

[Cite as *Frank v. Upper Arlington Schools*, 2018-Ohio-1554.]

MATTHEW FRANK	Case No. 2017-00841-PQ
Requester	Special Master Jeffery W. Clark
v.	<u>REPORT AND RECOMMENDATION</u>
UPPER ARLINGTON SCHOOLS	
Respondent	

{¶1} On September 29, 2017, requester Matthew Frank made a public records request to Dr. Kathleen Jenney, Associate Superintendent of respondent Upper Arlington Schools (UA Schools). The request consisted of four parts, numbered below for convenience:

1. any pictures, video surveillance, written correspondence, notes from phone conversations, emails, texts, records of calls made involving the investigations launched by the school,
2. any pictures, video surveillance, written correspondence, notes from phone conversations, emails, texts, records of calls made involving Matt frank [sic] or the investigations sent by Jeanine Hummer or Mark Hummer to the school from their professional, business or personal [sic],
3. any testimony which was taken under oath or in a deposition from any party,
4. the notes taken by Robin Hotham during the meeting with two outgoing and one incoming captains [sic] parents and AD Tony Pusater from last year.

(Complaint, p. 2.) On October 10, 2017, Andrew Geistfeld, Treasurer/Chief Financial Officer of UA Schools responded that the request was ambiguous and overly broad, and that responsive documents would contain information excepted under 20 U.S.C. 1232g (FERPA), R.C. 3319.321, and common-law attorney-client privilege, as well as personal information that is not a record of the office. (*Id.* at 3-4.) Geistfeld further responded that

he was enclosing “records that may be responsive in whole or in part” to the request, and advised that there was no responsive security video or testimony taken under oath. (*Id.* at 4.)

{¶2} On October 12, 2017, Frank filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of division R.C. 149.43(B). The case was referred to mediation and on November 30, 2017, the court was notified that the case was not fully resolved and mediation was terminated. On December 15, 2017, UA Schools submitted a response and motion to dismiss (Response). UA Schools has submitted copies of its post-complaint correspondence to Frank, and the affidavit of Dr. Kathleen Jenney.

{¶3} The 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 they are entitled to

relief. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 14. Therefore, the merits of this claim shall be determined under the standard of clear and convincing evidence. See *Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30.

Motion to Dismiss

{¶5} Respondent moves to dismiss the complaint as moot, stating that it has fully responded to Frank's requests of September 29, 2017, as allegedly clarified on November 1, 2017. 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. I find that the assertion of mootness cannot be determined based solely on the complaint and attachments. I recommend that the court DENY the motion to dismiss and determine the case on the merits.

Ambiguous and Overly Broad Request

{¶6} Respondent asserts that Frank's request No. 1 is "vague and overbroad in that it did not identify what 'investigations launched by the school' to which it was referring. (See, Exhibit 2)." (Response at 3.) The response provides no further analysis, although the attached correspondence (Exhibits 2-5) cites case law relevant to the issue.

{¶7} R.C. 149.43(B)(2) addresses ambiguous and overly broad requests:

- a. If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person

responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record may deny the request but shall 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 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." *State ex rel. Zidonis v. Columbus State Cmty. College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21. For example, 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* (all complaint files, all litigation files). Request No. 1 is for "any pictures, video surveillance, written correspondence, notes from phone conversations, emails, texts, records of calls made *involving the investigations launched by the school.*" (Emphasis added.) The request is not time-limited and does not identify a specific investigation, or even specific type(s) of investigation. The request is broader than the requests found improper in *Zauderer* and *Zidonis* in that it not only requires a search for every investigation ever launched, but for related images and communications outside of the investigation files. The request requires an unbounded search through UA Schools' academic, employment, security, athletics, and other categories of records. I find that Request No. 1 is overly broad.

{¶8} A records request is also unenforceable if it is too vague or indefinite to be properly acted on by the records holder. *State ex rel. Dehler v. Spatny*, 11th Dist. No. 2009-T-0075, 2010-Ohio-3052, ¶ 4, 18, *aff'd*, 127 Ohio St.3d 312, 2010-Ohio-5711. Indeed, without sufficient specificity for the court to order clear terms of compliance with the request, the court cannot enforce any alleged non-compliance. The terms of request No. 1 do not provide any standard to distinguish whether a particular communication is one "involving" the vague category of "investigations launched by the school." I find that

that request No. 1 is not sufficiently specific to reasonably identify what records are requested, and is therefore improperly ambiguous.

{¶9} 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 *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 certain information about personal injury claims), *rev’d in part on other grounds*, 131 Ohio St.3d 149, 2012-Ohio-115. See also *State ex rel. McElroy v. Polito*, 8th Dist. Cuyahoga No. 77042, 1999 Ohio App. LEXIS 5683 (Nov. 30, 1999) (request to gather all marriage license applications from a specified year improper when no collection or index of such records existed). There is no evidence that respondent maintains its various investigation records such that it can retrieve documents based on Frank’s description. I find that request No. 1 improperly requires respondent to conduct research to seek out and retrieve those records containing information of interest to Frank. *Id.*

{¶10} The Public Records Act requires parties to cooperate in clarifying ambiguous and overly broad requests, with the goal of identifying the specific records sought. When such a request is denied, R.C. 149.43(B)(2) requires the public office to

- b. 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.

Respondent denied Frank’s request No. 1 as vague and overbroad, but provides no evidence that it informed him of the manner in which its records are maintained and accessed. This constitutes a *per se* violation of R.C. 149.43(B)(2). *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 10-11. However, as in *ESPN* Frank does not ask that respondent be ordered to inform him of

the way the District maintains its records, and thus is not entitled to relief other than this finding of violation. *Id.* at ¶ 12-15.

