

IN THE COURT OF CLAIMS OF OHIO

JOSEPH ROY ROSE

Requester

v.

FAIRFIELD COUNTY SHERIFF
OFFICE JAIL

Respondent

Case No. 2022-00548PQ

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 July 13, 2022, requester Joseph Rose filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records and failure to produce records timely. Following mediation, respondent Fairfield County Sheriff Office Jail (“SO”) filed a motion to dismiss (Response) on September 15, 2022. On September 28, 2022, Rose filed a reply.¹ On November 1, 2022, the SO filed a sur-reply.

{¶3} Although the record in this action does not include any clearly written request, Rose’s prayer for relief summarizes the remaining records sought based on 1) his initial verbal requests to Lt. Hawks, the SO “records lady,” and Deputy Chief Ervin (Complaint

¹ The reply was not accompanied by a completed proof of service, in the absence of which “[d]ocuments filed with the court shall not be considered.” Civ.R. 5(B)(4). However, in the interest of justice the Special Master reviewed the reply and will reference certain portions below.

at 7); 2) written follow-up communication (*Id.* at 9); and, 3) his written interview during an investigation of his use-of force complaint to the SO (*Id.* at 13-14) as: “Mr. Hawks will not give me my video of them hurting me/with no reason why.” (*Id.* at 1.) Rose alleges instances of SO staff hurting him as occurring after he was placed in one residential pod and during his transport to another pod. (*Id.* at 13-14.)² The SO initially responded by providing Rose with written records of the investigation but denied his request for video. (*Id.* at 6.) The SO asserts that during litigation it has now provided Rose with complete and unredacted copies of all responsive video recordings and there is no audio because its surveillance cameras are not capable of recording audio. (Sur-reply at 5, Exh. B, ¶ 11 and Exh. F, ¶ 7.) Rose asserts that the records provided are not all of the video that should be available, that the videos should include audio, and that “these video tapes were remade.” (Reply. at 2-4.)

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

² During mediation Rose sought additional video footage outside of the request terms discerned in the complaint. (Response, Exh. A – Warner Aff. at ¶ 9-10.) However, new requests made during public records litigation do not relate back to the complaint. There is no cause of action based on violation of R.C. 149.43(B) unless the request was made and denied prior to the complaint. See *Strothers v. Norton*, 131 Ohio St.3d 359, 2012-Ohio-1007, 965 N.E.2d 282, ¶ 14; *State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 5 (10th Dist.). Nothing in this report prevents Rose from later making new requests to the SO separate from this litigation.

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 SO does not dispute that Rose reasonably identified the video records he sought but moves to dismiss the complaint on the ground that it has now produced all responsive records. On review, the Special Master finds that mootness is not conclusively shown on the face of the complaint. Moreover, as the matter is now fully briefed this defense is subsumed in the arguments to deny the claim on the merits. It is therefore recommended the motion to dismiss be denied.

Suggestion of Mootness

{¶7} In an action to enforce R.C. 149.43(B), a public office may produce the requested records prior to the court's decision, and thereby render the claim for production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 18-22. The City asserts it has now provided Rose with the available public records responsive to his request. (Response at 1-2, Exh. A – Warner Aff.; Sur-reply, Exh. G, H, I) Rose asserts that the records provided are not all the video that should be available (Reply at 3), that the videos should include audio recording (*Id.* at 2), and that “these video tapes were remade.” (*Id.* at 4.)

{¶8} The SO has filed copies of the video recordings provided to Rose as Exhibit A to its sur-reply. According to the time stamps visible in playback they show Mr. Rose during a time period from approximately 5:13:25 a.m. to 5:24.22 a.m. and represent a nearly continuous handoff of coverage from one camera to the next, other than zero to four-second gaps between the end of one camera's coverage and the beginning of the next. (Sur-reply, Exh. F – Carsey Aff. at ¶ 9; Exh. A, *Teleconference to discuss Joseph Rose PRR-20220822* and other files.) As these files are plainly responsive to the request, the Special Master finds that the demand for production is at least partially moot – to the extent of the specific video recordings provided during litigation.

Non-Existent Records

{¶9} A requester is entitled only to the existing records of a public office. “Public records” means records *kept by* a public office. R.C. 149.43(A)(1). 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. The public office must clearly deny the existence of the specifically requested records. *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 56-57.

{¶10} When a public office asserts that it has no additional records in its possession, the burden is on the requester to prove by clear and convincing evidence that the records it requests do exist and are maintained by that office. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394 2019-Ohio-1216, 128 N.E.3d 179, ¶ 5-10. The office’s assertion may be rebutted by evidence showing a genuine issue of fact, but 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.

{¶11} The SO attests that all saved video footage covering the time period in which Rose claims that SO staff were hurting him has been provided to him. (Response at 2-3, Exh. A – Warner Aff. at ¶ 5-8; Sur-reply at 1-4, Exh. F – Carsey Aff. at ¶ 5-6.) Rose claims that the SO “left out all of the video of me coming into or out of the pod,” implying that this is when staff were hurting him, and argues that

this is real convenient when considering all of the alleged allagations on me are right there and most of the damage they did to me is at the only door to a pod I guess with out a carmar on the only door in and out of this pod, they’d have the court believe.

(Reply at 3.) The SO noted, prior to Rose making his public records request, that the video reviewed for the use-of-force report “shows most of the contact between Officer Talbott and Inmate Rose except the door they enter CPOD from the hallway to Booking and going in and out of C112.” (Sur-reply, Exh. K – Use of Force Report at 1.) In response

to court order, the SO listed all camera views potentially relevant to the time period of Rose's request but noted that "[t]he Jail's cameras in question are motion activated so it is possible that some of the cameras in the areas of the Jail where Mr. Rose was present did not activate or record footage." (Sur-reply, Exh. B – Warner Aff. II at ¶ 6-7.) The SO further noted that it is possible some footage was overwritten prior to the SO's belated efforts to copy and deliver the video. (*Id.* at ¶ 8-10.)

