

[Cite as *Viola v. N. Royalton*, 2021-Ohio-748.]

ANTHONY VIOLA

Requester

v.

CITY OF NORTH ROYALTON

Respondent

Case No. 2020-00477PQ

Special Master Jeff Clark

REPORT AND RECOMMENDATION

{¶1} Ohio’s Public Records Act provides that upon request a public office “shall make copies of the requested public record available to the requester at cost and within a reasonable period of time.” R.C. 149.43(B)(1). Ohio courts construe the Public Records Act liberally in favor of broad access, with any doubt resolved in favor of disclosure of public records. *State ex rel. Hogan Lovells U.S., L.L.P. v. Dept. of Rehab. & Corr.*, 156 Ohio St.3d 56, 2018-Ohio-5133, 123 N.E.3d 928, ¶ 12. This action is brought under R.C. 2743.75, which provides an expeditious and economical procedure in the Court of Claims to resolve public records disputes.

{¶2} On June 26, 2020, requester Anthony Viola made a public records request to respondent City of North Royalton as follows:

I am writing to respectfully request all releasable public records related to Ward 6 Councilman Daniel Kasaris, particularly e mails from his Yahoo account with an official city council signature on them, that mention or contain the following names, or are to/from these individuals:

- (1) Tony Viola or Anthony Viola
- (2) Dawn Pasela
- (3) Matt Fairfield
- (4) Kathyryn or “Kat” Clover
- (5) Bryan Butler
- (6) “Task Force” or “Mortgaged Fraud Task Force”
- (7) Arvin Clar
- (8) Peter Beck
- (9) Jay Milano
- (10) Mark Bennett.

(Complaint at 22-23.) On July 2, 2020, the director of legislative services for the City responded, in pertinent part:

I am in receipt of your recent Public Records Request regarding ex Councilman Daniel Kasaris. The City of North Royalton does not maintain, own or control any private email accounts including Mr. Kasaris' Yahoo email.

In your request you stated "particularly e mails from his Yahoo account with an official city council signature on them". At this time are you looking to request records from his City email account though December 31, 2019 or just his personal Yahoo account? If so, please provide me with that request.

(*Id.* at 21-22.) On July 3, 2020, Viola replied, in pertinent part:

Since Mr. Kasaris added an official stamp to his Yahoo email account indicating he was a Ward 6 Councilman in North Royalton, I believe you have an obligation to identify any e mails he sent from that account that are responsive to the public records requests. We have previously obtained emails from the city's official account, so we are asking you to consult with Mr. Kasaris and let us know (1) which e mails from his private email account concern official city business; and (2) Weather or not the city is willing to assist in obtaining the records we are requesting.

(*Id.* at 21.) On July 7, 2020, the director responded:

In response to your July 3rd email, a further inquiry was made. All public records were maintained on Mr. Kasaris' city email account (ward6@northroyalton.org) pursuant to the city's retention schedule. We do not maintain, control or own any personal email accounts of city officials and employees.

(*Id.*)

{¶} On August 6, 2020, Viola filed his complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). On August 14, 2020, the special master issued an order directing the City to preserve and maintain all emails responsive to requester's public records request that were in the personal email account of city councilman Dan Kasaris on the date of the request. On September 29, 2020, Viola submitted a supplemental pleading with additional documents in support of

his claim. In the absence of objection by the City, and pursuant to Civ.R. 15(E) and R.C. 2743.75(E)(2), the special master directs the clerk to accept this supplemental pleading for filing. Following unsuccessful mediation, the City filed an answer and a separate motion to dismiss on November 30, 2020. Viola filed opposition to the City's motion to dismiss (Reply) on December 8, 2020.

Motion to Dismiss

{¶4} In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the claimant can prove no set of facts warranting relief after all factual allegations of the complaint are presumed true and all reasonable inferences are made in claimant's favor. *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 581, 669 N.E.2d 835 (1996). As long as there is a set of facts consistent with the complaint that would allow the claimant to recover, dismissal for failure to state a claim is not proper. *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 10. The unsupported conclusions of a complaint are, however, not admitted and are insufficient to withstand a motion to dismiss. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988).

{¶5} The City argues that the complaint fails to state a claim against it under the Public Records Act because: 1) Viola's request seeks email that does not document the duties or activities of Kasaris as a City councilperson, and 2) the City does not maintain, control or own any personal email accounts of City officials and employees. On consideration of the motion, the special master finds that the status of the requested communications as records or non-records of the City is not conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed this argument is subsumed in the City's defense on the merits. It is therefore recommended that that the motion to dismiss be denied, and the case determined on the merits.

