent not reversed itself in 2010, Ohio's county recorders apparently would have been unanimous.

Judging by the low amounts and the flat fees charged, the other counties appear to apply the "at cost" provision of the Public Records Act to the CDs. Indeed, most of the flat fees charged were \$1, which matches the model policies of the Ohio's Attorney General and Ohio Auditor based on the Act. Both advise setting a fee of "\$1 per disc" for

¹⁴⁹ (Stutzman Affid. ¶s 13, 14, 15, Vol. 3, tab 14; Answer to amended complaint, ¶ 22; amended complaint, ¶ 21.)

“downloaded computer files to a compact disc.”¹⁵⁰ And that matches verbatim the fee provision that was in the Recorder’s own policy until the Recorder deleted it a few days after relators deposed recorder Greene.¹⁵¹

When applying the Public Records Act and other laws that govern the public’s rights to obtain information from government offices, this Court has considered the past practices of the respondent public office and the practices of a respondent’s counterpart agencies elsewhere in the state. E.g., State ex rel. Wadd v. City of Cleveland, 81 Ohio St.3d 50, 50, 51, 53 & n.1, 1998-Ohio-444, 689 N.E.2d 25, 27, 28 & n.1; State ex rel. Plain Dealer Pub. Co. v. Floyd, 111 Ohio St.3d 56, 66, 2006-Ohio-4437, 855 N.E.2d 35, 46, ¶ 47; State ex rel. Consumer News Services, Inc. v. Worthington City Bd. of Ed, 97 Ohio St.3d 58, 58, 63, 67, 2002-Ohio-5311, 776 N.E.2d 82, 84, 87, 91, ¶s 2-4, 27, 49, 50.

D. The Recorder has presented no evidence that its “cost” to duplicate a master CD is any higher than \$1.

It costs less than 32¢ for the Recorder to make one CD copy of one master CD, if the relators don’t save that expense by supplying their own blank CDs.¹⁵² As it did for over a decade, the Recorder could use its now idle seven-drive CD burner to make copies for Data Trace and Property Insight simultaneously.

Judging by the calendar, the Recorder has 22 master CDs covering July and the same number covering August. At 32¢ per CD, it would cost the Recorder about \$28 to

¹⁵⁰ Stipulation ¶ 4, Vol. 2, Ex. G; Section 3.2, p. 3 of Ohio Atty. Gen’l policy, Vol. 2, tab 2; Ohio Auditor policies dated 9/29/2007 and 1/10/11, Vol. 3, tab 38, available at <http://www.auditor.state.oh.us/services/opengov/PublicRecordsPolicy85x11.pdf>.

¹⁵¹ (Stipulation ¶ 1 and tabs 4 and 5, Vol. 2.)

¹⁵² (Stipulation ¶ 6, Vol. 2, Ex. G.)

make two separate sets of CDs covering last July and August.

Until the Recorder deleted it after the relators deposed recorder Greene, the Recorder had listed its fee for downloading computer files to CD at \$1.¹⁵³ Presumably, the \$1 approximated the Recorder's actual cost to do that, and since there is no evidence that the Recorder spends more than \$1 to duplicate a master CD, relators do not insist that the Recorder charge a fee below \$1 per disc.

But they do ask the Court to compel the Recorder to provide the requested CDs at a fee no higher than \$1 per disc, and to amend or restore its prior policy and practice so that it does not charge a fee for CDs based on the volume of individual paper pages, but instead on its actual cost (\$1 or less) to produce the CDs.

Applying the Act's "at cost" limit to digital copies of recorded deeds on CD coincides with the core purpose of recording laws and their instrument, the county recorder. As the cases of the 19th century illustrate, the purpose of recording laws is economic: to further commerce by enabling land to move freely in commerce.

As the real estate industry's counterparts to Westlaw and Lexis, these relators use copies of recorded deeds to further the recording laws' core objectives in furthering commerce in land. Requiring them, or anyone, to pay \$417,000 for CDs of recorded deeds that cost the Recorder only \$28 to make undermines the most important function of recording laws. No one would pay that fee; everyone would instead forgo the obvious efficiency of searching and evaluating title to land using the digital technology that the CDs provide.

¹⁵³ (Stipulation ¶ 1 and tab 4, Vol. 2.)

The Recorder has said informally that R.C. 9.01 requires the \$417,000 fee that it demands here. Relators see nothing about that law to justify the demanded fee. But until relators see how the Recorder formally ties that law to its gigantic fee as an outlier among Ohio's counties, relators will address R.C. 9.01 in their reply.

Proposition of Law No. 8: The most that the Recorder could charge under the recorders' law – R.C. 317.32 – is \$2 for each CD copy of each master CD.

Even though the Recorder distorts the duplicating of a CD as “photocopying a document,” that still shouldn't yield the Recorder's crushing \$417,000 fee.

Consider how the recorders' law, R.C. 317.32, treats one paper page. No matter how much or how little information appears on one page – one word or several blocks of single-spaced text – the recorders' law sets the fee at \$2 for a photocopy of that page. The law does not treat a 50-page report the same way. If the report's text was single-spaced, the fee for a photocopy would be \$100. But if the text was double-spaced, the substance and quantity of the information would be exactly the same, but the fee would be \$200 because of the extra individual pages copied one at a time.

Copying the Recorder's master CD is more like copying a single paper page than like copying 3,000 paper pages. When a photocopier copies a paper page, it copies the entire set of data on that page. When a CD burner copies a CD, it copies the entire set of data on that CD.¹⁵⁴

Furthermore, each master CD is a compilation of information that is independent

¹⁵⁴ (Shulman report at 16-17, Vol. 3, tab 34.)

of every other master CD, and independent of every recorded deed.¹⁵⁵ So, when the Recorder makes a CD copy of a master CD, not only is it copying the entire set of data on that CD, but it is copying one unique record.

For large plat maps, the recorders' law doesn't set fees by the page. Where county recorders use "the photostatic or any similar process" for recording plat maps, the law sets the fee based on the "square inch." R.C. 317.32(K). By measuring those fees based on square inches instead of "pages," the legislature recognizes that different mediums use different units for measuring the information that they contain. We don't gauge the volume of information contained on a CD by the "page."¹⁵⁶

To treat solitary units of text-based information consistently – a page and a CD – the fee for one copy of one CD must be \$2 when applying only the recorders' law. Like a paper page, a CD is a solitary unit of information, and we don't measure the volume of information that CDs store by counting individual pages.¹⁵⁷

At \$2 per copy, the fee for each relator firm to receive a set of CD copies covering July and August would be \$44 for July and \$44 for August.

¹⁵⁵ See *State ex rel. Margolius v. City of Cleveland* (1992), 62 Ohio St.3d 456, 456-457 459, 460, 584 N.E.2d 665, 667, 669.

¹⁵⁶ (Shulman report at 13, 16-17, Vol. 3, tab 34.)

¹⁵⁷ (Shulman report at 13, 16-17, Vol. 3, tab 34.)

Conclusion

For the foregoing reasons, this Court should issue a writ of mandamus that compels the respondent Recorder to:

- comply with the relators' requests to provide to Property Insight and Data Trace duplicates of the master CDs covering July and August, 2010, but at a fee no higher than the respondent's "cost" under the Public Records Act, R.C. 149.43(B)(1), and thus with no "per-page" fee;
- amend its public-records policy to allow for digital copies of recorded instruments on CD, at a fee no higher than the respondent's "cost" under the Public Records Act, and with no "per-page" fee;
- restore the public-records policy that is Exhibit 4 to the deposition of Lillian Greene as charging \$1 per disc for digital copies of recorded deeds on CD, with no per-page fee – as there is no evidence that respondent's "cost" under the Public Records Act exceeds that amount.



