

[Cite as *Mohr v. Colerain Twp.*, 2018-Ohio-5015.]

KATHY J. MOHR

Requester

v.

COLERAIN TOWNSHIP

Respondent

Case No. 2018-01032PQ

Special Master Jeffery W. Clark

REPORT AND RECOMMENDATION

{¶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} On March 12, 2018, requester Kathy Mohr made a request to respondent Colerain Township for “the waiver document for health insurance, and would like to know all employees who are participating in this, and the amount for each official/employee.” (Complaint at 4.) The Township responded with a copy of the waiver form and corresponding policy, but withheld the names of participating employees as non-records. (*Id.* at 5.) On April 21, 2018, Mohr made a request to the Township for “a record of internet/Wi-Fi use by non-contract employees for October-December, 2017; and Jan-March, 2018.” (*Id.* at 2.). On April 23, 2018, the Township responded, “We have no records to fill this request.” (*Id.* at 3.)

{¶3} On July 2, 2018, Mohr filed a complaint under R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, the Township filed a motion to dismiss (Response) on September 4, 2018. The Township filed a supplemental response on September 27, 2018 pursuant to court order. On October 15, 2018, Mohr filed a reply. On November 15, 2018, the Township filed a limited waiver of privilege.

Motion to Dismiss

{¶4} The Township moves to dismiss the complaint on the grounds that, 1) it is under no legal obligation to provide non-record information, 2) it is prohibited from disclosing personal history information of state retirement fund contributors,¹ and 3) it is under no duty to create records where none exist. 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).

{¶5} Although both were arguably framed as requests for information rather than for reasonably identified records, the Township did not deny these requests as improper prior to the filing of the complaint. The second request seeks a “record” containing specific information, and the Township’s defense of non-existence is not conclusively proven on the face of the complaint and attachments. I recommend that the court overrule the motion to dismiss, and determine both claims on the merits.

Ambiguous and Overly Broad Requests

¹ Although the Township did not assert this and several other defenses until they were raised for the first time in its pleadings, a public office’s initial explanation “shall not preclude 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).

{¶6} Mohr's first request is for "the waiver document for health insurance, and would like to know all employees who are participating in this, and the amount for each official/employee." (Complaint at 4.) 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, ¶ 21-22. A public office is not required to create new documents in response to a public records request. *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 30; *Salemi v. Cleveland Metroparks*, 8th Dist. Cuyahoga No. 100761, 2014-Ohio-3914, ¶ 28-30. Mohr's statement that she "would like to know all employees who are participating in this, and the amount for each official/employee" is framed as a question to be answered, rather than a request for any particular, reasonably identified record. I find that the request is thus ambiguous and overly broad.

{¶7} However, the Township did not deny this request as ambiguous or overly broad, which would have triggered a mandatory obligation to provide Mohr with information and opportunity to revise her request. R.C. 149.43(B)(2); *Salemi* at ¶ 27. Instead, the Township accepted and endeavored to respond to the request, by providing a "Wage Withholding Summary" of all Township employees, with redactions. (Sept. 27, 2018 Harlow Aff. at ¶ 3; Exh. A.) The Township later provided redacted "Wage Detail" reports for several individual employees. (*Id.* at ¶ 4; Exh. B.) Because the Township chose to respond to the request, I recommend the court find the defense of overbreadth has been waived to the extent responsive records have been provided, and proceed to determine whether the redactions made by the Township are supported by law.

Health Insurance Deductions and Waivers

{¶8} The parties agree that Township employees who opt out of Township-provided health care sign a waiver form and receive a waiver payment that is reflected in the Gross Wages column of the Wage Withholding Summary for employees, as well

as in the Withholdings section of individual Wage Detail reports. (*Id.* at ¶ 3-4.) The Township asserts that these individual employee payroll deductions are personal matters that do not document the official duties and functions of the office, and are therefore not “records” subject to the Public Records Act. The Township further asserts that individual waiver payment information and withheld retirement contribution amounts are subject to statutory exemption under R.C. 1347.05(G), and R.C. 145.27(A)(2)(c), respectively.

Non-Records

{¶9} Mohr is entitled to relief only if she requested “records” that are subject to the Public Records Act. “Records” are defined in R.C. 149.011(G) as including

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.

