

[Cite as *Mentch v. Cleveland*, 2021-Ohio-1564.]

FRANCES MENTCH

Requester

v.

CITY OF CLEVELAND

Respondent

Case No. 2020-00535PQ

Special Master Jeff Clark

REPORT AND RECOMMENDATION

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{¶1} On March 27, 2020, respondent City of Cleveland acknowledged a public records request made by requester Frances Mentch for:

All of Michiel Wackers email and voice messages. All Community Development documents containing the following words or phrases: Dunham Tavern Museum, LASSI, Inc., Cleveland Foundation; Midtown LLC; Tim Collins and Jeff Epstein, and Euclid Ave addresses between 5500 and 7500 Euclid Ave

(Complaint at 4.) Mentch asserts that no records were provided in response to this request prior to her filing this action. (*Id.* at 1.)

{¶2} On March 28, 2020, Cleveland acknowledged a second Mentch request, for “Emails to f collier regarding Dunham Tavern Museum All documents that refer to Dunham Tavern Museum.” (*Id.* at 3.) Cleveland asked Mensch to clarify this request:

In order to request emails, we need a specific time line, keywords and to whom the emails are going to and coming from.

(*Id.* at 5, 8.) On August 17, 2020, Mentch clarified the March 28, 2020 request to:

I am interested in emails and documents attached to those emails that refer to the Dunham Tavern Museum, LASSI, Midtown LLC and Cleveland Foundation and were sent from or to Mr. Freddy Collier.  
Dates: from 1/01/2017 to present.  
keywords: dunham, LASSI, Midtown, Ronn, and Epstein.

(*Id.* at 9.) On September 5, 2020, Cleveland advised Mentch that the March 28, 2020 request had been in Requested Clarification status for 30 days, and that it considered the request closed. (*Id.* at 7.)

{¶3} On September 8, 2020, Mentch filed a complaint pursuant to R.C. 2743.75 alleging that Cleveland had denied access to public records in violation of R.C. 149.43(B). The case was referred to mediation, at the conclusion of which the parties informed the court that “the request found in the September 8, 2020 complaint has been satisfied” but that

the request beginning on page 3 of requester’s January 11, 2021 filing, Reference #C001997-121620, remains pending, and no resolution was reached during mediation on that request. Therefore, the parties agreed that this sole remaining request should go forward for a determination by the special master.

(Mediator’s January 27, 2021 Entry.) Request #C001997-121620, made during mediation on December 16, 2020, is for “Emails to or from David Bowen. Emails to or from Lillian Kuri.” (Requester’s January 11, 2021 filing at 3; Reply at 6.)

{¶4} On February 8, 2021, Cleveland filed a motion to dismiss (Response) on the grounds that the City cannot access the requested records from private email accounts, and that Request #C001997-121620 is overly broad. The special master issued an order permitting requester to file a reply by February 25, 2021. Mentch submitted her reply on February 26, 2021. In the interest of justice, the special master hereby directs the clerk to accept this late submission for filing.

### **Burden of Proof**

{¶5} The burden is on the requester to prove violation of R.C. 149.43(B) by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.). Mentch first bears the “burden of production” to show that she sought public records kept by Cleveland and that Cleveland did not make the requested

records available. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 33.

### **Analysis**

{¶6} Cleveland provides the following background for the officers named in Request #C001997-121620:

*[Bowen and Kuri] are longtime members of the City of Cleveland Planning Commission. Although they have been involved with the city for many years, neither one is an employee. They are both private citizens and correspondence related to city business is sent to the private email addresses each one has provided. The city does not claim that there are no emails between employees of the city of Cleveland and members of the planning commission.*

(Emphasis added.) (Response at 3.)

### **Status as a “Public Record” does not Depend on Storage Location**

{¶7} “Public record’ means records kept by any public office.” R.C. 149.43(A)(1).

The key terms of the definition are statutorily defined:

“Records” includes 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.

R.C. 149.011(G).