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Attorneys for Relators

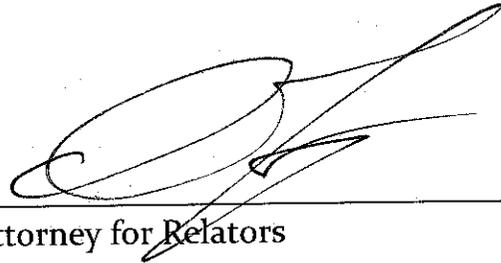
Certificate of Service

The foregoing *merits brief of relators* has been hand delivered on this 15th

day of June, 2011 to:

David T. Movius, Esq.
Matthew J. Cavanagh, Esq.
McDonald Hopkins LLC
600 Superior Avenue East - Suite 2100
Cleveland, Ohio 44114

Attorneys for Respondent



A handwritten signature in black ink, consisting of several loops and a long horizontal stroke, positioned above a solid horizontal line.

Attorney for Relators

Relators' Appendix

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Type Instrument: **Quit Claim Deed Ex** Date: 6/1/2010 9:05:00 AM
Tax District #: **3100** Tax List Year: **2010**
Grantor: **EDWARDS, EARL & LIDDELL, C** Land Use Code: **5100**
Grantee: **EDWARDS, EARL** Land Value: **12,300**
Balance Assumed: **\$ 0.00** Building Value: **36,600**
Total Consideration: **\$ 0.00** Total Value: **48,900**
Conv. Fee Paid: **\$ 0.00** Arms Length Sale: **NO**
Transfer Fee Paid: **\$ 0.50** Rcpt: **c-06012010-2**
Fee Paid by: **ATTORNEY** Inst #: **454858**
Exempt Code: Check #:

CUYAHOGA COUNTY RECORDER
LILLIAN J GREENE - 3
DEQC 6/1/2010 9:08:49 AM
201006010006

Frank Russo
CUYAHOGA COUNTY AUDITOR

Quit -Claim Deed

KNOW ALL MEN BY THESE PRESENTS

THAT, DENISE EDWARDS LIDDELL and KENNETH LIDDELL, (Husband & Wife)

Grantors, who claim title by or through instrument, recorded in Volume
Cuyahoga County Recorder's Office for the consideration of

Ten and no/00 ----- Dollars (\$10.00)

received to their full satisfaction of

EARL EDWARDS (divorced and not remarried), the Grantee,
whose TAX MAILING ADDRESS will be

3263 East 134th Street
Cleveland, Ohio 44120

have **Given, Granted, Remised, Released and Forever Quit-Claimed** and does by these presents absolutely give, grant, remise, release and forever quit-claim unto the said grantee, his heirs and assigns forever, of all such right and title as We, the said grantors, have or ought to have in and to the following described piece or parcel of land situated in City of Cleveland, the County of Cuyahoga, and State of Ohio, and known as:

being Sub-Lot No. 150, in the Kinsman Heights Allotment, of part of Original One Hundred Acre Lot No. 446, as shown by the recorded plat in Volume 44 of Maps, Page 26 of Cuyahoga County Records, and being 40 feet front on the Easterly side of East 134th Street, and extending back of equal width 120 feet, as appears by said plat, be the same more or less, subject to all legal highways.

3263 East 134th Street
Cleveland, Ohio 44120

PPN: 130-09-008

To Have and to Hold the premises aforesaid, with the appurtenances thereunto belonging to the said grantee, his successors and assigns, so that neither the said grantors, nor their heirs, nor any other persons claiming title through or under them shall or will hereafter claim or demand any right or title to the premises, or any part thereof; but they and every one of them shall by these presents be excluded and forever barred.

And for valuable consideration **Kenneth Liddell** does hereby remise, release and forever quit-claim unto the said grantee, his heirs and assigns, all of his right and expectancy of **Dower** in the above described premises.

In Witness Whereof we have hereunto set our hands this 25 day of May, 2010.

Denise C. Edwards Liddell
DENISE EDWARDS LIDDELL

Kenneth Liddell
KENNETH LIDDELL

COPY

S.Ct. Prac. R. 8.4. Mechanical requirements

(A) (1) Every original document filed with the Supreme Court shall be single-sided, shall be typewritten or prepared by word processor or other standard typographic process, and shall comply with the requirements of this rule. A medium weight, noncondensed Roman type style is preferred, and italic type style may be used only for case citations and emphasis. The Clerk may accept a handwritten document for filing only in an emergency, provided the document is clearly legible.

(2) All documents shall be on opaque, unglazed, 20 to 22 pound weight, white paper, 8 1/2 by 11 inches in size. The original shall not be stapled nor otherwise bound and shall not contain dividers or tabs. All margins shall be at least one inch, and the left margin shall be justified. Documents shall not be enclosed in notebooks or binders and shall not have plastic cover pages.

(3) The text of all documents shall be at least 12-point, double-spaced noncondensed type. Footnotes and quotations may be single-spaced; however, they shall also be in 12-point, noncondensed type. As used in this provision, "noncondensed type" shall refer either to Times New Roman type or to another type that has no more than eighty characters to a line of text.

(B) When these rules require that a copy of the court or agency opinion or decision being appealed be attached to a document filed with the Supreme Court, the copy shall be either of the following:

(1) A photocopy of the opinion or decision issued directly by the court or agency;

(2) An electronically generated copy that meets the requirements of division (A)(3).

(C) Any supplement to the briefs filed pursuant to S.Ct. Prac. R. 7.1 may be prepared and reproduced by photocopying the relevant documents in the record, even if those documents do not comply with the mechanical requirements of division (A), provided that the requirements as to paper size and paper type are met and each page of the supplement is clearly legible. Both sides of the paper may be used in preparing a supplement.

(D) Any document filed with the Supreme Court that exceeds two inches in thickness shall be bound and numbered in two or more parts, with each part containing a cover page.

149.011 Definitions

As used in this chapter, except as otherwise provided:

(A) "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. "Public office" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

(B) "State agency" includes every department, bureau, board, commission, office, or other organized body established by the constitution and laws of this state for the exercise of any function of state government, including any state-supported institution of higher education, the general assembly, any legislative agency, any court or judicial agency, or any political subdivision or agency of a political subdivision. "State agency" does not include the nonprofit corporation formed under section 187.01 of the Revised Code.

(C) "Public money" includes all money received or collected by or due a public official, whether in accordance with or under authority of any law, ordinance, resolution, or order, under color of office, or otherwise. It also includes any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.

(D) "Public official" includes all officers, employees, or duly authorized representatives or agents of a public office.

(E) "Color of office" includes any act purported or alleged to be done under any law, ordinance, resolution, order, or other pretension to official right, power, or authority.

(F) "Archive" includes any public record that is transferred to the state archives or other designated archival institutions because of the historical information contained on it.

(G) "Records" includes any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, created or received by or coming under the 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.

