[Cite as *Parks v. Colburn*, 2018-Ohio-4361.]

MICHAEL R. PARKS Requester v. TIM COLBURN, THE BERGER HOSPITAL Respondent	Case No. 2018-00879PQ Special Master Jeffery W. Clark REPORT AND RECOMMENDATION

{¶1} On October 5, 2017, requester Michael Parks made a public records request to respondent Tim Colburn, The Berger Hospital (Berger), stating:

> Please send copies of all communications that The Berger Hospital had with the following:
>
> [17 named individuals, six including email address]
>
> Regarding Facebook Report #1267439750034511

("Request No. 1") (Response at 3; Exh. 2.) On October 24, 2017, Berger responded by providing a complaint it had filed with Facebook regarding Parks, explaining that other responsive documents had been withheld based on attorney-client privilege and work product. (Complaint, Exh. D, E.) On May 10, 2018, Parks made a public records request to Berger legal counsel for the following:

> Please list all entities in which 'Berger' has an interest.
>
> Also consider this my last request for any records possessed by 'Berger' or any other entity that they may be privy to regarding the following records:
>
> Records that discuss me in regard to my Facebook page being removed by your law firm.
>
> * * *

("Request No. 2") (Complaint, Exhibit A.) On June 7, 2018, counsel responded that Berger had previously provided records in response to the same or similar requests, and had no additional responsive records to provide. (Response, Exh. 10 at p. 4-5.)

{¶2} On May 21, 2018, Parks filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records requested on October 5, 2017 and May 10, 2018 in violation of R.C. 149.43(B).[1] Following unsuccessful mediation, Berger filed a motion to dismiss (Response) on July 9, 2018. On July 31, 2018, Parks filed a reply. On August 20, 2018, Berger filed a sur-reply.

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

Motion to Dismiss

{¶4} Berger moves to dismiss Parks' Request No. 1, for "a list of all entities in which Berger has an interest," as moot and because it is an improper request for information rather than records. Berger moves to dismiss Request No. 2, for "records that discuss me in regard to my Facebook page being removed by your law firm," as moot, and as an improper request for information, and because the documents that

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[1] Parks' complaint seeks relief only with respect to these requests. The exhibits and reply reference other requests to Berger and other entities, apparently for context.

were withheld are excepted from release as attorney-client and attorney work product privileged material.

{¶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} While Parks' request wording has a strong likelihood of asking for information rather than for specific records, the possibility that they do adequately describe an existing record is not foreclosed on the face of the complaint and attachments. Berger arguably conceded that the second request sufficiently identified responsive records when it provided (and withheld) several records in response to the request. I find that neither overbreadth, nor the other defenses asserted by Berger - common-law attorney-client privilege, attorney work product, and mootness - can be conclusively determined based solely on the complaint and its attachments. I therefore recommend that the motion to dismiss be DENIED, and the matter determined on the merits.

Request No. 1: "A List of All Entities in Which Berger Has an Interest"

{¶7} 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 St.3d 153, 154, 707 N.E.2d 496 (1999). *See State ex rel. Lanham v. State Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 687 N.E.2d 283 (1997). A public office is thus not obliged to create a list that does not already exist. *State ex rel. Salemi v. Cleveland Metroparks*, 8th Dist. Cuyahoga No. 100761, 2014-Ohio-3914, ¶ 28-30

(no duty to create list of "any third-party businesses that shares customer lists with [respondent]"); *State ex rel. McElrath v. Cleveland*, 8th Dist. Cuyahoga No. 106078, 2018-Ohio-1753, ¶ 22 (no duty to compile list of officers present at an arrest); *State ex rel. Walden v Ohio State Med. Bd.*, 2011-Ohio-6560, 968 N.E.2d 1041, ¶ 9 (10th Dist.) (compilation of "addresses of * * * every licensed physician in Ohio" did not exist); *See also State ex rel. Kerner v. State Teachers Retirement Bd.*, 82 Ohio St.3d 273, 695 N.E.2d 256, (1998). Berger advised Parks that "there is no 'list' of entities in which Berger has an interest," and that it had provided all public records responsive to his previous requests for similar information. (Response Exh. 10, p. 4.) Berger attests that it has no additional public records to produce in response to either of Parks' requests. (Colburn Aff. at ¶ 11.) Request No. 1 is therefore an improper and unenforceable request for a document that does not exist.

{¶8} Separate from the question of whether any potentially responsive record exists, a public office has no duty to comply with a request that is ambiguous or overly broad. 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 * * *.

"[I]t 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 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.

{¶9} The request for "a list of all entities in which Berger has an interest" uses the vague term, "entities," modified by the ambiguous phrase, "in which Berger has an interest." The request could refer to anything from publicly traded companies in which

Berger funds are invested, to suppliers from which Berger contracts goods and services. Parks apparently intends the wording to extend beyond the concept of entities in which Berger "has a legal interest," since he continues to claim denial of access after receiving this response from Berger:

> [P]lease be advised that the only entities in which Berger has a legal interest are, as previously disclosed, Berger Health Foundation and Berger Health Partners, formerly known as Pickaway Health Services.

