[Cite as *Ebersole v. Powell*, 2018-Ohio-4597.]

BRIAN EBERSOLE	Case No. 2018-00478PQ
Requester	Special Master Jeffery W. Clark
v.	REPORT AND RECOMMENDATION
CITY OF POWELL	
Respondent	

{¶1} 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. Glasgow v. Jones,* 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13. Claims under R.C. 2743.75 are determined using the standard of clear and convincing evidence. *Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30.

{¶2} In late 2017 and early 2018, requester Brian Ebersole sent respondent City of Powell a series of public records requests. (Complaint, Exh. 1 at 1-2, 4-5, 24, 46-47, 55-59, 78-81, 113-114, 144-147, 169-172, 181-182, 199.) Powell produced several hundred pages of responsive records (*Id.* at 43-44, 49-50, 61-76, 97-109, 128-137, 153-165, 178-179; Lutz Aff. at ¶ 10-11; Reply, Exh. B.3, C, D), but advised Ebersole that some of his requests were improper as requests for non-records, or records that do not exist, and that some records had been withheld pursuant to public records exceptions. (Complaint, Exh. 1 at 61, 71, 76, 153-154, 178-179, 197-198.) After the filing of this action, Powell provided Ebersole with additional records (Response at 7-8; Teetor Aff. at ¶ 2-6, Exh. 1-2; Reply at 5, Exh. B.1, B.2; Corrected Notice of Supplement

to Record, Exh. B), and conducted additional searches to confirm that it possessed no additional identifiable records responsive to the requests. (Lutz Aff. at ¶ 11.)

{¶3} On March 16, 2018, Ebersole filed a complaint pursuant to R.C. 2743.75 alleging that Powell had denied access to public records in violation of R.C. 149.43(B). On June 6, 2018, the court was notified that mediation had failed to resolve all disputed issues. On June 20, 2018, Powell filed a response and motion to dismiss (Response) in which it asserted that it had provided all existing documents responsive to those requests that are not improper as overly broad, requests for non-records, requests for information, or excepted from disclosure. On June 21, 2018, the court issued an order requiring Ebersole to file a reply listing those requests that had not been satisfied, and identify what specific, existing records Powell had failed to produce. Ebersole filed a reply on July 9, 2018. Powell filed a sur-reply, and copies of court-ordered records under seal, on July 31, 2018. The parties submitted additional information in response to an order of August 31, 2018.

Motion to Dismiss

{¶4} 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.

{¶5} Powell moves to dismiss for failure to state a claim on the ground that all existing public records responsive to those of Ebersole's requests that are not ambiguous or overly broad have been produced, rendering his claims moot. I find that the issue of mootness cannot be determined in this case based solely on the complaint

and attachments thereto. I therefore recommend that the motion to dismiss for mootness be denied, and the issue determined on the merits.

{¶6} Powell also moves to dismiss Ebersole's claims because his records requests are overly broad, requests for non-existent documents, requests for non-records, requests for information, or are subject to a statutory exception. Under the abbreviated pleading procedure in this action (*see* R.C. 2743.75(D)(1) and (E)(2)) Powell's defenses have been filed as a combined response and motion to dismiss. As with the claim of mootness, most of these defenses are not conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed, I find that these arguments are subsumed in the arguments to deny the claims on the merits. I therefore recommend that that the motion to dismiss on these grounds be denied, and the matter determined on the merits.

Records Requests Presented for Determination

{¶7} The complaint and attachments contain scores of public records requests, responses, modifications, resolutions, supplemental requests, and reassertions. In his prayer for relief Ebersole first describes four unresolved requests (Complaint at 24-25, Prayer for Relief A1-4), but then seeks enforcement of additional, unspecified requests through a prayer for

> B. An order commanding Respondents to provide the legally required response to all of Requester's public records requests (attached hereto as Exhibit 1) pursuant to R.C. 149.43(B), including but not limited to the public records requests at Exhibit 1, pages 1-2, 46-47, 55-59, 78-81, 113-114, 144-147, 169-172, and 181-182.

(*Id.* at 25.) Paragraph B seeks an order to enforce any public records request discernable anywhere within the 219 pages of Complaint Exhibit 1. Paragraph B thereby fails to set forth a short and plain statement of claims showing entitlement to relief. Civ.R. 8(A). Following mediation, the special master issued an order providing Ebersole the opportunity to properly specify and support his claims before the court:

> In order to identify what issues remain in dispute in this case, the special master requires an additional pleading from requester, along with any supporting affidavit and documents. Pursuant to R.C. 2743(E)(3)(c), Ebersole is directed to file a reply that separately lists only those requests that Ebersole alleges have not been satisfied, and that he wishes to continue to litigate. For each such request, Ebersole is directed to quote the language of the request and cite the correspondence that contains the request. For each such request, Ebersole is directed to address the following:
>
> 1. Identify in as much detail as possible what specific, existing records the City has failed to produce that are responsive to this request.

