

[Cite as *Sheil v. Horton*, 2018-Ohio-2355.]

WILLIAM B. SHEIL

Requester

v.

JOHN HORTON

Respondent

Case No. 2017-00772PQ

Judge Patrick M. McGrath

DECISION

{¶1} Requester William B. Sheil of WJW-TV has brought a complaint against respondent John Horton, Media Relations Manager, Integrated Communications Department, Cuyahoga Community College, wherein he has alleged a denial of access to public records. Before the court are the following: (1) a report and recommendation issued on April 16, 2018, by Special Master Jeffery W. Clark, (2) Horton’s objections to Special Master Clark’s report and recommendation filed on April 30, 2018, (3) Horton’s motion for leave to exceed this court’s local rules pertaining to page limits for supporting memorandum briefs, which Horton filed on April 30, 2018, and (4) Sheil’s response to Horton’s objections filed on May 9, 2018.

{¶2} For reasons set forth below, the court determines that Horton’s motion for leave to exceed this court’s local rules relative to page limitations should be denied. The court also determines that Horton’s fifth and seventh objections should be sustained and that Horton’s first, second, third, fourth, sixth, and eighth objections should be overruled. The court further determines that the special master’s report and recommendation should not be adopted.

Background and Procedural History

{¶3} On September 19, 2017, Sheil filed a complaint with attachments wherein he claimed that respondent John Horton denied him access to public records. In the complaint, Sheil stated: “As you can see in the attached email, the Cuyahoga Community College Foundation will not provide a copy of the contract it has with actress

Octavia Spencer regarding a fee for speaking at an upcoming luncheon. This, despite the fact that the foundation calls itself ‘a component unit’ of the college. * * * This is time-sensitive: The lunch is October 4th.” The court appointed Jeffrey W. Clark as a special master in the cause and the court referred the matter to mediation. After mediation failed to successfully resolve all disputed issues between the parties, the court returned the case to Special Master Clark’s docket.

{¶4} On April 16, 2018, Special Master Clark issued a report and recommendation. In this report and recommendation, Special Master Clark stated that this case “presents two issues: (1) whether Tri-C Foundation is subject to the Public Records Act, and (2) if so, whether its contract with a speaker for a fundraising event may be withheld as a trade secret. The evidence establishes (1) that Tri-C Foundation is subject to the Public Records Act, and (2) the speaker contract contains no material that falls under the definition of trade secret.” (Report and Recommendation, at 2.) And in the conclusion of the report and recommendation Special Master Clark stated:

Upon consideration of the pleadings and attachments, I find by clear and convincing evidence that Tri-C Foundation is the functional equivalent of a public office and a person responsible for public records. I further find respondent has failed to show that any material in the requested contract constitutes trade secret. I therefore recommend that the court ORDER respondent to provide Sheil with an unredacted copy of the contract as submitted under seal. I further recommend that Sheil be entitled to recover the amount of the filing fee and any other costs associated with the action that he has incurred. R.C. 2743.75(F)(3)(b).

(Report and Recommendation, 25.) The court forwarded copies of Special Master Clark’s report and recommendation by certified mail to the parties’ counsel. According to the court’s docket, the parties’ counsel received the court’s mailing on April 19, 2018.

{¶5} Seven business days later—on April 30, 2018—Horton moved for leave to exceed this court’s page limits. That same day Horton filed written objections to Special Master Clark’s report and recommendation that exceeded this court’s page limits. According to the certificate of service attached to Horton’s objections, Horton’s counsel

served the objections upon Sheil's counsel by electronic mail and by U.S. certified mail, return receipt requested. On May 9, 2018, Sheil filed a response to Horton's objections to the special master's report and recommendation wherein he urged the court to overrule all of Horton's objections, adopt the special master's report and recommendation without any modification, and order the production of the requested record.

Horton's motion for leave to exceed page limitations

{¶6} Horton, through counsel, moves for leave to exceed this court's page limitations for supporting memorandum briefs. In the motion Horton's counsel also states: "Should the Court deny this Motion, Respondent requests the ability to refile its brief at the 15-page limit."

{¶7} L.C.C.R. 4(E) governs page limitations in this court. It provides: "Supporting, opposing, or memorandum briefs shall not exceed fifteen pages in length, exclusive of attachments. * * * Applications for leave to file a long brief shall be by motion that sets forth the unusual and extraordinary circumstances which necessitate the filing of a long brief." The fifteen-page limitation set forth in L.C.C.R. 4(E) has a purpose—it assists parties with the presentation of arguments without surplusage and it assists the court in disposing of disputed matters in an economical manner. As a federal district court has observed:

Page limitations "exist for good reason, to protect litigants and judicial resources alike, and [they] are neither aspirational nor advisory." *Morgan v. Bill Vann Co., Inc.*, 2011 U.S. Dist. LEXIS 140394, 2011 WL 6056083, *1 (S.D. Ala. Dec. 6, 2011) (emphasis added); *accord Cybor Corp. v. FAS Techs., Inc.*, 138 F.3d 1448, 1477-78 (Fed. Cir. 1998) (strict adherence to page limits is essential to "proper[] marshal[ing]" of judicial resources).

Beining v. Commr. of Social Sec., W.D.Pa. Civil Action No. 13-305, 2014 U.S. Dist. LEXIS 42765, at *1-2 (Mar. 31, 2014).

{¶8} The court is not persuaded that leave is warranted in this circumstance. Here, without leave of court, on April 30, 2018—seven days after Horton, through counsel, received a copy of the special master’s report and recommendation and the date that is the deadline for filing written objections in this case, see R.C. 2743.75(F)(2) (providing that either party may object to a report and recommendation within seven business days after receiving the report and recommendation)—Horton filed objections that exceed this court’s page limitations contained in L.C.C.R. 4(E). As a federal circuit judge noted in dissent:

Instead of getting leave to file an oversized brief before the deadline, lawyers wait for the last minute to file chubby briefs and dare us to bounce them. Of course, it’s hard to decide cases without a brief from one of the parties, and denying the motion usually knocks the briefing and argument schedule out of kilter. Denying the motion is thus more trouble than allowing the brief to be filed and putting up with the additional unnecessary pages. Sly lawyers take advantage of this institutional inertia to flout our page limits with impunity. This encourages disdain for our rules and penalizes lawyers * * * who make the effort to comply.