(Response Exh. 10, p. 4.) I find that the wording of Request No. 2 constitutes an improperly ambiguous, overly broad, and unenforceable request.

{¶10} R.C. 149.43(B)(2) urges parties to revise ambiguous and overly broad requests prior to litigation. Following denial, the statute provides that an 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.

In the context of Parks' previous requests regarding corporate entities to which Berger belonged, Berger provided records, invitations to discuss and revise, and explanatory information, stopping short only of Parks' request that Berger rewrite his request for him. (Response at 5-7.) I conclude that Berger has made good faith efforts to assist Parks with this request that satisfied R.C. 149.43(B)(2). I further find that, to the extent that Berger has answered the implied or embedded request for a list of entities in which Berger "*has a legal interest*," Berger has rendered this request moot.

Request No. 2: "Any records possessed by 'Berger' or any entity that they may be privy to regarding the following records: Records that discuss me in regard to my Facebook page being removed by your law firm."

{¶11} Parks' assertion of this language as a separate "request" that Berger denied is questionable. Parks' correspondence commended with the following October 5, 2017 public records request to Berger:

> Please send copies of all communications that The Berger Hospital had with the following:

> [17 named individuals, six including email address]
>
> Regarding Facebook Report #1267439750034511

(Response at 3; Exh. 2.) Berger responded with a copy of the Facebook complaint it had filed, explaining that additional responsive documents had been withheld based on attorney-client privilege and work product. (Complaint, Exh. D, E.) On May 10, 2018, Parks made a separate request for a list of entities in which Berger has an interest, but included in the same email what appeared to be a reminder or reassertion of the earlier request:

> Also consider this my last request for any records possessed by 'Berger' or any other entity that they may be privy to regarding the following records:
>
> Records that discuss me in regard to my Facebook page being removed by your law firm.
>
> * * *

(Complaint, Exhibit A.) Parks' apparent intent to reassert the October 5, 2017 request, rather than make a new request, is reinforced by Park's similarly paraphrased reference in the complaint to the earlier request:

> On October 5, 2017 Claimant made a public records request for a (any) communication(s) from Berger to the law firm of Bricker and Eckler (B&E) requesting/authorizing them to have Claimant's Facebook page removed. Exhibit E shows what information was provide [sic] to the Claimant.

(Complaint at 2.) As for what specific records Parks demands by any version of the request, he references only Berger's reply to the October 5, 2017 request (Complaint, Exh. D) and states:

> Exhibit D proves that records do exist regarding Facebook Report #1267439750034511. Claimant demands these records.

(*Id.*) In order to clarify what specific dispute remained following mediation, the court issued a July 16, 2018 order for Parks to file a reply, and "[i]dentify in as much detail as possible what specific, existing records respondent has failed to produce in response to the request." Parks' July 31, 2018 reply did not identify any remaining records beyond

the records referenced in Exhibit D, adding only that he believed those records "are not protected because of the crime/fraud exception." (July 31, 2018 Response to Order at 7-9.) Berger attests that there are no other records responsive to the request (Colburn Aff. at ¶ 11), and Parks has provided no evidence to the contrary.

{¶12} I conclude that the withheld documents, conceded to be responsive and filed under seal, are the only disputed records related to Request No. 2.[2] The remaining issue before the court is whether Berger properly withheld these records based on attorney-client privilege and attorney work product.

Attorney-Client Privilege and Attorney Work Product

{¶13} R.C. 149.43(A)(1) enumerates specific exceptions from the definition of "public record," including a catch-all exception for, "[r]ecords the release of which is prohibited by state or federal law." R.C. 149.43(A)(1)(v). The City asserts that all the withheld documents in this case are protected from disclosure by the common-law attorney-client privilege, defined in Ohio as follows:

> "Under the attorney-client privilege, '(1) [w]here legal advice of any kind is sought (2) from a professional legal adviser in his capacity as such, (3) the communications relating to that purpose, (4) made in confidence (5) by the client, (6) are at his instance permanently protected (7) from disclosure by himself or by the legal adviser, (8) unless the protection is waived.'"

(Citations omitted.) *State ex rel. Leslie v. Ohio Housing Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508*,* 824 N.E.2d 990, ¶ 21. "The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of these records." *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537,

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[2] If the issue were not so limited, this request is improperly ambiguous, overly broad and unenforceable for the same reasons discussed for Request No. 1. For example, in *State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 314, 750 N.E.2d 156 (2001) the Court held that a request for "any and all records generated * * * containing any reference whatsoever to [the requester]" fails to identify the records sought with sufficient clarity. Parks' request for "[r]ecords that discuss me in regard to my Facebook page being removed" is similarly ambiguous and overly broad.