149.43 Availability of public records; mandamus action; training of public employees; public records policy; bulk commercial special extraction requests

(A) As used in this section:

(1) "Public record" means 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 this state kept by the nonprofit or for-profit entity operating the alternative school pursuant to section 3313.533 of the Revised Code. "Public record" does not mean any of the following:

(a) Medical records;

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

(c) Records pertaining to actions under section 2151.85 and division (C) of section 2919.121 of the Revised Code and to appeals of actions arising under those sections;

(d) Records pertaining to adoption proceedings, including the contents of an adoption file maintained by the department of health under section 3705.12 of the Revised Code;

(e) Information in a record contained in the putative father registry established by section 3107.062 of the Revised Code, regardless of whether the information is held by the department of job and family services or, pursuant to section 3111.69 of the Revised Code, the office of child support in the department or a child support enforcement agency;

(f) Records listed in division (A) of section 3107.42 of the Revised Code or specified in division (A) of section 3107.52 of the Revised Code;

(g) Trial preparation records;

(h) Confidential law enforcement investigatory records;

(i) Records containing information that is confidential under section 2710.03 or 4112.05 of the Revised Code;

(j) DNA records stored in the DNA database pursuant to section 109.573 of the Revised Code;

(k) Inmate records released by the department of rehabilitation and correction to the department of youth services or a court of record pursuant to division (E) of section 5120.21 of the Revised Code;

- (l) Records maintained by the department of youth services pertaining to children in its custody released by the department of youth services to the department of rehabilitation and correction pursuant to section 5139.05 of the Revised Code;
- (m) Intellectual property records;
- (n) Donor profile records;
- (o) Records maintained by the department of job and family services pursuant to section 3121.894 of the Revised Code;
- (p) Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information;
- (q) In the case of a county hospital operated pursuant to Chapter 339. of the Revised Code or a municipal hospital operated pursuant to Chapter 749. of the Revised Code, information that constitutes a trade secret, as defined in section 1333.61 of the Revised Code;
- (r) Information pertaining to the recreational activities of a person under the age of eighteen;
- (s) Records provided to, statements made by review board members during meetings of, and all work products of a child fatality review board acting under sections 307.621 to 307.629 of the Revised Code, and child fatality review data submitted by the child fatality review board to the department of health or a national child death review database, other than the report prepared pursuant to division (A) of section 307.626 of the Revised Code;
- (t) Records provided to and statements made by the executive director of a public children services agency or a prosecuting attorney acting pursuant to section 5153.171 of the Revised Code other than the information released under that section;
- (u) Test materials, examinations, or evaluation tools used in an examination for licensure as a nursing home administrator that the board of examiners of nursing home administrators administers under section 4751.04 of the Revised Code or contracts under that section with a private or government entity to administer;
- (v) Records the release of which is prohibited by state or federal law;
- (w) Proprietary information of or relating to any person that is submitted to or compiled by the Ohio venture capital authority created under section 150.01 of the Revised Code;
- (x) Information reported and evaluations conducted pursuant to section 3701.072 of the

Revised Code;

(y) Financial statements and data any person submits for any purpose to the Ohio housing finance agency or the controlling board in connection with applying for, receiving, or accounting for financial assistance from the agency, and information that identifies any individual who benefits directly or indirectly from financial assistance from the agency;

(z) Records listed in section 5101.29 of the Revised Code.

(aa) [FN1] Discharges recorded with a county recorder under section 317.24 of the Revised Code, as specified in division (B)(2) of that section.

(2) "Confidential law enforcement investigatory record" means any record that pertains to a law enforcement matter of a criminal, quasi-criminal, civil, or administrative nature, but only to the extent that the release of the record would create a high probability of disclosure of any of the following:

(a) The identity of a suspect who has not been charged with the offense to which the record pertains, or of an information source or witness to whom confidentiality has been reasonably promised;

(b) Information provided by an information source or witness to whom confidentiality has been reasonably promised, which information would reasonably tend to disclose the source's or witness's identity;

(c) Specific confidential investigatory techniques or procedures or specific investigatory work product;

(d) Information that would endanger the life or physical safety of law enforcement personnel, a crime victim, a witness, or a confidential information source.

(3) "Medical record" means 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.

(4) "Trial preparation record" means any record that contains information that is specifically compiled in reasonable anticipation of, or in defense of, a civil or criminal action or proceeding, including the independent thought processes and personal trial preparation of an attorney.

(5) "Intellectual property record" means a record, other than a financial or administrative record, that is produced or collected by or for faculty or staff of a state institution of

higher learning in the conduct of or as a result of study or research on an educational, commercial, scientific, artistic, technical, or scholarly issue, regardless of whether the study or research was sponsored by the institution alone or in conjunction with a governmental body or private concern, and that has not been publicly released, published, or patented.

(6) "Donor profile record" means all records about donors or potential donors to a public institution of higher education except the names and reported addresses of the actual donors and the date, amount, and conditions of the actual donation.

(7) "Peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation residential and familial information" means any information that discloses any of the following about a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation:

(a) The address of the actual personal residence of a peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or an investigator of the bureau of criminal identification and investigation, except for the state or political subdivision in which the peace officer, parole officer, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation resides;

(b) Information compiled from referral to or participation in an employee assistance program;

(c) The social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of, or any medical information pertaining to, a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(d) The name of any beneficiary of employment benefits, including, but not limited to, life insurance benefits, provided to a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer;

(e) The identity and amount of any charitable or employment benefit deduction made by the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's,

correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's employer from the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's compensation unless the amount of the deduction is required by state or federal law;

(f) The name, the residential address, the name of the employer, the address of the employer, the social security number, the residential telephone number, any bank account, debit card, charge card, or credit card number, or the emergency telephone number of the spouse, a former spouse, or any child of a peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation;

(g) A photograph of a peace officer who holds a position or has an assignment that may include undercover or plain clothes positions or assignments as determined by the peace officer's appointing authority.

As used in divisions (A)(7) and (B)(9) of this section, "peace officer" has the same meaning as in section 109.71 of the Revised Code and also includes the superintendent and troopers of the state highway patrol; it does not include the sheriff of a county or a supervisory employee who, in the absence of the sheriff, is authorized to stand in for, exercise the authority of, and perform the duties of the sheriff.

As used in divisions (A)(7) and (B)(5) [FN2] of this section, "correctional employee" means any employee of the department of rehabilitation and correction who in the course of performing the employee's job duties has or has had contact with inmates and persons under supervision.

As used in divisions (A)(7) and (B)(5) [FN3] of this section, "youth services employee" means any employee of the department of youth services who in the course of performing the employee's job duties has or has had contact with children committed to the custody of the department of youth services.

As used in divisions (A)(7) and (B)(9) of this section, "firefighter" means any regular, paid or volunteer, member of a lawfully constituted fire department of a municipal corporation, township, fire district, or village.

As used in divisions (A)(7) and (B)(9) of this section, "EMT" means EMTs-basic, EMTs-I, and paramedics that provide emergency medical services for a public emergency medical service organization. "Emergency medical service organization," "EMT-basic," "EMT-I," and "paramedic" have the same meanings as in section 4765.01 of the Revised Code.

As used in divisions (A)(7) and (B)(9) of this section, “investigator of the bureau of criminal identification and investigation” has the meaning defined in section 2903.11 of the Revised Code.

(8) “Information pertaining to the recreational activities of a person under the age of eighteen” means information that is kept in the ordinary course of business by a public office, that pertains to the recreational activities of a person under the age of eighteen years, and that discloses any of the following:

(a) The address or telephone number of a person under the age of eighteen or the address or telephone number of that person’s parent, guardian, custodian, or emergency contact person;

(b) The social security number, birth date, or photographic image of a person under the age of eighteen;

(c) Any medical record, history, or information pertaining to a person under the age of eighteen;

(d) Any additional information sought or required about a person under the age of eighteen for the purpose of allowing that person to participate in any recreational activity conducted or sponsored by a public office or to use or obtain admission privileges to any recreational facility owned or operated by a public office.

