

[Cite as *Hicks v. Newtown*, 2018-Ohio-1540.]

CHRISTOPHER R. HICKS

Requester

v.

VILLAGE OF NEWTOWN

Respondent

Case No. 2017-00612-PQ

Judge Patrick M. McGrath

DECISION

{¶1} Before the court is (1) a report and recommendation of Special Master Jeffery W. Clark filed on November 30, 2017; (2) a document labeled “Response to REPORT AND RECOMMENDATION of Special Master Jeffery W. Clark” filed on December 7, 2017 by requester Christopher R. Hicks, which the court has identified as objections to Special Master Clark’s report and recommendation; (3) a document labeled “NEW INFORMATION Financial Transparency discussed on 12/12 and in MOU” filed on December 14, 2017 by Hicks; (4) objections to Special Master Clark’s report and recommendation filed on December 15, 2017 by respondent the village of Newtown; and (5) a motion to strike filed on December 19, 2017 by the village of Newtown wherein the village asks the court to strike Hicks’s filing of December 14, 2017.

{¶2} For reasons discussed below, the court holds that, although the special master identified the relevant law, the special master’s report and recommendations should be modified. The court further concludes that Hicks’s objections should be overruled, that the village of Newtown’s objections should be sustained, and that the village of Newtown’s motion to strike should be granted, and that Hicks’s filing of December 14, 2017 should be stricken.

Background and Procedural History

{¶3} On July 14, 2017, Hicks filed a complaint against the mayor of Newtown, Ohio, alleging a denial of access to public records. Hicks sought certain records pertaining to a joint venture between the village of Newtown and Miami Valley Christian Academy (MVCA). The court appointed Jeffrey W. Clark as a special master in the cause and it referred the matter to mediation. After mediation failed to successfully resolve all disputed issues between the parties, the court returned the case to the docket of Special Master Clark. The special master apparently construed the village's response to Hicks' complaint, which the village filed on October 26, 2017, as a Civ.R. 12(B)(6) motion. About a month later, on November 30, 2017, Special Master Clark issued a report and recommendation wherein he found a statement made by the village's mayor in a village council meeting constituted clear and convincing evidence that a member of MVCA showed the mayor visible evidence of financial resources (Report and Recommendation, 9), and wherein he concluded:

- a. Upon consideration of the pleadings and attachments, I find that Hicks has failed to establish by clear and convincing evidence that the Village of Newtown violated division (B) of R.C. 149.43 with respect to his request for "transparent information on all donors/contributors relating to the project," "transparent information on the special loan of \$500k relating to the project (source, and specific below market terms)," and "transparent information from any entity specifically set up for this project," as these requests are improperly ambiguous and overly broad. I recommend that Newtown's motion to dismiss for failure to state a claim pursuant to Civ.R. 12(B)(6) be granted as to these claims.
- b. I further find that the remaining requested items, to the extent they were actually used and relied on by Newtown to document its functions, decisions, and other activities, are "records" of Newtown. This includes records received by, inspected by, or proffered to Newtown's representative as the "assurances" of MVCA financial resources under [Joint

Venture Agreement] Section 4.8. I find that MVCA is a “person responsible for” any such records, and I recommend that the court ORDER Newton to obtain and provide Hicks with copies of any such records. I recommend that Hicks be entitled to recover the amount of the filing fee under R.C. 2743.75(F)(3)(b).

(Report and Recommendation, 17.)

{¶4} According to the court’s docket, the court served a copy of the special master’s report and recommendation upon the parties. And according to the docket, on December 6, 2017, Hicks received a copy of the special master’s report and recommendation and, on December 7, 2017, the village received a copy of the special master’s report and recommendation.