(June 21, 2018 Order.) Ebersole filed a reply on July 9, 2018, with a table listing the requests that he alleges remain unsatisfied. (Reply, Exh. A.)

{¶8} To the extent Ebersole continues to reference or incorporate any other putative request that was not separately listed, quoted, and referenced as required by the order (e.g., *Id.* asterisked footnotes; Reply, *passim*) I find that Ebersole has failed to provide the short, plain statement of claim required by Civ.R. 8(A), and failed to comply with the special master's order. I therefore recommend that any claims Ebersole asserts beyond those listed in Reply Exh. A be dismissed without prejudice.

Burdens of Proof

{¶9} In a claim to enforce Ohio's Public Records Act (PRA), the ultimate burden is on the requester to prove an alleged violation. In mandamus:

> Although the PRA is accorded liberal construction in favor of access to public records, "the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence."

(Citation omitted.) *State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 428, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 15. Claims pursuant to R.C. 2743.75 must likewise be established by clear and convincing evidence. *Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30. Thus, Ebersole bears the burden of proving each claimed violation of R.C. 149.43(B) by clear and convincing evidence.

{¶10} If a public office asserts an exception to the Public Records Act as its basis for withholding requested records, the burden shifts to the office to establish the applicability of the claimed exception. *State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner's Office*, 153 Ohio St.3d 63, 2017-Ohio-8988, 101 N.E.3d 396, ¶ 15; *State ex rel. Nat'l Broad. Co. v. Cleveland*, 38 Ohio St.3d 79, 82-83, 526 N.E.2d 786 (1988), paragraph 2 of the syllabus. Powell thus bears the burden of proving that each withheld record or portion of a record falls squarely within any claimed exception.

{¶11} However, the defense that a document is not a record does not assert an exception. An exception is a state or federal law prohibiting or excusing disclosure of items that otherwise meet the definition of "public record." Before the issue of exceptions arises, a requester must first show that he has made a request that invokes the Public Records Act. Thus, when a public office claims that an item is not a record of the office,

> a requester must establish that they are (1) documents, devices, or items, (2) created or received by or coming under the jurisdiction of CMHA, (3) which serve to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. See *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005 Ohio 4384, 833 N.E.2d 274, ¶ 19.

State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth., 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 23.[1] The *O'Shea* Court cites to *Dispatch v. Johnson*, where the Court held:

> Therefore, in order to establish that state-employee home addresses are records for purposes of R.C. 149.011(G) and 149.43, *the Dispatch must prove* that home addresses are (1) documents, devices, or items, (2) created or received by or coming under the jurisdiction of the state agencies, (3) which serve to document the organization, functions,

[1] Similarly, where an office attests that requested records do not exist, the requester has the burden to establish that the records exist by clear and convincing evidence. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 22-26.

> policies, decisions, procedures, operations, or other activities of the office. *If the Dispatch fails to prove* any of these three requirements, it will not be entitled to a writ of mandamus to compel access to the requested state-employee home addresses because those records are not subject to disclosure under the Public Records Act.

(Emphasis added.) *Id.* at ¶ 19. Therefore, if a public office claims that a requested document is not a "record" of the office, the burden is upon the requester to show that it meets the definition contained in R.C. 149.011(G). Requester cites no Supreme Court precedent to the contrary. (Reply at 5-6.) *But see Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820 at ¶ 75-78.

Disposition of Requester's Claims

<u>Prayer for Relief #A1</u>

> "I am making a public records request to the City of Powell for a copy of any and all checks (including check stubs and any other attachment thereto) from GAIG [the Great American Insurance Company] that contributes funds to the City's settlement with The Center for Powell Crossing, LLC[.]" See, Verified Compl. Ex. 1, at 144; see also, Verified Compl. Ex. 1, at 81, 114, 144, and 169.

(Reply, Exh. A at 000001.) Ebersole argues that checks written by GAIG to satisfy its contractual obligation in the settlement of the Powell Crossing litigation were "related to City business," and that the redacted account information in the checks "is necessary to verify the authenticity of the check." (Reply at 5.) Powell counters that it never possessed, used, monitored or required copies of the checks to document its own decisions and actions in the settlement, and that the checks therefore have never served as "records" of Powell.