“Public office” includes any state agency, public institution, political subdivision, or other organized body, office, agency, institution, or entity established by the laws of this state for the exercise of any function of government. \* \* \*

R.C. 149.011(A). There is no dispute that Cleveland is a “public office,” and that the Cleveland City Planning Commission is one of its departments.<sup>1</sup> City Planning Commissioners are thus officials who derive their duties and authority from the City, including their responsibility for records documenting their duties and actions.

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<sup>1</sup> Charter of the City of Cleveland, Chapter 11 The Executive, § 76 City Planning Commission.

{¶8} Email is “an electronic record as defined in section 1306.01 of the Revised Code.” *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 21. If an email is created or received by a person in their capacity as a public official, and the email documents the organization, functions, policies, decisions, procedures, operations, or other activities of the office, then it is a “record.” *State ex rel. Bowman v. Jackson City Sch. Dist.*, 4th Dist. Jackson No. 10CA3, 2011-Ohio-2228, ¶ 10-15. *Accord Glasgow* at ¶ 22-23.

{¶9} Cleveland asserts that it cannot access City records if they are located only in an official’s personal account:

The dispute is about the accessibility of those emails. The Public Records Act applies only to “public records” as defined by the Act. Emails sent by and received by individuals with city of Cleveland email addresses are within the scope of public records.

(*Id.*) However, electronic records created and received by the officers and employees of a public office are “records” regardless of where they are stored, including in the personal electronic devices and accounts of office personnel,<sup>2</sup> *Cincinnati Enquirer v. Cincinnati*, Ct. of Cl. No. 2018-01339PQ, 2019-Ohio-969, ¶ 8-10, 13-15; *Sinclair Media III v. Cincinnati*, Ct. of Cl. No. 2018-01357PQ, 2019-Ohio-2624, ¶ 4-11, adopted by *Sinclair Media III v. Cincinnati*, Ct. of Cl. No. 2018-01357PQ, 2019-Ohio-2623, ¶ 13-15. A public office acts through its employees and officers, including their creation, receipt, and maintenance of office records. *Sinclair Media III* at ¶ 9. Cleveland cannot enter into enforceable promises of confidentiality with respect to public records, including with its personnel. *State ex rel. National Broadcasting Co. v. Cleveland*, 82 Ohio App.3d 202, 212-213, 611 N.E.2d 838 (1992). See *Dissell v. Cleveland*, Ct. of Cl. 2017-00855PQ, 2018-Ohio-5444, ¶ 25 and cases cited therein. If a public office permits storage in an official’s personal email account of the only copies of records that document the duties

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<sup>2</sup> Likewise, requests under FOIA reach the records of an agency head kept on a private email account. *Competitive Enter. Inst. v. Office of Sci. & Tech. Policy*, 827 F.3d 145, 149-150 (D.C.Cir.2016).

and actions of that official, then those are the copies “kept by the public office” within the meaning of R.C. 149.43(A)(1).<sup>3</sup> Cleveland concedes that Planning Commission members use their personal email accounts to exchange and store communications related to City business:

[C]orrespondence related to city business is sent to the private email addresses each [Planning Commission member] has provided. The city does not claim that there are no emails between employees of the city of Cleveland and members of the planning commission.

(Response at 3.)

{¶10} The special master finds by clear and convincing evidence that email records of the City of Cleveland exist on the personal email accounts of the named Commission members. Based on the law cited above, these communications are not excluded from the definition of “public records” merely because they are kept only in the members’ personal email accounts.

#### **Duty to Organize and Maintain Public Records to Facilitate Access**

{¶11} Public records must be provided to any person upon request. R.C. 149.43(B)(1). In order to facilitate production, public offices are required to organize and maintain their records so as to be able to make them available when requested. R.C. 149.43(B)(2);<sup>4</sup> *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, ¶ 36; *State ex rel. Beacon Journal Pub. Co. v. Andrews*, 48 Ohio St.2d 283, 289, 2 Ohio Op.3d 434, 358 N.E.2d 565 (1976). The duty to “organize and maintain” implies capable administrative management of the retrieval, analysis, and production of office records. This duty is the same when the public office allows an official or employee to keep office records at their residence, in

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<sup>3</sup> However, requesting email from the private account may not be justified if the official, record copies of the communications are kept in files maintained on the public office’s internal electronic storage devices, and the personal account contains only convenience copies. See *Neff v. Knapp*, Ct. of Cl. No. 2017-00876PQ, 2018-Ohio-2357, ¶ 10.