{¶5} On December 7, 2017, Hicks filed a response to the report and recommendation, which the court’s docket has identified as “objections.” Hicks’s filing contains a proof of service that states: “I hereby certify that a copy of the foregoing was served this 7th day of December 2017, by ordinary mail, postage pre-paid pursuant to Civ.R. 5(B)(2)(C) to the following: * * *.” In his response of December 7, 2017, Hicks states that “[i]n general, I believe the Report and Recommendation supports most of my points but is too ambiguous and will be used by Newtown and MVCA to further evade honoring the words of the agreement (and records requests). * * * The Report and Recommendation, in its tortured logic, will only serve to further delay.” Hicks’s response states: “The language in the Report and Recommendation is tortured as it goes on for 10 pages after the invention of the phantom test (on page 8) connecting ORC 149.43 and the approval of construction contracts. * * * The Report and Recommendation, while helpful, is ultimately quite vague. I do not see this as a case of first impression but if it is (or if the area of law is novel or there is insufficient direct case law), it may be better to treat it as such rather than issue a ruling that adds confusion vs. yields clarity.” Hicks further states: “My preference, however, would be that the Court re-examines its Report and Recommendations. There cannot be artificial tests introduced that are not

in the agreement and not associated with ORC 149.43 based on flawed citations ex: approving a specific settlement) and intentional secrecy flout requests by referring to things loosely (ex: “money in the bank”) and then claiming it cannot provide records because the public cannot name the bank.”

{¶6} On December 14, 2017, after Hicks filed his response, Hicks filed a document labeled “NEW INFORMATION Financial Transparency discussed on 12/12 and in MOU” wherein Hicks states: “On December 12, respondent Village of Newtown (‘Newtown’) with Miami Valley Christian Academy (‘MVCA’) introduced a ‘Memorandum of Understanding’ (‘MOU’) adding to the Joint Venture Agreement (‘JVA’), Addendum 1 and Addendum 2. * * * I again ask the court to re-examine its conclusions in light of my response and this new information.”

{¶7} On December 15, 2017, the village of Newton, through counsel, filed objections to the special master’s report and recommendation. The village of Newtown urges that the special master’s report and recommendation “(1) makes a material mistake of fact regarding comments made by the Mayor of Newtown that the Special Master relies upon in reaching his conclusion; and (2) erroneously finds that the Requestor, Christopher Hicks (“Hicks”), has established a violation of the Ohio Public Records Act such that Hicks be entitled to recover the filing fee under R.C. 2743.75(F)(3)(b).” In support of its objections, the village emphasizes that it and MVCA are in an exploratory stage concerning the joint venture, that a conversation between the village’s mayor and a MVCA board member regarding financial assurances was an informal conversation—not an official action of the village—and that statements made by the village’s mayor in a council meeting “are not related to the ‘assurances’ required by the JVA. They were just statements regarding an informal meeting between the Mayor and an MVCA Board Member.” The village notes: “To be clear, the Village has not received, reviewed, acted upon, or made any determinations based on any financial information received from MVCA.” And the village asserts that “it will be the legislative

authority of the Village, not the Mayor, who will ultimately evaluate and determine whether MVCA should proceed with executing construction contracts for the project.” In a proof of service included with its objections, the village indicated that it served a copy of its objections on Hicks by certified mail.

{¶8} On December 19, 2017, the village of Newtown moved to strike Hick’s filing of December 14, 2017, urging this court to order the clerk to mark Hicks’s filing of December 14, 2017 as “not accepted for filing” because, in the village’s view, Hicks’s filing of December 14, 2017 is not authorized by law or this court. Hicks did not file a timely response to the village of Newtown’s motion to strike.

Law and Analysis

{¶9} R.C. 2743.75(F)(2) governs objections to a special master’s report and recommendation related to a dispute alleging a denial of access to public records. Pursuant to R.C. 2743.75(F)(2):

c. Either party may object to the report and recommendation within seven business days after receiving the report and recommendation by filing a written objection with the clerk and sending a copy to the other party by certified mail, return receipt requested. Any objection to the report and recommendation shall be specific and state with particularity all grounds for the objection. If neither party timely objects, the court of claims shall promptly issue a final order adopting the report and recommendation, unless it determines that there is an error of law or other defect evident on the face of the report and recommendation. If either party timely objects, the other party may file with the clerk a response within seven business days after receiving the objection and send a copy of the response to the objecting party by certified mail, return receipt requested. The court, within seven business days after the response to the objection is filed, shall issue a final order that adopts, modifies, or rejects the report and recommendation.