For my part, I don’t feel bound to read beyond the 14,000 words allowed by our rules, so I won’t read past page 66 of the state’s brief. * * *

Cuevas v. Hartley, 835 F.3d 892, 893 (9th Cir.2016) (Kozinski, J., dissenting). The court finds that the dissenting jurist’s sentiments are well-founded. Just as the dissenting jurist in *Cuevas* did not feel bound to read beyond the amount of words allowed by the federal court’s rules when he was presented with an oversized brief, in this instance the court does not feel bound to read beyond the fifteen pages allowed by this court’s local rules with respect to Horton’s filed objections. The court is not persuaded by Horton’s contention that an “increase of the page limitation is necessary and appropriate given the length of the Special Master’s opinion (26 pages) and the complex and factual and legal record in this case that is relevant to this Court’s determination.”

{¶9} Horton's motion labeled "Respondent's Motion For Leave To Exceed Page Limit On Respondent's Objections To The Special Master's Report and Recommendation" filed on April 30, 2018, is not well-taken. Horton's request to re-file his brief at the 15-page limit also is not well-taken. The court determines that Horton's motion should be denied.

Horton's objections to the special master's report and recommendation

Horton presents eight written objections for the court to adjudicate:

1. Objection No. 1: The Special Master erred by applying a "liberal interpretation" in favor of "broad access" to the speaker contract.
2. Objection No. 2: The Special Master erred when he concluded that raising scholarship funds to support post-secondary education is a "traditional government function" (the first prong of the *Oriana House* test).
3. Objection No. 3: The Special Master erred in concluding, in using a unique counterfactual calculation, that the government provides a substantial amount of funding to the Foundation (the second prong of the *Oriana House* test).
4. Objection No. 4: The Special Master erred in finding that the government's involvement and/or regulation of the Foundation is significant, based on the fact that government officials occupy four out of 63 Foundation board of director positions (the third prong of the *Oriana House* test).
5. Objection No. 5: The Special Master erred in finding that the Foundation was created by the government to avoid the requirements of the Public Records Act (the fourth prong of the *Oriana House* test).
6. Objection No. 6: The Special Master erred in concluding that the relationship between the Foundation and Tri-C is analogous to that presented in *State ex rel. Toledo Blade Co. v. University of Toledo Foundation*.
7. Objection No. 7: The Special Master erred in concluding that the Foundation is "a person responsible" for the public records of Tri-C.
8. Objection No. 8: The Special Master erred in concluding that the speaker contract does not contain trade secrets protected by Ohio law.

For ease of analysis, the court shall combine some of Horton's objections or consider them in an order that is different than the order offered by Horton.

{¶10} R.C. 2743.75(F)(2) governs objections to a report and recommendation issued by a special master of this court. Pursuant to R.C. 2743.75(F)(2):

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.

{¶11} Upon review, the court finds that, in accordance with requirements contained in R.C. 2743.75(F)(2), Horton has filed his objections within seven business days after receiving the special master's report and recommendation. Additionally, Horton's counsel has represented in a certificate of service that they served the objections upon Sheil's counsel by certified mail, return receipt requested, and by electronic mail. Because Horton's counsel has complied with procedural requirements contained in R.C. 2743.75(F)(2) relative to the filing deadline and service of written objections, the court determines that Horton's objections are properly before the court.

{¶12} The court also determines that Sheil's response to Horton's objections are timely filed. According to the court's docket, the court sent a copy of Horton's objections to Sheil's counsel on May 1, 2018. And the copy of Horton's objections was delivered to Sheil's counsel on May 7, 2018. Two days later, on May 9, 2018, Sheil, through counsel, filed a response to Horton's objections.

A. First Objection – Whether the special master erred by applying a “liberal interpretation” in favor of “broad access” to the speaker’s contract.

{¶13} By Horton’s first objection, Horton asks the court to determine whether the special master erred by applying a “liberal interpretation” in favor of “broad access” to the speaker’s contract. In support of his first objection, Horton states: “The Special Master predicated his analysis on a supposed ‘liberal presumption’ that there should be ‘broad access’ to documents held by a private entity alleged to be the functional equivalent of a public office. (Special Master’s Report and Recommendation (‘SM Rep.’) p. 13.) This is not the law.”

{¶14} In the report and recommendation, the special master stated: “Even were this question [whether Tri-C Foundation is the functional equivalent of a public office] were closer, the court must construe R.C. 149.43 liberally in favor of broad access in weighing the factors. *Oriana House* at ¶ 35.” (Report and Recommendation, at 13.) Notably, in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193, ¶ 35, the Ohio Supreme Court stated:

Even construing R.C. 149.43 liberally in favor of broad access, as we must, State ex rel. Plain Dealer Publishing Co. v. Cleveland, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 20, we conclude that there is not clear and convincing evidence that Oriana House is a public institution and thus a public office subject to the Public Records Act. Two factors of the functional-equivalency test favor the auditor's position, and two factors favor Oriana House's position. The two factors that favor the auditor's position are not fully in her favor, while the two factors that favor Oriana House are wholly in its favor. After considering the pertinent factors, we conclude that Oriana House is not a public institution.

(Emphasis added.) Upon review, the court determines that special master’s statement that the court must construe R.C. 149.43 liberally in favor of broad access in weighing factors set forth in *Oriana House* is not error. The court concludes that Horton’s first objection should be overruled.

B. Sixth Objection – Whether the special master erred in concluding that the relationship between Tri-C Foundation and Tri-C is analogous to that presented in *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 602 N.E.2d 1159 (1992).