The definition of “record” does not include every piece of paper on which a public officer writes something, or every document received by a public office. *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 13. R.C. 149.011(G) requires more than mere receipt and possession of an item for it to be a record for purposes of R.C. 149.43. *State ex rel. Beacon Journal Publ’g Co. v. Whitmore*, 83 Ohio St.3d 61, 64, 697 N.E.2d 640 (1998). With respect to public employees, “[t]o the extent that any item contained in a personnel file is not a ‘record,’ *i.e.*, does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed.” *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188, 610 N.E.2d 997 (1993).

{¶10} A requester seeking items withheld as non-records must establish that they “create a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of the [public office].” *State*

ex rel. Dispatch Printing Co. v. Johnson, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 22. This is fully consistent with the purposes of the Public Records Act:

As we noted in *McCleary*, disclosure of information about private citizens is not required when such information “reveals little or nothing about an agency’s own conduct” and “would do nothing to further the purposes of the Act.” 88 Ohio St.3d at 368 and 369, 725 N.E.2d 1144, quoting *United States Dept. of Justice v. Reporters Commt. for Freedom of the Press* (1989), 489 U.S. 749, 780, 109 S.Ct. 1468, 103 L.Ed.2d 774.

State ex rel. Beacon Journal Publ'g Co. v. Bond, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 9-13. *Accord Dispatch* at ¶ 27. See *International Union, United Auto., Aerospace & Agric. Implement Workers v. Voinovich*, 100 Ohio App.3d 372, 376, 654 N.E.2d 139 (10th Dist.1995) (personal calendars and appointment books); *Sandine v. Argyle*, Ct. of Cl. 2017-00891-PQ, 2018-Ohio-1537, ¶ 2, 12-14 (employee records showing child support arrearages).

{¶11} The records sought by Mohr document optional health insurance choices made by employees. The records do not document the employees’ performance of work on the “organization, functions, policies, decisions, procedures, operations, or other activities” of the public office. See *Dispatch* at ¶ 26. While total expense and other collective statistical information regarding the health waiver option would be records of the agency’s financial operations, the choices of individual employees do not document the agency’s official functions. See *State ex rel. Jones v. Myers*, 61 Ohio Misc.2d 617, 581 N.E.2d 629 (C.P.1991) (court did not analyze status as “records,” but found choices regarding personal financial matters subject to right of privacy).

{¶12} “Inherent in Ohio’s Public Records Law is the public’s right to monitor the conduct of government,” and the very purpose of the Act is to expose governmental activity to public scrutiny. *Dispatch* at ¶ 27, citing *McCleary*. Mindful of this purpose, I find under the facts and circumstances of this case that disclosure of an individual employee’s health insurance opt-in or waiver would not help to “monitor the conduct of state government” and would reveal little or nothing about the agency or its activities. I

find that Mohr fails to meet her burden to prove that this information is a “record” subject to the Public Records Act.

Claimed Exceptions

{¶13} R.C. 149.43(A)(1) sets forth specific exceptions from the definition of “public record” as well as 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 public office bears the burden of proof to establish the applicability of any 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.

{¶14} Where a public record does not fall under any statutory exception, the public office must disclose the record. *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 29. Records custodians are not authorized to create new exceptions based on a balancing of interests or generalized privacy concerns. *Id.* at ¶ 31. The General Assembly is the ultimate arbiter of public policy, and a public office may not withhold records simply because it disagrees with the policies behind the law permitting their release. *Id.* at ¶ 37. See *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 172, 637 N.E.2d 911 (1994).

R.C. Chapter 1347

{¶15} The Township argues that the opt-out and waiver payment entries are personal information as defined in R.C. 1347.01(E), and that the Township is under an affirmative duty to prevent its disclosure under R.C. 1347.05(G). (Response at 5-6.) R.C. 1347.05 provides, in relevant part:

Every state or local agency that maintains a personal information system shall:

* * *

(G) Take reasonable precautions to protect personal information in the system from unauthorized modification, destruction, or disclosure.

This proscription applies only to personal information in a “personal information *system*.” Assuming *arguendo* that the opt-out and waiver payment entries are “personal information,” the Township has presented no evidence that these entries are part of a “personal information system.” R.C. 1347.01(F) provides that

“System” does not include * * * routine information that is maintained for the purpose of internal office administration, the use of which would not adversely affect a person.