{¶10} The court finds that Hicks has filed a response, which has been identified as objections, within seven business days after receiving the special master’s report and recommendation. Hicks’s objections are thus timely filed. However, Hicks’s completed

proof of service does not indicate that Hicks served a copy of his objections by certified mail, return receipt requested, as required by R.C. 2743.75(F)(2). Hicks's filing therefore is procedurally irregular because Hicks has failed to comply with requirements contained in R.C. 2743.75(F)(2).

{¶11} The court also finds that Hick's filing of December 14, 2017 wherein he attempts to introduce additional information that was not before the special master also is procedurally irregular because R.C. 2743.75(F)(2) does not expressly permit the introduction of additional information to objections to a report and recommendation of a special master. And, under Ohio case law, a reviewing court generally cannot add matter to the record before it, which was not part of the original proceedings, and then decide a case based the newly introduced matter. See *Paasewe v. Wendy Thomas 5 Ltd.*, 10th Dist. Franklin No. 09AP-510, 2009-Ohio-6852, ¶ 15, quoting *State v. Ishmail*, 54 Ohio St.2d, 377 N.E.2d 500 (1978), paragraph one of the syllabus ("Pursuant to long-standing precedent, '[a] reviewing court cannot add matter to the record before it, which was not a part of the trial court's proceedings, and then decide the appeal on the basis of the new matter' "). The court therefore finds that the village's motion to strike Hicks's filing of December 14, 2017 is well-taken and the court determines that village's motion to strike filed on December 19, 2017, should be granted, and that Hicks's filing of December 14, 2017 should be stricken.

{¶12} With respect to the village's objections of December 15, 2017, the court finds that the village's objections were filed within seven business days after the village received a copy of the special master's report and recommendation. The village's objections are thus timely. And a review of the proof service attached to the village's objections, wherein the village's counsel indicates that a copy of the objections was served on Hicks by certified mail, shows that the village substantially complied with R.C. 2743.75(F)(2) that requires service of objections on the other party by certified mail, return receipt requested.

{¶13} In the report and recommendations, the special master “recommend[s] that Newtown’s motion to dismiss [of October 26, 2017] for failure to state a claim pursuant to Civ.R. 12(B)(6) be GRANTED” as to requests for “transparent information on all donors/contributors relating to the project,” “transparent information on the special loan of \$500k relating to the project (source, and specific below market terms),” and “transparent information from any entity specifically set up for this project” because these requests are ambiguous and overly broad. The court adopts the special master’s findings of fact and conclusions of law that Hicks’s requests for “transparent information on all donors/contributors relating to the project,” “transparent information on the special loan of \$500k relating to the project (source, and specific below market terms),” and “transparent information from any entity specifically set up for this project” are ambiguous and overly broad and, as a consequence, are improper public-records requests. See *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶ 10 (the Public Records Act does not compel a public office to do research or to identify records containing selected information). However, based on the court’s independent review of the village of Newtown’s filing of October 26, 2017, the court does not find that the village of Newtown filed a Civ.R. 12(B)(6) motion. Rather, based on the court’s review, the village of Newtown filed a response, urging that Hicks’s complaint should be dismissed and judgment granted in its favor. Thus, by its response the village of Newtown seeks a dismissal upon consideration of all matters properly filed in response to Hicks’s complaint. By comparison, a Civ.R. 12(B)(6) motion is limited to a review of a complaint and its attachments. See *Cline v. Mtge. Electronic Registration Sys.*, 10th Dist. Franklin No. 13AP-240, 2013-Ohio-5706, ¶ 9 (“In ruling on a Civ.R. 12(B)(6) motion, a trial court ‘ cannot resort to evidence outside the complaint to support dismissal [except] where certain written instruments are attached to the complaint.’ ”) *Brisk v. Draf Industries*, 10th Dist. No. 11AP-233, 2012-Ohio-1311, 10, quoting *Park v. Acierno*, 160 Ohio App.3d 117, 2005-Ohio-1332, ¶ 29 (7th Dist.)”).