Burden of Proof

{¶6} A requester must establish any public records violation by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶¶ 27-30 (5th Dist.). At the outset, Viola bears the “burden of production” to plead and prove facts showing that he sought identifiable public records pursuant to R.C. 149.43(B)(1), and that the City did not make those records available. *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, 2020-Ohio-5371, ¶¶ 33. As part of this burden, Viola must show that the items sought meet the statutory definition of “records,” and that the records were kept by the City.

Viola seeks the following relief:

I am respectfully asking the Ohio Court of Claims to determine whether or not Mr. Kasaris utilized his personal Yahoo E Mail account to conduct official business, and whether or not affixing his official government signature on these e mails requires - at a minimum - that government agencies at least search that account for responsive public records.

(Complaint at 4.) The City agrees that Kasaris maintained a personal email account but denies there is any evidence that City email “records” exist there. The City denies that it has any obligation to conduct a search of Kasaris’ personal account.

Records and Non-Records

“Records” are defined in R.C. 149.011(G) as including:

any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, 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.

A putative record must satisfy all three elements of the definition. The parties do not dispute that email communications meet the first element as “any document” and “an electronic record.” However, the City argues that Viola fails to prove that any requested email from Kasaris’ personal account meets the third element of serving “to document

the organization, functions, policies, decisions, procedures, operations, or other activities *of the office*.” Analysis will thus focus on the third element.¹

{¶7} The definition of a “record” does not include every piece of paper on which a public officer writes something. *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 13. Even for email within a public office’s official account, a requester must show that the email actually served to document “an official duty or activity of the office” to qualify as a record of the office. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff’s Dept.*, 82 Ohio St.3d 37, 41, 693 N.E.2d 789 (1998) (e-mail consisting of racist slurs against a co-worker, although reprehensible, was not used to conduct sheriff’s department business). *Accord State ex rel. Beacon Journal Publ. Co. v. Whitmore*, 83 Ohio St.3d 61, 63-64, 697 N.E.2d 640 (1998). The test is not whether Viola feels an email could be useful or of interest to him, but rather whether it was used by the City to document its official duties and activities.

Records “Kept By” a Public Office

{¶8} A person may only request public records from the public office or person responsible for them. *Cvijetinovic v. Cuyahoga Cty. Auditor*, 8th Dist. Cuyahoga No. 96055, 2011-Ohio-1754, ¶ 4. The search terms used by Viola to identify the desired emails appear to relate to Kasaris’ previous employment as an assistant prosecuting attorney. *See Viola v. Cuyahoga Cty. Prosecutor’s Office*, Ct. of Cl. No. 2020-00506PQ (Report and Recommendation Jan. 7, 2021). Although identical documents may serve as records documenting the activities of more than one public office, *State v. Sanchez*, 79 Ohio App.3d 133, 136, 606 N.E.2d 1058 (6th Dist.1992), Viola has made no such assertion here. Instead, Viola argues that because Kasaris used his City title in the signature block of his personal email, all such email is a public record of the City.

Non-Existent Records

¹ Neither party expressly addresses the second statutory element – that the item must have been “created or received by or [come] under the jurisdiction of” the public office. For the sake of concision, this issue will not be analyzed in this report, as the outcome is conclusively resolved by the third element.

{¶9} A public office has no duty to provide records that do not exist, or that it 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. An office may establish by affidavit that all existing records have been provided. *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 Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 15. Although the office's affidavit may be rebutted by evidence showing a genuine issue of fact, a requester's mere belief based on inference and speculation does not constitute the evidence necessary to establish that a document exists as a record. *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.

Evidence Submitted

{¶10} Former Assistant Prosecuting Attorney Daniel Kasaris maintained a private email account, danieljkasaris@yahoo.com, at all times relevant to this action. (Kasaris Aff. at ¶ 7-8.) With respect to Viola's requests, Kasaris attests that:

I have conducted a search of my personal email account, danieljkasaris@yahoo.com based on the criteria set forth in Requester's public records request. That search yielded no emails that relate to any case or matter involving the CCPO or that related to my employment or duties with the CCPO.