Non-Records

A "record" is defined as

> any document, device, or item, regardless of physical form or characteristic, * * * created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, *which serves to*

> *document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.*

(Emphasis added.) R.C. 149.011(G). To constitute a public record subject to the Public Records Act a document must first be a “record” and must be “kept by” the public office. *State ex rel. Sch. Choice Ohio, Inc. v. Cincinnati Pub. Sch. Dist.*, 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183, ¶ 13. Proving that an item documents the activities of the public office is a statutory prerequisite to establishing the item as a “record”:

> "To the extent that an item does not serve to document the activities of a public office, it is not a public record and need not be disclosed." *Bond*, 98 Ohio St.3d 146, 2002 Ohio 7117, P9, 781 N.E.2d 180. If the converse were true, the General Assembly would not have included the requirement in the R.C. 149.011(G) definition of "records" that the document, device, or item in question "document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." The court cannot delete this statutory prerequisite.

State ex rel. Dispatch Printing Co. v. Johnson, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 29.

> A contrary conclusion would lead to the absurd result that any document received by a public office and retained by that office would be subject to R.C. 149.43 regardless of whether the public office ever used it to perform a public function. The plain language of R.C. 149.011(G), which requires more than mere receipt and possession of a document in order for it to be a record for purposes of R.C. 149.43, prohibits this result. (Citation omitted.)

State ex rel. Beacon Journal Publishing Co. v. Whitmore, 83 Ohio St.3d 61, 64, 1998 Ohio 180, 697 N.E.2d 640 (1998).

{¶12} Ebersole thus has the burden to show that the checks were “created or received by or [came] under the jurisdiction of” Powell,[2] and that they served “to

[2] There is no evidence that Powell created or received copies of the GAIG checks prior to Ebersole’s request, but Powell does not dispute that appropriate documentation of contribution by an insurance company to settlement of its liability is a matter “coming under the jurisdiction of” the City.

document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). However, Ebersole asserts only that the checks are "related to City business including the *Powell Crossing* litigation" and that "[s]everal Powell Council members publicly announced that GAIG's contribution to the settlement induced Council to approve it." (Reply at 5.) Powell attests that the GAIG checks "were never in the possession of anyone for the City of Powell. Those checks were not drawn on City of Powell funds." (Lutz Aff. at ¶ 12; July 31, 2018 Teetor Aff. at ¶ 4.)

{¶13} With respect to the fact of GAIG contribution to the settlement of Powell's liability in the *Powell Crossing* litigation, Powell provided Ebersole with the GAIG transmittal letter on which City Manager Lutz was copied, which noted the value of the enclosed checks. (Complaint, Exh. 1 p. 109.) Regarding the terms of coverage, Powell apparently provided Ebersole with copies of its insurance policies with GAIG (Complaint Exh. 1 at 106), and with a copy of a reservation of rights letter. (*Id.* at 63-69.) Powell also provided Ebersole with Powell's own settlement checks written on the City account, the related processing and delivery paperwork, and a copy of the settlement agreement. (Reply at 7-18, Exh. B3.) Powell thus provided Ebersole with copies of its records documenting of the fact of, the amount of, and the completion of the insurance company's payments in the *Powell Crossing* litigation.

R.C. 149.40 requires that a

> public office shall cause to be made only such records *as are necessary* for the adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the agency and for the protection of the legal and financial rights of the state and persons directly affected by the agency's activities.

(Emphasis added.) The statutory duty to make only such records *as are necessary* for adequate and proper documentation means that a public office is not required to make all records *that might possibly* document an office activity or transaction. Ebersole provides no evidence that Powell was required by law to obtain a copy of the GAIG

checks. *School Choice Ohio*, 147 Ohio St.3d 256, 2016-Ohio-5026, 63 N.E.3d 1183 at ¶ 14. Regardless of his personal interest in them, Ebersole has not shown that it was necessary for Powell to obtain and maintain copies of the actual checks, either in its own hands, or in the possession of the insurance company.

Mootness

{¶14} After the initiation of this case, Powell's counsel informally obtained copies of the settlement checks from GAIG on condition of certain redactions, and provided the redacted copies to Ebersole. (Teetor Aff. at ¶ 2-6; Studenic Aff. at ¶ 6; July 31, 2018 Teetor Aff. at ¶ 2-3; Reply at 5, B. Ebersole Aff. at ¶ 8, 10, Exh. B.1-2.) On review *in camera*, I find that all information in the checks, except bank account and routing numbers and the signature block of the payee, has been disclosed in these copies. Since the request is now moot as to the portions of the checks provided to Ebersole, the remaining dispute over their content is limited to Ebersole's demand for this information.