2009-Ohio-1767, 905 N.E.2d 1221, ¶ 22. The attorney-client privilege extends to government agencies (including their administrative personnel) consulting with in-house counsel for legal advice or assistance. *State ex rel. Lanham v. DeWine,* 135 Ohio St.3d 191, 2013-Ohio-199, 985 N.E.2d 467, ¶ 22-30. The rank of employees providing information is irrelevant if information is consciously communicated to legal counsel for the purpose of providing legal advice. *See Upjohn Co. v. United States*, 449 U.S. 383, 101 S.Ct. 677, 66 L.Ed.2d 584 (1981). An *in camera* inspection of withheld records may be necessary, *Lanham* at ¶ 21-23, and has been conducted in this case.

{¶14} A public office may withhold only the portion of the record that falls squarely within any claimed exception.

> If a public record contains information that is exempt from the duty to permit public inspection or to copy the public record, the public office or the person responsible for the public record shall make available all of the information within the public record that is not exempt.

R.C. 149.43(B)(1). When asserting the attorney-client privilege, the public office must redact only the exempt portions of the record, and then provide the requester with the nonexempt portions in compliance with this express duty in R.C. 149.43(B)(1). *State ex rel. Anderson v. Vermilion*, 134 Ohio St.3d 120, 2012-Ohio-5320, 980 N.E.2d 975, ¶ 19-24. Berger has withheld four email strings in their entirety. In order to determine the exempt portions of each record, the court issued an order directing respondent to file a pleading and/or affidavit providing the following information for each withheld document:

> Identify by page, paragraph, line, and word, as appropriate, those portions of the document that respondent asserts are communication relating to the purpose of legal advice from Berger's legal adviser(s) in their capacity as such.

(August 3, 2018 Order.) Instead, respondent filed only a general assertion that the emails were protected by the attorney-client privilege in their entirety. (August 20, 2018 Respondent’s Pleading, Exh. A.)

{¶15} A party asserting the attorney-client privilege bears the burden of showing the applicability of the privilege. *MA Equip. Leasing I, LLC v. Tilton*, 2012-Ohio-4668, 980 N.E.2d 1072 ¶ 21 (10th Dist.); *see State ex rel. Pietrangelo v. Avon Lake,* 146 Ohio St.3d 292, 2016-Ohio-2974, 74 N.E.3d 419, ¶ 9. In this case, respondent has submitted the affidavit of Tim Colburn attesting generally that "I consider all communications with legal counsel regarding this matter to be privileged and confidential." (Colburn Aff. at ¶ 4.) In addition to its conclusory assertions that the emails contain attorney-client privileged material, Berger has provided the names, titles, and roles of the correspondents who were parties to the email communications. (August 20, 2018 Respondent's pleading, Exh. A.) Berger's response lacks any detailed or section-specific explanation of communication content, or of any legal argument that header, signature, forwarding, and other information surrounding the actual communication text is privileged, or of any argument that non-exempt withheld information was otherwise made available to the requester or is inextricably intertwined. *See Pietrangelo* at ¶ 11-17. In the absence of detailed supporting evidence and argument from Berger, the court is left to review the withheld documents for any material that self-evidently meets the definition of attorney-client (A-C) and/or attorney work product (WP) privileged material.

{¶16} On review of the withheld documents *in camera*, I find that all are email communications between Berger Hospital CEO Tim Colburn, and legal counsel to Berger or counsel with common legal interest. Several email chains include forwarded emails between two of Berger's counsel. Applying the claimed privileges, I find the following:

Page(s)	Determination
Berger_001	Header information is not covered by A-C or WP privilege, other than the text in the Subject line that follows the second forward slash mark.

	Message content is A-C privileged. Signature block is not covered by A-C or WP privilege.
Berger_002	*Two emails on page. For both:* Header information is not covered by A-C or WP privilege. Message content is A-C privileged. Signature block is not covered by A-C or WP privilege.
Berger_003, and Berger_008	Header information is not covered by A-C or WP privilege. Message content is A-C privileged, except for first line of text following salutation. Signature block is not covered by A-C or WP privilege.
Berger_004, and Berger_009	*First email:* Contains no text content. Not covered by A-C or WP privilege. *Second email:* Header information is not covered by A-C or WP privilege. Message content is A-C privileged. Signature block is not covered by A-C or WP privilege.
Berger_005 to Berger_007, and Berger_010 to Berger_012	*Two emails.* As forwarded, both constitute A-C privileged material. As originated, both constitute WP privileged material. May be redacted in entirety including headers and signature blocks.
Berger_013	*First email:* Same as second email on Berger_002. *Second email:* Same as Berger_003.
Berger_014	*Email at bottom of page:*

	Same as first email on Berger_004 and Berger_009.
Berger_015 to Berger_017	*First complete email on Berger_015:* Same as second email on Berger_004 and Berger_009. *Remaining emails:* Same as Berger_005 to Berger_007 and Berger_010 to Berger_012.

Conclusion

{¶17} Upon consideration of the pleadings and attachments, I recommend that the court grant Parks' claim for relief for partial production of the withheld records from Request No. 2 as detailed above, and deny all other claims. I recommend that costs be assessed equally between the parties.

{¶18} *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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Sent to S.C. Reporter 10/26/18