(9) “Community control sanction” has the same meaning as in section 2929.01 of the Revised Code.

(10) “Post-release control sanction” has the same meaning as in section 2967.01 of the Revised Code.

(11) “Redaction” means obscuring or deleting any information that is exempt from the duty to permit public inspection or copying from an item that otherwise meets the definition of a “record” in section 149.011 of the Revised Code.

(12) “Designee” and “elected official” have the same meanings as in section 109.43 of the Revised Code.

(B)(1) Upon request and subject to division (B)(8) of this section, all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours. Subject to division (B)(8) of this section, upon 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. If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the

person responsible for the public record shall make available all of the information within the public record that is not exempt. When making that public record available for public inspection or copying that public record, the public office or the person responsible for the public record shall notify the requester of any redaction or make the redaction plainly visible. A redaction shall be deemed a denial of a request to inspect or copy the redacted information, except if federal or state law authorizes or requires a public office to make the redaction.

(2) To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section. A public office also shall have available a copy of its current records retention schedule at a location readily available to the public. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

(3) If a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. If the initial request was provided in writing, the explanation also shall be provided to the requester in writing. The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.

(4) Unless specifically required or authorized by state or federal law or in accordance with division (B) of this section, no public office or person responsible for public records may limit or condition the availability of public records by requiring disclosure of the requester's identity or the intended use of the requested public record. Any requirement that the requester disclose the requestor's identity or the intended use of the requested public record constitutes a denial of the request.

(5) A public office or person responsible for public records may ask a requester to make the request in writing, may ask for the requester's identity, and may inquire about the intended use of the information requested, but may do so only after disclosing to the requester that a written request is not mandatory and that the requester may decline to reveal the requester's identity or the intended use and when a written request or disclosure of the identity or intended use would benefit the requester by enhancing the ability of the public office or person responsible for public records to identify, locate, or deliver the public records sought by the requester.

(6) If any person chooses to obtain a copy of a public record in accordance with division (B) of this section, the public office or person responsible for the public record may require that person to pay in advance the cost involved in providing the copy of the public record in accordance with the choice made by the person seeking the copy under this division. The public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy. Nothing in this section requires a public office or person responsible for the public record to allow the person seeking a copy of the public record to make the copies of the public record.

(7) Upon a request made in accordance with division (B) of this section and subject to division (B)(6) of this section, a public office or person responsible for public records 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. The public office or person responsible for the public record may require the person making the request to pay in advance the cost of postage if the copy is transmitted by United States mail or the cost of delivery if the copy is transmitted other than by United States mail, and to pay in advance the costs incurred for other supplies used in the mailing, delivery, or transmission.

Any public office may adopt a policy and procedures that it will follow in transmitting, within a reasonable period of time after receiving a request, copies of public records by United States mail or by any other means of delivery or transmission pursuant to this division. A public office that adopts a policy and procedures under this division shall comply with them in performing its duties under this division.

In any policy and procedures adopted under this division, a public office may limit the number of records requested by a person that the office will transmit by United States mail to ten per month, unless the person certifies to the office in writing that the person does not intend to use or forward the requested records, or the information contained in them, for commercial purposes. For purposes of this division, "commercial" shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

(8) A public office or person responsible for public records is not required to permit a person who is incarcerated pursuant to a criminal conviction or a juvenile adjudication to

inspect or to obtain a copy of any public record concerning a criminal investigation or prosecution or concerning what would be a criminal investigation or prosecution if the subject of the investigation or prosecution were an adult, unless the request to inspect or to obtain a copy of the record is for the purpose of acquiring information that is subject to release as a public record under this section and the judge who imposed the sentence or made the adjudication with respect to the person, or the judge's successor in office, finds that the information sought in the public record is necessary to support what appears to be a justiciable claim of the person.

(9) Upon written request made and signed by a journalist on or after December 16, 1999, a public office, or person responsible for public records, having custody of the records of the agency employing a specified peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation shall disclose to the journalist the address of the actual personal residence of the peace officer, parole officer, prosecuting attorney, assistant prosecuting attorney, correctional employee, youth services employee, firefighter, EMT, or investigator of the bureau of criminal identification and investigation and, if the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child is employed by a public office, the name and address of the employer of the peace officer's, parole officer's, prosecuting attorney's, assistant prosecuting attorney's, correctional employee's, youth services employee's, firefighter's, EMT's, or investigator of the bureau of criminal identification and investigation's spouse, former spouse, or child. The request shall include the journalist's name and title and the name and address of the journalist's employer and shall state that disclosure of the information sought would be in the public interest.

As used in this division, "journalist" means a person engaged in, connected with, or employed by any news medium, including a newspaper, magazine, press association, news agency, or wire service, a radio or television station, or a similar medium, for the purpose of gathering, processing, transmitting, compiling, editing, or disseminating information for the general public.

(C)(1) If a person allegedly is aggrieved by the failure of a public office or the person responsible for public records to promptly prepare a public record and to make it available to the person for inspection in accordance with division (B) of this section or by any other failure of a public office or the person responsible for public records to comply with an obligation in accordance with division (B) of this section, the person allegedly aggrieved may commence a mandamus action to obtain a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, that awards court costs and reasonable attorney's fees to the person that instituted the mandamus action, and, if applicable, that includes an order fixing statutory

damages under division (C)(1) of this section. The mandamus action may be commenced in the court of common pleas of the county in which division (B) of this section allegedly was not complied with, in the supreme court pursuant to its original jurisdiction under Section 2 of Article IV, Ohio Constitution, or in the court of appeals for the appellate district in which division (B) of this section allegedly was not complied with pursuant to its original jurisdiction under Section 3 of Article IV, Ohio Constitution.

If a requestor transmits a written request by hand delivery or certified mail to inspect or receive copies of any public record in a manner that fairly describes the public record or class of public records to the public office or person responsible for the requested public records, except as otherwise provided in this section, the requestor shall be entitled to recover the amount of statutory damages set forth in this division if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section.

The amount of statutory damages shall be fixed at one hundred dollars for each business day during which the public office or person responsible for the requested public records failed to comply with an obligation in accordance with division (B) of this section, beginning with the day on which the requester files a mandamus action to recover statutory damages, up to a maximum of one thousand dollars. The award of statutory damages shall not be construed as a penalty, but as compensation for injury arising from lost use of the requested information. The existence of this injury shall be conclusively presumed. The award of statutory damages shall be in addition to all other remedies authorized by this section.

The court may reduce an award of statutory damages or not award statutory damages if the court determines both of the following:

- (a) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;
- (b) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(2)(a) If the court issues a writ of mandamus that orders the public office or the person

responsible for the public record to comply with division (B) of this section and determines that the circumstances described in division (C)(1) of this section exist, the court shall determine and award to the relator all court costs.

(b) If the court renders a judgment that orders the public office or the person responsible for the public record to comply with division (B) of this section, the court may award reasonable attorney's fees subject to reduction as described in division (C)(2)(c) of this section. The court shall award reasonable attorney's fees, subject to reduction as described in division (C)(2)(c) of this section when either of the following applies:

(i) The public office or the person responsible for the public records failed to respond affirmatively or negatively to the public records request in accordance with the time allowed under division (B) of this section.

(ii) The public office or the person responsible for the public records promised to permit the relator to inspect or receive copies of the public records requested within a specified period of time but failed to fulfill that promise within that specified period of time.