<sup>4</sup> “To facilitate broader access to public records, a public office or the person responsible for public records shall organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with division (B) of this section.” R.C. 149.43(B)(2).

their car, or in personal electronic accounts or devices. *Sinclair Media III v. Cincinnati*, Ct. of Cl. No. 2018-01357PQ, 2019-Ohio-2624, ¶ 11. *Cincinnati Enquirer v. Cincinnati*, Ct. of Cl. No. 2018-01339PQ, 2019-Ohio-969, ¶ 14. Records kept only in a personal account are likewise subject to maintenance there for the duration of the applicable office records retention schedule.<sup>5</sup> See R.C. 149.351. How the public office practically fulfills its duty to identify and retrieve records from an official's private account is a matter between the office and the official, but manifestly includes requiring that person to produce all responsive records when a request is made, including searching by key words if the personal account has that functionality.

{¶12} The special master finds that Cleveland has a duty to identify and retrieve properly requested records that it allows to be kept only in the personal email accounts of its officials.

### **Ambiguous or Overly Broad Request**

{¶13} Cleveland next asserts that the complaint does not state a claim for which relief may be granted because Request #C001997-121620 is overly broad. A public records request that is overly broad may be denied. R.C. 149.43(B)(2). 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 Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21. See generally *Gupta v. Cleveland*, Ct. of Cl. No 2017-00840PQ, 2018-Ohio-3475. An unbounded request for all emails to and from a named correspondent is generally overly broad and may be denied. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 17, 19. A request for email records is not overly broad if it is reasonably circumscribed by time period, subject matter, author or sender/recipient,

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<sup>5</sup> Note that 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.

and the like. See *State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 23-27.

{¶14} 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. Mentch's request seeks "Emails to or from David Bowen. Emails to or from Lillian Kuri." (Requester's January 11, 2021 filing at 3.) The request is overly broad for several reasons. First, the request is for a substantial time period of two years. (Reply at 6.) Second, the request demands "all emails to or from" the named correspondents, without identifying any office subject matter. *Kesterson* at ¶ 23-27. The request is identical to the one found overly broad in *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 395, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 19 ("[I]nsofar as Glasgow broadly sought all of Jones's work-related e-mail messages, text messages, and correspondence during her entire tenure [less than six months] as state representative, his request was improper because it was overly broad"). See also *State ex rel. Bristow v. Baxter*, 6th Dist. Erie Nos. E-17-060, E-17-067, E-17-070, 2018-Ohio-1973, ¶ 11-16; *Patton v. Univ. of Akron*, Ct. of Cl. No. 2017-00820PQ, 2018-Ohio-1555, ¶ 2, 9-10.

{¶15} Mentch asserts that Cleveland could have narrowed the scope of the request by inferring that she sought emails exchanged with unnamed "people who are employed by the City in the Planning Department and interact with the Planning Commissioners." (Reply at 3.) However, a public office is not required to make inferences. Moreover, a request remains ambiguous and overly broad when it identifies correspondents only as belonging to titles, groups, or categories, for which research is required to establish their 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.

{¶16} Mentch correctly notes that when denying the request as overly broad, Cleveland had an obligation to provide her with an opportunity to revise the request by

informing her of the manner in which records are maintained by Cleveland and accessed in the ordinary course of the office's duties. R.C. 149.43(B)(2). Cleveland did invite Mentch to clarify this request by providing a subject or keyword to search, identifying recipients or senders who are employees, and shortening the time frame. (Reply at 10-12.) While its requests for email subjects and reasonable timeframe are within the spirit of the explanation required by R.C. 149.43(B)(2), Cleveland effectively preempted further negotiation by misinforming Mentch that it was not required to maintain and access the emails of commission members from personal accounts.