{¶11} I therefore recommend that request No. 1 be found both overly broad and ambiguous, and to be an improper request for respondent to search through its records to find information of interest to Frank.

Suggestion of Mootness

{¶12} 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 existed, and finally, what existing responsive records were provided.

Non-existent Records

{¶13} 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, ¶ 5, 8-9; *State ex rel. Chatfield v. Gammill*, 132 Ohio St.3d 36, 2012-Ohio-1862. Respondent avers that it has no records responsive to Frank's request No. 3, and no video surveillance records responsive to requests 1 and 2. (Response at 3; Exhibit 2.) While the affidavit submitted by Respondent does not directly address assertions of non-existence, the affiant states that she "fulfilled Mr. Frank's public records request by producing the District's public records as they related to all requests other than Mr. Frank's overbroad and vague request" (Jenney Aff. at ¶ 3.), from which the court may infer that all *existing* records were produced. Frank has submitted no evidence or argument to the contrary. I therefore find that Frank has failed to show by clear and convincing evidence that he has been denied access to records described in Request No. 3, or to any video surveillance records. I recommend that the court DENY Frank's claims as they relate to request No. 3 and to video surveillance records.

Responsive Records Provided

{¶14} Respondent avers that “Respondent served Requester with all public records responsive to item (2),” i.e., “records of calls made involving Matt Frank or the investigations sent by Jeanine Hummer or Mark Hummer.” (Response at 2-3.) Respondent further asserts that it served Frank with copies of the notes written by Robin Hotham, in satisfaction of request No. 4. (Response at 3; Exhibits 3 and 4.)

{¶15} On December 19, 2017, the court directed Frank to file a pleading confirming or disputing the response by UA Schools, including but not limited to; 1) whether his request was now limited to records relating to a specified incident, 2) whether he had been provided with all responsive records relating to records of calls between two officials and the school, 3) whether he accepted respondent’s assertion that there was no security video or recorded testimony, 4) whether respondent had provided all notes taken by a named person at a particular meeting, 5) whether he disputed any redactions in the records produced, and 6) “What particular records responsive to your request has UA Schools failed to produce?” Frank filed no response to the order.

{¶16} The court then offered respondent the opportunity to provide evidence supporting its defenses:

- c. Pursuant to R.C. 2743.75(E)(3)(c), the special master now directs UA Schools to file an affidavit in support of its motion. *See, e.g., State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 9; *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, ¶ 14-16.

(January 12, 2018 Order.) On February 9, 2018, Respondent filed the affidavit of Dr. Kathleen Jenney. With regard to Frank’s original request of September 29, 2017, the affidavit asserts:

- d. I fulfilled Mr. Frank’s public records request by producing the District’s public records as they related to all requests other than

Mr. Frank's overbroad and vague request for all records "involving the investigations launched by the school."

(Jenney Aff. at ¶ 3.) Frank provides no evidence or argument to the contrary. Although respondent provides only a general assertion of compliance, it stands uncontradicted. Under these circumstances, I find that respondent has met its burden to establish that it has provided the requested records to moot requests 2, 3, and 4. *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.

Modified Request

{¶17} Respondent states that it received a clarification from Frank of request No. 1, and then provided Frank with all public records responsive to the clarified request. (*Id.*; Exhibit 5.) Dr. Jenney affirms that

- e. [u]pon the request of the Court of Claims, Mr. Frank clarified his request on November 1, 2017. Specifically, Mr. Frank clarified that he sought all investigation records as they related to the "August 20, 2017 Girls Golf incident." I thereafter prepared the District's public records responsive to that clarified request and produced them to Mr. Frank through our legal counsel on November 6, 2017.

(Jenney Aff. at ¶ 4.) While the court encourages consensual revision of ambiguous or overly broad requests in cases filed under R.C. 2743.75, such revision serves only to establish admission, waiver, or mootness, and 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.).

{¶18} The court also lacks adequate evidence regarding this issue. There is no evidence that any clarification was reduced to writing, and Frank did not respond to the court's direction that he confirm or deny revision. The court should decline to address satisfaction of an allegedly revised request based only on parol evidence from the

opposing party. I recommend that the court find that assertions regarding a revised request, and response thereto, are not properly before the court.

Application of Claimed Exceptions

{¶19} In light of the finding that all of Frank's requests are either fatally ambiguous and overly broad, or moot, I find that the court need not consider the statutory public records exceptions asserted by respondent. Moreover, even were the court inclined to determine the application of claimed exceptions, the response and affidavit do not provide support for the records exceptions or the withholding of non-record information, as asserted in the cover letters. (Response at 3; Exhibits 2-5; Jenney Aff.). Respondent did not file copies of any of the documents provided to Frank from which information was redacted, or particularly describe the information redacted. I recommend that the court decline to consider respondent's assertions of exceptions or non-record status.

Conclusion

{¶20} Upon consideration of the pleadings and attachments, I recommend that the court DENY Frank's claim for relief as to request No. 1 because the request is overly broad and ambiguous. I further recommend that the court find that the claims regarding requests 2, 3, and 4 are MOOT and should be DISMISSED.

{¶21} 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).

JEFFERY W. CLARK
Special Master

Case No. 2017-00841-PQ

-10- REPORT AND RECOMMENDATION

cc:

Matthew Frank
2231 Brixton Road
Columbus, Ohio 43221

Jessica K. Philemond
250 East Broad Street, Suite 900
Columbus, Ohio 43215

Filed February 16, 2018
Sent to S.C. Reporter 4/20/18