[Cite as *Assn. of Cleveland Firefighters, Local 83 Intl. Assn. of Firefighters v. Cleveland*, 2022-Ohio-4006.]

IN THE COURT OF CLAIMS OF OHIO

ASSOCIATION OF CLEVELAND FIREFIGHTERS, LOCAL 83 INTERNATIONAL ASSOCIATION OF FIRE FIGHTERS Requester v. CITY OF CLEVELAND, OHIO, LAW DEPARTMENT Respondent	Case No. 2022-00057PQ Special Master Jeff Clark REPORT AND RECOMMENDATION

{¶1} The Public Records Act requires a public office to make copies of requested public records available at cost and within a reasonable period of time. R.C. 149.43(B)(1). The Act is construed liberally in favor of broad access, with any doubt resolved in favor of disclosure. *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. R.C. 2743.75 provides an expeditious and economical procedure to resolve public records disputes in the Court of Claims.

{¶2} On November 5, 2021, attorney Mark Guidetti on behalf of requester Association of Cleveland Firefighters Local 93 (Local 93) asked an official in the City of Cleveland Department of Human Resources (HR) to "advise as soon as possible as to" nine questions regarding "a policy requiring all members of the Hazmat Unit to undergo physical examinations." (Complaint at 3.) On November 8, 2021, the official copied Guidetti on an email advising she had forwarded the request to "Division of Fire management." (*Id*. at 5-6.) Guidetti emailed HR on January 7, 2022 for an update and received a reply on January 12, 2022 that the request had been forwarded to "Fire and Law." (*Id*. at 4-5.) On January 11 and 12, 2022, City counsel and "City of Cleveland –

Public records" acknowledged in separate emails that the request would be handled through the City's Public Records Center. (*Id*. at 7-9.)

{¶3} On February 1, 2022, Local 93 filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records and failure to produce records within a reasonable period of time. On June 22, 2022, the City filed an answer (Response) and a motion to dismiss (MTD). On July 7, 2022, Local 93 filed a reply. On September 2, 2022, the City filed a supplemental response. On September 23, 2022, Local 93 filed a motion to accelerate the case, which is hereby denied as moot.

Burden of Proof

{¶4} The requester in an action under R.C. 2743.75 bears an overall burden to establish a public records violation by clear and convincing evidence. *Hurt v. Liberty Twp*., 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.). The requester bears an initial burden of production "to plead and prove facts showing that the requester sought an identifiable public record pursuant to R.C. 149.43(B)(1) and that the public office or records custodian did not make the record available." *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 33.

Motion to Dismiss

{¶5} To dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt 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).

{¶6} The City moves to dismiss on the grounds that 1) only two bullet points in Local 93's November 5, 2021 letter seek identifiable public records, 2) it has now produced all available records for both requests and the claim for production is moot, 3)

Local 93 has not met its burden to prove that any other responsive records exist, and 4) the four-month delay between the request and the City's production of one record and denial of the remainder of the requests was reasonable.

Requests for Information or Answers to Questions are not Public *Records* Requests

{¶7} The burden is on Local 93 to prove facts showing that each request sought an identifiable public record. *Welsh-Huggins,* at ¶ 33. In response to questions or requests for information that do not reasonably identify "records," a public office has no

> clear legal duty to seek out and retrieve those records which would contain the information of interest to the requester. Cf. *State ex rel. Cartmell v. Dorrian* (1984), 11 Ohio St.3d 177, 179, 464 N.E.2d 556. Rather, 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. Fant v. Tober, 8th Dist. Cuyahoga No. 63737, 1993 Ohio App. LEXIS 2591, *3-4 (April 28, 1993), *aff'd*, 68 Ohio St.3d 117, 623 N.E.2d 1201 (1993). Accord *State ex rel. Lanham v. State Adult Parole Auth*., 80 Ohio St.3d 425, 427, 687 N.E.2d 283 (1997) (request for "qualifications of APA members"). This includes requests for records supporting an agency decision. *State ex rel. Morabito v. Cleveland*, 8th Dist. Cuyahoga No. 98820, 2012-Ohio-6012, ¶ 14 (for information, including "why, how, when, and by whom" a video was destroyed); *Kovach v. Geauga Cty. Auditor's Office*, Ct. of Cl. No. 2019-00917PQ, 2019-Ohio-5455, ¶ 9-10 (seeking explanations or reasons for the execution of public functions, and to admit or deny factual representations).