{¶17} The special master finds that the request for all email of two named officials, without any specificity as to topic or time period, is ambiguous and overly broad, does not reasonably identify the records sought, and is thus unenforceable under the Public Records Act. The special master further finds that Cleveland violated R.C. 149.43(B)(2) by providing insufficient and erroneous information in its request for clarification of the overly broad request.<sup>6</sup>

**A New Public Records Request Made During Litigation is not Cognizable in that Action**

{¶18} Although not asserted by respondent, the claim forwarded by the parties may be subject to dismissal for lack of subject matter jurisdiction. Mentch made Request #C001997-121620 after the complaint was filed in this action. (See Requester's January 11, 2021 filing.) This request was not encompassed within, and did not overlap in any apparent manner, the requests listed in the complaint.

{¶19} The parties asked the mediator to forward this new request to the special master for review and determination. However, litigants cannot vest a court with subject-matter jurisdiction by agreement. *Cheap Escape Co. v. Haddox, L.L.C.*, 120 Ohio St.3d

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<sup>6</sup> Cleveland and Mentch have additional tools to assist in negotiating requests. See *Gupta v. Cleveland*, Ct. of Cl. No. 2017-00840PQ, 2018-Ohio-3475, ¶¶ 59-62. Greater cooperation in revision of overly broad requests can result in mutually satisfactory results 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.



493, 499, 2008 Ohio 6323, 900 N.E.2d 601, ¶ 22. R.C. 149.43(C) requires a prior request as a prerequisite to a mandamus action, or, by the same language, a complaint filed under R.C. 2743.75. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 20; *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, 965 N.E.2d 282, ¶ 14; *Dissell v. Cleveland, Ct. of Cl.* No. 2017-00855PQ, 2018-Ohio-5444, ¶ 6-7. Discussion or revision of a public records request during litigation does not relate back to or supplement the claim stated in the complaint. Judicial resolution of this claim is thus limited to the public records requests set forth in the complaint.

{¶20} The parties agreed that the requests set forth in the complaint have been satisfied (Mediator's January 27, 2021 Entry). The claim for production in the complaint is therefore moot. Neither party has disputed the mediator's entry in subsequent pleadings. The special master therefore recommends the court dismiss the parties' request to determine a claim based on a new request made during mediation.

#### **Failure of Timely Production**

{¶21} "*When* records are available for public inspection and copying is often as important as *what* records are available." (Emphasis *sic.*) *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 52, 689 N.E.2d 25 (1998). Accordingly, the Public Records Act requires that a public office "shall make copies of the requested public record available to the requester \* \* \* within a reasonable period of time." R.C. 149.43(B)(1). Whether a public office has provided records within a "reasonable period of time" depends upon all the pertinent facts and circumstances of the case. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 11-12. The requester bears the burden of demonstrating that a public office's response was unreasonably delayed. *Id.*

{¶22} Mentch asserts that Cleveland violated the requirement to provide copies within a reasonable period of time by not producing any records in the five-month period

between her initial requests and the filing of her complaint. (Complaint at 2.) This delay was further extended until the requests were satisfied during mediation. Cleveland makes no argument in response. The city does not cite any exemption that applied to the emails it provided during mediation, or explain how much time was required to locate, retrieve, review, and make redactions (if any) to the records provided. There is no indication that providing the records would have taken more than a fraction of the five-months-plus delay.

{¶23} The special master finds that Mentch has shown that Cleveland failed to provide within a reasonable period of time copies of records in response to the requests found in the complaint.

### **Conclusion**

{¶24} Upon consideration of the pleadings and attachments, the special master recommends the court dismiss the claims in the complaint as moot. The special master further recommends the court grant respondent's motion to dismiss the claim added at the end of mediation because that request is overly broad. The special master further recommends the court dismiss the latter claim for lack of jurisdiction. It is recommended that costs be assessed equally between the parties.

{¶25} *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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JEFF CLARK  
Special Master