{¶15} By Horton’s sixth objection, Horton contends that the special master erred when he concluded that the relationship between Tri-C Foundation and Tri-C (Cuyahoga Community College) is “analogous” to the situation in *State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 602 N.E.2d 1159 (1992). Horton maintains that the special master’s conclusion that ““there is no material distinction between the facts here and those in *Toledo Foundation* [sic]’ is simply untrue (SM Rep. p. 11.)”. According to Horton:

- In *State ex rel. Toledo Blade Company*, the foundation in that case “had extensive involvement in and responsibility for the school’s finances generally (beyond raising money for scholarships), and ‘receive[d], h[e]ld, invest[ed] and administer[ed] property and ... spen[t] funds for the benefit of the university.’ *Toledo Blade*, at 261.” (Objections, 10.) But, here the Tri-C Foundation “has no involvement with Tri-C’s endowment generally, and simply raises money for scholarships and student programs. (Court’s Exh. At 21; O’Bryan Aff. I ¶ 5-8).” (Objections, 10.)
- Unlike the foundation in *State ex rel. Toledo Blade Company*, the Tri-C Foundation “does not hold funds in Tri-C’s name. (O’Bryan Aff. I ¶ 8.) *Toledo Blade*, at 262.” (Objections, 10.)
- Unlike the circumstance in *State ex rel. Toledo Blade Company*, the Tri-C Foundation “absolutely does compensate Tri-C for the staff and other administrative resources its receives from the school.” (Objections, 10.)

And Horton urges that the special master “wrongly reasoned that the Foundation is analogous to the foundation in *Toledo Blade* because Tri-C employees are ‘guaranteed’ four *ex officio* seats on the Foundation’s board of directors. (SM Rep. p. 12.)”

{¶16} By his sixth objection Horton also challenges the special master’s reliance on 2016 Ohio Atty.Gen.Ops. No. 2016-13 to support the analysis contained in the report and recommendation.

{¶17} In the report and recommendation at page 11, the special master noted that *State ex rel. Toledo Blade Company* is a case that came before *Oriana House*. Citing to *Oriana House*, at ¶ 24, the special master stated: “The Court summarized the pertinent factors in *Toledo Foundation* as ‘A private nonprofit corporation that acts a major gift-receiving and soliciting arm of a public university and receives support from public taxation is a “public office” pursuant to R.C. 149.011(A).’ *Id.*” (Report and Recommendation, 11.) A review of paragraph 24 of *Oriana House* discloses that in that case the Ohio Supreme Court cited to paragraph one of the syllabus in *State ex rel. Toledo Blade Company* as indirect support for the proposition that the Ohio Supreme Court had considered factors similar to factors in the functional-equivalency test in making a determination whether an entity is a public institution and thus a public office subject to R.C. 149.43. And in paragraph one of the syllabus in *State ex rel. Toledo Blade Company*, the Ohio Supreme Court held: “A private nonprofit corporation that acts as a major gift-receiving and soliciting arm of a public university and receives support from public taxation is a ‘public office’ pursuant to R.C. 149.011(A), and is subject to the public records disclosure requirements of R.C. 149.43(B).”

{¶18} Here, the record before the court shows that Tri-C Foundation acts a major gift-receiving and soliciting arm of Tri-C and the record suggests that Tri-C Foundation may receive indirect support from public taxation. In an affidavit, Megan O’Bryan— president of Tri-C Foundation and vice-president of development for Tri-C—averred:

“The Foundation was incorporated in August 1973 as a tax-exempt, not for profit corporation under Section 501(c)(3) of the Internal Revenue Code for the purpose of collecting donations from individuals, corporations, and foundations, located primarily in northeast Ohio, to be distributed as scholarships to persons attending the College and to be used for other purposes benefitting the College.” (O’Bryan Affidavit, ¶ 5, dated November 22, 2017.) And in another affidavit, O’Bryan attested: “As noted in the College’s Comprehensive Annual Financial Report for the Fiscal Years Ended June 30, 2017 and 2016, during those years the Foundation recognized contributions and special events revenue from the College of \$870,874 and \$1,158,452, respectively.” (O’Bryan Affidavit, ¶ 9, dated February 26, 2018.)

{¶19} In common usage, the term analogous means “susceptible of comparison either in general or in some specific detail.” *Webster’s Third New International Dictionary* 77 (2002). It is true that Tri-C Foundation may differ in some particulars from the University of Toledo Foundation, as described by the Ohio Supreme Court in *State ex rel. Toledo Blade Company* at 262. Nonetheless, a similarity does exist—both Tri-C Foundation’s role, and the University of Toledo Foundation’s role, as described in *State ex rel. Toledo Blade Company*, includes the receipt and administration of property for the benefit of a public institution of higher education.

{¶20} The court is not persuaded by Horton’s claim that special master erred when he concluded that the relationship between Tri-C Foundation and Tri-C Community College is analogous to the situation in *State ex rel. Toledo Blade Company*.

{¶21} Horton also takes issue with the special master’s reasoning relative to four ex officio seats on Tri-C Foundation’s Board of Directors. A review of the record discloses that, effective September 13, 2017, (1) Alex Johnson, Ph.D., President, Cuyahoga Community College, (2) David Kuntz, Executive Vice President/Treasurer, Administration & Finance, Cuyahoga Community College, (3) Karen Miller, Ph.D.,

Provost & Executive Vice President, Access, Learning and Success, Cuyahoga Community College, and (4) Megan O'Bryan are ex officio members of the 2017-2018 Cuyahoga Community College Foundation. (Affidavit of Megan O'Bryan, dated November 22, 2017, and Exhibit A to affidavit.)