The court therefore does not adopt the special master's recommendation for a Civ.R. 12(B)(6) dismissal as to Hicks's claims for these documents.

{¶14} The village of Newtown urges that the special master's report and recommendation "makes a material mistake of fact regarding comments made by the Mayor of Newtown that the Special Master relies upon in reaching his conclusion." A mistake of fact "is defined as a mistaken supposition of the existence of a specific fact." *Sheet Metal Workers Local 98 v. Whitehurst*, 5th Dist. Knox No. 03 CA 29, 2004-Ohio-191, ¶ 34, citing *Firestone Tire & Rubber Co. v. Cent. Natl. Bank*, 159 Ohio St. 423, 112 N.E.2d 636 (1953), paragraph two of the syllabus. See *Black's Law Dictionary* 1153 (10th Ed.2014) (defining "mistake of fact" as a "mistake about a fact that is material to a transaction; any mistake other than a mistake of law"). The village, however, does not dispute that the village's mayor had a conversation with a MVCA board member or that the mayor made a statement in a village council meeting pertaining to a conversation with a MVCA board member. Rather, the village of Newtown's dispute appears to concern the special master's application of law to these facts.

{¶15} The special master found that records received by, inspected by, or proffered to the village of Newtown's representative as the "assurances" of MVCA financial resources under [Joint Venture Agreement] Section 4.8 "to the extent that they were actually used and relied on by Newtown to document its functions, decisions, and other activities, are 'records' of Newtown" and the special master "conclude[d] that any properly requested items utilized by Newtown as assurances that MVCA had adequate financial resources, including documents and images shown to Mayor Kobasuk at his meeting with a member of MVCA, meet the definition of 'records' of Newtown." The special master recommends that this court order the village of Newtown to obtain and

provide Hicks with copies of any such records. The special master also concluded that MVCA is a “ ‘person responsible for public records’ in a relationship of ‘quasi-agency’ ” with the village of Newtown and that the village of Newtown is obligated by R.C. 149.351(B)(1) to maintain assurances of MVCA financial resources, and to take any necessary steps to retrieve the records or to make them available under the Public Records Act.

{¶16} The court determines that the special master’s determination as to MVCA’s assurances of financial resources—to the extent that they were actually used and relied on by the village—constitute a public record is a correct conclusion of law. See R.C. 149.011(G) (definition of record as used in R.C. Chapter 149); *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 15-16 (mere receipt by a school district of resumes and other materials sent by applicants did not make these documents records for purposes of R.C. 149.43 and until the school district retrieved the documents from its post office and reviewed them or otherwise used or relied on them, they were not records subject to disclosure under R.C. 149.43).

{¶17} However, the court does not agree with the special master’s application of law in this case and the court determines that a modification of the special master’s report and recommendation is required. According to the special master’s report and recommendation, during a village council meeting of May 23, 2017, the village’s mayor stated:

- d. “I met with a member of MVCA last week. He assured me that they have just about 1.5 million dollars. He showed me evidence that I did not receive nor did I ask for any documents, but he assured me and he demonstrated to me that he had 1.5 ... or 1.45 million dollars in ready, liquid funds. Now they’re not all in a bank account but in today’s world a phone call or a keystroke will have those funds delivered to the bank account. So I was shown sufficient evidence that they have nearly 1.5 million dollars at this stage. Since we are in the exploratory stage that is sufficient. If

any council member wants to hear more, I will talk about that for the meeting, but I don't want to put in on the records ... confidential financial information. But they did demonstrate to me almost 1.5 million dollars in readily accessible funds."

(Footnote omitted.) In his report and recommendation, the special master states: "Although the mayor states that he did not physically handle any documents, I find his statement to be clear and convincing evidence that the member of the MVCA showed him visible 'evidence' of financial resources. The evidence was more than just verbal assurance, because the mayor states that the MVCA member 'assured me *and he demonstrated to me* that he had 1.5 or 1.45 million dollars in ready, liquid funds' " (Emphasis sic.)