(c) Court costs and reasonable attorney's fees awarded under this section shall be construed as remedial and not punitive. Reasonable attorney's fees shall include reasonable fees incurred to produce proof of the reasonableness and amount of the fees and to otherwise litigate entitlement to the fees. The court may reduce an award of attorney's fees to the relator or not award attorney's fees to the relator if the court determines both of the following:

(i) That, based on the ordinary application of statutory law and case law as it existed at the time of the conduct or threatened conduct of the public office or person responsible for the requested public records that allegedly constitutes a failure to comply with an obligation in accordance with division (B) of this section and that was the basis of the mandamus action, a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records did not constitute a failure to comply with an obligation in accordance with division (B) of this section;

(ii) That a well-informed public office or person responsible for the requested public records reasonably would believe that the conduct or threatened conduct of the public office or person responsible for the requested public records as described in division (C)(2)(c)(i) of this section would serve the public policy that underlies the authority that is asserted as permitting that conduct or threatened conduct.

(D) Chapter 1347. of the Revised Code does not limit the provisions of this section.

(E)(1) To ensure that all employees of public offices are appropriately educated about a public office's obligations under division (B) of this section, all elected officials or their

appropriate designees shall attend training approved by the attorney general as provided in section 109.43 of the Revised Code. In addition, all public offices shall adopt a public records policy in compliance with this section for responding to public records requests. In adopting a public records policy under this division, a public office may obtain guidance from the model public records policy developed and provided to the public office by the attorney general under section 109.43 of the Revised Code. Except as otherwise provided in this section, the policy may not limit the number of public records that the public office will make available to a single person, may not limit the number of public records that it will make available during a fixed period of time, and may not establish a fixed period of time before it will respond to a request for inspection or copying of public records, unless that period is less than eight hours.

(2) The public office shall distribute the public records policy adopted by the public office under division (E)(1) of this section to the employee of the public office who is the records custodian or records manager or otherwise has custody of the records of that office. The public office shall require that employee to acknowledge receipt of the copy of the public records policy. The public office shall create a poster that describes its public records policy and shall post the poster in a conspicuous place in the public office and in all locations where the public office has branch offices. The public office may post its public records policy on the internet web site of the public office if the public office maintains an internet web site. A public office that has established a manual or handbook of its general policies and procedures for all employees of the public office shall include the public records policy of the public office in the manual or handbook.

(F)(1) The bureau of motor vehicles may adopt rules pursuant to Chapter 119. of the Revised Code to reasonably limit the number of bulk commercial special extraction requests made by a person for the same records or for updated records during a calendar year. The rules may include provisions for charges to be made for bulk commercial special extraction requests for the actual cost of the bureau, plus special extraction costs, plus ten per cent. The bureau may charge for expenses for redacting information, the release of which is prohibited by law.

(2) As used in division (F)(1) of this section:

(a) "Actual cost" means the cost of depleted supplies, records storage media costs, actual mailing and alternative delivery costs, or other transmitting costs, and any direct equipment operating and maintenance costs, including actual costs paid to private contractors for copying services.

(b) "Bulk commercial special extraction request" means a request for copies of a record for information in a format other than the format already available, or information that cannot be extracted without examination of all items in a records series, class of records, or data base by a person who intends to use or forward the copies for surveys, marketing, solicitation, or resale for commercial purposes. "Bulk commercial special extraction

request” does not include a request by a person who gives assurance to the bureau that the person making the request does not intend to use or forward the requested copies for surveys, marketing, solicitation, or resale for commercial purposes.

(c) “Commercial” means profit-seeking production, buying, or selling of any good, service, or other product.

(d) “Special extraction costs” means the cost of the time spent by the lowest paid employee competent to perform the task, the actual amount paid to outside private contractors employed by the bureau, or the actual cost incurred to create computer programs to make the special extraction. “Special extraction costs” include any charges paid to a public agency for computer or records services.

(3) For purposes of divisions (F)(1) and (2) of this section, “surveys, marketing, solicitation, or resale for commercial purposes” shall be narrowly construed and does not include reporting or gathering news, reporting or gathering information to assist citizen oversight or understanding of the operation or activities of government, or nonprofit educational research.

317.08 Records to be kept by county recorder

(A) Except as provided in divisions (C) and (D) of this section, the county recorder shall keep six separate sets of records as follows:

(1) A record of deeds, in which shall be recorded all deeds and other instruments of writing for the absolute and unconditional sale or conveyance of lands, tenements, and hereditaments; all notices as provided in sections 5301.47 to 5301.56 of the Revised Code; all judgments or decrees in actions brought under section 5303.01 of the Revised Code; all declarations and bylaws, and all amendments to declarations and bylaws, as provided in Chapter 5311. of the Revised Code; affidavits as provided in sections 5301.252 and 5301.56 of the Revised Code; all certificates as provided in section 5311.17 of the Revised Code; all articles dedicating archaeological preserves accepted by the director of the Ohio historical society under section 149.52 of the Revised Code; all articles dedicating nature preserves accepted by the director of natural resources under section 1517.05 of the Revised Code; all agreements for the registration of lands as archaeological or historic landmarks under section 149.51 or 149.55 of the Revised Code; all conveyances of conservation easements and agricultural easements under section 5301.68 of the Revised Code; all instruments extinguishing agricultural easements under section 901.21 or 5301.691 of the Revised Code or pursuant to terms of such an easement granted to a charitable organization under section 5301.68 of the Revised Code; all instruments or orders described in division (B)(2)(b) of section 5301.56 of the Revised Code; all no further action letters issued under section 122.654 or 3746.11 of the Revised Code; all covenants not to sue issued under section 3746.12 of the Revised Code, including all covenants not to sue issued pursuant to section 122.654 of the Revised Code; any restrictions on the use of property contained in a no further action letter issued under section 122.654 of the Revised Code, any restrictions on the use of property identified pursuant to division (C)(3)(a) of section 3746.10 of the Revised Code, and any restrictions on the use of property contained in a deed or other instrument as provided in division (E) or (F) of section 3737.882 of the Revised Code; any easement executed or granted under section 3734.22, 3734.24, 3734.25, or 3734.26 of the Revised Code; any environmental covenant entered into in accordance with sections 5301.80 to 5301.92 of the Revised Code; all memoranda of trust, as described in division (A) of section 5301.255 of the Revised Code, that describe specific real property; and all agreements entered into under division (A) of section 1506.44 of the Revised Code;

(2) A record of mortgages, in which shall be recorded all of the following:

(a) All mortgages, including amendments, supplements, modifications, and extensions of mortgages, or other instruments of writing by which lands, tenements, or hereditaments are or may be mortgaged or otherwise conditionally sold, conveyed, affected, or encumbered;

(b) All executory installment contracts for the sale of land executed after September 29,

1961, that by their terms are not required to be fully performed by one or more of the parties to them within one year of the date of the contracts;

(c) All options to purchase real estate, including supplements, modifications, and amendments of the options, but no option of that nature shall be recorded if it does not state a specific day and year of expiration of its validity;

(d) Any tax certificate sold under section 5721.33 of the Revised Code, or memorandum of it, that is presented for filing of record.

(3) A record of powers of attorney, including all memoranda of trust, as described in division (A) of section 5301.255 of the Revised Code, that do not describe specific real property;

(4) A record of plats, in which shall be recorded all plats and maps of town lots, of the subdivision of town lots, and of other divisions or surveys of lands, any center line survey of a highway located within the county, the plat of which shall be furnished by the director of transportation or county engineer, and all drawings and amendments to drawings, as provided in Chapter 5311. of the Revised Code;

(5) A record of leases, in which shall be recorded all leases, memoranda of leases, and supplements, modifications, and amendments of leases and memoranda of leases;

(6) A record of declarations executed pursuant to section 2133.02 of the Revised Code and durable powers of attorney for health care executed pursuant to section 1337.12 of the Revised Code.