{¶22} Generally speaking, a member ex officio is a member “who serves on a board or committee by virtue of holding an office, and whose membership will therefore pass with the office to his or her successor.” *Black’s Law Dictionary* 1133 (10th Ed.2014) (defining member ex officio). In the report and recommendation, the special master stated:

Tri-C occupies four *ex officio* seats on the Tri-C Foundation board. Common purposes of *ex officio* seats for public offices include a guaranteed presence to monitor activity. Since the Tri-C Foundation Board’s Directors have control over the property and all the business and financial affairs of the Foundation (O’Bryan Aff. I at ¶ 7.), the Tri-C officers’ *ex officio* seats provide it with regular opportunity to monitor Tri-C Foundation’s performance. The accounting rules tying Tri-C Foundation to Tri-C as its “component unit” provide additional monitoring of overall performance through joint audit reports. *While there is no evidence that Tri-C specifically monitored the contract with Ms. Spencer* (O’Bryan Aff. I at ¶ 36-52.), *it was clearly aware* through its involved staff of the scheduling and planning of the Presidential Scholarship Luncheon.

(Emphasis added.) (Report and Recommendation, 15.) Absent evidence regarding the Tri-C ex officio members’ active involvement in affairs of the Tri-C Foundation’s Board of Directors, it is unclear to the court how the special master came to determine that Tri-C “was clearly aware” of the scheduling and planning of the Presidential Scholarship Luncheon, especially given O’Bryan’s averments that she “personally” conducts the search and negotiations to engage speakers for the Presidential Scholarship Luncheon, that “[n]o other Foundation staff participate in contract negotiations for the speaker at the Luncheon,” that the Tri-C Foundation’s Board “is also not typically aware of the specific terms of the speaker’s contract for the Presidential

Scholarship Luncheon,” and that O’Bryan “discussed the contract’s terms with select Board members, including the Board President, following Fox News’ initial request to the Foundation.” (O’Bryan, Affidavit, ¶ 42, 46, dated November 22, 2017.) Nonetheless, given that, according to O’Bryan, since the inception of the Presidential Scholarship Luncheon in 1992, the Presidential Scholarship Luncheon has raised more than \$18 million to benefit students at Tri-C (O’Bryan Affidavit, ¶ 14, dated November 22, 2017), it does seem reasonable to conclude that Tri-C, through its members ex officio, may have had some awareness of the scheduling and planning of the Presidential Scholarship Luncheon.

{¶23} Besides challenging the special master’s use of *State ex rel. Toledo Blade Company*, Horton also challenges the special master’s reliance on 2016 Ohio Atty.Gen.Ops. No. 2016-013 to support the notion that Tri-C Foundation should be treated as a public office. In 2016 Ohio Atty.Gen. Ops. 2016-013, the Ohio Auditor of State asked the Ohio Attorney General to opine whether “a private nonprofit corporation, ‘the primary purpose of which is to act as a major gift-receiving and soliciting arm of the public college or university, the assets of which inure to the benefit of and are primarily expended for the college or university, and which is responsible for keeping records of donations for the public college or university,’ is subject to audit by the Auditor of State pursuant to R.C. 117.10(A).” (Footnote omitted.) *Id.* at 1. At paragraph two of the opinion’s syllabus, the Ohio Attorney General advised:

A public college or university foundation established as a private nonprofit corporation in accordance with R.C. Chapter 1702, the primary purpose of which is to solicit and receive, on behalf of a state college or university, gifts, donations, and bequests made for the benefit or use of the state college or university, and which is responsible for keeping records of donations for the state college or university constitutes a “public office” pursuant to R.C. 117.01(D).

The Ohio Supreme Court has instructed that attorney general opinions “are not binding on courts; at best, they are persuasive authority.” *State ex rel. Van Dyke v. Pub.*

Emples. Retirement Bd., 99 Ohio St.3d 430, 2003-Ohio-4123, 793 N.E.2d 438, ¶ 40. Given that an opinion of the Ohio Attorney General is, at best, persuasive authority, and that, in this instance, the Ohio Attorney General's advice contained in the second paragraph of the syllabus is relevant to the pertinent issues identified by the special master in this case, the court determines that special master did not err when he relied on the Ohio Attorney General's advice to inform the analysis contained in the report and recommendation.

{¶24} Accordingly, the court determines that Horton's sixth objection should be overruled.

C. Second, Third, Fourth, and Fifth Objections – Whether the special master's application of the functional-equivalency test established in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193 constitutes error.

{¶25} Horton's second, third, fourth, and fifth objections challenge the special master's application of the functional-equivalency test established by the Ohio Supreme Court in *State ex rel. Oriana House, Inc. v. Montgomery*, 110 Ohio St.3d 456, 2006-Ohio-4854, 854 N.E.2d 193. In *Oriana House*, the Ohio Supreme Court considered an appeal from a judgment granting a writ of mandamus to compel a private, nonprofit corporation to provide access to certain records under the Public Records Act, R.C. 149.43. In *Oriana House*, the Ohio Supreme Court established a test for determining whether a private entity should be deemed a public institution under R.C. 149.011(A). The Ohio Supreme Court held that

in determining whether a private entity is a public institution under R.C. 149.011(A) and thus a public office for purposes of the Public Records Act, R.C. 149.43, a court shall apply the functional-equivalency test. Under this test, the court must analyze all pertinent factors, including (1) whether the entity performs a governmental function, (2) the level of government funding, (3) the extent of government involvement or regulation, and (4) whether the entity was created by the government or to avoid the requirements of the Public Records Act.

Oriana House, ¶ 25. The Ohio Supreme Court further held that “the functional-equivalency analysis begins with the presumption that private entities are not subject to the Public Records Act absent a showing by clear and convincing evidence that the private entity is the functional equivalent of a public office.” *Id.* at ¶ 26. And in *Oriana House* at ¶23, the Ohio Supreme Court stated that applying the functional-equivalency test “requires a case-by-case analysis, examining all pertinent factors with no single factor being dispositive.”