Bank Account Numbers, Routing Numbers, and Signature Blocks

{¶15} Even if the court found that other portions of the checks met the definition of "records" of Powell, Ebersole does not show that the account and routing numbers appear on the checks for any purpose other than the administrative convenience of the bank and the account holder. *Dispatch v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274 at ¶ 25; *Wengerd v. E. Wayne Fire Dist.*, Ct. of Cl. No. 2017-00426-PQ, 2017-Ohio-8951, ¶ 37 (bank account or routing information, to the extent they are used only for administrative convenience and reveal nothing about the agency's conduct, would be non-record information). There is no reason to believe that Powell did, or must, use the GAIG bank account and routing numbers on the checks in documenting its own activities. *See Hicks v. Newtown*, Ct. of Cl. No. 2017-00612-PQ, 2018-Ohio-1540, ¶ 16-20.

{¶16} To be sure, where a requester shows that banking records are required to be kept by statute, or that they document illicit behavior, they may be subject to

disclosure, *State ex rel. Plain Dealer Pub. Co. v. Lesak,* 9 Ohio St.3d 1, 457 N.E.2d 821 (1984), including cancelled checks. *Domokos v. Bd. of Ed.*, 11th Dist. Lake No. 13-071, 1989 Ohio App. LEXIS 1924, *4 (May 26, 1989). There has been no such showing here. Therefore, I find that the bank account and routing numbers on the checks do not serve as "records" of Powell.

{¶17} Similarly, Ebersole fails to show that the signature block and actual signature of the payee are "records." Disclosure of this information would reveal little or nothing about the city or its activities. *Dispatch v. Johnson* at ¶ 27-28. The fact that a writing *pertains to* an office's activity does not mean that it *documents* the office's activity. *See State ex rel. Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 11-13 (documents containing juror names and court questionnaire responses do not shed light on a court's performance of its statutory duties). This is not to say that a payee signature block could never serve as a record. However, considering the records Powell did maintain to document payment of the *Powell Crossing* settlement, Ebersole does not show that *necessary* documentation of Powell's activities included maintaining copies of the payee signature blocks.

{¶18} I find that Ebersole fails to show by clear and convincing evidence that the items sought in this request satisfy the definitions of "records" or "public record." R.C. 149.011(G); R.C. 149.43(A)(1). The fact that Powell was later able to obtain copies of the checks informally and provide redacted copies to Ebersole does not waive the requirement that requester must establish that these items were "records" of Powell to enforce a right of production under R.C. 149.43(B)(1). It does, however, moot the request to the extent the items were provided.

Quasi-Agency

{¶19} Ebersole argues that the checks were kept by GAIG for Powell on the principle of quasi-agency, *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 550 N.E.2d 464 (1990), and that "public bodies may not hide public records through

their attorneys." *State ex rel. Findlay Publ. Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 684 N.E.2d 1222, (1997) (Reply at 3.) In those cases, the documents held by a third party were conceded to be (or not opposed as) "public records" under R.C. 149.011(G) and R.C. 149.43(A)(1). *Mazzaro* at 39-40; *Findlay* at 136-137. The question before both courts was whether sole possession of an accepted "record" by a third party relieved the public office of exercising a demonstrated right of access in order to produce the record. *Mazzaro* at 40; *Findlay* at 137-138. *See generally Wengerd v. E. Wayne Fire Dist.*, Ct. of Cl. No. 2017-00426-PQ, 2017-Ohio-8951, ¶ 14-22. As noted earlier, however, unless requested documents first meet the definition of "records" the question of whether they can be accessed by the public office is irrelevant. Because I find that the GAIG checks never met the definition of "records" of Powell, I find it unnecessary to further analyze the question of whether GAIG served as a "person responsible for public records" under a theory of quasi-agency.

{¶20} Under the facts and circumstances of this case, I find that the GAIG checks do not meet the definition of "records" of Powell and therefore need not be disclosed.

<u>Prayer For Relief #A2</u>

> "Please provide any and all written correspondence between, by, or among any one or more of the City, the Central Ohio Risk Management Association ("CORMA"), and/or Great American Insurance Group that refers, reflects, or relates to the City's litigation with [The Center for Powell Crossing LLC] or the $1.8 million settlement with [The Center for Powell Crossing LLC]. See, Verified Compl., Exhibit 1, at 46; see also, Verified Compl. Ex. 1, at 80, 113-114, 144-146, 169-171, and 181-182.
>
> Subsequent correspondence clarified that the request includes requests for correspondence among the City's, GAIG's, or CORMA's "employees, attorneys, or other representatives." See, Verified Compl. Ex. 1, at 144.

