

[Cite as *Viola v. N. Royalton*, 2021-Ohio-1153.]

ANTHONY VIOLA

Requester

v.

CITY OF NORTH ROYALTON

Respondent

Case No. 2020-00477PQ

Judge Patrick E. Sheeran

DECISION AND ENTRY

{¶1} This case is before the Court on Requester’s Objections to the Report and Recommendation of the Special Master. For the reasons that follow, this Court OVERRULES the Objections and ADOPTS the Report and Recommendation of the Special Master.

1. Background

{¶2} On June 26, 2020, Requester Anthony Viola (“Viola”) made a public records request from the City of North Royalton (“Respondent”). The request was for “all releaseable (sic) public records related to Ward 6 Councilman Daniel Kasaris, particularly emails from his Yahoo account with an official city signature on them, that mention or contain the following names, or are to/from those individuals.” Thereafter, Viola listed the names of nine persons, plus the phrase “Task Force” or “Mortgaged Fraud Task Force.”

{¶3} Six days later, Respondent replied that it did not maintain, own, or control any private emails of Kasaris. In response, Viola noted that Respondent had an obligation to identify any emails Kasaris sent from his private account, acknowledging that, pursuant to his Public Records request, he had already received the emails from Respondent’s official account for Ward Six. Viola asked Respondent to “let him know” if emails from Kasaris’ private account concerned official city business. Respondent answered by noting a further inquiry had been made but reiterated that it had no control over any personal email accounts of city officials.

{¶4} As a result of the foregoing, Viola filed a complaint with this Court, asking that a search be made of Kasaris' private email account. Viola noted that Kasaris affixed his 'official government signature' which identified him as a City Council member to private emails sent from Kasaris' Yahoo email account.

{¶5} Respondent filed a Motion to Dismiss, which, because the matter had been fully briefed, the Special Master recommended that the Motion to Dismiss be denied, and the case determined on its merits. The Special Master then proceeded to consider the merits of the case and concluded that Respondent had not violated R.C. 149.43(B).

{¶6} Viola has filed four Objections to the Special Master's Report and Recommendation. These are:

1. The Magistrate did not address that Kasaris submitted a materially false affidavit, wherein he swore he NEVER used his private Yahoo [email] account for his official business.
2. An objection to the Special Master's finding that "Viola does not point to any action, decision, or other activity recorded in these emails that documents the official duties or activities of Kasaris as a city councilperson. Viola noted that "Private emails of Kasaris *may* constitute public records, and must be searched." (Emphasis added)
3. The Magistrate failed to require the city, at a minimum, to determine whether or not it possesses emails forwarded from the Kasaris private email account on its server, and indicate whether or not those records were part of the materials searched.
4. The Magistrate's Report never answered the question as to whether or not emails between a prosecutor and government witness constitute public records, requiring the production of all Kasaris-Clover emails.

2. Law and Analysis

{¶7} R.C. 2743.75(F)(2) governs objections to a Special Master's report and recommendation. Pursuant to R.C. 2743.75(F)(2), either party

[M]ay object to the report and recommendation within seven business days after receiving the report and recommendation by filing a written objection with the clerk and sending a copy to the other party by certified mail, return receipt requested. * * * If either party timely objects, the other party may file with the clerk a response within seven business days after receiving the objection and send a copy of the response to the objecting party by certified mail, return receipt requested. The Court, within seven business days after the response to the objection is filed, shall issue a final order that adopts, modifies, or rejects the report and recommendation.”

{¶8} In considering these four objections, it must be kept in mind that what this Court is asked to consider is whether the Special Master erred in recommending dismissal of this case for lack of a violation of R.C. 149.43(B), where Requester asked for emails from a private email account. This Court will consider the Second, Third, and Fourth Objections before reviewing the First Objection.

A. The Materials Requester Seeks on Kasaris’ Private Email Account Do Not Constitute Public Records.

{¶9} In order to decide this case, the main inquiry is whether the emails from the private server are public records, and who has the burden of showing whether they are or are not.

R.C. 149.43 (B) reads in pertinent part as follows:

...all public records responsive to the request shall be promptly prepared and made available for inspection to any person at all reasonable times during regular business hours.

R.C. 149.011(G) defines record as “

[A]ny document, device or item, regardless of physical form...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.*” See R.C. 149.011(G). (Emphasis added).

