

[Cite as *Robinson v. Alexandria*, 2018-Ohio-1581.]

STANLEY E. ROBINSON

Requester

v.

VILLAGE OF ALEXANDRIA

Respondent

Case No. 2017-00808PQ

Special Master Jeffery W. Clark

REPORT AND RECOMMENDATION

{¶1} Between September 20, 2015 and September 17, 2017, requester Stanley Robinson submitted six letters to respondent Village of Alexandria (Village) containing a total of 400 public records requests. (Complaint at 49-114.) The Village responded that the September 20, 2015 request was voluminous and contained language that was ambiguous and overly broad, but would be reviewed and responded to in batches “as is logistically practical.” (*Id.* at 60.) The complaint attached documentation that Robinson characterizes as the “village’s attempted compliance records.” (*Id.* at 115-135). The complaint lists the response status of 338 remaining requests as either “no response” or “not satisfied.” (*Id.* at 4-48.)

{¶2} On October 5, 2017, Robinson filed a complaint under R.C. 2743.75 alleging denial of timely access to public records in violation of R.C. 149.43(B). On October 10, 2017, the court referred the case to mediation. The parties engaged in four mediation sessions. On December 14, 2017, the Village filed a spreadsheet listing Robinson’s requests and the Village’s responses. On January 17, 2018, the mediator filed an entry stating:

On January 12, 2018, a fourth mediation was conducted with the parties. During the mediation, the parties agreed to the following:

- 1) Respondent's Village Administrator will provide requester with documents in response to 18 currently outstanding requests on or before *January 31, 2018*;

- 2) Requester may visit the Village of Alexandria's office during normal business hours to inspect any remaining records that have not been provided from now until *February 15, 2018*;
- 3) On *February 15, 2018*, requester shall file with the court either a notice of voluntary dismissal, or a letter stating that the case has not been resolved through mediation. The case shall then proceed pursuant to R.C. 2743.75(E)(2) if necessary.

(Emphasis sic.) On February 1, 2018, the Village filed

a comprehensive spreadsheet of Requester Stanley Robinson's revised public records requests with Respondent's responses to each request, marked and attached as Exhibit A. The additional documents were produced to Mr. Robinson on January 31, 2018. As previously discussed during the fourth mediation, Mr. Robinson may visit the Village of Alexandria's office during normal business hours to look for and inspect any remaining records.

"Robinson came to the Village office once in January 2018, while [the mayor] was present, and spent less than one hour searching for documents." (Jasper Aff. at ¶ 5.) On February 12, 2018, Robinson filed a request that the case proceed to judicial determination of 37 "remaining unsatisfied requests." On February 26, 2018, the Village filed a response and motion to dismiss (Response) with the affidavits of Mayor Jim Jasper, Fiscal Officer Carol Gissinger, and Village Administrator Linda Propster.

{¶3} Ohio's Public Records Act, R.C. 149.43, provides a remedy for production of records under R.C. 2743.75 if the court of claims determines that a public office has denied access to public records in violation of R.C. 149.43(B). The policy underlying the Act is that "open government serves the public interest and our democratic system." *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "[O]ne of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed." *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997). Therefore, the Act "is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public

records.” *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996). R.C. 149.43(B)(1) requires a public office to make copies of public records available to any person upon request, within a reasonable period of time.

{¶4} R.C. 2743.75(F)(1) states that determination of public records claims shall be based on “the ordinary application of statutory law and case law.” Case law regarding the alternative public records remedy under R.C. 149.43(C)(1)(b) provides that a relator must establish by “clear and convincing evidence” that he is entitled to relief. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 14. Therefore, the merits of this claim shall be determined under the standard of clear and convincing evidence, i.e., “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. *Accord Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17 CAI 05 0031, 2017-Ohio-7820, ¶ 27-30.

### **Motion to Dismiss**

{¶5} The Village moves to dismiss the complaint on the grounds that, 1) it has released all public records in its possession that are responsive to the requests, and 2) certain requests are overly broad, vague, and/or ambiguous. In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O’Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). The

unsupported conclusions of a complaint are, however, not admitted and are insufficient to withstand a motion to dismiss. *Mitchell* at 193.