This language appears to broadly exclude routinely kept personnel and financial files, for any contents that “would not adversely affect a person,” from the definition of the protected “system.” The Township submitted no evidence that disclosure of the employees’ opt-out information would “adversely affect” them in any way. Nor may the courts presume that a general desire for privacy creates an exception. *WBNS TV, Inc. v. Dues* at ¶ 31. I find that the Township has failed to prove by clear and convincing evidence that the information is part of a protected personal information system under the definition in R.C. 1347.01(F). I therefore recommend that the court find that R.C. 1347.05(G) does not apply to the withheld information.

R.C. 145.27(A)

{¶16} The Township asserts that its records of employee contributions to the state retirement system are exempted from disclosure under R.C. 145.27(A)(2)(c). I find, first, that Mohr never requested Township records of employee contributions to the state retirement system. While this information coincidentally appears in the larger records containing the insurance opt-in and waiver payment information, it is non-responsive to the request and thus could be withheld even if it were not subject to any public records exception.

{¶17} Further, the opt-out payment would not indirectly reveal anything about an employee’s retirement benefits, because retirement benefits are based only on earnable

salary. R.C. 145.017. R.C. 145.01(R)(2)(b) exempts amounts paid by an employer in lieu of providing insurance from “earnable salary,” and therefore does not reveal an employee’s record of contributions. See R.C. 145.48.

{¶18} Moreover, R.C. 145.27(A) applies only to records “maintained by the public employees retirement board,” not to information maintained by an employing agency. R.C. 145.27(A)(2)(c) provides:

(2) The records of the board shall be open to public inspection and may be made available in printed or electronic format, except that the following shall be excluded, except with the written authorization of the individual concerned:

* * *

(c) The individual's personal history record.

As used in R.C. 145.27(A), “personal history record” means

information *maintained by the public employees retirement board* on an individual who is a member, former member, contributor, former contributor, retirant, or beneficiary that includes the address, telephone number, social security number, record of contributions, correspondence with the public employees retirement system, or other information the board determines to be confidential.

R.C. 145.27(A)(1).

{¶19} A public office may not utilize an exception that is limited to other agencies. *State ex rel. Beacon Journal Publg. Co. v. Akron*, 104 Ohio St.3d 399, 2004-Ohio-6557, 819 N.E.2d 1087, ¶ 36-45 (police department could not assert exception applying only to similar reports of children services agencies); *State ex rel. Gannett Satellite Info. Network v. Petro*, 80 Ohio St.3d 261, 266, 685 N.E.2d 1223 (1997) (auditor could not assert grand jury records exception applying only to other officials). I find that the Township has not shown by clear and convincing evidence that the exception in R.C. 145.27(A)(2)(c) applies to Township information withheld in response to Mohr’s first request.

Non-existent Records

{¶20} Mohr's second request was for "a record of internet/Wi-Fi use by non-contract employees for October-December, 2017; and Jan-March, 2018." (Complaint at 2.) The Township fiscal officer attests that no such records are kept by Colerain Township. (Sept. 4, 2018 Harlow Aff. at ¶ 2-3; Sept. 27, 2018 Harlow Aff. at ¶ 8.) 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, 6 N.E.3d 471, ¶ 5, 8-9; *State ex rel. Chatfield v. Gammill*, 132 Ohio St.3d 36, 2012-Ohio-1862, 968 N.E.2d 471. I find that the Township has met its burden to support the non-existence of records responsive to this request. *State ex rel. Fant v. Flaherty*, 62 Ohio St.3d 426, 427, 583 N.E.2d 1313 (1992); *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 14-15. Confirming this assertion, Mohr has advised the court "I understand there is not [sic] record to support this request." (Reply.) I recommend the court find there is no evidence that Mohr has been denied access to records described in the second request.

Conclusion

{¶21} Upon consideration of the pleadings and attachments, I recommend that the court DENY requester's claims for production of records in this case because the requests are for either non-records, or for records that do not exist. I recommend that court costs be assessed to requester.

{¶22} 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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-10- REPORT AND RECOMMENDATION

JEFFERY W. CLARK
Special Master

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