(B) All instruments or memoranda of instruments entitled to record shall be recorded in the proper record in the order in which they are presented for record. The recorder may index, keep, and record in one volume unemployment compensation liens, internal revenue tax liens and other liens in favor of the United States as described in division (A) of section 317.09 of the Revised Code, personal tax liens, mechanic's liens, agricultural product liens, notices of liens, certificates of satisfaction or partial release of estate tax liens, discharges of recognizances, excise and franchise tax liens on corporations, broker's liens, and liens provided for in sections 1513.33, 1513.37, 3752.13, 5111.022, and 5311.18 of the Revised Code.

The recording of an option to purchase real estate, including any supplement, modification, and amendment of the option, under this section shall serve as notice to any purchaser of an interest in the real estate covered by the option only during the period of the validity of the option as stated in the option.

(C) In lieu of keeping the six separate sets of records required in divisions (A)(1) to (6) of this section and the records required in division (D) of this section, a county recorder

may record all the instruments required to be recorded by this section in two separate sets of record books. One set shall be called the "official records" and shall contain the instruments listed in divisions (A)(1), (2), (3), (5), and (6) and (D) of this section. The second set of records shall contain the instruments listed in division (A)(4) of this section.

(D) Except as provided in division (C) of this section, the county recorder shall keep a separate set of records containing all corrupt activity lien notices filed with the recorder pursuant to section 2923.36 of the Revised Code and a separate set of records containing all medicaid fraud lien notices filed with the recorder pursuant to section 2933.75 of the Revised Code.

317.112 Quality of paper; legibility; alternate requirements to assure necessary quality

(A) Each instrument by which the title to real estate or personal property, or by which any interest in or lien on real estate or personal property, is conveyed, created, encumbered, assigned, discharged, canceled, or otherwise disposed of, and that is presented to the county recorder for recording or filing shall satisfy each of the following requirements:

(1) The instrument shall be of a quality of paper that permits the legible reproduction of the instrument by photographic or microphotographic [sic.] processes;

(2) The contents of the instrument shall be sufficiently legible to permit their reproduction by photographic or microphotographic processes.

(B)(1) If an instrument that is described in division (A) of this section and that is presented for recording or filing does not satisfy each of the requirements of that division, the county recorder may prior to recording or filing the instrument require the person who presented the instrument for recording or filing to do either of the following:

(a) If the instrument presented was a copy of an original document, to substitute the original document for recording or filing if it satisfies the requirements of division (A) of this section;

(b) To prepare or cause to be prepared, and present for recording or filing a true copy of the instrument, which true copy shall be handwritten or typewritten, satisfy the requirements of division (A) of this section, and contain a certification of the person who prepared the true copy that it is a true copy of the instrument.

(2) The county recorder shall attach a true copy of an instrument that is presented for recording or filing pursuant to division (B)(1)(b) of this section to the instrument that was presented for recording or filing.

(3) The notice that is imparted by the recording or filing of an instrument is not affected if the county recorder accepts an instrument for recording or filing that subsequently is found not to satisfy each of the requirements of division (A) of this section.

(C) This section does not apply to wills or death certificates.

317.114 Standards for preparation of documents

(A) Except as otherwise provided in divisions (B) and (C) of this section, an instrument or document presented for recording to the county recorder shall have been prepared in accordance with all of the following requirements:

- (1) Legible print size not smaller than a font size of ten;
- (2) Minimum paper size of eight and one-half inches by eleven inches;
- (3) Maximum paper size of eight and one-half inches by fourteen inches;
- (4) Black or blue ink only;
- (5) No use of highlighting;
- (6) Margins of one-inch width on each side of each page of the instrument or document;
- (7) A margin of one-inch width across the bottom of each page of the instrument or document;
- (8) A three-inch margin of blank space across the top of the first page of each instrument or document to accommodate any certification or indorsement of the county engineer, county auditor, or county recorder, as may be required by law, with the right half of that margin being reserved for the indorsement of the county recorder required by section 317.12 of the Revised Code; and
- (9) A one and one-half-inch margin of blank space across the top of each of the remaining pages of the instrument or document to accommodate any certification or indorsement of the county engineer, county auditor, or county recorder, as may be required by law.

(B)(1) Except as otherwise provided in division (B)(2) of this section, the county recorder shall accept for recording an instrument or document that does not conform to the requirements set forth in division (A) of this section but shall charge and collect the following additional fees for each such instrument or document: an additional base fee for the recorder's services of ten dollars and a housing trust fund fee of ten dollars, which shall be collected pursuant to section 317.36 of the Revised Code.

(2) The county recorder shall accept for recording an instrument or document that does not conform to the requirements set forth in division (A) of this section but shall not charge and collect the additional fees specified in division (B)(1) of this section for page numbers, hand-written, typed, or printed initials, bar codes, copyright information, trailing portions of signatures, plat description of any oil and gas well location or drilling unit or lease, or any other incidental information that is not essential to the recording

process or to the legal validity of the instrument or document and that may appear in either of the side margins or in the bottom margin. In addition, notary stamps and seals and any signatures and initials that may appear within the instrument or document need not satisfy the font size requirement and no additional fees may be charged or collected by the county recorder for such a nonconformance.

(C) This section does not apply to any of the following:

- (1) Any document that originates with any court or taxing authority;
- (2) Any document authorized to be recorded under section 317.24 of the Revised Code;
- (3) Any plat, as defined in section 711.001 of the Revised Code, that is required or authorized by the Revised Code to be recorded;
- (4) Any document authorized to be recorded that originates from any state or federal agency;
- (5) Any document executed before July 1, 2009.

317.12 Indorsement on and receipt for deed

Upon the presentation of a deed or other instrument of writing for record, the county recorder shall indorse thereon the date, the precise time of its presentation, and a file number. Such file numbering shall be consecutive and in the order in which the instrument of writing is received for record, except financing statements, which shall have a separate series of file numbers and be filed separately, as provided by sections 1309.501 to 1309.527 of the Revised Code. Until recorded, each instrument shall be kept on file in the same numerical order, for easy reference. If required, the recorder shall, without fee, give to the person presenting such instrument a receipt naming the parties thereto, the date thereof, and a brief description of the premises. When a deed or other instrument is recorded, the recorder shall indorse on it the time when recorded, and the number or letter and page of the book in which it is recorded.

317.13 Recording of data

(A) Except as otherwise provided in division (B) of this section, the county recorder shall record in the proper record, in legible handwriting, typewriting, or printing, or by any authorized photographic or electronic process, all deeds, mortgages, plats, or other instruments of writing that are required or authorized by the Revised Code to be recorded and that are presented to the recorder for that purpose. The recorder shall record the instruments in regular succession, according to the priority of presentation, and shall enter the file number at the beginning of the record. On the record of each instrument, the recorder shall record the date and precise time the instrument was presented for record. All records made, prior to July 28, 1949, by means authorized by this section or by section 9.01 of the Revised Code shall be deemed properly made.

(B) The county recorder may refuse to record an instrument of writing presented to the recorder for recording if the instrument is not required or authorized by the Revised Code to be recorded or the recorder has reasonable cause to believe the instrument is materially false or fraudulent. This division does not create a duty upon a recorder to inspect, evaluate, or investigate an instrument of writing that is presented for recording.

