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VIA ELECTRONIC MAIL

The Honorable Mark J. Tekulve
Clermont County Prosecuting Attorney
101 Main Street, 2nd Floor
Batavia, Ohio 45103

Dear Prosecutor Tekulve:

You have requested an informal opinion on whether a clerk of courts may limit remote access to court records. Specifically, you ask:

> If a clerk of courts chooses to permit remote access to court records to attorneys only, must he necessarily allow remote access to every other person who requests such access, whether or not such person is an attorney?

Upon our review of your inquiry, we conclude that a clerk of courts is permitted under the Rules of Superintendence to limit remote access to attorneys only. Moreover, we conclude that the granting of remote access to attorneys does not require the granting of remote access to any other person who requests remote access. We reached this conclusion after analyzing two things. First, the implementation and definition of "remote access". Second, the limitation provisions found within Sup.R. 45.

I

The Rules of Superintendence were created pursuant to the authority found in Article IV, Section 5(A)(1) of the Ohio Constitution. Sup.R. 1(B). "Except where otherwise provided, these Rules of Superintendence for the courts of Ohio are applicable to all courts of appeal, courts of common pleas, municipal courts, and county courts in this state." Sup.R. 1(A). Regarding public records, prior to 2009 the courts in Ohio followed the Public Records Act. *State ex rel. Parisi v. Dayton Bar Assn. Certified Grievance Commt.*, 159 Ohio St.3d 211, 2019-Ohio-5157, 150 N.E.3d 43, ¶ 16. In 2009, however, Rules of Superintendence 44 through 47 were enacted to govern how courts would make court records accessible to the public. *See id.* at ¶ 16-17. For the matter at hand, we are focused primarily on 44 and 45 of the Rules of Superintendence.

Rule of Superintendence 45(C)(1) provides for the implementation of "remote access". In particular, the rule states that "[a] court or clerk *may* offer remote access to a court record." The use of "may" in Sup.R. 45(C)(1) denotes a granting of discretionary authority. *See e.g., Miller v.*

Miller, 132 Ohio St.3d 424, 2012-Ohio-2928, 973 N.E.2d 228, ¶ 28, quoting *Dorrian v. Scioto Conservancy Dist*., 27 Ohio St.2d 102, 108, 271 N.E.2d 834 (1971) ("[o]rdinarily, the word 'shall' is a mandatory one, whereas 'may' denotes the granting of discretion"). A court or a clerk of court, therefore, is not required to provide remote access to court records. Instead, the use of "may" shows that a court or clerk of court has the discretion to choose whether or not to grant remote access.

As stated in your request, you have a concern that stems from the term "the ability of any person" as found in the definition of "remote access" set forth in Sup.R. 44(K). In particular, you are concerned that the term "the ability of any person" prevents a court or clerk of court from limiting remote access to attorneys only. The full definition states that "'[r]emote access' means *the ability of any person* to electronically search, inspect, and copy a court record at a location other than the place where the record is made available." Sup.R. 44(K) (Emphasis added). This definition creates no requirement for the court or clerk of court to follow. Instead, a plain reading shows that the use of the term "any person" means that the definition of remote access includes a situation in which "any person" is given electronic access to court records. It does not prohibit the court or clerk of court from limiting access to electronic records to only certain persons. For this reason, we find no authority in Sup.R. 44(K) that prohibits the limiting of remote access to attorneys only.

II

In addition to the implementation of "remote access" being discretionary, provisions set forth in Sup.R. 45 show that public access may be limited. Specifically, Sup.R. 45(E)(1) states that "[a]ny party to a judicial action or proceeding or other person who is the subject of information in a case document may, by written motion to the court, request that the court restrict public access to the information or, if necessary, the entire document." In addition to an interested party seeking to limit access, "the *court may restrict public access* to the information in the case document or, if necessary, the entire document *upon its own order."* Sup.R. 45(E)(1) (Emphasis added). Also, "[a] court *shall* restrict public access to information in a case document or, if necessary, the entire document, if it finds by clear and convincing evidence that the presumption of allowing public access is outweighed by a higher interest after considering" three factors. Sup.R. 45(E)(2) (Emphasis added). The three factors are: "(a) [w]hether public policy is severed by restricting public access; (b) [w]hether any state, federal, or common law exempts the document or information from public access; (c) [w]hether factors that support restriction of public access exist, including risk of injury to persons, individual privacy rights and interests, proprietary business information, public safety, and fairness of the adjudicatory process." *Id*. As such, while Sup.R. 45(A) states that "[c]ourt records are presumed open to public access", the public's right to access is not absolute. *See State ex rel. Cincinnati Enquirer v. Lyons*, 140 Ohio St.3d 7, 2014-Ohio-2354, 14 N.E.3d 989, ¶ 14 ("access is not unlimited, and we have crafted exemptions in Sup.R. 44 and 45 that are to be viewed stringently").

Although public access may be limited, the least-restrictive means available shall be used when limiting public access. *See* Sup.R. 45(E)(3). For the matter at hand, part (b) of the non-exhaustive list of least-restrictive means set forth in Sup.R. 45(E)(3) is of particular importance. Sup.R. 45(E)(3)(b) states that one of the least-restrictive means is "[r]estricting remote access to either the document or the information while maintaining its direct access[.]" Thus, if a clerk of courts

believes that limiting remote access to only attorneys is justified under Sup.R.45(E)(1) or (2), a local rule may establish such restriction using the least-restrictive means available. *See generally* Sup.R. 5. We must note, however, Sup.R. 47. In particular, Sup.R. 47(A)(1) states that "[t]he provisions of Sup.R. 44 through 47 requiring redaction or omission of information in case documents or restricting public access to case documents shall apply only to case documents in actions commenced on or after July, 1 2009." For actions commenced prior to July 1, 2009, the access to the case documents "shall be governed by federal and state law." *Id.* But when dealing with administrative documents, "[t]he provisions of Sup.R. 44 through 47 restricting public access to administrative documents shall apply to all documents regardless of when created." Sup.R. 47(A)(2).

Conclusion

For the reasons set forth above, it is our opinion, and you are hereby advised that if a clerk of courts deems it necessary to limit remote access under the provisions of Sup.R. 45(E), the clerk may limit remote access to attorneys only. While such restriction under Sup.R. 45(E) for administrative documents is applicable regardless of when the action commended, a restriction under Sup.R. 45(E) for case documents, however, applies only to actions commenced on or after July 1, 2009. *See* Sup.R. 47(A)(1) and (2). Although we determine that such action is permissible, the decision to implement such a rule is ultimately one of discretion. Since the decision is one of discretion, we cannot advise as to whether such limitation of remote access should or should not be done. *See* 2004 Op. Att'y Gen. No. 2004-032, at 2-294 ("[t]he Attorney General is not authorized to provide other officials with direction regarding the exercise of their discretion").

Please note that this response does not constitute a formal opinion of the Ohio Attorney General.

Please do not hesitate to contact me with any questions.

Sincerely,

DAVE YOST
Ohio Attorney General

/s/ *Byers B. Emmerling*

Byers B. Emmerling
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