{¶12} While the lack of video covering every second of Rose's transfer from one pod to another is plausibly consistent with Rose's accusation that the SO left out portions of video showing officers "hurting me," the short breaks in coverage are also consistent with the narrative in the SO's use-of-force report, the SO's affidavits in this case, and the surviving footage. The Special Master finds that Rose has failed to meet his burden to prove by clear and convincing evidence that any additional video records responsive to the request exist in the SO's keeping beyond those provided to requester.

Audio Recording

{¶13} Rose cites no duty requiring the SO to record audio with its jail interior video surveillance. Nor does Rose's mere belief that a public office should have created audio records establish that such records exist.

A relator's belief that a document exists (or should exist) is not sufficient to create a genuine issue of material fact as to whether the document exists. *See, e.g., State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St. 3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26 (relator's claimed "reasonable and good faith belief" that documents "do, in fact, exist" "did not constitute sufficient evidence to establish that the documents do exist" for purpose of mandamus claim under Ohio Public Records Act);

(Add'l citations omitted.) *Crenshaw v. Cleveland Law Dept.*, 8th Dist. Cuyahoga No. 108519, 2020-Ohio-921, ¶ 42 (requester believed respondent *should have* gathered additional documents as part of an investigation).

{¶14} The SO attests that "None of the Jail's video cameras have the capability to record audio. Therefore, none of the footage of Mr. Rose at the Jail on February 22nd included audio." (Sur-reply, Exh. B – Warner Aff. at ¶ 11.) Rose argues that audio must exist because the use-of-force report states that an inmate told Rose he could have the inmate's lower bunk, when no corrections officer was present. Rose reasons that the SO

could not have known what the inmate said to him without an audio recording. (Reply at 2-3.) However, the report states only that the video shows

at that time an unknown inmate takes his own items off from a bottom rack and places on a top rack. The unknown inmate then goes up to inmate Rose and says something which was later learned that he was giving up the bottom rack for Inmate Rose.

(Sur-reply, Exh. K – Use of Force Report at 1. The SO explains that

Sgt. Carsey’s investigation included statements from witnesses, including Mr. Rose’s own statement that “an inmate did get up” to offer him his bunk. (Exhibit K, at page 2.) As such, it was possible to determine what was said from sources other than recorded audio.

(Sur-reply at 6.) Coupled with the department’s attestation that the cameras were incapable of recording audio, the Special Master finds no evidence to support Rose’s assertion that audio records exist related to the requested video footage, much less the clear and convincing evidence necessary to meet Rose’s burden.

{¶15} The Special Master accordingly finds the claim for production of records in the complaint is now moot in its entirety.

{¶16} Independent of the claim for production, Rose’s claim of untimeliness in production of the documents is not moot. “[A] separate claim based on the untimeliness of the response persists unless copies of all required records were made available ‘within a reasonable period of time.’ R.C. 149.43(B)(1).” *State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 19.

Timeliness

{¶17} “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. Offices have a statutory duty to “organize and maintain public records in a manner that they can be made available for inspection or copying in accordance with [R.C. 149.43(B)].” R.C. 149.43(B)(2). Whether a public office has provided records within a “reasonable period of time” depends upon all the pertinent facts and circumstances of the case. *Cordell* at ¶ 12.

{¶18} Rose states that during an April 20, 2022 conversation with Lt. Hawks he requested the surveillance video recordings, but Hawks does not recall the request made on that date as including video records. (Complaint at 7; Sur-reply at 3, Exh. D – Hawks Aff., ¶ 5.) Rose states he repeated his request during his May 2, 2022 call to the records department, and the SO agrees the request was discussed at that time. (Complaint at 7; Sur-reply at 3, Exh. C – Ervin Aff., ¶ 4.) The request is also referenced in Rose’s June 3, 2022 email to rochelle.menningen@fairfieldcountyohio.gov. (Complaint at 7-8.) After receiving the complaint (no earlier than July 13, 2022, per the court’s certified mail receipt) the SO determined it should release copies of the video. (Response, Exh. A – Warner Aff. at ¶ 7.) The SO attempted to deliver the video recordings to Rose on August 22, 2022.

{¶19} In light of Lt. Hawk’s attestation to the contrary, the Special Master finds Rose has submitted insufficient evidence to show that a specific request for video recordings was made on April 20, 2022. However, the Special Master finds that the sixteen weeks between the May 2, 2022 request and the SO’s first attempt to deliver records on August 22, 2022 exceeds any reasonable period of time necessary to provide the records. See generally *State ex rel. Ware v. Bureau of Sentence Computation*, 10th Dist. Franklin No. 21-AP-419, 2022-Ohio-3562, ¶ 2, 16-17 and cases cited therein. The fact that the SO later located and copied the records in less than the five weeks between the filing of the complaint and delivery to Rose is demonstrative evidence that the process did not require sixteen weeks. On the facts and circumstances before the court, the Special Master finds the SO failed to make copies of the requested records available within a reasonable period of time, in violation of R.C. 149.43(B)(1).

Conclusion

{¶20} Upon consideration of the pleadings and attachments the Special Master recommends the court find that requester’s claim for production of records is now moot. The Special Master further recommends the court find that respondent failed to produce the requested public records within a reasonable period of time. It is recommended requester be entitled to recover from respondent the amount of the filing fee of twenty-five dollars and any other costs associated with the action that were incurred by requester, and that court costs be assessed to respondent.

{¶21} 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 November 8, 2022
Sent to S.C. Reporter 12/15/22