(C) If a person presents an instrument of writing to the county recorder for recording and the recorder, pursuant to division (B) of this section, refuses to record the instrument, the person may commence an action in or apply for an order from the court of common pleas in the county that the recorder serves to require the recorder to record the instrument. If the court determines that the instrument is required or authorized by the Revised Code to be recorded and is not materially false or fraudulent, it shall order the recorder to record the instrument.

317.18 Direct and reverse indexes

At the beginning of each day's business, the county recorder shall make and keep up general alphabetical indexes, direct and reverse, of all the names of both parties to all instruments previously received for record by him. The volume and page where each such instrument is recorded may be omitted until it is actually recorded if the file number is entered in place of the volume or page. The indexes shall show the kind of instrument, the range, township, and section or the survey number and number of acres, or the permanent parcel number provided for under section 319.28 of the Revised Code, or the lot and subplot number and the part thereof, all as the case requires, of each tract, parcel, or lot of land described in any such instrument. The name of each grantor shall be entered in the direct index under the appropriate letter, followed on the same line by the name of the grantee, or, if there is more than one grantee, by the name of the first grantee followed by "and others" or its equivalent. The name of each grantee shall be entered in the reverse index under the appropriate letter, followed on the same line by the name of the grantor, or, if there is more than one grantor, by the name of the first grantor followed by "and others" or its equivalent.

As to notices of claims filed in accordance with sections 5301.51, 5301.52, and 5301.56 of the Revised Code, there shall be entered in the reverse index under the appropriate letter the name of each claimant, followed on the same line by the name of the present owner of title against whom the claim is asserted, if the notice contains the name of the present owner; or, if the notice contains the names of more than one such owner, there shall be entered the name of the first owner followed by "and others" or its equivalent.

In all cases of deeds, mortgages, or other instruments made by any sheriff, master commissioner, marshal, auditor, executor, administrator, trustee, or other officer, for the sale, conveyance, or encumbrance of any lands, tenements, or hereditaments, and recorded in the recorder's office, the recorder shall index the parties to such instrument under their appropriate letters, respectively, as follows:

- (A) The names of the persons represented by such officer as owners of the lands, tenements, or hereditaments described in any such instruments;
- (B) The official designation of the officer by whom such instrument was made;
- (C) The individual names of the officers by whom such instrument was made.

In all cases of instruments filed in accordance with Chapter 5311. of the Revised Code, the name of each owner shall be entered in the direct index, under the appropriate letter, followed on the same line by the name of the condominium property, and the name of the condominium property shall be entered in the reverse index under the appropriate letter followed on the same line by the name of the owner of the property, or, if the instrument contains the names of more than one owner, there shall be entered the name

of the first owner followed by "and others" or its equivalent.

Any general alphabetical index shall be commenced in conformity to this section, and whenever, in the opinion of the board of county commissioners, it becomes necessary to transcribe, on account of its worn out or incomplete condition, any volume of an index in use, such volume shall be revised and transcribed to conform with this section; except that in counties having a sectional index in conformity with section 317.20 of the Revised Code, such transcript shall be only a copy of the original.

317.32 Fees

The county recorder shall charge and collect the following fees, to include base fees for the recorder's services and housing trust fund fees, collected pursuant to section 317.36 of the Revised Code:

(A) For recording and indexing an instrument when the photocopy or any similar process is employed, a base fee of fourteen dollars for the first two pages and a housing trust fund fee of fourteen dollars, and a base fee of four dollars and a housing trust fund fee of four dollars for each subsequent page, size eight and one-half inches by fourteen inches, or fraction of a page, including the caption page, of such instrument;

(B) For certifying a photocopy from the record previously recorded, a base fee of one dollar and a housing trust fund fee of one dollar per page, size eight and one-half inches by fourteen inches, or fraction of a page; for each certification where the recorder's seal is required, except as to instruments issued by the armed forces of the United States, a base fee of fifty cents and a housing trust fund fee of fifty cents;

(C) For manual or typewritten recording of assignment or satisfaction of mortgage or lease or any other marginal entry, a base fee of four dollars and a housing trust fund fee of four dollars;

(D) For entering any marginal reference by separate recorded instrument, a base fee of two dollars and a housing trust fund fee of two dollars for each marginal reference set out in that instrument, in addition to the fees set forth in division (A) of this section;

(E) For indexing in the real estate mortgage records, pursuant to section 1309.519 of the Revised Code, financing statements covering crops growing or to be grown, timber to be cut, minerals or the like, including oil and gas, accounts subject to section 1309.301 of the Revised Code, or fixture filings made pursuant to section 1309.334 of the Revised Code, a base fee of two dollars and a housing trust fund fee of two dollars for each name indexed;

(F) For recording manually any plat not exceeding six lines, a base fee of two dollars and a housing trust fund fee of two dollars, and for each additional line, a base fee of ten cents and a housing trust fund fee of ten cents;

(G) For filing zoning resolutions, including text and maps, in the office of the recorder as required under sections 303.11 and 519.11 of the Revised Code, a base fee of twenty-five dollars and a housing trust fund fee of twenty-five dollars, regardless of the size or length of the resolutions;

(H) For filing zoning amendments, including text and maps, in the office of the recorder as required under sections 303.12 and 519.12 of the Revised Code, a base fee of ten dollars and a housing trust fund fee of ten dollars regardless of the size or length of the

amendments;

(I) For photocopying a document, other than at the time of recording and indexing as provided for in division (A) of this section, a base fee of one dollar and a housing trust fund fee of one dollar per page, size eight and one-half inches by fourteen inches, or fraction thereof;

(J) For local facsimile transmission of a document, a base fee of one dollar and a housing trust fund fee of one dollar per page, size eight and one-half inches by fourteen inches, or fraction thereof; for long distance facsimile transmission of a document, a base fee of two dollars and a housing trust fund fee of two dollars per page, size eight and one-half inches by fourteen inches, or fraction thereof;

(K) For recording a declaration executed pursuant to section 2133.02 of the Revised Code or a durable power of attorney for health care executed pursuant to section 1337.12 of the Revised Code, or both a declaration and a durable power of attorney for health care, a base fee of at least fourteen dollars but not more than twenty dollars and a housing trust fund fee of at least fourteen dollars but not more than twenty dollars.

In any county in which the recorder employs the photostatic or any similar process for recording maps, plats, or prints the recorder shall determine, charge, and collect for the recording or rerecording of any map, plat, or print, a base fee of five cents and a housing trust fund fee of five cents per square inch, for each square inch of the map, plat, or print filed for that recording or rerecording, with a minimum base fee of twenty dollars and a minimum housing trust fund fee of twenty dollars; for certifying a copy from the record, a base fee of two cents and a housing trust fund fee of two cents per square inch of the record, with a minimum base fee of two dollars and a minimum housing trust fund fee of two dollars.

The fees provided in this section shall be paid upon the presentation of the instruments for record or upon the application for any certified copy of the record, except that the payment of fees associated with the filing and recording of, or the copying of, notices of internal revenue tax liens and notices of other liens in favor of the United States as described in division (A) of section 317.09 of the Revised Code and certificates of discharge or release of those liens, shall be governed by section 317.09 of the Revised Code, and the payment of fees for providing copies of instruments conveying or extinguishing agricultural easements to the office of farmland preservation in the department of agriculture under division (H) of section 5301.691 of the Revised Code shall be governed by that division.