{¶8} Local 93's November 5, 2021 letter (Complaint at 3) requests that the City "advise as soon as possible as to" nine bullet-pointed questions. Bullet Point 1 asks:

- *Whether the City is instituting or has instituted a policy requiring all members of the HazMat Unit to undergo physical examinations*.

This question seeks a yes or no answer, not a document. It requests only information as to whether a type of policy has been instituted. Although not obliged under the Public Records Act to do so, the City answered this question in the negative on March 15, 2022, which effectively answered Bullet Points 2 and 3 as both are conditioned on the existence of such a policy. (Response, Exh. A.) Bullet Point 2 asks:

- *If so, when that decision was made*.

This question also seeks only information – the naming of a point in time – and does not attempt to identify any office record. Bullet Point 3 asks:

- *If so, how that decision was made and who was involved in that decision-making process*.

This is a question seeking a narrative explanation of how a decision was made and who was involved rather than identifying a specific, existing record. See *Morabito* at ¶ 14.

Bullet Point 4 refers back to the type of policy posited in Bullet Point 1:

- *If so, what is that policy (please forward a copy of said policy, if one exists)*

Although the first six words are an improper request for information, and the remainder can be understood only by cross-referencing a previous question, the Special Master finds that the parenthetical request is sufficiently specific to identify a record, i.e., "a copy of" "a policy requiring all members of the HazMat Unit to undergo physical examinations." The City's counsel acknowledged that this was a request for a record (Complaint at 7-8) and responded that no such record existed. (Response, Exh. A.)

Bullet Points 5 through 8 ask "Please advise as soon as possible as to:"

- *The nature of the physical examination – what exactly would be "tested" – medical conditions, physical agility, etc.*;
- *What is the standard being utilized during such examinations*;
- *How the results of the examinations may be used by the City*;
- *Who at the City will have access to results of such examination*.

These are requests for narrative explanations or information that do not mention records or attempt to identify any existing document.

Bullet Point 9 requests:

- *Any records of prior implementation of the City administering such examinations to the HazMat Unit*.

Bullet Point 9 does request records. (Complaint at 7-8).

{¶9} The Special Master finds that Bullet Points 1-3 and 5-8 are improper requests for information or answers to questions and fail to state a claim for which relief may be granted under R.C. 149.43. To be clear, these are not flawed records requests that are subject to objection as ambiguous or overly broad. R.C. 149.43(B)(2). They are not requests for records *at all* and therefore cannot invoke any duty found in R.C. 149.43(B).

{¶10} As its second ground for dismissal, the City asserts that it has now released all public records responsive to Patrick's requests, rendering the complaint moot. (Answer at ¶ 6 and Aff. Defenses ¶ 5; Motion to Dismiss at 2-3.) On review, the special master finds that full satisfaction of the requests is not conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed and the court has access to the withheld record *in camera*, this argument is subsumed in the City's defense on the merits.

{¶11} Finally, the City's assertion that its response was timely is not conclusively shown on the face of the complaint and attachments, as it had neither denied the two proper public requests nor provided any records prior to the filing of this action. As the matter is now fully briefed with the dates of final responses and the City's explanations, this argument is subsumed in the City's defense on the merits.

{¶12} Local 93 has met its initial burden to show that it sought identifiable public records through Bullet Points 4 and 9 and that the City did not make any records available. The Special Master recommends that the motion to dismiss be DENIED as to Bullet Points 4 and 9 and GRANTED as to Bullet Points 1-3 and 5-8. It is further recommended that the court DENY the motion to dismiss Bullet Points 4 and 9 as moot, DENY the motion to dismiss the claim of untimely response, and proceed to consider these matters on the merits.

Non-Existent Records

{¶13} A "record" is defined for purposes of the Public Records Act as

> 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). A document must be one "created or received by or coming under the jurisdiction of any public office" to meet this definition and thus must exist before it can be the subject of a "records" request. A public office has no duty to provide records that do not already exist or that it does not possess. *State ex rel. Alford v. Toledo Corr. Inst*., 157

Ohio St.3d 525, 2019-Ohio-3847, 138 N.E.3d 1133, ¶ 5; *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 8.

Bullet Point 4

{¶14} The City asserts that "the requirement that all members of the HazMat Unit undergo physical examinations is not a matter of City policy. Rather, this is an OSHA requirement." (Response at ¶ 4, Exh. A; Feb. 11, 2021 Fioritto Aff. at ¶ 2-7; Kilbane Aff. at ¶ 3-5.) The Fioritto and Kilbane affidavits clearly deny the existence of any record responsive to Bullet Point 4.

{¶15} In rebuttal, Local 93 complains only that the City "failed to determine if any responsive or additional records existed." (Reply at 4.) However, "there is no duty under R.C. 149.43 for respondents to detail the steps taken to search for records responsive to the requests." (Citations omitted.) *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 26. Once the City denied that requested records existed, it became Local 93's burden to show by clear and convincing evidence that additional records *do* exist. *Cordell* at ¶ 8-10. A requester's mere belief in the existence of additional records does not constitute sufficient evidence to establish that responsive documents exist. *McCaffrey* at ¶ 22-26.

{¶16} By order of June 30, 2022, the Special Master directed Local 93 to file a reply evidencing "in as much detail as possible what additional records exist in respondent's keeping that are responsive to each request." In response, Local 93 provided no evidence of the existence of a City policy regarding HazMat physical examinations. The Special Master finds that Local 93 has not met its burden to show that the City kept any record responsive to Bullet Point 4 at the time the request was made.

Bullet Point 9

{¶17} The City expressly admits to possession of a Concentra pricing sheet as the only record responsive to Bullet Point 9 that. (Supp. Response at 1, 7.) When ordered by the court to file under seal

> [c]omplete and unredacted copies of all records responsive to the request for "Any records of prior implementation of the City administering such examinations to the HazMat Unit" that were in respondent's possession on the date of the request

(Aug. 12, 2022 Order at 1), the City filed only a copy of the pricing sheet. The City asserts that "[n]o additional records responsive to the request for 'Any records of prior implementation of the City administering such examinations to the HazMat Unit' were in Respondent's possession on the date of the request." (Supp. Response, Privilege Log.) The City attests that it has turned over all non-privileged documents in its possession (Response, Burchak Aff.) or that it is able access from Concentra (Puin Aff.) and concludes that "it has produced all responsive records." (MTD at 4.)

{¶18} The City acknowledges it "may well possess certain medical records of HazMat Unit members, but [does] not handle the OSHA-required medical surveillance exams" responsive to Bullet Point 9. (Supp. Response at 7.) The OSHA-required physical examinations of HazMat Unit members are conducted by a contractor, Concentra Health Services, Inc. (*Id*. at ¶ 7, Exh. B – Katsifis Aff. at ¶ 2-4.) The City admits that these examinations generate medical records, but references their existence only in the possession of Concentra, *e.g*.,

> Just as Concentra would be entitled to assert that medical records of HazMat Unit members were protected under HIPPA from disclosure, so too may Concentra assert that its own proprietary guidelines for such exams are confidential.

(MTD at 4.)

{¶19} However, the City admits that "Concentra is able to let the Division know if a member is fit for duty on the HazMat Unit without turning over records from the member's medical file." (Supp. Response, Burchak Aff. at ¶ 3, Fakult Aff. at ¶ 3.) Unlike medical records, any writing received by the City from Concentra letting the Fire Division know if a member is fit for duty is a record responsive to Bullet Point 9, not subject to exemption, and existing in the City's possession. *State ex rel. Multimedia, Inc. v. Snowden*, 72 Ohio St.3d 141, 144-145, 647 N.E.2d 1374 (1995). The City maintains notifications of fitness for duty for purposes other than providing medical treatment and must therefore provide Local 93 with copies of the documents. *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997).

{¶20} By order of June 30, 2022, the Special Master directed Local 93 to evidence "in as much detail as possible what additional records exist in respondent's keeping that

are responsive to each request." In its reply, Local 93 offered no detail as to any additional records, arguing only that the City "failed to locate" records or determine if any additional records existed. (Reply at 4-5.) The City's offered its perception that "it appears that the only remaining potentially-responsive records are the medical surveillance guidelines of Concentra, a medical provider which contracts with the City." (MTD at 3.) Local 93 made no response to this statement in its reply.