{¶21} Powell asserts that this claim is ambiguous, overly broad, and unenforceable. Powell further asserts that the claim is moot following production of responsive records. (Response at 8-14; Sur-reply at 6-7.) Ebersole argues that

additional correspondence possessed by and exchanged between Powell's agents and contractual partners has yet to be provided. (Reply at 6-7.)

Ambiguous or Overly Broad Requests

{¶22} A public records requester must reasonably identify the particular, existing records sought. A request that is ambiguous or overly broad may be denied. In the statutory framework governing the making of public records requests, R.C. 149.43(B)(2) provides:

> 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 * * *.

It is thus "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 Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21. Indeed, without sufficiently specific request language on which to base an order of compliance, a court cannot later enforce alleged non-compliance:

> A general request, which asks for everything, is not only vague and meaningless, but essentially asks for nothing. At the very least, such a request is unenforceable because of its overbreadth. At the very best, such a request is not sufficiently understandable so that its merit can be properly considered.

State ex rel. Zauderer v. Joseph, 62 Ohio App.3d 752, 756, 577 N.E.2d 444 (10th Dist.)

{¶23} Review of Ohio public records case law reveals that attorneys, accustomed to writing discovery instruments, are susceptible to writing public records requests as though they were interrogatories or requests for production of documents. While a person may request public records for use in civil litigation, *Gilbert v. Summit Cty.*, 104 Ohio St.3d 660, 2004-Ohio-7108, 821 N.E.2d 564, the standards for a proper public records request are distinctly different from the standards for civil discovery. A

discovery-style demand to conduct an officewide search for records containing information "regarding or related to" an agency program, organization, or person is improper as a public records request. *State ex rel. Thomas v. Ohio State Univ*. 71 Ohio St.3d 245, 245-246, 643 N.E.2d 126 (1994), cited with approval in *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶ 10; *State ex rel. Thomas v. Ohio State Univ*. 70 Ohio St.3d 1437, 638 N.E.2d 1041 (1994). The Public Records Act does not

> compel a governmental unit to do research or to identify records containing selected information. That is, relator has not established that a governmental unit has the clear legal duty to seek out and retrieve those records which would contain the information of interest to the requester. *Cf. State ex rel. Cartmell v. Dorrian* (1984), 11 Ohio St.3d 177, 179, 464 N.E.2d 556. Rather, 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. Fant v. Tober, 8th Dist. Cuyahoga No. 63737, 1993 Ohio App. LEXIS 2591, *3-4 (April 28, 1993), *aff'd*, 68 Ohio St.3d 117, 623 N.E.2d 1202 (1993).

{¶24} Judicial determination of whether an office has properly denied a request as ambiguous or overly broad is based on the facts and circumstances in each case, *Zidonis* at ¶ 26. In this case, I find that the request in Prayer for Relief A2 is ambiguous and overly broad in several respects. First, it is not limited to a date range and encompasses over three years of City correspondence. *See Zidonis* at ¶ 21 (all complaint files and litigation files for six years); *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711, 939 N.E.2d 831, ¶ 1-3 (all records relating to prison quartermaster's orders for and receipt of clothing and shoes for seven years).

{¶25} Second, the request is not limited to a litigation file, a single department, a single record retention series, or any other means of determining the boundaries of the request.

{¶26} Third, instead of naming the persons whose correspondence is sought, the request requires the office to conduct research to find correspondents based on their

relationship to various organizations. Ebersole emphasizes that the request includes not just records identified by the names of those organizations, but any written correspondence among City, GAIG, or CORMA "employees, attorneys, or other representatives." A request is ambiguous or overly broad when it identifies correspondents only as belonging to titles, groups or categories, for which research by the office is required to recognize such membership. *State ex rel. Oriana House, Inc. v. Montgomery*, 10th Dist. Franklin Nos. 04AP-492, 04AP-504, 2005-Ohio-3377, ¶ 9, overturned on other grounds, 107 Ohio St.3d 1694, 2005-Ohio-6763, 840 N.E.2d 201; *Gannett GP Media, Inc. v. Ohio Dept. of Pub. Safety,* Ct. of Cl. No. 2017-00051-PQ, 2017-Ohio-4247*,* ¶ 11.