### **Suggestion of Mootness**

{¶6} In an action to enforce R.C. 149.43(B), a public office may produce the requested records prior to the court's decision, and thereby render the claim for production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 18-22. A court considering a claim of mootness for a public records request must first determine what records were requested, and then whether any responsive records were provided. The complaint included attached copies of multiple public records requests made to respondent, listed the requests Robinson claimed were unfulfilled, and included no admission or evidence that the Village had provided records responsive to the unfulfilled requests. While the Village may dispute the validity of a request based on facts and circumstances later evidenced, and may moot claims by providing records prior to the report and recommendation, the complaint on its face states a claim for which relief may be granted. I recommend that the court proceed to determine whether the remaining records were withheld in violation of R.C. 149.43(B).

{¶7} While not apparent in the complaint and therefore not subject to the motion to dismiss, the Village submitted evidence that it later provided Robinson with a number of responsive records and explanations for non-production. (December 14, 2017, January 12, 2018, and February 1, 2018 notices of filing and exhibits.) Robinson concedes this production and these explanations by limiting his claim at this time to 37 "remaining unsatisfied requests." (February 12, 2018 notice, spreadsheet.) I therefore recommend that the claim for production be DENIED as moot as to all requests other than those listed in Robinson's February 12, 2018 notice.

### **Ambiguous and Overly Broad Requests**

{¶8} Although some of the remaining requests are worded in a manner that is likely ambiguous or overly broad, each must be analyzed under the totality of the facts

and circumstances in the case. *State ex rel. Zidonis v. Columbus State Cmty. College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 26. I find provisionally that the complaint on its face states a claim for which relief may be granted. I recommend that the court DENY the motion to dismiss on this ground, and proceed to determine whether the requests that are allegedly ambiguous or overly broad were denied in violation of R.C. 149.43(B)(2).

{¶9} In making a request, “it is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.” *Zidonis* at ¶ 21-22; *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006 Ohio 6365, 857 N.E.2d 1208, ¶ 29. A request for an entire category of records is improper. *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 756, 577 N.E.2d 444 (10th Dist.1989) (all traffic accident reports). *Accord Zidonis, supra* (all complaint files, all litigation files); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 16-19 (all email sent or received for six months by one official); *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711, 939 N.E.2d 831, ¶ 1-3 (prison quartermaster’s orders and receipts for clothing for seven years); *State ex rel. McElroy v. Polito*, 8th Dist. Cuyahoga No. 77042, 1999 Ohio App. LEXIS 5683 (Nov. 30, 1999) (all marriage license applications from a specified year, where no collection or index of such records existed). A public office has no duty to organize its records to permit easier searching based on a requester’s preferred criteria. *Zidonis* at ¶ 28-30.

{¶10} The special master first notes that the parties, to their credit, cooperated both prior to this action and in court mediation to resolve the vast majority of the original, voluminous requests. Of the remaining requests, the Village asserts that twelve are overly broad, vague, and/or ambiguous. (Response at 7-10.) The special master finds that four of the twelve are improperly ambiguous and/or overly broad, and were thus properly denied. The rest either reasonably identified the records sought, and/or were resolved by a search that established that no responsive records existed.

{¶11} I find that Robinson's request for "all written or email communication, sent or received by village officials or personnel, between January 1, 2015 and [February 13, 2017], concerning village business" (Appendix, line 23) is an improper request for years of office correspondence. See *Glasgow, supra*. Similarly, Robinson's requests for "all zoning permit applications: denied or approved since June 1, 2012" and "all zoning variance applications or letters" (Appendix, lines 51, 52) are impermissible requests for entire record categories over multiple years. See *Zidonis* at ¶ 21-22. I find that these three requests are overly broad.

{¶12} Separately, a public office is not obliged to "seek out and retrieve those records which would contain the information of interest to the requester." *State ex rel. Fant v. Tober*, 8th Dist. Cuyahoga No. 63737, 1993 Ohio App. LEXIS 2591, \*3 (April 28, 1993). See *Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶ 10-11; *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 190 Ohio App.3d 218, 2010-Ohio-3416, ¶ 7-11 (8th Dist.) (request for records containing information about personal injury claims), *rev'd in part on other grounds*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297. I find that Robinson's September 20, 2015 request for "all zoning correspondence, written or emailed, since July 1, 2014" (Appendix, line 53) is not limited to zoning files, but instead requires the Village to conduct a search through more than a year of its correspondence for a type of information of interest to Robinson. Robinson admits that he knows zoning records are maintained by address. (February 12, 2018 spreadsheet, line 58.) Unlike the request in *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 28-39, this request did not specify a single person (here, an address) to whom the records were related. Where Robinson did identify such records by address, the Village provided either responsive records or an explanation of nonexistence. (Appendix.) I find accordingly that this request was ambiguous and overly broad, and did not reasonably identify the records sought.

