



Ohio Board of Professional Conduct

OPINION 2024-05

Issued October 4, 2024

Withdraws Adv. Op. 1993-11

Lawyer's Receipt of Inadvertently Sent Information Obtained Through Public Records Request

SYLLABUS: A lawyer who submits a records request to a public agency is required to notify the agency if the lawyer knows or reasonably knows the agency's response includes information related to representation of a client that was inadvertently sent to the lawyer. There is no ethical obligation for the lawyer to refrain from reviewing the inadvertently sent information, sharing the information with the lawyer's client, or communicating with the lawyer's client about the receipt of the information.

This nonbinding advisory opinion is issued by the Ohio Board of Professional Conduct in response to a prospective or hypothetical question regarding the application of ethics rules applicable to Ohio judges and lawyers. The Ohio Board of Professional Conduct is solely responsible for the content of this advisory opinion, and the advice contained in this opinion does not reflect and should not be construed as reflecting the opinion of the Supreme Court of Ohio. Questions regarding this advisory opinion should be directed to the staff of the Ohio Board of Professional Conduct.



Ohio Board of Professional Conduct

THOMAS J. MOYER OHIO JUDICIAL CENTER
65 SOUTH FRONT STREET, 5TH FLOOR, COLUMBUS, OH 43215-3431
614.387.9370
www.bpc.ohio.gov

HON. D. CHRIS COOK
CHAIR
PATRICK M. McLAUGHLIN
VICE-CHAIR

RICHARD A. DOVE
DIRECTOR
D. ALLAN ASBURY
SENIOR COUNSEL
VACANT
COUNSEL

OPINION 2024-05

Issued October 4, 2024

Withdraws Adv. Op. 1993-11

Lawyer's Receipt of Inadvertently Sent Information Obtained Through Public Records Request

SYLLABUS: A lawyer who submits a records request to a public agency is required to notify the agency if the lawyer knows or reasonably knows the agency's response includes information related to representation of a client that was inadvertently sent to the lawyer. There is no ethical obligation for the lawyer to refrain from reviewing the inadvertently sent information, sharing the information with the lawyer's client, or communicating with the lawyer's client about the receipt of the information.

APPLICABLE RULES: Prof.Cond.R. 1.4, 3.4, 4.4, 8.4

QUESTIONS PRESENTED:

- 1). Whether a lawyer has an ethical obligation to notify the sender of information related to the representation of a client that was inadvertently sent to the lawyer in response to a public records request.
- 2). Whether a lawyer has an ethical obligation to refrain from reading information related to the representation of a client or sharing the information with the lawyer's client when the information was inadvertently sent to the lawyer in response to a public records request.

ANALYSIS:*Receipt of inadvertently disclosed information*

Lawyers pursuing certain types of litigation against a public agency may choose to utilize public records requests to obtain information from the agency prior to or during litigation. *See e.g., Gilbert v. Summit County, 2004-Ohio-7108* (public agency may not refuse public record request by litigant on ground that discovery was denied by court order in litigation against the agency.) The public agency may review the requested records, prior to being made available, to determine if any records are exempt from disclosure under R.C. 149.43 (Ohio Public Records Act), including records that contain information protected by the attorney-client privilege. *State ex rel. Davis v. Metzger, 2014-Ohio-2329, ¶10* (certain files require careful review to redact information that does not document the organization or functions of the agency.) Despite a public agency's review and redaction of records when fulfilling a public records request, information may be inadvertently sent that is beyond the scope of the request.

The questions presented are addressed by Prof.Cond.R. 4.4(b):

A lawyer who receives a document or electronically stored information relating to the representation of the lawyer's client and knows or reasonably should know that the document or electronically stored information was inadvertently sent shall promptly notify the sender.

Information is deemed to have been inadvertently sent "when it is *** accidentally included with information that was intentionally transmitted." Pro.Cond.R. 4.4, cmt.[2]. The rule does not distinguish between situations involving litigation and those that do not, nor is application of the rule limited to information related to the representation of a client.

Duty to notify the sender

Under the questions presented, a lawyer is obligated under Prof.Cond.R. 4.4(b) to promptly notify the public agency of the receipt of information related to the representation of a client when the lawyer knows or reasonably knows that the information was inadvertently sent. For instance, a document or electronically stored information marked as privileged, or communication between a lawyer and client, clearly

indicates that the sender did not intend for it to be transmitted. This obligation is imposed on the lawyer even though the public records request was made prior to the litigation and regardless of whether the information is related to the representation of a client.

The requirement of prompt notification permits the sender to take protective measures to eliminate any unfair advantage that may be obtained by the recipient lawyer. N.Y. Eth. Op. 2012-1. For example, the public agency may alert its lawyer of the issue in order for the lawyer to decide to request a return or destruction of the information, or to later seek to suppress the use or admission of the information in litigation. Whether the lawyer is unilaterally required to take additional steps after notification, such as retaining, preserving, returning, or destroying the information is not addressed by the rule and is a decision that is left to the professional judgment of the lawyer. Prof.Cond.R. 4.4(b), cmt. [2]. “[T]he sole requirement of providing notice to the sender of the receipt of inadvertently sent information [is] evidence of the intention to set no other specific restrictions [in the rule] on the receiving lawyer's conduct.” ABA Formal Op. 06-442.

Neither Prof.Cond.R. 4.4(b) nor this advisory opinion addresses the question of whether the privileged status of inadvertently transmitted information via a response to a public records request is waived. This question is a matter of law and beyond the scope of the Rules of Professional Conduct and this opinion.

Review or use of information contained in document

Prof.Cond.R. 4.4(b) is silent as to the obligations of the lawyer beyond notification to the sender of the inadvertently transmitted information. Consequently, there is no ethical obligation imposed under the Rules of Professional Conduct upon the recipient lawyer to refrain from reading or reviewing the information or sharing its contents with the client. When a lawyer has been exposed to information before knowing or having reason to know it was inadvertently transmitted, a lawyer is not barred under the rule from using the information. NYC Ethics Op. 2003-04. The ABA has similarly concluded that Prof.Cond.R. 4.4(b), “does not require the receiving lawyer either to refrain from examining the materials or to abide by the instructions of the sending lawyer.” ABA Formal Opinion 05-437.

Upon notification of inadvertently sent information during litigation, the public agency may attempt to seek relief from a court concerning its use, return, and/or

destruction. Under such circumstances, the lawyer or the lawyer's client may be subject to a court order to avoid further review of the information, its return to the sender, or its destruction. A lawyer's failure to comply with the court order could implicate Prof.Cond.R. 3.4(c) (disobeying an obligation under the rules of a tribunal) or Prof.Cond.R. 8.4(d) (conduct prejudicial to the administration of justice.)

Communication with Client

A lawyer in possession of inadvertently sent information related to the representation of a client through a public records request may communicate receipt of the information to the lawyer's client. This may necessitate further discussion with the client about how the client's objectives may be pursued by any future use of the information, its destruction, or its return to the sender. Prof.Cond.R. 1.4(a)(2). The lawyer should explain during the discussion with the client the implications of receiving the inadvertently sent information and whether its use in litigation may be subject to Rules of Evidence, Rules of Civil Procedure, judicial orders, or law. Prof.Cond.R. 1.4(b).