{¶27} Fourth, in requesting all written correspondence "between, by, or among any one or more of the City," CORMA, and/or GAIG, requester includes all correspondence entered into between two outside agencies, CORMA and GAIG, regardless of whether respondent City of Powell was a party to the correspondence.

{¶28} Fifth, the request is ambiguous and overly broad in requesting a search through both the email system and paper files of the office for any correspondence "that refers, reflects, or relates to" Powell's litigation with The Center for Powell Crossing LLC. A public office is not obliged to "seek out and retrieve those records which would contain the information of interest to the requester." *Fant v. Tober*, *supra*. *See State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 314, 750 N.E.2d 156 (2001) ("any and all records * * * containing any reference whatsoever to [the requester]"); *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; *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 14-15 (request for "[a]ny and all email communications * * * which reference * * * the 'evidence-based model' or education

funding in general") (first ellipsis sic); *State ex rel. Thomas v. Ohio State Univ.*, 71 Ohio St.3d 245, 246, 643 N.E.2d 126 (1994) (noting denial of writ of mandamus where request sought information "regarding or related to" any pro-animal-rights action group or individual); *State ex rel. Youngstown Publ'g Co. v. Youngstown*, 7th Dist. Mahoning No. 05MA66, 2006-Ohio-7272, ¶ 28-32 ("asking for all records concerning when and where negotiations took place and between whom is not a request for a specific document.") A request for records "regarding" an office operation is improperly ambiguous, overly broad, and requires a search rather than reasonably identifying the records sought. *Gannett GP Media* at ¶ 12.

{¶29} I find that this request is improperly ambiguous and overly broad, does not reasonably identify the records sought, and is therefore unenforceable under the Public Records Act.

Suggestion of Mootness

{¶30} Despite its ambiguous and overly broad nature, Powell proceeded with efforts to satisfy this request, providing Ebersole with 253 pages of responsive records. (Lutz Aff. at ¶ 10-11; Reply Exh. C.1-7.) 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. Although Powell's affidavit provides only a general assertion of full compliance, Ebersole provides no evidence to the contrary, other than his belief that there must be additional correspondence by or through Powell's attorneys, insurance company, CORMA, or other unnamed representatives or agents. (Reply, Exh. A at 1.) 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 responsive documents exist. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246,

¶ 22-26; *State ex rel. Gooden v. Kagel,* 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 471, ¶ 8.

{¶31} Because the parties disagree as to whether documents in the hands of Powell's various agents and correspondents are "records" of Powell, the above principles do not apply neatly to the facts and circumstances of this case. However, given the dispositive finding that the request is ambiguous and overly broad, and therefore unenforceable, the court need not reach the question of whether the entirety of this request has been rendered moot. I recommend that the court find the claim is moot only to the extent that Powell has provided the responsive records referenced above.

Prayer For Relief #A4

> "[P]lease identify and provide me with any and all documents that the City relied upon, consulted, referenced, or referred to in making the determination that the requested copy of the GAIG settlement check 'does not 'serve to document the organization, functions, policies, decisions, procedures, operations, or other activities' of the City of Powell." See, Verified Compl., Ex. 1, at 182.

{¶32} In response to the court's order to provide copies of all records received from Powell to date in response to this request, Ebersole states "NOTHING PROVIDED." The record demonstrates to the contrary that Powell provided Ebersole with two letters detailing its counsel's reliance on specific statutory and case law, and on a public records manual.[3] (Response at 15; Complaint at ¶ 60-61, 70, Exh. 1 at 178, 197-198.) I find that to the extent these letters provided the response sought, the claim based on this request is moot.

{¶33} Moreover, in response to a question or request for information, a public office has "no duty under R.C. 149.43 to create new records by searching for and compiling information from existing records." *State ex rel. White v. Goldsberry*, 85 Ohio

[3] While none of the statutes, case law, or the reference manual referenced in the letters are "records" of the City of Powell, the letters are otherwise responsive to Ebersole's request.

St.3d 153, 154, 1999-Ohio-447, 707 N.E.2d 496 (1999). In *State ex rel. Lanham v. State Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 1997-Ohio-104, 687 N.E.2d 283 (1997), a request for records evidencing the "qualifications of APA members" was found to be an improper request for records containing certain information, rather than for specific records. *Accord State ex rel. Morabito v. Cleveland*, 8th Dist. Cuyahoga No. 98820, 2012-Ohio-6012, ¶ 14 (request for written "confirmation of * * * (5) why, how, when, and by whom the video was destroyed — are not authentic public records requests, but requests for information outside the scope of R.C. 149.43."); *Daugherty v. Mohr*, 10th Dist. Franklin No. 11AP-5, 2011-Ohio-6453, ¶ 32-35 ("all * * * policies, emails, or memos regarding whether prison officials are authorized to 'triple cell' inmates into segregation"); *Reinel v. Butler Cty. Auditor*, Ct. of Cl. No. 2018-00441PQ, 2018-Ohio-2914, ¶ 4 (asked for records of "how you calculated" tax modifications, "the Auditor properly denied the request to provide an explanation for his execution of a public function.").