5301.25 Recording of instruments for conveyance or encumbrance of lands; name of surveyor

(A) All deeds, land contracts referred to in division (A)(2)(b) of section 317.08 of the Revised Code, and instruments of writing properly executed for the conveyance or encumbrance of lands, tenements, or hereditaments, other than as provided in division (C) of this section and section 5301.23 of the Revised Code, shall be recorded in the office of the county recorder of the county in which the premises are situated. Until so recorded or filed for record, they are fraudulent insofar as they relate to a subsequent bona fide purchaser having, at the time of purchase, no knowledge of the existence of that former deed, land contract, or instrument.

(B) Whenever a survey is made of lands that are being conveyed, the county auditor shall require that the name of the person who made the survey appear in the deed. The name shall either be printed, typewritten, stamped, or signed in a legible manner. An instrument is in compliance with this division if it contains a statement in the following form:

“A survey of this property was made by

(Name)

This division does not apply to any court decree, order, judgment, or writ, to any instrument executed or acknowledged outside of this state, or to any instrument executed within this state prior to September 20, 1965.

(C) All tax certificates sold pursuant to section 5721.32 or 5721.33 of the Revised Code, or memoranda thereof, may be recorded in the office of the county recorder of the county in which the premises are situated, as provided in division (B) of section 5721.35 of the Revised Code; provided, however, that the first and superior lien of the state and its taxing districts conveyed to the holder of the tax certificate, as provided in division (A) of section 5721.35 of the Revised Code, shall in no way be diminished or adversely affected if the tax certificate evidencing the conveyance of such first and superior lien, or memorandum thereof, is not recorded as provided in this section.

5733.09 Exempted companies

(A) (1) Except as provided in divisions (A)(2) and (3) of this section, an incorporated company, whether foreign or domestic, owning and operating a public utility in this state, and required by law to file reports with the tax commissioner and to pay an excise tax upon its gross receipts, and insurance, fraternal, beneficial, bond investment, and other corporations required by law to file annual reports with the superintendent of insurance and dealers in intangibles, the shares of which are, or the capital or ownership in capital employed by such dealer is, subject to the taxes imposed by section 5707.03 of the Revised Code, shall not be subject to this chapter, except for sections 5733.031, 5733.042, 5733.05, 5733.052, 5733.053, 5733.069, 5733.0611, 5733.40, 5733.41, and sections 5747.40 to 5747.453 of the Revised Code. However, for reports required to be filed under section 5725.14 of the Revised Code in 2003 and thereafter, nothing in this section shall be construed to exempt the property of any dealer in intangibles under section 5725.13 of the Revised Code from the tax imposed under section 5707.03 of the Revised Code.

(2) An electric company subject to the filing requirements of section 5727.08 of the Revised Code or otherwise having nexus with or in this state under the Constitution of the United States, or any other corporation having any gross receipts directly attributable to providing public utility service as an electric company or having any property directly attributable to providing public utility service as an electric company, is subject to this chapter.

(3) A telephone company that no longer pays an excise tax under section 5727.30 of the Revised Code on its gross receipts billed after June 30, 2004, is first subject to taxation under this chapter for tax year 2005. For that tax year, a telephone company with a taxable year ending in 2004 shall compute the tax imposed under this chapter, and shall compute the net operating loss carry forward for tax year 2005, by multiplying the tax owed under this chapter, net of all nonrefundable credits, or the loss for the taxable year, by fifty per cent.

(B) A corporation that has made an election under subchapter S, chapter one, subtitle A, of the Internal Revenue Code for its taxable year under such code is exempt from the tax imposed by section 5733.06 of the Revised Code that is based on that taxable year.

A corporation that makes such an election shall file a notice of such election with the tax commissioner between the first day of January and the thirty-first day of March of each tax year that the election is in effect.

(C) An entity defined to be a "real estate investment trust" by section 856 of the Internal Revenue Code, a "regulated investment company" by section 851 of the Internal Revenue Code, or a "real estate mortgage investment conduit" by section 860D of the Internal Revenue Code, is exempt from taxation for a tax year as a corporation under this chapter and is exempt from taxation for a return year as a dealer in intangibles under Chapter

5725. of the Revised Code if it provides the report required by this division. By the last day of March of the tax or return year the entity shall submit to the tax commissioner the name of the entity with a list of the names, addresses, and social security or federal identification numbers of all investors, shareholders, and other similar investors who owned any interest or invested in the entity during the preceding calendar year. The commissioner may extend the date by which the report must be submitted for reasonable cause shown by the entity. The commissioner may prescribe the form of the report required for exemption under this division.

(D)(1) As used in this division:

(a) "Commercial printer" means a person primarily engaged in the business of commercial printing. However, "commercial printer" does not include a person primarily engaged in the business of providing duplicating services using photocopy machines or other xerographic processes.

(b) "Commercial printing" means printing by one or more common processes such as letterpress, lithography, gravure, screen, or digital imaging, and includes related activities such as binding, platemaking, prepress operation, cartographic composition, and typesetting.

(c) "Contract for printing" means an oral or written agreement for the purchase of printed materials produced by a commercial printer.

(d) "Intangible property located at the premises of a commercial printer" means intangible property of any kind owned or licensed by a customer of the commercial printer and furnished to the commercial printer for use in commercial printing.

(e) "Printed material" means any tangible personal property produced or processed by a commercial printer pursuant to a contract for printing.

(f) "Related member" has the same meaning as in section 5733.042 of the Revised Code without regard to division (B) of that section.

(2) Except as provided in divisions (D)(3) and (4) of this section, a corporation not otherwise subject to the tax imposed by section 5733.06 of the Revised Code for a tax year does not become subject to that tax for the tax year solely by reason of any one or more of the following occurring in this state during the taxable year that ends immediately prior to the tax year:

(a) Ownership by the corporation or a related member of the corporation of tangible personal property or intangible property located during all or any portion of the taxable year or on the first day of the tax year at the premises of a commercial printer with which the corporation or the corporation's related member has a contract for printing with

respect to such property or the premises of a commercial printer's related member with which the corporation or the corporation's related member has a contract for printing with respect to such property;

(b) Sales by the corporation or a related member of the corporation of property produced at and shipped or distributed from the premises of a commercial printer with which the corporation or the corporation's related member has a contract for printing with respect to such property or the premises of a commercial printer's related member with which the corporation or the corporation's related member has a contract for printing with respect to such property;

(c) Activities of employees, officers, agents, or contractors of the corporation or a related member of the corporation on the premises of a commercial printer with which the corporation or the corporation's related member has a contract for printing or the premises of a commercial printer's related member with which the corporation or the corporation's related member has a contract for printing, where the activities are directly and solely related to quality control, distribution, or printing services, or any combination thereof, performed by or at the direction of the commercial printer or the commercial printer's related member.

(3) The exemption under this division does not apply for a taxable year to any corporation having on the first day of January of the tax year or at any time during the taxable year ending immediately preceding the first day of January of the tax year a related member which, on the first day of January of the tax year or during any portion of such taxable year of the corporation, has nexus in or with this state under the Constitution of the United States or holds a certificate of compliance with the laws of this state authorizing it to do business in this state.

(4) With respect to allowing the exemption under this division, the tax commissioner shall be guided by the doctrines of "economic reality," "sham transaction," "step transaction," and "substance over form." A corporation shall bear the burden of establishing by a preponderance of the evidence that any transaction giving rise to an exemption claimed under this division did not have as a principal purpose the avoidance of any portion of the tax imposed by section 5733.06 of the Revised Code.

Application of the doctrines listed in division (D)(4) of this section is not limited to this division.

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