{¶13} I therefore recommend that the requests at Appendix lines 23, 51, 52 and 53 be found ambiguous and/or overly broad. However, I find that Robinson's requests of November 23, 2016 for copies "of all applications, emails and resumes submitted for the positions of street worker, public works associate or maintenance associate, \* \* \* or water clerk since October 1, 2016" (Appendix, lines 45, 46) were sufficiently specific, and were for an immediately preceding period of less than two months in which respondent's staff could not have been unaware of recent hires to the listed positions. The Village knew how to locate the records, noting that they would be in the new hires' personnel files. (*Id.*) Accordingly, I find that the Village is obligated to produce copies of the requested records from the personnel files of listed positions hired between October 1, 2016 and November 23, 2016.

{¶14} To maximize satisfaction of records requesters and minimize the need for litigation, the Public Records Act requires parties to cooperate in clarifying ambiguous and overly broad requests, with the goal of identifying the specific records sought. See *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 18-20. When such requests are denied, R.C. 149.43(B)(2) requires the public office to

provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties.

In its first response, the Village offered to work with Robinson to clarify the nature and content of ambiguous and overly broad requests. (Complaint at 61.) Further, the Village utilized R.C. 149.43(B)(5) by asking if Robinson would share the intended use of the requested records to facilitate identifying and locating the records sought (*id.*), and Robinson complied. (*Id.* at 60.) As a former mayor, Robinson had preexisting knowledge of how the Village maintained its records that should have facilitated his framing of more specific requests. *Zidonis* at ¶ 38. During mediation, the Village

provided additional responsive records, even to allegedly ambiguous and overly broad requests. (Appendix, lines 23, 51, 53, 59, 60.) See *Zidonis* at ¶ 39. Robinson accepted the Village's invitation to visit its office, across the street from his residence, and personally search for desired records. (Response, Jasper Aff. at ¶ 5; Complaint at 60.) In the future, the court encourages the parties to cooperate even more thoroughly using all available tools to specify, and satisfy, records requests. See *Morgan, supra*; *Zidonis* at ¶ 35-40.

### **Non-existent Records**

{¶15} A public office has no duty to provide records that do not exist, or that the office does not possess. *State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 471, ¶ 5, 8-9; *State ex rel. Chatfield v. Gammill*, 132 Ohio St.3d 36, 2012-Ohio-1862, 968 N.E.2d 471. Village officials attest that they have provided the responsive documents that they could find. (Gissinger Aff. at ¶ 5, Propster Aff. at ¶ 5.) The Village provides not only this general assertion of compliance, but detailed descriptions of existing records that were provided, and assertions that records responsive to specific requests did not exist. Based on these representations, I find that the Village met its burden to support the non-existence of records responsive to the requests at Appendix lines 3-7, 11, 15-16, 18, 20, 25, 27-28, 31, 34-35, 38, 41-42, 45-47 (other than in personnel files), 50, and 54-58. *State ex rel. Fant v. Flaherty*, 62 Ohio St.3d 426, 427, 583 N.E.2d 1313 (1992); *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 14-15. Robinson has submitted no evidence or argument to the contrary, other than his belief that the Village formerly kept such records or should keep such records. However, even a reasonable and good faith belief by a requester, based only on inference and speculation, does not constitute the clear and convincing evidence necessary to establish that a responsive document exists. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 22-26;



*Gooden* at ¶ 8. I find that Robinson has failed to show by clear and convincing evidence that he has been denied access to records described in the requests listed above.

{¶16} With regard to now-nonexistent records that were allegedly disposed of improperly, or that should have been created but were not, any claim for relief would sound in various statutory obligations to create, retain, and properly dispose of records necessary for the proper documentation of a public office's governmental functions, e.g., R.C. 121.22(C), R.C. 149.351, R.C. 149.39, R.C. 149.40, etc. The law provides remedies for such claims in injunction, forfeiture, replevin, and mandamus. However, the statute under which the present action is brought, R.C. 2743.75, is limited to claims of violations of R.C. 149.43(B). Thus, to the extent Robinson alleges failure to create, retain, and properly dispose of records, his complaint does not state a claim for which relief is available in this court.