{¶34} The request asks Powell to explain its decision, not to produce reasonably identified public records. It essentially inquires: "From which documents did you consult information for your decision on a public records issue?" For a person to identify the documents they relied upon, consulted, referenced or referred to for anything, they must exercise their memory and judgment to compile a list that did not previously exist. Even where a request is for existing "policies, emails, or memos" regarding whether an office's action was authorized, such a request does not identify records with reasonable clarity. *Daugherty v. Mohr, supra*. I find that this request seeks the answer to a question; seeks information about a determination, rather than specified records; and requires the creation of a new record. The request is therefore improper and unenforceable.

{¶35} Powell further argues that if Ebersole intended to request internal research or memoranda regarding its determination that certain documents were non-records, such legal documents would be protected by the attorney work product doctrine or

attorney-client privilege, and that any such documents were kept by its attorneys and were never in the possession of Powell. Given the improper and unenforceable nature of the request itself, the court need not reach these defenses.

Claim Document

> Please provide any proof of loss forms, claims, or other notices that the City provided to any one or more of the City's insurance carriers to notify them that the City may make a claim in connection with the litigation with Powell Crossing." See, Verified Compl., Ex. 1, at 46; see also, Verified Compl. Ex. 1, at 146. Please note the claim document is also a public record that is responsive to the request under Prayer for Relief #A2.

{¶36} Powell first argues that Ebersole did not include this request in the Prayer for Relief of his complaint, but made the request for the first time in his reply pleading, and that this claim should therefore be dismissed. (Sur-reply at 3-4.) However, the record shows that Ebersole made this request verbatim in an email attached to the complaint at Exh. 1, p. 46. As noted in Requests Presented for Determination, the totality of Ebersole's requests were referenced in Prayer for Relief Section B. In response to the court's direction to list, quote, and reference only those requests he wished to continue to litigate, Ebersole properly presented this request, and the special master will proceed to recommend disposition.

In connection with this claim, the court directed Powell to file under seal

> a complete and unredacted copy of any written proof of loss forms, claims, or notice of potential claim in connection with the litigation with Powell Crossing presented to Great American Insurance Group under policy number 3128223, with the effective dates of October 1, 2014 to October 1, 2015, by the City of Powell.

The order further directed Powell to file a sur-reply with argument and support for withholding of any such documents. (Order of July 17, 2018 at 1-2.) In response, Powell filed a one-page First Notice of Loss (FNOL). Powell explained that this was a GAIG form that was filled out and sent to GAIG by CORMA, without copying Powell, based on

the city manager's email notification to CORMA. (Sur-reply at 4-6; Studenic Aff. at ¶ 4-5; Corrected Notice of Supplement to Record, Exh. B.)[4]

{¶37} In its second defense, Powell argues that a notice form filled out by a CORMA officer and sent only to GAIG is not responsive to a request for claims or notices "that the City provided to any one or more of the City's insurance carriers." *Id.* Where a document does not match the terms of the request, it is not responsive:

> McCaffrey further claims that there is evidence that a record exists that is responsive to the second records category because Gains testified that Mahoning County Assistant Prosecuting Attorney Don Duda heard from a county employee about potential misconduct by a grand juror, and Gains instructed Duda to write a letter concerning what he had been told, which would be sealed and given to Stratford to forward to the special prosecutors. But the letter did not constitute a record of a communication between the prosecutor's office and a member of the grand jury—at best, it was a communication between the prosecutor and the special prosecutors that summarized a conversation between an assistant prosecuting attorney and a county employee about a grand juror.

State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 25. Applying the ordinary rules of grammar, the request for items "that the City provided to any one or more of the City's insurance carriers" seeks documents that Powell itself provided to the insurance carrier, and does not include a CORMA-created document that was triggered by the city manager's email. I find that under these circumstances, Ebersole has not shown by clear and convincing evidence that Powell failed to comply with R.C. 149.43(B) in not considering the FNOL form as a responsive record to this request.

