

[Cite as *Parks v. Webb*, 2018-Ohio-1578.]

MICHAEL R. PARKS

Requester

v.

PATRICIA WEBB

Respondent

Case No. 2017-00995PQ

Special Master Jeffery W. Clark

REPORT AND RECOMMENDATION

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{¶1} On December 6, 2017, requester Michael Parks made the following public records request to respondent Patricia Webb, Clerk, Pickaway County Board of Commissioners (PCBC):

{¶2} Please send me the minutes from yesterday's commissioners' meeting(s).

{¶3} Send them in whatever format they are in at the time of this email. 3:45 PM.

Handwritten  
Draft word doc  
Draft PDF  
And/or  
Audio

(Response, Exh. A.) Parks had previously been advised that meeting notes were recorded in Microsoft Word DOC format. (Complaint at 2.) On December 11, 2017, Webb sent Parks a copy of the meeting minutes in PDF format. (Response, Exh. B.) On December 13, 2017, Parks responded: "The record sent is not what I requested." (*Id.*) On December 18, 2017, Pickaway County Administrator Brad Lutz emailed Parks that the requested records had been provided as required by law (Response, Exh. C.), incorporating by reference previous correspondence in which he advised that "[i]t is not appropriate nor required by sunshine law to send a document that can be edited, such as a Word document." (Complaint at 4.)

{¶4} On December 20, 2017, Parks 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 December 29, 2017, the court referred the case to mediation. On January 8, 2018, Webb filed an answer and motion to dismiss (Response). On March 5, 2018, the court was advised that the case had not been resolved in mediation. On March 14, 2018, Webb filed a supplemental motion to dismiss, including her affidavit.

{¶5} 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. 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).

{¶6} 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. *Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17 CAI 05 0031, 2017-Ohio-7820, ¶ 27-30.

### **Motion to Dismiss**

{¶7} Webb moves to dismiss the complaint on the grounds that she provided all records responsive to the requests in a timely manner. 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.

{¶8} 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 must determine whether the responsive records were provided, based on the evidence. *State ex rel. Cincinnati Enquirer v. Dupuis*, 98 Ohio St.3d 126, 2002-Ohio-7041, 781 N.E.2d 163, ¶ 7-10. The complaint alleges that Parks requested notes and drafts of specific meeting minutes in the format in which they were maintained by the office, and that the records were not provided in native format as requested. While respondent may dispute the available formats for requested records, the complaint on its face states a claim for which relief may be granted. I recommend that the court proceed to determine whether the requested records were withheld in violation of R.C. 149.43(B).

#### **Nature of the Requested Record**

{¶9} Respondent Webb, as Clerk of the Board of Commissioners for Pickaway County, was responsible for creating board meeting minutes. (Webb Aff. at ¶ 1-2.) At the December 5, 2017 board meeting, Webb took handwritten and typed notes, and then combined the notes into a Microsoft Word document. (*Id.* at ¶ 3-5.) The resulting draft minutes were kept as a Word file at the time Parks made his request. (*Id.* at ¶ 6.) On receipt of the request, Webb used Word program commands to make a copy of the file in PDF (Portable Document Format) format, rather than make an identical copy in the original DOC (Word) format. (*Id.* at ¶ 6-7.) Although the visible text in the original

and PDF document files was identical, the PDF file lacked the DOC file's ease of editing. The conversion process also altered the metadata identifying the date/time of creation/modification of the record. (*Id.* at ¶ 6; Complaint at 5.)

### **Entitlement to Records in the Format Kept By the Public Office**

{¶10} The Ohio Public Records Act defines “public record” as “records *kept by* any public office.” Respondent kept the PCBC draft minutes as a Microsoft Word document. R.C. 149.43(B)(6) provides that if a person chooses to obtain a copy of a public record,

[t]he public office or the person responsible for the public record shall permit that person to choose to have the public record duplicated upon paper, upon the same medium upon which the public office or person responsible for the public record keeps it, or upon any other medium upon which the public office or person responsible for the public record determines that it reasonably can be duplicated as an integral part of the normal operations of the public office or person responsible for the public record. When the person seeking the copy makes a choice under this division, the public office or person responsible for the public record shall provide a copy of it in accordance with the choice made by the person seeking the copy.

The requester's choice in duplication is not limited to the physical recording medium, such as disk, film, tape, or paper, but includes the choice between available versions of the requested record. The Supreme Court has noted that it does not matter whether a fiscal officer dubs a copy of a master [backup] CD, versus copying the same images directly from the office's server to a new CD, following this observation with citation to R.C. 149.43(B)(6). *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 66. A requester is entitled to choose a dubbed copy of an audiotape record, versus only listening to the tape and receiving a written transcript. *State ex rel. Dispatch Printing Co. v. Morrow Cty. Prosecutor's Offc.*, 105 Ohio St.3d 172, 2005-Ohio-685, 824 N.E.2d 64, ¶ 12-14. A requester may insist that direct photographic prints be made of requested

photographs, instead of less detailed photocopy (Xerox) copies that the public office would prefer to provide. *State ex rel. Minor v. Cuyahoga Cty. Jail*, 8th Dist. Cuyahoga No. 63718, 1992 Ohio App. LEXIS 4100 (June 29, 1992).