{¶10} In considering the public records request made by Viola, which is for a search of Kasaris’ email account given certain search terms, the Special Master noted

that the search terms “appear to relate to Kasaris’ previous employment as an assistant prosecuting attorney.”ⁱ From the record in this case, this Court clearly agrees with that assessment. Having reviewed the emails submitted by Viola that came from the private email account of Kasaris, this Court agrees with the Special Master that none of them, in any way, show anything that would make them fit within the definition of “record” noted above. Further, Viola does not present any evidence that there actually **are** any such records on the private email account; he merely asserts that there **may** be such on said email account.ⁱⁱ

{¶11} In addition, Viola bears the burden, by clear and convincing evidence, that any public records he seeks from Kasaris’ private email account are in fact public records. Viola argues that because each of the emails from Kasaris’ private account have the seal of the office he holds on North Royalton’s City Council, all such records are public records. This argument exalts form over substance, fails to account for the statutory definition of ‘record’ as noted *supra*, and therefore lacks merit. See, e.g. *State, ex rel. Cincinnati Enquirer v. Ronan* 127 Ohio St. 3d 236, 2010 Ohio 5680, where the Ohio Supreme Court stated, at ¶ 13:

Just as R.C. 149.43(A)(1) ‘does not define a “public record” as any piece of paper on which a public officer writes something,’ *State ex rel. Steffen v. Kraft* (1993), 67 Ohio St.3d 439, 440, 1993 Ohio 32, 619 N.E.2d 688, 689; R.C. 149.43 and 149.011(G) do not define ‘public record’ as any piece of paper received by a public office that *might* be used by that office. Cf. *Tax Analysts v. United States Dep’t of Justice* (C.A.D.C.1988), 845 F.2d 1060, 1068, 269 U.S. App. D.C. 315 (‘Of course, agency possession and power to disseminate a document are still insufficient by themselves to make it an “agency record.” * * * Agencies must use or rely on the document to perform agency business, and integrate it into their files, before it may be deemed an “agency record” ’). 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.” (Emphasis sic.) Id. at 64.

B. A Claim that a Private Email Account *May* Contain Public Records is Insufficient to Authorize a Search of that Email Account.

{¶12} Viola’s Second Objection then argues that because the Magistrate noted that Kasaris’ use of his private email account *may* contain public records, he therefore is entitled to have a search of those records done by Respondent. This contention lacks merit. Assuming, for purposes of this sentence, that Respondent would be able to search the private email of a *former* member of City Council, Viola must still meet his burden of persuasion, by showing that public records actually exist or are likely to exist there, and he must do so by clear and convincing evidence. The only evidence properly before this Court involve clearly private emails that have no relation whatsoever with North Royalton city business.

{¶13} Based on the foregoing, Viola’s Second Objection lacks merit, and is therefore OVERRULED.

{¶14} Viola’s Third Objection asks for confirmation that the emails that Kasaris forwarded from his private email account actually made it to his public email account. This is simply a back door argument to seek relief that would require Respondent to search the private email account of Kasaris. In addition to the burden of persuasion Viola has not met, it must be noted that Respondent complied with Viola’s initial request (despite it being, at least arguably, overly broad) for “all releasable public records related to Ward 6 Councilman Daniel Kasaris.” Respondent’s Answer, at ¶ 4, admits that Viola made that request, and that such records were provided to Viola in a timely manner. Viola acknowledged this in his Complaint, wherein he stated “We have previously obtained emails from the city’s official account.”ⁱⁱⁱ Hence, his Complaint made no further requests for any records kept by Respondent regarding Kasaris, but focused exclusively on the private email account of Kasaris.

{¶15} Based on the foregoing, Viola's Third Objection lacks merit, and is OVERRULED.

C. A Magistrate is not Required to Answer Questions that are Not Relevant to the Case.

{¶16} Viola's Fourth Objection is that the Magistrate never answered the question of whether or not emails between a prosecutor and a government witness constitute public records.