{¶18} The court determines that modification of the report and recommendation is necessary for two reasons. First, the court does not believe that evidence exists in the record as to what specific information is being requested and identified as public record, or what specific information is being recommended to be ordered to be turned over as a public record. There is simply no description of the physical nature or material make-up of the "assurances" shown to Mayor Kobasuk. Second, the law requires evidence that the information sought was used by the public entity in its official capacity and such evidence, in the court's view, does not exist based on this record. The village's administrator, Jerry Thamann, avers in an affidavit attached to the village's response of October 26, 2017 that "Newtown does not have any public records responsive to the request for financial statements for any entity specifically set up for the project at issue in this case, or of any financial accounts relating to this project." And the village represents to the court that it has not received, reviewed, acted upon, or made any determinations based on financial information received from MVCA. Thus, notwithstanding that the special master found the village's mayor statement in the village council meeting constitutes clear and convincing evidence, the court concludes that, based on its independent review, the evidence does not support such a finding.

{¶19} In the report and recommendation, the special master concluded that MVCA is a “person responsible for public records” in a relationship of “quasi-agency.” (Report and Recommendation, 16.) The court determines that the special master’s conclusion that MVCA constitutes a “person responsible for public records” in a “quasi-agency” relationship is a correct conclusion of law. See *State ex rel. Am. Civ. Liberties Union of Ohio, Inc. v. Cuyahoga Cty. Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 53, quoting *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 550 N.E.2d 464 (1990) (“ ‘R.C. 149.43(C) manifests an intent to afford access to public records, even when a private entity is responsible for the records.’ *Id.* at 39. Therefore, ‘where (1) a private entity prepares records in order to carry out a public office’s responsibilities, (2) the public office is able to monitor the private entity’s performance, and (3) the public office has access to the records for this purpose, a relator in an R.C. 149.43(C) mandamus action is entitled to relief regardless of whether he also shows that the private entity is acting as the public office’s agent.’ *Id.*”).

{¶20} The special master has recommended that, to the extent that MVCA’s “assurances” of financial resources have actually been used and relied on by the village of Newton, these financial assurances constitute records of the village to which Hicks is entitled to inspect or of which Hicks is entitled to receive copies. However, because the court previously has determined that evidence does not exist as to what specific information is being requested and identified as a public record and, because there is no evidence that such information was used by the village of Newtown, the court cannot conclude that information that is unidentified or not used by the village constitutes a public record. The court therefore does not adopt the special master’s recommendation for an order directing the village of Newtown to obtain and provide Hicks with such information. The court also does not adopt the special master’s recommendation that Hicks should be authorized to recover the amount of the filing fee under R.C. 2743.75(F)(3)(b).

Conclusion

{¶21} For reasons set forth above, the court holds that, although the special master identified the relevant law, the special master's report and recommendations should be modified. The court further concludes that Hicks's objections should be overruled, that the village of Newtown's objections should be sustained, and that the village of Newtown's motion to strike should be granted, and that Hicks's filing of December 14, 2017 should be stricken.

PATRICK M. MCGRATH
Judge

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[Cite as *Hicks v. Newtown*, 2018-Ohio-1540.]

CHRISTOPHER R. HICKS

Requester

v.

VILLAGE OF NEWTOWN

Respondent

Case No. 2017-00612-PQ

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶22} For the reasons set forth in the decision filed concurrently herewith, and upon independent review of the objected matters, the court MODIFIES Special Master Jeffery W. Clark's report and recommendation issued on November 30, 2017; the court OVERRULES the objections contained in Hicks's response of December 7, 2017; the court SUSTAINS the village of Newtown's objections of December 15, 2017; the court GRANTS the village of Newtown's motion to strike of December 19, 2017; and the court STRIKES Hicks's filing of December 14, 2017. Judgment is rendered in favor of the village of Newtown. Court costs shall be assessed against Hicks. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

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