{¶26} Thus, applying *Oriana House*, at the outset a determination whether Tri-C Foundation is a private entity is required. If Tri-C Foundation is a private entity, then a presumption exists that it should not be subject to the Ohio Public Records Act absent a showing by clear and convincing evidence that it is the functional equivalent of a public office. In *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus, the Ohio Supreme Court held that clear and convincing evidence “is that measure or degree of proof which is more than a mere ‘preponderance of the evidence,’ but not to the extent of such certainty as is required ‘beyond a reasonable doubt’ in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established.” *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus.

{¶27} Here, based on the court’s review, it does not appear that the special master made an express finding of fact whether Tri-C Foundation is a private entity. A review of the record shows that in an independent auditor’s report to the Board of Directors of Tri-C Foundation—a report that comprises the statements of financial position as of June 30, 2017 and 2016—Tri-C Foundation is referred to as “a component unit of Cuyahoga Community College.” But, in Horton’s response to Sheil’s complaint, Horton states: “The Foundation is a private entity, separate from the College * * *.” (Response, 1, filed on November 22, 2017.) Thus, the record is equivocal whether Tri-C Foundation is a wholly private entity, as Horton maintains.

{¶28} The court will therefore review the special master's finding that, by clear and convincing evidence, Tri-C Foundation is the functional equivalent of public office.

1. *Oriana House* Factor One: Whether an entity performs a governmental function

{¶29} In the report and recommendation, the special master stated that Tri-C Foundation "solicits and receives public donations, to be distributed as scholarships to persons attending Tri-C and for other purposes benefitting Tri-C. * * * The Tri-C Foundation thus performs an indispensable sub-function within Tri-C's traditional governmental education function. This factor weighs strongly in favor of Tri-C Foundation's status as the functional equivalent of a public office." However, the first prong of the *Oriana House* functional-equivalency test requires a determination "whether the entity performs a governmental function," see *Oriana House* at ¶ 25—not whether the entity performs an indispensable sub-function.

{¶30} Citing to Fuller, Matthew B. (2014) "A History of Financial Aid to Students," *Journal of Student Financial Aid*: Vol. 44: Iss. 1, Article 4 (Available at: <http://publications.nasfaa.org/jsfa/vol44/iss1/4>), Horton in his second objection contends that the provision of financial aid historically has been a private function, not a governmental, function. Notably, Fuller in his article states in the conclusion: "Across the history of financial aid, one sees an evolution away from local, citizen-initiated philanthropy, to moderate government control and coordination, and, finally, to full federal oversight and financing of a massive and complex system of financial aid." Thus, based on this authority, whether a historically indispensable sub-function within the traditional governmental-education function is the solicitation of funds for higher education, as the special master suggests, is debatable. Compare Ohio Constitution, Article VI, Section 3 ("Provision shall be made by law for the organization, administration and control of the public school system of the state supported by public funds: provided, that each school district embraced wholly or in part within any city shall have the power by referendum vote to determine for itself the number of members and

the organization of the district board of education, and provision shall be made by law for the exercise of this power by such school districts”) with R.C. 3358.09 (“The general assembly shall support a state community college by such sums of money and in such manner as it may provide, but support may also be obtained from other sources”).

{¶31} The court disagrees with the special master’s assessment that this “factor weighs *strongly* in favor of Tri-C Foundation’s status as the functional equivalent of a public office.” (Emphasis added.) (Report and Recommendation, 4.) Nonetheless, given that, according to Fuller’s article, there has been an “evolution away from local, citizen-initiated philanthropy, to moderate government control and coordination, and, finally, to full federal oversight and financing of a massive and complex system of financial aid,” and given that in R.C. 3358.09, as a matter of public policy, the General Assembly permits a state community college to obtain support from other sources, there is some support for the proposition that the receipt and solicitation of gifts in connection with an Ohio entity of higher education has evolved to become a governmental function.

{¶32} The court determines that Horton’s second objection should be overruled.

2. *Oriana House* Factor Two - The level of government funding to a private entity.

{¶33} By Horton’s third objection, Horton asserts that the special master’s analysis of the second prong of the *Oriana House* test is error because the special master purportedly used a “unique and counterfactual calculation, that the government provides a substantial amount of funding to the Foundation.”

{¶34} In the report and recommendation, the special master found that the second factor of the *Oriana House* functional-equivalency test “weighs moderately to strongly in favor of the foundation’s status as the functional equivalent of a public office.” (Report and Recommendation, 5.) In support of this finding, the special master noted: “While contributions, grants and special event receipts are ‘revenue’ as an accounting concept, almost all such revenue collected by Tri-C Foundation is destined for Tri-C.

These moneys no more ‘fund’ the Foundation than if they were artworks or real estate physically collected and transferred, intact, to Tri-C.” (Report and Recommendation, 4-5.) In the court’s view, it is unlikely that a person or entity would physically collect real estate and transfer it intact to a state community college, especially given that real estate, as commonly understood, is property in building and land. The special master’s statement relative to works of art and real estate appear to be akin to obiter dictum—a “judicial comment while delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential.” *Black’s Law Dictionary* 1240 (10th Ed.2014). See *State v. Mason*, Slip Op. No. 2018-Ohio-1462, ¶ 45 (Kennedy, J., concurring) (“With regard to dicta, Chief Justice Marshall wrote the following almost 200 years ago in *Cohens v. Virginia*: ‘It is a maxim not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit when the very point is presented for decision.’ 19 U.S. 264, 399, 5 L.Ed. 257 (1821)”).

{¶35} In the special master’s analysis of the second factor of the *Oriana House* test, the special master states: “A more meaningful measure of government funding of a fund-raising entity is the percentage of its operational expenses that comes from public sources. * * * Moreover, even using the broad concept of ‘revenue’ as all moneys received, Tri-C Foundation revenues consist mostly or entirely of public money. ‘Public money’ is defined by R.C. 117.01(C) to mean ‘any money received, collected by, or due a public official under color of office, as well *any money collected by any individual on behalf of a public office or as a purported representative or agent of the public office.*’ (Emphasis added.) ‘Public money’ includes money raised by a nonprofit corporation for a public office. 2016 Ohio Atty. Gen. Ops. No. 2016-013 at * 68-70. Under this definition, it appears that 100 percent of Tri-C Foundation’s total revenues come from public sources.” (Report and Recommendation, 5.)

