

IN THE COURT OF CLAIMS OF OHIO

E. ROBERTA WADE

Requester

v.

MAYOR THOMAS M. O'LEARY,
CITY OF GALION

Respondent

Case No. 2022-00595PQ

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 June 9, 2022, requester Roberta Wade faxed a letter to respondent Thomas M. O'Leary, Mayor, City of Galion, stating:

Please provide me with *true and complete copies* of your records regarding all marriages that you have performed under your authority as Mayor of the City of Galion. Also please provide me with *true and complete copies* of your records regarding all payments that were made for your performing these marriage [*sic*], regardless of whether you received the payment, regardless of whether the payment was designated as a donation, or any other designation. This public records request is for your records of all marriages that you performed as Mayor and is also for your records of all payments associated with those marriages.

(Emphases *sic*.) (Complaint, Exh. 1.) Receiving no reply to the letter, Wade faxed it again on July 13, 2022. Again receiving no response, Wade filed a complaint on July 29, 2022 pursuant to R.C. 2743.75 alleging denial of access to public records and failure to

produce records timely. Following partially successful mediation, O'Leary filed his response and a motion to dismiss (MTD) on October 24, 2022. On November 4, 2022, Wade filed a reply.

Burden of Proof

{¶3} 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.” *State ex rel. 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

{¶4} 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).

{¶5} O'Leary does not dispute that Wade reasonably identified the records she sought but moves to dismiss the complaint on the ground that he 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

{¶6} 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. Wade agrees that 215 responsive marriage license records and "the marriage spreadsheet" have been provided. (Reply at 2.) The Special Master finds that the claim is thus moot as to these documents.

{¶7} However, Wade disputes O'Leary's attestations that there are no existing office records of "payment" for performing marriage ceremonies. (*Id.* at 2-4.)

Non-Existent Records

{¶8} "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 in its keeping 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.

{¶9} 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. O'Leary attests that he has now provided Wade with all public records responsive to her request. (Response at ¶ 3-6, Echelberry Aff. at ¶ 3-4, attached letter of Aug. 3, 2022.)

{¶10} The office's assertion of non-existence 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. In the case at bar, Wade asserts only that O'Leary *solicited* donations for a local organization and that *if* donations were made in response to his suggestion, they would constitute public records. Wade offers no

evidence that any newlywed actually made such a donation. Moreover, nowhere in her pleadings does Wade even *allege* that donations occurred. She appears to assume, without sworn or even anecdotal evidence, that donations were made. While O’Leary could have greatly assisted the court by providing any knowledge on his part as to whether or not such donations occurred, he was not required to and chose not to. The burden to prove that additional records exist rests on Wade, and her inference and speculation that donations may have occurred falls far short of the clear and convincing evidence necessary to establish that they did.

{¶11} Separately, Wade does not establish that donations encouraged by a public official, if made, must be memorialized in records kept by the public office. However, in the absence of the predicate showing that donations were made, the court need not consider hypothetical records’ status for the City or the Internal Revenue Service.

{¶12} For the reasons above, the Special Master finds that Wade has not shown by clear and convincing evidence that any City records exist responsive to her request for O’Leary’s records of payments associated with marriages.

{¶13} Independent of the claim for production, Wade’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

{¶14} “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.

{¶15} On June 9, 2022, Wade faxed her first request for records regarding the marriages O’Leary performed. Despite her follow-up on July 13, 2022, O’Leary did not provide the records, or even acknowledge the request, until two months later, sending copies of the public marriage certificates by mail on August 3, 2022. O’Leary did not assert any exemption for any part of these records. The time required for location, copying and delivery would have been minimal, perhaps a matter of days. The Special Master finds that the eight weeks taken by O’Leary to provide *any* response to Ware’s request exceeded any reasonable period of time. 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. On the facts and circumstances before the court, the Special Master finds O’Leary 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

{¶16} 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.

{¶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 November 10, 2022
Sent to S.C. Reporter 12/15/22