{¶38} Third, Powell argues that the FNOL does not meet the definition of "record" or "public record" of the city.[5] As with the checks sent by GAIG, there is no evidence

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[4] Powell states that it learned during litigation that it had not previously provided Ebersole with a copy of Lutz's email. (Notice of Supplement to Record.) Provision of the email and its attachment (Corrected Notice of Supplement to Record, Exh B) renders the request moot as it pertains to this record.

that Powell itself received or sought a copy of the FNOL form prior to Ebersole's request. *See Hicks v. Newtown*, Ct. of Cl. No. 2017-00612-PQ, 2018-Ohio-1540, ¶ 14-18. Powell submitted evidence that the FNOL was physically created by an official of CORMA. There is no evidence that Powell "kept" this document, i.e., maintained it itself or through others in conformity with its records retention schedule. There is no evidence that a copy of the FNOL was necessary for the adequate and proper documentation of the organization, functions, policies, decisions, procedures, and essential transactions of the city and for the protection of the legal and financial rights of the state and persons directly affected by the agency's activities. R.C. 149.40.

{¶39} There is no reason to believe that Powell did or must use the FNOL in documenting its own activities. The form transmits notice for the administrative convenience of CORMA and GAIG, not to document the official functions of Powell. *Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 25, 27-28; *Beacon Journal Publishing Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 11-13. The fact that Powell was later able to obtain a copy of the form does not waive any argument that the requester must show that the form was a "record" of Powell. I find that Ebersole fails to show by clear and convincing evidence that the FNOL satisfies the definitions of "record" and "public record" of Powell under R.C. 149.011(G) and R.C. 149.43(A)(1).

Failure to Provide Required Information and Opportunity to Revise

{¶40} Ebersole asserts that Powell violated R.C. 149.43(B)(2) by not objecting to the request in Prayer for Relief #A2 as overly broad until after litigation had been filed, and not providing the required information as to how City records are maintained. (Reply at 3.) Because a public office's initial explanation for denial "shall not preclude

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[5] This analysis is limited to the City of Powell, and has no bearing on the status of any other agency for whom the document may be a record. *See State ex rel. Bell v. Brooks*, 130 Ohio St.3d 87, 2011-Ohio-4897, 955 N.E.2d 987; R.C. 149.431.

the public office or the person responsible for the requested public record 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), Powell was permitted to raise the defense of overbreadth in this action. However, Powell became subject to its obligations under R.C. 149.43(B)(2) at that point.

{¶41} R.C. 149.43(B)(2) urges parties to revise denied ambiguous and overly broad requests prior to litigation. Following denial, a public office

> 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.

The statute does not require the office to rewrite the request for the requester, but the office should convey relevant information to support revision of the request. Options include, but are not limited to: offering to discuss revision with the requester, *Zidonis* 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861 at ¶ 4-5, 40; *State ex rel. Morgan v. Strickland,* 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 14-20, providing the requester with a copy of the office's records retention schedule, *Zidonis* at ¶ 36, or other explanation of how office records are maintained and accessed. *Id.* at ¶ 35. Notably, Ebersole demonstrated in some of his request modifications and pleadings that he could have made requests that more reasonably identified the records he sought. *Id.* A public office's voluntary effort to provide some responsive records, notwithstanding denial of the request, is considered favorably in evaluating its response. *Id.* at ¶ 39; *Morgan, supra,* at ¶ 6, 14. Here, Powell made such efforts and provided Ebersole with hundreds of responsive records.

{¶42} In responding to the request in Prayer for Relief #A2 prior to this action, Powell neither denied the request nor provided significant information as to the manner in which records are maintained and accessed by the office. Powell has now denied the request, and the failure to provide information and invite revision 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. As in *ESPN*, Ebersole does not ask that respondent be ordered to inform him of the way Powell maintains its records, and thus is not entitled to relief other than a finding of violation. *Id.* at ¶ 12-15.

{¶43} Ebersole may of course file a new public records request for any specific, additional records he 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) through (B)(7), with the goal of identifying the specific records sought while minimizing the burden on the public office. Early cooperation can result in timely, mutually satisfactory revision of overly broad requests, and is favored by the courts. *See State ex rel. Morgan v. Strickland,* 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 15-20.

Conclusion

{¶44} Upon consideration of the pleadings and attachments, I recommend the court DENY requester's claim for production of records. I further recommend that the court find that respondent failed to respond to requester's overly broad request with the opportunity and information required by R.C. 149.43(B)(2). I recommend that costs be shared equally by the parties.

{¶45} *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

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Filed October 9, 2018
Sent to S.C. Reporter 11/14/18