{¶36} It is true that, in a general sense, a donation from a private donor—a member of the general public—could be viewed as “public money,” as the special master’s analysis seems to suggest. However, there exists authority for a contrary view as to what may constitute public funding. See, e.g., *S/O ex rel. Am. Ctr. for Economic Equality v. Jackson*, 2015-Ohio-4981, 53 N.E.3d 788, ¶ 23 (8th Dist.) (applying functional-equivalency factors) (stating that “the level of government funding obtained by NERA for this disparity study is minimal. Jon Wainwright, Senior Vice President of NERA, provided that NERA generates approximately \$125 million in annual revenue, the large majority of which is obtained from private entities. According to the City’s contract with NERA, the City agreed to pay an amount not to exceed \$757,602. The revenue generated from its contract with the City was therefore less than 1 percent of its total revenue”). Notably, in this instance Horton appears to concede that Tri-C Foundation receives some government funding because in his response to Sheil’s complaint he states that in this case “the Foundation’s government funding is minimal.”

{¶37} While the court does not agree with the special master’s assessment that application of the third factor of the *Oriana House* test “weighs moderately to strongly in favor of the foundation’s status as the functional equivalent of a public office,” the court determines that, in view of Horton’s apparent concession that Tri-C Foundation receives some government funding, Horton’s third objection should be overruled.

3. *Oriana House* Factor Three - The extent of government involvement or regulation.

{¶38} By Horton’s fourth objection, Horton urges that the special master erred in his application of the third prong of the *Oriana House* test. Horton contends that the special master “erred in finding that the government’s involvement and/or regulation of the Foundation is significant, based on the fact that government officials occupy four out of 63 Foundation board of director positions.” Horton disputes the special master’s finding that Tri-C Foundation and Tri-C “were ‘closely intertwined,’ in the Foundation’s

use of facilities, staff time, and other administrative support provided by Tri-C (which the Foundation compensates Tri-C for via charge-backs). (SM Rep. p. 6.)”

{¶39} In support of a conclusion that the third factor of the *Oriana House* test “weighs moderately in favor of Tri-C Foundation’s status as the functional equivalent of a public office,” the special master acknowledges that Tri-C does not control the day-to-day activities of Tri-C Foundation, but Tri-C and Tri-C Foundation nonetheless “are closely intertwined.” The special master’s conclusion that the Tri-C and Tri-C Foundation are “closely intertwined” is supported by evidence supplied by Horton. Megan O’Bryan, President of the Tri-C Foundation and an *ex officio* member of Tri-C Foundation’s board, averred in an affidavit:

- “In consideration for the Foundation’s fundraising and donor engagement, the College provides the Foundation with office space and technology in-kind support for its operations.” (Affidavit, ¶ 25, dated November 22, 2017);
- “The College’s Chief Financial Officer determines an equitable method of valuing support services provided to the Foundation, which the Foundation records in its books and records.” (Id. at ¶ 26.)
- “Pursuant to this cost-sharing agreement, the College’s IT department provides in-kind services and the use of its servers for the Foundation’s email system for which the Foundation is allocated a charge-back by the College.” (Id. at ¶ 28.)
- “Six of twenty college resource development staff dedicate a percentage of their time to work for the Foundation.” (Id. at ¶ 30.)
- “In fiscal year 2017, the Foundation recognized \$227,268 of contributed services from the College as contribution revenue and as administrative, general, and fundraising expenses.” (Id. at ¶ 32.)

- “Michael Johns, the College’s Executive Director for Accounting and Financial Operations, is one of the College’s employees whose time on behalf of the Foundation is accounted for in charge backs between the College and the Foundation, and 10% of his time expressly accounted for in this way.” (Sur-Reply Affidavit of Megan O’Bryan, ¶ 10, dated February 26, 2018.)

Thus, evidence supplied by Horton supports the special master’s view that Tri-C and Tri-C Foundation “are closely intertwined.”

{¶40} Horton contends that emphasis should be given to whether the government controls day-to-day operations of the private entity. However, in *State ex rel. Oriana House, Inc.*, 110 Ohio St.3d 456, 2006-Ohio-485, ¶ 25, the Ohio Supreme required courts to “analyze all pertinent factors, including * * * (3) the extent of government involvement or regulation.” (Emphasis added.) The Ohio Supreme Court’s use of the disjunctive “or,” as opposed to the conjunctive “and” indicates that the court intended a court to analyze governmental involvement with a private entity separately from governmental regulation of a private entity. See *Columbia Gas Transm. Corp. v. Levin*, 117 Ohio St.3d 122, 2008-Ohio-511, 882 N.E.2d 400, ¶ 20 (“The General Assembly’s use of the disjunctive ‘or,’ as opposed to the conjunctive ‘and,’ indicates that the classifications are intended to be read separately from each other, and public utility is only one of the classifications to which R.C. 5727.02 applies”).

{¶41} The court determines that the special master’s conclusion that the third factor of the *Oriana House* functional-equivalency test “weighs moderately in favor of Tri-C Foundation’s status as the functional equivalent of a public office” is not error. The court further determines that Horton’s fourth objection should be overruled.

4. *Oriana House* Factor 4 - Whether the entity was created by the government or to avoid the requirements of the Public Records Act.

{¶42} By his fifth objection, Horton challenges the special master’s application of the fourth factor of the *Oriana House* functional-equivalency test. The fourth factor of

the *Oriana House* functional-equivalency test requires a court to determine “whether the entity was created by the government or to avoid the requirements of the Public Records Act.” *Oriana House* at ¶ 25. In the report and recommendation, the special master stated that this factor “weighs strongly in favor of Tri-C Foundation’s status as the functional equivalent of a public office” because in August 1973 Tri-C’s then-vice president of finance incorporated the Tri-C Foundation, because the then-vice president of finance signed as the agent for statutory service, and because the “broad purposes of the Foundation are exclusively for the benefit of the Board of Trustees of the Cuyahoga Community College District.” (Report and recommendation, 8.)