{¶21} The City attests that it has produced the only City record responsive to Bullet Point 9, while acknowledging that Concentra possesses medical surveillance guidelines and other unspecified medical records. Weighing the evidence before the court, the Special Master finds that other than 1) the medical surveillance examination price sheet and 2) Concentra notices to the City of HazMat Unit members' fitness for duty, Local 93 has failed to show the existence of specific additional records in the possession of the City, or to specify additional medical records that exist in the possession of Concentra.

{¶22} With respect to both the medical surveillance examination guidelines and the medical records generated from the examinations, Local 93 claims that the City must access those records from Concentra under the theory of quasi-agency.

Quasi-Agency

{¶23} A requester bears the burden to establish a relationship of quasi-agency:

> The quasi-agency theory applies when "'(1) a private entity prepares records in order to carry out a public office's responsibilities, (2) the public office is able to monitor the private entity's performance, and (3) the public office has access to the records for this purpose.'" [*State ex rel. ACLU of Ohio v. Cuyahoga County Bd. of Commrs.*, 128 Ohio St.3d 256, 2011-Ohio-625, 943 N.E.2d 553], at ¶ 53, quoting *State ex rel. Mazzaro v. Ferguson*, 49 Ohio St.3d 37, 39, 550 N.E.2d 464 (1990). The caselaw demonstrates, however, that when a requester has adequately proved the first prong of the quasi-agency test, the requester has met his burden: proof of a delegated public duty establishes that the documents relating to the delegated functions are public records.

(Emphasis added.) *State ex rel. Armatas v. Plain Twp. Bd. of Trs*., 163 Ohio St.3d 304, 2021-Ohio-1176, 170 N.E.3d19, ¶ 16, 18. The Supreme Court has now simplified the quasi-agency principle to this single prong: Did a private entity prepare records in order to carry out a public office's responsibilities, *i.e*., do the records relate to delegation of a public duty? *Armatas* at ¶ 16, 22.

{¶24} Local 93 makes the conclusory assertion that "Concentra is a private entity which prepares and manages records in connection with the services it provides to the City to carry out a portion of the City's 'Human Resource' and administrative responsibilities." (Reply at 9.) This does nothing more than restate the factual burden Local 93 must meet. Local 93 does not show that the City has a responsibility to conduct OSHA-mandated medical surveillance examinations itself, or that it has conducted these examinations in the past, or even that it would be permitted to do so with doctors who are direct employees of the City.

{¶25} The City did not conduct the examinations described in the request. The Department of Human Resources Medical Unit Manager advised Local 93 that "SMU [Safety Medical Unit] is not involved in these examinations." (Complaint at 3; Response, Verification of Complaint, Houston Aff.) The "medical surveillance examinations" are performed by Concentra Health Services, Inc. and vary by the type of each employee's exposure to potentially hazardous substances and conditions. (Response, Exh. B, Katsifis Aff. at ¶ 2-4.) The City asserts, and Local 93 does not dispute, that the examinations are mandated by the federal Occupational Safety and Health Administration (OSHA), not by City policy. (*Id*., Exh. A, Exh. B, Katsifis Aff. at ¶ 4.) The City asserts that these are clinical examinations primarily conducted for the employee's medical benefit, i.e., identifying exposure-related health effects so that actions can be taken to both avoid further exposure and prevent or address adverse health outcomes. (Supp. Response at 3-5.) Concentra's medical files for individual employees are not provided to the City and are not necessary for it to conduct its operations. (*Id*. at 8, Burchak Aff. at ¶ 2, Fakult Aff. at ¶ 2.)

{¶26} Neither party provides detailed information as to the City's official responsibilities in connection with OSHA medical surveillance examinations, or the status of different resulting records as documenting the "organization, functions, policies, decisions, procedures, operations, or other activities of the office." R.C. 149.011(G). Supporting information on these issues might be developed using the tools of civil discovery. Discovery is available in a mandamus action to enforce R.C. 149.43(B), but

not in the public records dispute program in this court, which is expressly intended to provide an expeditious and economical procedure. See R.C. 2743.75(A) and (E)(3)(a).

{¶27} On the evidence submitted, the Special Master finds that Local 93 fails to meet its burden to establish by clear and convincing evidence that Concentra "prepares records in order to carry out [the City]'s responsibilities," other than Concentra notifications as to HazMat Unit members' fitness for duty.

Claimed Exceptions[1]

Burden of Proof

{¶28} "[T]he custodian has the burden to establish the applicability of an exception." *State ex rel. Pietrangelo v. Avon Lake*, 146 Ohio St.3d 292, 2016-Ohio-2974, 55 N.E.3d 1091, ¶ 2, 9. All exceptions to disclosure are strictly construed against the public-records custodian. *State ex rel. Rogers v. Dept. of Rehab. & Corr.,* 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 7. To meet its burden, the records custodian must prove 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, ¶ 10. Any doubt should be resolved in favor of disclosure. *State ex rel. James v. Ohio State Univ.*, 70 Ohio St.3d 168, 169, 637 N.E.2d 911 (1994). Regarding the level of proof required:

> When a public office or records custodian relies on an exemption the application of which is not apparent just from the record itself, the office must provide evidence to support the applicability of the exemption. *See, e.g., State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 401-402, 2000-Ohio-207, 732 N.E.2d 373 (2000).

Welsh-Huggins v. Jefferson Cty. Prosecutor's Office, 163 Ohio St. 3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 30, 35, 50. Of particular significance to establishing the exceptions claimed in this case,

> Conclusory statements in an affidavit that are not supported by evidence are not sufficient evidence to establish the exemption's applicability.

[1] As the City notes, the Bullet Point 9 request for "records of prior implementation of the City administering such examinations to the HazMat Unit" is unclear and potentially includes medical records. (MTD at 2.) However, the City waived the defenses of ambiguity or overbreadth by not denying Bullet Point 9 and providing Local 93 with an opportunity to correct the defects in the request prior to the complaint. *State ex rel. Summers v. Fox*, 163 Ohio St. 3d 217, 2020-Ohio-5585, 169 N.E.3d 625, ¶ 74.

Id.

Medical Records

{¶29} During mediation, the City provided Local 93 with a redacted copy of the examination price sheet, referring to other, unspecified records as "medically privileged or confidential." (Response at ¶ 6, Exh. A, and Verification of Complaint - Burchak Aff. Local 93 has not met its burden to prove that the City actually or constructively possessed any records responsive to Bullet Point 9 other than the medical surveillance price sheet, for which the City does not assert any medical records exemption. The court therefore need not determine whether any medical records exemption applies to the medical surveillance guidelines, or to records possessed solely by Concentra.

Trade Secret

The Ohio Uniform Trade Secrets Act defines "trade secret" as:

> information, including the whole or any portion or phase of any scientific or technical information, design, process, procedure, formula, pattern, compilation, program, device, method, technique, or improvement, or any business information or plans, financial information, or listing of names, addresses, or telephone numbers, that satisfies both of the following:
>
> (1) It derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable by proper means by, other persons who can obtain economic value from its disclosure or use.
>
> (2) It is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

R.C. 1333.61(D). "An entity claiming trade secret status bears the burden to identify and demonstrate that the material is included in categories of protected information under the statute and additionally must take some active steps to maintain its secrecy." *Besser II*, 89 Ohio St.3d 396, 400, 2000-Ohio-207, 732 N.E.2d 373 (2000). To meet this burden, the entity must provide more than conclusory statements in affidavits to show which, if any, information is a "trade secret." *Id.* at 400-404. Accord *Hance v. Cleveland Clinic*, 2021-Ohio-1493, 172 N.E.3d 478, ¶ 27-32 (8th Dist.); *Harris v. Belvoir Energy, Inc*., 8th Dist. Cuyahoga No. 103460, 2017-Ohio-2851, ¶ 16. The following factors are used in trade secret analysis:

> (1) The extent to which the information is known outside the business; (2) the extent to which it is known to those inside the business, i.e., by the employees; (3) the precautions taken by the holder of the trade secret to guard the secrecy of the information; (4) the savings effected and the value to the holder in having the information as against competitors; (5) the amount of effort or money expended in obtaining and developing the information; and (6) the amount of time and expense it would take for others to acquire and duplicate the information.

Besser II at 399-400. The City does not claim any responsive information as trade secrets of the City, but only as trade secrets of Concentra.

{¶30} The City claims that it redacted "confidential business pricing information" labeled as trade secret from the only record it provided to Local 93, citing R.C. 149.43(A)(1)(m), R.C. 1331.61(D), and *State ex rel. Fisher v. PRC Pub. Sector, Inc*., 99 Ohio App.3d 387 (10th Dist.1994). (Answer, Exh. A p. 2.) The City also alleges that any medical surveillance examination guidelines used by Concentra would be exempt from public records release as trade secret. (Id. at 7.) When the City requested a copy of the medical surveillance guidelines used by Concentra for HazMat Unit physicals it was told that they were "confidential and proprietary trade secrets." (MTD at 2-3; Response, Verification of Complaint – Puin Aff.) The City submitted the affidavit of Richard Katsifis, Senior Counsel at Select Medical Corporation, who attests, in pertinent part:

> 2. Concerta performs medical surveillance examinations for employees who may be exposed to potentially hazardous substances and conditions; * * *
>
> 7. I affirm that Concentra's medical surveillance exam guidelines are internal documents containing proprietary and confidential information, which cannot be disclosed to any external person or entity.

(Answer, Exh. A p. 2.) Notably, Concentra addressed only the surveillance exam guidelines in the affidavit, and not attest that *prices* charged for the surveillance exam components are proprietary, confidential, or met any other standard of trade secret.

{¶31} The City offers nothing but a conclusory affidavit by Concentra, far inferior to those contained in the cases cited above, that its medical surveillance examination guidelines are trade secrets. However, these guidelines exist only in the possession of Concentra. (Response, Exh. B, Katsifis Aff. at ¶ 5-7.) As Local 93 has not proven access to these records under the theory of quasi-agency, the guidelines are not records kept by the City and the application of the trade secret exemption to them need not be determined.

{¶32} Concentra has not provided even a conclusory affidavit asserting that its pricing sheet for medical surveillance examinations for the City is a trade secret, much less provide evidence that it satisfies the *Besser II* factors. Nor is any one of the *Besser II* factors apparent on the face of the document. The Special Master finds that the City has failed to meet its burden to prove that the pricing sheet falls squarely within the trade secret exemption.

Timeliness

{¶33} "The primary duty of a public office when it has received a public-records request is to promptly provide any responsive records within a reasonable amount of time and when a records request is denied, to inform the requester of that denial and provide the reasons for that denial. R.C. 149.43(B)(1) and (3)." *Cordell v. Paden,* 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 11. The head of a public office "is under a statutory duty to organize his office and employ his staff in such a way that his office will be able to make these records available for inspection and to provide copies when requested within a reasonable time." *State ex rel. Beacon Journal Pub. Co. v. Andrews*, 48 Ohio St.2d 283, 289, 358 N.E.2d 565 (1976). As relevant to the City, see *Wadd v. Cleveland*, 81 Ohio St.3d 50, 53-54, 689 N.E.2d 25 (1998) (Cleveland's high volume of requests does not exempt it from acting with the requisite promptness). Whether a public office has provided records within a "reasonable period of time" depends on all the pertinent facts and circumstances of the case. *Cordell.* at ¶ 12. The requester bears the burden of demonstrating that an office's response was unreasonably delayed. *Id*.

{¶34} In defense of its delay, the City complains that Local 93 "directed their November 5, 2021 letter to the wrong department. (MTD at 4.) The City argues that "[a] public records request is dated from the time it is made to the public office with custody of the records," citing *Cvijetinovek v. Cuyahoga Cty. Auditor*, 8th Dist. Cuyahoga No. 96055, 2011-Ohio-1754, ¶ 4. (MTD at 3.) First, the initial submission of Fire Dept. HazMat Unit medical questions to the "City of Cleveland, Public Safety Medical Unit" appears reasonable and is not obviously "the wrong department." Regardless, the PSMU forwarded the request to what the City itself considered the proper unit on November 8, 2021 (Complaint at 4-6), and that three-day delay was inconsequential.

{¶35} The City next states: "The letter was then forwarded to two other departments over the holiday season and during a transition to a new mayoral administration after the retirement of the longest-serving Mayor in Cleveland history." (MTD at 4) First, the unexplained, repeated forwarding of a public records request around an office is not a valid excuse for delay, particularly for departments served by the internal Cleveland Public Records Center. Prompt internal forwarding of a public records request to the appropriate official or department is expected and unremarkable. See, *e.g., State ex rel. Keating v. Skeldon*, 6th Dist. Lucas No. L-08-1414, 2009-Ohio-2052, ¶ 2-5. Second, Ohio governmental subdivisions observe a handful of civic holidays and at least one of these will pass if a public office delays long enough. Holidays do not constitute unusual facts or circumstances but are part of the ordinary operating environment of a public office. Finally, the court may take notice that all Ohio cities periodically change administrations without suspending or delaying their statutory duties. The Special Master finds that the assertion of these factors to excuse a four-month delay in providing any substantive response is, at best, disingenuous.