(Kasaris Aff. at ¶ 10.) This testimony is some evidence supporting the non-existence of responsive City records in his personal account. Kasaris admits that he included his office title in the signature block he used for his personal account. This practice can indicate a signer is communicating in his official capacity, but could be merely for vanity or, as Kasaris attests, "as a means of promoting my political interest." (*Id.* at ¶ 11.) The use of his office title in the signature block does not, standing alone, constitute clear and convincing evidence that any email in Kasaris' personal account served to document his official duties and activities in the City.

{¶11} In support of his claim, Viola submitted a short string of exemplars from the danieljkasaris@yahoo.com account (Complaint at 5; Supplemental Pleading at 6-7.). However, 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, and none is independently apparent to the special master. The exemplars appear to be entirely personal in nature. Viola has also filed what appear to be office emails provided to Viola by the Cuyahoga County Prosecutor's Office. (Supplemental Pleading at 8-83). None are probative of whether City records exist in Kasaris' personal email account. Viola points to no gaps in other City communications that would imply the existence of missing correspondence. Finally, Viola has filed additional documents and affidavits that are either duplicates of previous filings, irrelevant, or gratuitously salacious. (Reply at 6-24.)

Request to Compel Office Search of a Personal Email Account

{¶12} Viola argues that the City must conduct its own search of Kasaris' personal email account based on Viola's belief that responsive records may exist there. Viola cites no statutory or case law requiring a public office to conduct such a search under these circumstances, or indeed any requirement that individual employees must always review their personal accounts in response to a public records request. *See Gupta v. Cleveland*, Ct. of Cl. No. 2017-00840PQ, 2018-Ohio-3475, ¶ 19. The special master takes notice that the response to a public records request for an individual official's correspondence may often rely appropriately, even necessarily, on identification and retrieval of responsive records by the official himself.

{¶13} To be sure, a public office has a duty to retrieve its public records from wherever they are "kept" within the meaning of the Public Records Act, including electronic records stored only on an employee's personal device. *See Sinclair Media III v. Cincinnati*, Ct. of Cl. No. 2018-1357PQ, 2019-Ohio-2624, ¶ 5-12 and cases cited therein. The assertion that it does "not maintain, control or own any personal email

accounts of city officials and employees” is no defense to the City’s duty to produce City records if any happen to be kept in an employee’s residence, car trunk, email account, private office, etc. Moreover, if a requester provides *prima facie* evidence that an office has improperly deleted emails that are public records, the office may be ordered to recover those records by reasonable means. *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶¶ 26-41.

{¶14} However, in the absence of any evidence to the contrary the City may be presumed to have performed its duties, including public records identification and retrieval, regularly and in a lawful manner. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 29. While an office has no duty under R.C. 149.43 to detail for a requester the steps taken to identify and retrieve requested records, *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26, the City explained to Viola that it obtained relevant testimony from its former employee regarding his personal account and found that no responsive City records were kept there. (Motion to Dismiss at 5.) The former employee attests:

During my years of service to the City of North Royalton as a North Royalton City Councilperson I was assigned the use of a city email address which I used for city business;

I maintain a personal email account with Yahoo.com, Danieljkasaris@yahoo.com. I maintained this account during the time I was a North Royalton City Councilperson. I searched my personal email account, Danieljkasaris@yahoo.com, using the search terms listed in the above public records request. That search yielded no public records of the City of North Royalton that are responsive to the public records request above.

It was my practice to keep my personal emails on my personal email account and to avoid using the Danieljkasaris@yahoo.com account for any city of North Royalton business;

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 had 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 under, and in my City of North Royalton email account;

I acknowledge that I did identify myself as a Ward Six Councilman in the “signature block” on my personal emails as a means of promoting my political interest but never as a means of transacting any actual city or public business.

(Kasaris Aff. at ¶ 9-13.)

{¶15} On the facts and evidence before the court, the special master finds that Viola has not shown that the manner in which the City processed his public records requests violated R.C. 149.43(B). None of the materials submitted by Viola persuade the special master that an *in camera* inspection of the email in Kasaris’ personal account is required. Weighing the evidence before the court, the special master finds that Viola has not met his burden to prove by clear and convincing evidence that any responsive records of the City exist in Kasaris’ personal email account.

Conclusion

{¶16} Based on the pleadings, affidavits, and documents submitted in this action, the special master recommends the court find that requester has not shown that respondent violated R.C. 149.43(B). It is recommended that costs be assessed to requester.

{¶17} *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).

JEFF CLARK
Special Master

Filed January 22, 2021
Sent to S.C. Reporter 3/12/21