{¶11} The courts have rejected efforts by public offices to restrict the form or version in which computerized public records will be provided. In *State ex rel. Margolius v. Cleveland*, 62 Ohio St.3d 456, 584 N.E.2d 665 (1992), the Court found that the city could not restrict the requester to a paper printout of electronic data, but must provide a copied magnetic tape of the data compilation. The *Margolius* Court found that members of the public should not have to forfeit the value added to the records by the manner in which the public office stores and organizes them. *Id.* at 459-460. As the Fourth District Court of Appeals summarized:

The basic tenet of *Margolius* is that a person does not come -- like a serf -- hat in hand, seeking permission of the lord to have access to public records. Access to public records is a matter of right. The question in this case is not so much whether the medium should be hard copy of [sic] diskette. Rather, the question is: Can a government agency, which is obligated by law to supply public records, impede those who oppose its policies by denying the value-added benefit of computerization?

The Ohio Supreme Court answered this question first in *State ex rel. Cincinnati Post v. Schweikert* (1988), 38 Ohio St.3d 170, 173-174, 527 N.E.2d 1230, 1233, when it held:

“The law does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials at public expense.”

The *Margolius* court further stated, in following its holding in *Cincinnati Post*:

“Similarly, a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through the creation and storage on tape of a data base containing such records.” *Margolius, supra*, 62 Ohio St.3d at 460, 584 N.E.2d at 669.

*State ex rel. Athens County Property Owners Assn. v. Athens*, 85 Ohio App.3d 129, 131, 619 N.E.2d 437 (4th Dist.1992). See also *Data Trace, supra*; 1994 Ohio Op. Atty. Gen. No. 6 (copies of microfiche or -film versus paper). A common thread in these cases is preserving the utility of the public record for the requester.

{¶12} Where records are stored in a computer already programmed to produce the desired output, the requested document is considered to be an “existing” record for the purpose of an R.C. 149.43 request. *State ex rel. Scanlon v. Deters*, 45 Ohio St.3d 376, 379, 544 N.E.2d 680 (1989), overruled on other grounds by *State ex rel. Steckman v. Jackson*, 70 Ohio St.3d 420, 639 N.E.2d 83 (1994). Thus, even if the file here had been kept in another word-processing format, but using software capable of converting it to Word, Webb would have been obliged to convert the file to Word format if Parks had so requested. The case here is much more straightforward – respondent’s computer is not only already programmed to produce the desired output, but respondent uses and stores the record in the format of the desired output.

{¶13} Turning from the requested record format or version, to the provision of all information kept within the original form of a record, the Supreme Court notes that

public records can be items, documents, and items within documents. See, e.g., *State ex rel. Beacon Journal Publishing Co. v. Akron* (1994), 70 Ohio St.3d 605, 606, 1994 Ohio 6, 640 N.E.2d 164 (Social Security numbers found within payroll files were ‘records’ for purposes of R.C. 149.011(G)); *Dupuis*, 98 Ohio St.3d 126, 2002 Ohio 7041, 781 N.E.2d 163, P21 (settlement proposal within larger court record is a public record). Moreover, a contrary holding would ignore our precedent that the public records laws should be read broadly and construed liberally to effectuate the intent of the statute.

(Emphasis added.) *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, fn. 3. Metadata is an item within many paper and electronic documents, defined as “[s]econdary data that organize, manage, and facilitate the use and understanding of primary data.” *Black’s Law Dictionary* 1080 (9th Ed. 2009). Examples include postal codes, cancellation, and addresses on an envelope; header information in an email;

page and line numbers in a transcript; and author/date/version/GPS information in an electronic document or image. Computer word processing metadata may be automatically embedded in document files, and readily meets the description of “items within” an electronic document. In the analogous area of civil discovery, the advisory committee notes to Fed.R.Civ.R. 26(f) state that “production may be sought of information automatically included in electronic files but not apparent to the creator or to readers.”

Computer programs may retain draft language, editorial comments, and other deleted matter (sometimes referred to as “embedded data” or “embedded edits”) in an electronic file but not make them apparent to the reader. Information describing the history, tracking, or management of an electronic file (sometimes called “metadata”) is usually not apparent to the reader viewing a hard copy or a screen image.

