

[Cite as *Neff v. Knapp*, 2018-Ohio-2357.]

STACEY A. NEFF	Case No. 2017-00876PQ
Requester	Special Master Jeffery W. Clark
v.	<u>REPORT AND RECOMMENDATION</u>
LISA KNAPP	
Respondent	

{¶1} On September 15, 2017, requester Stacey Neff made public records requests to Joel Spitzer, Orange Township Fiscal Officer, for:

- 1) personnel file for Lisa Knapp
- 2) any records of requests from Lisa Knapp for financial records for Orange Township
- 3) any communications from or to Lisa Knapp related to forensic audit, including communications sent to state auditor or private auditing firm
- 4) attendance record for Lisa Knapp, including meeting type and date, since taking office as township trustee
- 5) any communications regarding legal implications of videotaping or recording of township meetings, internet posts
- 6) any information regarding the cost of insurance to protect Orange Township against lawsuits related to YouTube videos or trustee internet posts.

(Complaint at 2.) On September 18, 2017, Spitzer forwarded a second, slightly different version of these requests to respondent Lisa Knapp, Orange Township Trustee, noting in his cover email that

This is a courtesy notice that your personnel file will be produced as part of this office's duty to provide it. Rest assured, all information that requires redaction will be redacted.

Please see the remaining requested items below. Obviously, several items are under your control; thus, would need to be provided from you.

Please provide notice to this office once the items requested are prepared for delivery.

(*Id.* at 3.) Additional correspondence submitted by Neff is truncated and incomplete, but appears to show that Knapp had not provided copies of her personal email for response to any of the requests as of October 10, 2017. (*Id.* at 4-5.) Neff states she received records responsive to request Nos. 1, 4, and 6 “directly from the township.” (*Id.* at 1.)

{¶2} On October 25, 2017, Neff filed a complaint naming Knapp in her capacity as an Orange Township Trustee and alleging denial of access to public records in violation of R.C. 149.43(B). Neff alleges:

I have received all items that I requested directly from township. However, those items requested directly from Ms. Knapp have not been addressed.<sup>1</sup> Lisa uses a personal email address so only she can send this information. Please see highlighted items on next page.

(Complaint at 1.) The “highlighted items” are requests Nos. 2, 3, and 5. (*Id.* at 2.) On January 16, 2018, Neff and Knapp both filed additional material. Following unsuccessful mediation, Knapp submitted a February 5, 2018 motion to dismiss (Response). On March 9, 2018, legal counsel entered an appearance on behalf of Knapp and Orange Township, and on March 28, 2018, filed records responsive to requests Nos. 2 and 3 under seal. Respondent filed affidavits authenticating these records, and attesting that no records exist in response to request No. 5.

{¶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.

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<sup>1</sup> Neff made no request “directly” to Knapp. Both versions of her requests, and all subsequent correspondence, were directed to Spitzer.

“[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). Claims under R.C. 2743.75 are determined using the standard of clear and convincing evidence. *Hurt v. Liberty Twp.*, 5<sup>th</sup> Dist. Delaware No. 17CA1050031, 2017-Ohio-7820, ¶ 27-30.

{¶4} The parties do not dispute that the requested documents constitute “records” within the meaning of 149.011(G), or that Orange Township is a respondent to this action as a public office. Neff named Knapp in her capacity as a trustee, and an action against a government official in her official capacity generally constitutes an action against the official’s office. *See State ex rel. Estate of Miles v. Piketon*, 121 Ohio St.3d 231, 2009-Ohio-786, 903 N.E.2d 311, ¶ 18-23. In conformity: 1) counsel has appeared on behalf of both Knapp and Orange Township (March 9, 2018 Notice of Appearance), 2) the action does not assert a liability to which only Knapp must respond, *Id.* at ¶ 22-23, and 3) Neff’s request was directed to Fiscal Officer Spitzer, who is by statute the person responsible for the administrative records of the township. R.C. 507.04. The duty to produce responsive records in compliance with R.C. 149.43(B) may thus fall on the township, Spitzer, and/or Knapp, depending on the facts and circumstances of each request.

### **Motion to Dismiss**

{¶5} 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.

{¶6} Knapp defends the township's failure to provide records responsive to request No. 2 by stating that Spitzer, as fiscal officer, was responsible to provide any records he had received and maintained. (Response at 9.) She states that request No. 3 is ambiguous and overly broad, and that any responsive records would be excepted from release under R.C. 4701.19(B) (*Id.* at 10-15.) Knapp alleges that request No. 5 is also ambiguous and overly broad, and that she has no responsive records. (*Id.* at 15-16.) Respondent later submitted 48 pages of records responsive to request No. 2, adding mootness as a basis for the motion to dismiss.

{¶7} While respondent's motion and actions present cognizable defenses to the public records claims, these defenses cannot be determined based solely on the complaint and attachments. I therefore recommend that the motion to dismiss be DENIED, and the matter determined on the merits.

#### **Orange Township Retention Schedule**

{¶8} "Public record" means records kept by any public office. R.C. 149.43(A)(1). Public records are "kept by" each public office pursuant to the terms of its approved records retention schedule. R.C. 149.351(A), R.C. 149.40, R.C. 149.42. The 2017 Orange Township retention schedule is organized according to the person or department responsible for particular categories of records. (Neff filing of January 16, 2018, Orange Township RC-2.) The first responsible person is "TOWNSHIP FISCAL OFFICER." A written request from a township trustee to the fiscal officer for township financial records would fall under the fiscal officer's responsibility for the category "CORRESPONDENCE (INCLUDING E-MAILS) \* \* \* *Executive* (Twp Policies, Programs, Fiscal or Personnel Matters)." (RC-2 at 3.) The retention period

for Executive correspondence is “Permanent.” (*Id.*) The fiscal officer is also responsible for Audit Reports, and related “*Executive ( \* \* \* Fiscal \* \* \* Matters)*” correspondence. (*Id.* at 1, 3.) Public records requests likely fall under “*General*” correspondence, retained for two fiscal years. (*Id.* at 3.) Correspondence that is “Transient (Convey info of temp importance, e.g. telephone messages, Drafts \* \* \*.)” is retained for 30 days or until superseded. (*Id.*) Non-record personal email may be deleted at will. (*Id.* at 5.)

**Request No. 2: “*Any records of requests from Lisa Knapp for financial records for Orange Township.*”**

{¶9} Request No. 2 was received by Fiscal Officer Spitzer, the person responsible for the records of Orange Township. R.C 507.04; Bodnar Aff. at ¶ 2; *State ex rel. MADD v. Gosser*, 20 Ohio St.3d 30, 485 N.E.2d 706 (1985), paragraph two of the syllabus (“When statutes impose a duty on a particular official to oversee records, that official is the ‘person responsible’ under R.C. 149.43(B).”) However, Spitzer did not provide Neff with copies of requested records in his keeping, or reject the request as ambiguous or overly broad, or assert any exception, or respond that the records did not exist. Instead, Spitzer forwarded to Knapp a second version of the request in which Neff had added the sentence, “For all requests we would like information from Lisa Knapp’s personal or township email address.”<sup>2</sup> (Complaint at 3.) With no explanation as to whether he also maintained the responsive records, Spitzer stated in his forwarding email, “Obviously, several items are under your control; thus, would need to be provided from you. Please provide notice to this office once the items requested are prepared for delivery.” (*Id.*)

{¶10} Even if duplicate, convenience, or sending-party copies existed elsewhere, Spitzer was the person officially responsible for the township records. Respondent has provided no evidence to support Spitzer’s assertion that official, scheduled records

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<sup>2</sup> Neff’s first email was sent on September 15, 2018 at 4:17 PM. (Complaint at 2.) Neff’s second email was sent three minutes later, with modified language in request No. 3 and the additional sentence requesting information from Lisa Knapp’s personal as well as township email addresses. (*Id.* at 3.)

responsive to request No. 2 were “obviously” only under Knapp’s control. Orange Township Administrator Lee Bodnar has since provided Neff with 48 pages of township correspondence responsive to request No. 2.<sup>3</sup> (Bodnar Aff. at ¶ 3-4; attachments.) The email headers and hard copy addresses show that all of this correspondence was either to, from, or cc’d to Spitzer or to the assistant fiscal officer. Bodnar’s production of township records responsive to this request belies any necessity for Spitzer to have sought copies from Knapp. Spitzer’s failure to provide township records responsive to this request was a violation of R.C. 149.43(B)(1), and his failure to provide an explanation for denial of production was a violation of R.C. 149.43(B)(3). Spitzer’s redirection of the request to a trustee, rather than providing the records he maintained, resulted in delay of the response beyond a reasonable period of time, a further violation of R.C. 149.43(B)(1).

{¶11} Bodnar states that despite ambiguous and overly broad wording, the township has liberally construed the terms in providing Neff with records “generally related” to the request. (*Id.*) I find that Bodnar’s post-complaint delivery of records responsive to request No. 2 renders 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. Neff may of course file a new public records request for any additional township records she believes exist.

**Request No. 3: “Any communications from or to Lisa Knapp related to forensic audit, including communications sent to state auditor or private auditing firm.”**

{¶12} Respondent asserts that this request is ambiguous and overly broad.<sup>4</sup> The request language comprehensively asks for “any communications,” which would include

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<sup>3</sup> On March 5, 2018, Bodnar was appointed Township Records Custodian, and henceforth will oversee and coordinate the Township’s response to public records requests. (Bodnar Aff. at ¶ 2.)

<sup>4</sup> Although Spitzer did not cite this exemption in his responses to Neff’s requests, respondent is permitted to raise it in defense of this litigation. “The explanation [provided when denying a request] shall

any electronic or paper format. Communications “related to” forensic audit is not limited to a particular audit, and could include informational inquiries, training materials, meeting minutes, personal communications, and any tangential communication referencing financial audit. The request is not limited to any time period. Knapp notes she has worked for Orange Township since October 1998, so the request would require a review of nearly 20 years of records. (Response at 10.) Since the request demands a search through many years of township communications, for only vaguely described information, I find that it is improperly ambiguous and overly broad (see analysis of overbreadth issue in next section).

{¶13} Although Spitzer forwarded Knapp a different version of this request, Knapp correctly addresses only the original language on which Neff based her complaint, i.e.

However, those items requested directly from Ms. Knapp have not been addressed: \* \* \* Please see highlighted items of next page.

\* \* \*

3) any communications from or to Lisa Knapp related to forensic audit, including communications sent to state auditor or private auditing firm.

(Complaint at 1-2.) In her second version, Neff inserted “the latest township audit/” before “forensic audit.” (Complaint at 3.) While this narrows the time frame to the “latest” audits, it also expands the target subject from just forensic audit to include non-forensic audit. The second version also leaves the ambiguous “related to” language in place. Even the second version of request No. 3 is arguably ambiguous and overly broad. Neff may of course seek to craft a new request that reasonably identifies the records she seeks.

{¶14} Despite the overbreadth of the original request, Knapp was able during the course of litigation to identify a few responsive records. Knapp has submitted five pages

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not preclude the public office \* \* \* from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section.” R.C. 149.43(B)(3).

of responsive records under seal, but argues that they are subject to an exception.<sup>5</sup> The burden is on respondent to prove an exception:

Exceptions to disclosure under the Public Records Act, R.C. 149.43, are strictly construed against the public-records custodian, and the custodian has the burden to establish the applicability of an exception. A custodian does not meet this burden if it has not proven that the requested records fall squarely within the exception.

*State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, paragraph two of the syllabus. Knapp argues that “the statements, records, schedules, working papers, and memoranda made by a certified public accountant or public accountant incident to or in the course of performing an audit of a public office” are excepted from public records release pursuant to R.C. 4701.19(B). (Response at 9-15.) However, in *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 550 N.E.2d 464 (1990), the Supreme Court found that R.C. 149.43(B) required disclosure by the Auditor of State (AOS) of records prepared by an independent certified public accountant (ICPA) despite the ownership interest of the ICPA and the exception in R.C. 4701.19(B). *Id.* at 40. At the time, R.C. 4701.19(B) provided that the records of the ICPA, except reports submitted by the accountant to the client, were not a public record. The Court found that reports received by or available to the AOS did not fall under this wording. The General Assembly later amended R.C. 4701.19(B) to except ICPA records “that are in the possession of the auditor of state.” Sub.S.B. No. 200, 147 Ohio Laws, Part IV, 8616. While the amendment superseded the specific holding as to the AOS, it leaves the general holding of *Mazzaro* in effect for other public offices. I therefore find that R.C. 4701.19(B) does not apply to the township.

{¶15} Even were the township eligible to assert it, the exception in R.C. 4701.19(B) applies only to records made by a CPA “incident to or in the course of

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<sup>5</sup> Although the records include an attorney correspondent, respondent does not assert attorney-client privilege. (Respondent’s April 19, 2018 Supplement to Clarify the Record at 2.)



performing an audit of a public office or private entity.” The documents filed under seal are not communications regarding an ongoing or even imminent audit. All five pages are emails and a brochure from private auditing firms responding to township inquiries as to their available services and fees. Under the plain language of the statute, I find that none of these records fall within the scope of the exception.

{¶16} In support of her claim that Knapp engaged in additional audit communications, Neff filed a mostly illegible image described as “a detailed list of communication auditing firm Perry and Associates has received from Trustee Knapp.” (January 23, 2018 Neff filing at 4.) The image is not authenticated and contains no legible reference to Knapp, Perry and Associates, or to any other sender or recipient. I find that this document has no evidentiary value. Knapp attests that “I have not maintained any other document, in my official capacity, which is ‘related to forensic audit, including communications sent to state auditor or private auditing firm.’” (March 28, 2018 Knapp Aff. re: “forensic audit” at ¶ 2.) 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. I find that Neff fails to show by clear and convincing evidence that additional communications responsive to request No. 3 exist.

**Request No. 5: “Any communications regarding legal implications of videotaping or recording of township meetings, internet posts.”**

{¶17} Respondent asserts: 1) that request No. 5 is overly broad and vague, and 2) that Knapp is not in possession of any responsive records. (Response at 16.).

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

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. Request No. 5 comprehensively demands "any communications," which could include any electronic or paper format. The request is not limited to any time period, or by specific correspondents. The topic, "regarding legal implications of videotaping or recording of township meetings, internet posts," is overly broad in that both "regarding" and "implications" are vague terms of expansion rather than of specificity. In practice, the request would require an unbounded search through all of the township's communication records. I find that Request No. 5 is overly broad.

{¶19} 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 a request, the court cannot enforce any alleged non-compliance. The terms of request No. 5 do not provide any standard to distinguish whether a particular office communication is one "regarding" the indefinite category of the "legal implications" of recording township meetings, or of "internet posts." I find that that request No. 5 is not sufficiently specific to reasonably identify what records are requested, and is therefore improperly ambiguous.

{¶20} 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*, 8<sup>th</sup> 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 (8<sup>th</sup> 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*, 8<sup>th</sup> Dist. Cuyahoga No. 77042, 1999 Ohio App. LEXIS 5683 (Nov. 30, 1999) (request to gather and produce records improper where no collection or index of such records existed). There is no evidence that the township maintains its records such that it can retrieve documents based on Neff's description. I find that this request improperly requires respondent to conduct research to seek out and retrieve those records containing information of interest to Neff. *Fant, supra*.

{¶21} 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 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 offers no evidence that the township informed Neff of the manner in which its records are maintained and accessed, or that it invited a revised request No. 5 (or No. 3). 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*, Neff does not ask that respondent be ordered to inform her of the way the township maintains its records, and thus is not entitled to relief other than this finding of violation. *Id.* at ¶ 12-15.

{¶22} I therefore recommend that request No. 5 be found both overly broad and ambiguous, and an improper request for respondent to search through records to find information of interest to Neff. Neff may of course file a new public records request for any additional records she believes may exist. In the future, the parties are encouraged to make full use of the tools provided by the legislature to narrow overly broad requests. See R.C. 149.43(B)(2) and (B)(5).

{¶23} As a separate defense, Knapp attests that she has kept no records in her official capacity responsive to request No. 5. (March 28, 2018 Knapp Aff. re: “legal implications” request at ¶ 1.) While Bodnar does not separately attest that the township maintains no records responsive to this request, Neff states in her complaint that she believes she has already “received all items that I requested directly from the township.” (Complaint at 1.) The court therefore lacks any probative evidence that any records remain to be produced in response to this request.

{¶24} Based on the above, I find that Neff has failed to show by clear and convincing evidence that she has been denied access to records described in request No. 5.

### **Conclusion**

{¶25} Upon consideration of the pleadings and attachments, I recommend that the court DENY Neff’s claim for production of records responsive to request No. 2 as moot. I further recommend that the court GRANT Neff’s claim for production of the records responsive to request No. 3 submitted under seal. I further recommend that the court DENY Neff’s request for production of records in request No. 5 as overly broad and ambiguous, and because respondent attests that no further responsive records exist. Neff has shown by clear and convincing evidence that respondent township violated the requirements of R.C. 149.43(B)(1), (B)(2), and (B)(3), and I recommend that the court find Neff is entitled to recover the amount of the filing fee and any other costs associated with the action that she has incurred. R.C. 2743.75(F)(3)(b).

{¶26} *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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JEFFERY W. CLARK  
Special Master

**Filed May 2, 2018**  
**Sent to S.C. Reporter 6/18/18**