{¶17} The straightforward answer to this Objection is that this question has no relevance whatsoever to the relief Viola seeks from *this* Respondent. Assuming for purposes of argument that the City of North Royalton could legally search Kasaris' private email account, nothing posited by Viola would make any such email a public record insofar as the City of North Royalton is concerned. Respondent has no obligation to search for, much less turn over, emails that simply do not concern it. In short, Respondent is not a clearing house for information that does not relate to its municipal functions, and it has no authority to extend its powers in that direction. See: *Cvijetinovic v. Cuyahoga County Auditor* (8th App. Dist., Cuyahoga No. 96055), 2011 Ohio 1754, at ¶ 4 (“[T]he right to inspect public record***is dependent upon a request to the public office responsible for the public records.”).

{¶18} Respondent's Fourth Objection also lacks merit and is OVERRULED.

D. The Affidavits Viola Objects to are Not Relevant to this Case.

{¶19} Respondent's First Objection is that Kasaris submitted contradictory affidavits, thus rendering his denials of keeping emails relating to his work as a member of City Council suspect, and necessitating Respondent to search Kasaris' private email account.

{¶20} Paragraph 4 of the first Kasaris Affidavit (dated October 21, 2020), states:

The Affiant possesses no E-mails sent or received by him on his personal E-mail account which meet the definition of “records” of the Ohio

Attorney General's Office under R.C. 149.011(G) in that they serve to document the organization, function, policies, decisions, procedures, operations or other activities of said Office.

{¶21} Kasaris' second affidavit, included in Respondent's Answer, and separately included in Respondent's Motion to Dismiss, both filed on November 30, 2020, contains the following, at Paragraph 12:

On the rare occasion a North Royalton constituent would inadvertently send me an email on my Yahoo email account, when I replied to the particular email I cc'ed my City of North Royalton email account, Ward6@northroyalton.org. This would have the effect of forwarding the mail to the City Email account for the Ward 6 representative. Any further communication with that resident could then occur, and in my City of North Royalton email account.

{¶22} Viola argues that these emails are contradictory, and therefore the credibility of Kasaris is highly suspect. However, a close reading of these two paragraphs does not show a contradiction. Consider that the first paragraph is written in the present tense; that is, as of October 21, 2020, Kasaris 'possesses'—that is; at that time, he had no such emails. In the second Affidavit, dated November 24, 2020, Kasaris noted that there were rare occasions where "a North Royalton constituent" *had* "inadvertently" sent an email to the Yahoo account. He stated his practice in such instances—to forward said emails to his official account with Respondent, and deal with them from that account.

{¶23} While it could be argued that the original constituent emails could still be on the Yahoo account, Kasaris partially addressed this in a third Affidavit, which is contained in the Objections filed by Viola. It must be noted that this Affidavit was part of a filing by the Attorney General's Office as the Respondent in Case No. 2020-00507PQ, There, in ¶ 12, in discussing emails from the time when he worked at the Attorney General's office ("AGO"), he stated he deleted case notes he had sent to his Yahoo account. In any event, such emails, according to Kasaris, had nothing to do with Viola.

They also have nothing to do with the instant case. Kasaris noted that the emails referenced in that affidavit related to a criminal case that had nothing to do with Viola, and that Kasaris deleted the emails once that criminal case was over. There is nothing in the record that even remotely suggests that this affidavit has anything to do with Respondent.

{¶24} A review of all these affidavits clearly show that Viola's burden of persuasion is not materially advanced—or advanced at all—by these affidavits. Therefore, Viola has produced nothing that could remotely constitute clear and convincing evidence to show that public records exist on the Yahoo account of Kasaris that have any relevance or materiality to the request he has made in this case.

{¶25} Insofar as Viola submits that he has a good faith belief that such documents do exist, the Ohio Supreme Court answered that submission by noting that such a belief

[D]oes not constitute sufficient evidence to establish that the documents do exist..." *State, ex rel. McCaffery, v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St. 3d 139, 2012 Ohio 4246, at ¶ 26.

{¶26} Based on the foregoing, the First Objection lacks merit and is OVERRULED.

3. Conclusion

{¶27} This Court, having made an independent review of this case, ADOPTS the Report of the Special Master. Judgment is rendered in favor of Respondent. Court costs are assessed against Requester. The Clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

{¶28} IT IS SO ORDERED.

PATRICK E. SHEERAN
Judge

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- ⁱ January 22, 2021 Report and Recommendation of the Special Master, at 5.
ⁱⁱ Objections to the Report and Recommendation, filed February 9, 2021, at 2.
ⁱⁱⁱ See Requester's Complaint, Exhibit G, at p. 1.