*Id.*; See *Townsend v. Ohio DOT*, 10th Dist. No. 11AP-627, 2012-Ohio-2945, ¶21. The committee notes further state under “117. *Information otherwise discoverable or obtainable:*”

Metadata is not addressed directly in Federal Rules of Civil Procedure but is subject to general rules of discovery; metadata thus is discoverable if it is relevant to claim or defense of any party and is not privileged. Fed. R. Civ. P. 26(b)(1). *Aguilar v. Immigration & Customs Enforcement Div.* (S.D.N.Y. Nov. 20, 2008), 255 FRD 350.

However, a requester of electronic public records under R.C. 149.43 is not entitled to metadata unless he properly requests it. *State ex rel. McCaffrey v. Mahoning County Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 21. Here, respondent was aware of Parks' interest in, and discussed with him the use of, the metadata embedded in records he requested. (Complaint at 5-8.) As part of the resulting chain of correspondence, Parks requested the meeting minutes in the format they were in at the time of the request. (Response, Exhibit A.) Instead, Webb altered the file to provide Parks with less utility and different metadata information than the version

kept in the normal operations of the office. Webb took these extra steps solely to reduce the functionality of the record.<sup>1</sup> (Webb Aff. at ¶ 7.)

{¶14} While Parks' request listed several formats in which the requested records might exist, he clarified that from among those formats Webb should send the records "in whatever format they are in at the time of this email. 3:45 PM." This provision of the request could not be clearer. This court recently considered a similar request for electronic records in a specific format. In *Speros v. Secty. of State*, Court of Claims No. 2017-00389-PQ, 2017-Ohio-8453, the requester asked for records "in machine-readable format (e.g. Access or single table Excel," but instead received records in HTML format, with less utility. (*Id.* at ¶ 1.) The court found that the request wording had sufficiently specified that the records be produced in one of the named file formats, which the respondent had accomplished prior to the court's decision. (*Id.* at ¶ 7-8.)

{¶15} R.C. 149.43(B)(1) requires public offices to produce public records upon request, and R.C. 149.43(A)(1) provides that public records are any records kept by a public office. Even if the obligation to produce records complete and unaltered were not plain from this language, the court has a duty to avoid any construction of the statute that would circumvent the evident purpose of the enactment, or lead to unreasonable or absurd results. R.C. 1.47(C); R.C. 1.49(E); *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 31. As government records become increasingly digitized, respondent's construction of R.C. 149.43 and R.C. 149.011(G) as vesting it with routine authority to convert electronic records into a functionally degraded form, and/or strip out desired metadata,

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<sup>1</sup> Webb states that "it is the policy of the Commissioners' Office to provide documents that cannot be edited or changed by the person receiving the document" (Webb Aff. at ¶ 7.) Office policy cannot supersede the Public Records Act in any case, but there is also no evidence that a PDF copy cannot be "edited or changed." Although requiring more time and expense than if the file were in DOC format, a Word file converted to PDF may be converted back to an editable form using Adobe Acrobat Pro. Myriad other technical options enable any determined editor to alter virtually any electronic record. The court notes that altering public records with purpose to defraud is a criminal offense. See R.C. 2913.42 *Tampering with records*.

is unreasonable because it would authorize pointless impairment of the people's records. The steps taken by Webb to diminish the content, utility, and value of the requested public record are contrary to the fundamental requirement that the Public Records Act be construed liberally in favor of broad access, and to resolve any doubt in favor of disclosure. *Seneca Cty.* at ¶ 10, 17, 39.

{¶16} The requirement to provide unimpaired public records does not create an additional burden on the public office. On the contrary, the stripping of functionality and metadata from a public record usually, as in this case, requires more steps, effort and time. (Webb Aff. at ¶ 6-7.) Public offices also have control over what records they create, including metadata and the capabilities of office software. A public office is required to make "only such records as are necessary for the adequate and proper documentation [of the agency]." R.C. 149.40. Specific statutes provide the option to remove some metadata when retaining certain electronic records, e.g. R.C. 1306.11. Electronic records properly disposed of prior to a public records request are not subject to production under the Public Records Act. *Seneca Cty.* at ¶ 23. Finally, when the content of any public record is deemed to require protection for security or other concerns, the General Assembly may craft an appropriate exception to the Public Records Act.

{¶17} Respondent cites no statute, case law, or other legal justification for denying Parks an identical copy of the requested record in its native format. The import of the cases cited above is that a public office may not deliberately impair the value of records created with taxpayer dollars, on equipment purchased with taxpayer dollars, using software licensed with taxpayer dollars, on a template and in a format used by the office as an integral part of its record-keeping function. I find that the requested record in its original format is a public record of the Pickaway County Board of Commissioners and that respondent has failed to provide a copy of that record as properly requested.

**Conclusion**

{¶18} Upon consideration of the pleadings and attachments, I recommend that the court DENY Webb's motion to dismiss and GRANT Parks' claim for production of the requested records in the format they were kept by the office at the time of the request. I recommend the court order that Parks is entitled to recover from the PCBC 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).

{¶19} 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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