{¶43} Horton challenges the special master’s determination and he urges that the “seminal decision on this point is the Ohio Supreme Court’s 2011 opinion in *State ex rel. Bell v. Brooks*, 2011-Ohio-4897.” In *State ex rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987, the Ohio Supreme Court affirmed an appellate court’s judgment insofar as it denied a writ of mandamus on grounds that a County Risk Sharing Authority, Inc. (CORSA) was not the functional equivalent of a public office for purposes of R.C. 149.43. In *Brooks*, applying the functional-equivalency test established in *Oriana House*, the Ohio Supreme Court stated: “Like the entities in *Oriana House* and [*State ex rel. Repository v. Nova Behavioral Health, Inc.*, 112 Ohio St.3d 338, 2006-Ohio-6713, 859 N.E.2d 936], CORSA was created as a private, nonprofit corporation, was not established by a government entity, and was not formed as an alter ego of a governmental agency to avoid the requirements of the Public Records Act. *Oriana House*, 110 Ohio St.3d 456, 2006 Ohio 4854, 854 N.E.2d 193, at ¶ 34; *Repository* at ¶ 37.” *Brooks* at ¶ 25.

{¶44} Based on the court’s review of the record, Tri-C Foundation was not established by Tri-C—a government entity. According to the copy of Tri-C Foundation’s articles of incorporation labeled “Articles of Incorporation of Cuyahoga Community College” approved August 28, 1973, Tri-C Foundation resulted from a desire “to form a

corporation not for profit under the Non-Profit Corporation Law of the State of Ohio.” The articles list the purpose or purposes of the foundation as, among other things, to “receive, hold, invest and administer property of any kind * * *and to make expenditures * * * exclusively for charitable, scientific, literary or educational purposes in connection with, and to or for the benefit of, any community college now or hereafter owned or operated by the Board of Trustees of the Cuyahoga Community College District * * *.” Notably, in the articles of incorporation Dante N. Biello, the incorporator, does *not* identify himself as the then vice-president of finance for Tri-C. Nor does a review of the articles of incorporation show that Tri-C Foundation was formed as an alter ego of a governmental agency, i.e., Tri-C, to avoid the requirements of the Public Records Act.

{¶45} The court finds that Horton’s fifth objection has merit. And the court determines that the special master erred when he concluded that the fourth factor of the *Oriana House* test “weighs strongly in favor of Tri-C Foundation’s status as the functional equivalent of a public office.” The court determines that, based on the record before the court, Horton’s fifth objection should be sustained.

{¶46} Because, upon independent review, the court concludes that the four-factor functional-equivalency test established in *Oriana House*, as applied to the record before the court, indicates that not all four factors have been satisfied in this instance. The court rejects the special master’s finding that “by clear and convincing evidence that Tri-C Foundation is the functional equivalent of a public office * * *.” (Report and Recommendation, 25.)

D. Seventh Objection - Whether the special master erred in concluding that Tri-C Foundation is responsible for public records of Tri-C.

{¶47} By its seventh objection, Horton challenges the special master’s finding by clear and convincing evidence that Tri-C Foundation is “a person responsible for public records.” In the report and recommendation, the special master stated: “A private entity that is not the functional equivalent of a public office may still be subject to the same

responsibility, as a ‘person responsible for public records.’” (Report and Recommendation, 14.) Notably, in *State ex rel. Carr v. City of Akron*, 112 Ohio St.3d 351, 2006-Ohio-6714, 859 N.E.2d 948, ¶ 36, the Ohio Supreme Court stated:

“R.C. 149.43(C) permits a mandamus action against either ‘a public office or the person responsible for the public record’ to compel compliance with the Public Records Act.” *State ex rel. Toledo Blade Co. v. Bur. of Workers’ Comp.*, 106 Ohio St.3d 113, 2005-Ohio-6549, 832 N.E.2d 711, ¶ 20. “R.C. 149.43(C) manifests an intent to afford access to public records, even when a private entity is responsible for the records.” *State ex rel. Mazzaro v. Ferguson* (1990), 49 Ohio St.3d 37, 39, 550 N.E.2d 464. 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.*; *State ex rel. Cincinnati Enquirer v. Krings* (2001), 93 Ohio St.3d 654, 657, 758 N.E.2d 1135.

Thus, in accordance with *State ex rel. Carr*, the relevant inquiry here concerns (1) whether Tri-C Foundation prepares records in order to carry out the responsibilities of a public office, i.e., Tri-C, (2) whether the public office, i.e., Tri-C, is able to monitor Tri-C Foundation’s performance, and (3) whether the public office, i.e., Tri-C, has access to the records for this purpose.

{¶48} As discussed above, the court has determined that there is some support for the proposition that the receipt and solicitation of gifts in connection with an Ohio institution of higher education has evolved to become a governmental function. Also, insofar as Tri-C has ex officio members who sit on Tri-C Foundation’s board, Tri-C has some capability to monitor Tri-C Foundation. However, whether Tri-C has access to records for the purpose of monitoring Tri-C Foundation’s performance is arguable because in the record is a sworn declaration that Tri-C Foundation’s regulations “state that the Board’s Directors have control over the property and all of the business and financial affairs of the Foundation,” that Tri-C “has no role in deciding or controlling how

the Foundation invests its endowment,” that Tri-C Foundation “does not hold funds for the College or in the College’s name,” that Tri-C Foundation’s “fundraising database is wholly separate from the College and is stored on a separate off-site server,” and that Tri-C Foundation’s contract with Olivia Spencer is not stored on Tri-C’s servers that Tri-C uses in accordance with a charge-back agreement. (O’Bryan Affidavit, ¶ 7, 8, 29, 49, dated November 22, 2017.) This evidence appears to militate against the special master’s statement that “Tri-C monitors Tri-C Foundation performance, and has demonstrated access to its records, making the foundation a ‘person responsible for public records’ in a relationship of quasi-agency. *State ex rel. ACLU v. Cuyahoga Cty. Bd. of Comm’rs*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553, ¶ 52-54.” (Report and Recommendation, 17.) And, in view of this evidence, the court concludes that the evidence in the record is not clear and convincing evidence for the proposition that Tri-C Foundation is a person responsible for public records, as the special master found.