### **Records To Be Produced**

{¶17} I find that the Village has failed to show that the following requests were either ambiguous or overly broad, or that they did not exist in its records: Appendix lines 9, 10, 14, and 45-47. The fact that the Village has produced a copy of what it calls the "personnel file" of named employees does not satisfy its obligation to provide the other specifically identified types of employee records in the requests at Appendix lines 9 and 10. *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 57-58. The evidence also demonstrates that the Village recognized the record request for a "certification of funds" at Appendix line 14 as sufficiently specific to identify a particular purchase order, but has neither provided the related certification record or responded that it does not exist. Finally, the requests at Appendix lines 45 and 46 (47 is a duplicate of 46) were for reasonably identified employee applications records in the preceding two months. Under the particular facts and circumstances of this case, where the Village was aware that responsive records existed in the personnel files of

recent hires, I find that Robinson sufficiently identified the records sought in these requests.

{¶18} Therefore, the Village remains obligated to produce the records listed above, or respond that no such records exist.

### **Legible Records To Be Provided**

{¶19} “To facilitate broader access to public records, a public office \* \* \* shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section.” R.C. 149.43(B)(2). A public record is not maintained in the required manner if it cannot be made available in a format that contains all of its original information. See, e.g., R.C. 9.01. In this case, Robinson alleges that the records responsive to the request at Appendix line 15 were produced in a reduced size from their original format, and as a result were illegible. The Village does not deny that these records can be reproduced in their original size. It appears from the parties’ descriptions that the original records have been copied to an archival medium as described in R.C. 9.01, which requires the public office to make provisions for “enlarging them whenever requested,” and to “keep and make readily accessible to the public the machines and equipment necessary to reproduce the records and information in a readable form.”

{¶20} I find that the records as provided in response to the request in Appendix line 15 violated the Village’s duty under R.C. 149.43(B)(2). I conclude that the Village is obligated to produce copies of records responsive to the request at Appendix line 15 in a readable form.

### **Modified Request**

{¶21} Robinson lists two requests for specific zoning files that he made after the filing of the complaint. (Appendix, lines 59, 60.) While the court encourages consensual revision of ambiguous or overly broad requests in cases filed under R.C. 2743.75, such revision does not relate back to the filing of the complaint. There can be no cause of

action based on failure of a public office to provide records in accordance with R.C. 149.43(B) without a proper request having been made and denied prior to filing the complaint. See *State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 5 (10th Dist.).

{¶22} I recommend that the court find that assertions regarding these revised requests, and responses thereto, are not properly before the court.

#### **Receipt of Additional Pleadings**

{¶23} Both parties submitted pleadings beyond the authorized complaint and response provided for in R.C. 2743.75(D)(1) and (E)(2). Although unsolicited pleadings can delay the “expeditious and economical procedure” intended for actions brought under R.C. 2743.75, in this instance the special master directs the clerk to accept for filing all of the additional pleadings submitted before the date of referral to the special master (February 26, 2018), pursuant to R.C. 2743.75(E)(2). The clerk is directed to mark documents received after this date as “Received But Not Filed.”

#### **Timeliness**

{¶24} Without detailing the records and time spans involved, the evidence shows that the Village did not produce copies of many of the responsive records in this matter until months or years after the original requests. I find that the Village failed to comply with its obligation under R.C. 149.43(B)(1) to provide copies of all properly requested records “within a reasonable period of time.”

#### **Conclusion**

{¶25} Upon consideration of the pleadings and attachments, I recommend that the court GRANT the Village’s motion to dismiss as to all requests other than those listed in requester’s January 12, 2018 notice. I further recommend that the court GRANT Robinson’s claim for production of records responsive to requests at Appendix lines 9, 10, 14, and 45-47, and for readable copies of records responsive to the request at Appendix line 15, as detailed in this report. I further recommend that the court DENY

all other claims for production of records in this case as either ambiguous, overly broad, or for records that the Village affirms do not exist.

{¶26} I recommend the court order that Robinson is entitled to recover from the Village the twenty-five-dollar filing fee and any other costs associated with the action that were incurred by him. R.C. 2743.75(F)(3)(b).

{¶27} Pursuant to R.C. 2743.75(F)(2), either party may file a written objection with the clerk of the Court of Claims of Ohio within seven (7) business days after receiving this report and recommendation. Any objection shall be specific and state with particularity all grounds for the objection. A party shall not assign as error on appeal the court's adoption of any factual findings or legal conclusions in this report and recommendation unless a timely objection was filed thereto. R.C. 2743.75(G)(1).

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