{¶36} The City submits no evidence that holidays or change of administration had any direct or significant effect on the time available to staff in the Cleveland Public Records Center, the "Division of Fire management," or "Fire and Law" to process public records requests. The City cites no appellate holding that four months, with or without holidays and change of administration, is a "reasonable period of time" before a public office provides *any* substantive response to a public records request of this nature.

{¶37} Local 93 avers that the City created delay by "unlawfully" waiting to commence review of the request until it had consolidated Local 93's email request into its public records request portal, a.k.a. GovQA, two months after the request was received by the City. It is true that Local 93 is entitled to make its requests either verbally or in writing, R.C. 149.43(B)(3) and (4), and the Public Records Act does not permit a public office to *restrict* requesters to only written requests or to any other City-defined procedure. However, nothing prevents the City from expanding the options for persons to submit requests by implementing an online portal, or from consolidating requests into the portal

system for the City's convenience. Local 93 is mistaken in claiming it is "unlawful" (Reply at 2, 7) for the City to add this option.

{¶38} None of the above alters the City's statutory obligation to respond to public records requests within a reasonable period of time based on the date the request was made, i.e., when it was received by a responsible department or employee. The City retains exactly the same statutory obligation to timely respond to public records requests made verbally, delivered through the U.S. Mail, received via email, or using any other written format and means of delivery, as it does for requests filed through its online portal. The date of receipt in this case was November 8, 2021 at the latest, and the City delivered its only substantive response over four months later on March 15, 2022. (Response, Exh. A.)

{¶39} The City offers no excuse why its explanation of non-existence in response to the Bullet Point 4 request for a copy a City policy covering the HazMat Unit physical examinations could not have been reviewed and explained within, at most, a matter of days. The Special Master finds the March 15, 2022 response to Bullet Point 4 was not made within a reasonable period of time under the facts and circumstances of this case.

{¶40} In response to Bullet Point 9, the City produced a one-page physical examination pricing table from which it redacted the prices. The response to this request would have involved some brief period of time to identify responsive records and also to inquire of Concentra whether an exemption might apply. Nevertheless, the City offers no valid excuse as to why responsive retrieval and correspondence should not have been completed within, at most, a matter of weeks rather than four months. The Special Master finds that the March 15, 2022 response to Bullet Point 9 was not made within a reasonable period of time under the facts and circumstances of this case.

{¶41} Even had the City's response time started from its belated acknowledgment of the request through GovQA, the 60 days from then until a response was finally sent would still have exceeded a reasonable period of time.

Further Revision of Request

{¶42} The conclusions in this report do not restrict Local 93 from filing properly revised requests for additional records. Under similar circumstances, courts have

encouraged parties to persevere to achieve a mutually acceptable resolution of currently deficient records requests. *See State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 14-19. The General Assembly provides statutory tools to optimize the scope, speed, format, economy, and delivery of public records. *See* R.C. 149.43(B)(2), (3), (5), (6), (7) and (9). The parties are encouraged to cooperate fully in negotiating future revisions using those tools.

Conclusion

{¶43} Upon consideration of the pleadings, attachments, and the record filed under seal, the special master recommends the court grant respondent's motion to dismiss the claims for production of records based on Bullet Points 1-3 and 5-8. The Special Master further recommends the court find that requester fails to prove that any record exists that is responsive to Bullet Point 4. The Special Master further recommends the court order respondent to disclose all records responsive to Bullet Point 9 that notify respondent of employees' fitness for duty, and to disclose an unredacted copy of the 2020 Concentra examination price sheet. The Special Master further recommends that the court find respondent failed to provide copies of records within a reasonable period of time in violation of R.C. 149.43(B)(1). It is recommended costs be assessed to respondent.

{¶44} *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 October 13, 2022
Sent to S.C. Reporter 11/10/22