{¶49} The court concludes that Horton’s seventh objection should be sustained.

E. Eighth Objection – Whether the special master erred in concluding that Tri-C Foundation’s contract with actress Octavia Spencer does not contain trade secrets protected by Ohio law.

{¶50} By Horton’s eighth objection, Horton asserts that the special master erred when he determined that Horton failed to show that any part of Tri-C Foundation’s contract with Octavia Spencer fell squarely within the definition of a trade secret under Ohio law.

{¶51} In *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 399, 732 N.E.2d 373 (2000), the Ohio Supreme Court explained that trade secrets “are exempt from disclosure under the ‘state or federal law’ exemption of R.C. 149.43.” And in *Besser* the court noted that it had adopted certain factors when analyzing a trade-secret claim, stating:

We have also adopted the following factors in analyzing a trade secret claim: “(1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.” *State ex rel. The Plain Dealer v. Ohio Dept. of Ins.* (1997), 80 Ohio St. 3d 513, 524-525, 687 N.E.2d 661, 672, citing *Pyromatics, Inc. v. Petruziello* (1983), 7 Ohio App. 3d 131, 134-135, 7 Ohio B. Rep. 165, 169, 454 N.E.2d 588, 592.

An entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy. *See Fred Siegel Co., L.P.A. v. Arter & Hadden* (1999), 85 Ohio St. 3d 171, 181, 707 N.E.2d 853, 862.

Id. at 399-400.

{¶52} In support of Horton’s eighth objection, Horton asserts that the special master disregarded uncontested evidence in Megan O’Bryan’s affidavit of November 22, 2017, that supports a finding that Tri-C Foundation’s contract with Octavia Spencer constitutes a trade secret. In this affidavit, Megan O’Bryan averred: “If information related to the terms of the contracts for the Presidential Scholarship Luncheon, including Ms. Spencer’s were publically available, the Foundation would be forced to match or beat contract terms in future speakers’ contracts.” (O’Bryan Affidavit, ¶ 36, dated November 22, 2017.) O’Bryan also averred: “In my experience, knowledge by speakers of terms of previous contracts would impair the Foundation’s ability to pay speakers the lowest fee possible because potential speakers often utilize previous contracts as benchmarks when negotiating their speaking fees” and “[w]ithout secrecy regarding the terms of speaker contracts, speakers would be able to command higher fees from the Foundation for speaking at the Presidential Scholarship Luncheon.” (*Id.* at ¶ 37, 38.)

{¶53} In this instance, however, the issue of secrecy appears to be of no moment. Here, within the record is a copy of a contract wherein Kent State University contracted to have Octavia Spencer speak at Kent State University's spring 2017 university-wide commencement ceremony. Notably, this contract lists a guaranteed fee, terms for the reimbursement of travel and expenses, and technical requirements—items that are similar to items in the contract at issue.

{¶54} In *State ex rel. Plain Dealer v. Ohio Dep't of Ins.*, 80 Ohio St.3d 513, 529, 687 N.E.2d 661 (1997), the Ohio Supreme Court observed that

R.C. 1333.61 grants a document trade secret status only if the information is not generally known or readily ascertainable to the public. R.C. 1333.61(D)(1). Here, many of the documents compiled in the Memoranda are already public documents, such as the title to properties owned by Blue Cross, matters involving its financial structure that appear regularly on its annual statement, and pending litigation. Although some of the other information may not have been released into the public domain, the presence of information already made public prevents us from concluding that the Memoranda, as a whole, is a document that is not generally known to the public.

In this case, there is available in the public domain information about Octavia Spencer's guaranteed fee—and other details—for a speaking event at a university located in the general vicinity of Tri-C, i.e., northeast Ohio, that was scheduled to be held a few months before her appearance at Tri-C Foundation's Presidential Scholarship Luncheon. Upon an in camera inspection of the contract at issue and, upon independent review of the special master's report and recommendation, the court concludes that the special master correctly determined that Horton failed to show that any material in the requested contract constitutes a trade secret.

{¶55} The court determines that Horton's eighth objection should be overruled.

Conclusion

{¶56} Accordingly, for reasons set forth above, the court determines that "Respondent's Motion For Leave To Exceed Page Limit On Respondent's Objections

To The Special Master's Report and Recommendation" filed on April 30, 2018, should be denied. The court further determines that Horton's fifth and seventh objections should be sustained and that Horton's first, second, third, fourth, sixth, and eighth objections should be overruled. The court further determines that the special master's report and recommendation should not be adopted.

PATRICK M. MCGRATH
Judge

[Cite as *Sheil v. Horton*, 2018-Ohio-2355.]

WILLIAM B. SHEIL

Requester

v.

JOHN HORTON

Respondent

Case No. 2017-00772PQ

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶57} For the reasons set forth in the decision filed concurrently herewith, and upon independent review of the objected matters, the court SUSTAINS respondent John Horton’s fifth and seventh objections and the court OVERRULES Horton’s first, second, third, fourth, sixth, and eighth objections to Special Master Jeffery W. Clark’s report and recommendation of April 16, 2018. The court DENIES “Respondent’s Motion For Leave To Exceed Page Limit On Respondent’s Objections To The Special Master’s Report and Recommendation” filed on April 30, 2018. The court’ DOES NOT ADOPT Special Master Jeffery Clark’s Report and Recommendation of April 16, 2018.

{¶58} Judgment is rendered in favor of respondent John Horton. Court costs are assessed against requester William B. Sheil. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge