

**IN THE COURT OF CLAIMS OF OHIO**

E. ROBERTA WADE

Requester

v.

MAYOR THOMAS M. O'LEARY,  
CITY OF GALION

Respondent

Case No. 2022-00607PQ

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 ("the City"), stating: "Please provide me with *true and complete copies* of all of the shut-off lists for the City of Galion Utilities from January 2020 to the present." (Emphasis *sic.*) (Complaint, Exh. 1.) On June 22, 2022, the City responded:

"We are denying your request because Ohio Revised Code 149.43(A)(1)(aa) specifically exempts:

"[u]sage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility."

(Response, Echelberry Aff., *passim*, attached June 22, 2022 letter.)<sup>1</sup>

{¶3} On July 29, 2022, Wade filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, O’Leary filed his response and a motion to dismiss (MTD) on October 24, 2022. On November 7, 2022, Wade filed a reply.

### **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.” *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**

{¶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} O’Leary does not dispute that Wade reasonably identified the records she sought but moves to dismiss the complaint on the ground that there are no documents created entitled “shut-off list” for utility accounts, and that in any case records assembled into such a list would be exempt from public records release under R.C. 149.43(A)(1)(aa).

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<sup>1</sup> Wade failed to attach this copy “of any written responses or other communications relating to the request from the public office” to her complaint as required by R.C. 2743.75(D)(1).

On review, the Special Master finds that non-existence of a responsive list 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.

### **Non-Existent Records**

{¶7} “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.

{¶8} In this case the City does not clearly deny the existence of the specifically requested records. The safety-service director attests only “[t]hat in the process of billing and administering said utilities, that there are no documents created entitled ‘shut off list’ \* \* \*.” (Response, Ward Aff. at ¶ 3.) This language leaves open two possibilities that the specifically requested records do exist: 1) that lists of termination of utility accounts exist but are given some title other than “shut-off list,” and 2) that shut-off lists/reports/etc. can be generated using the existing programming of the office utility database but have not been “created” during billing administration for the requested time period. See generally *Anthony v. Columbus City Schools*, Ct. of Cl. No. 2021-00069PQ, 2021-Ohio-3242, ¶ 8-10. (Database Rule). The City has not clearly denied the existence of the specifically requested records to the exclusion of either of these possibilities.

{¶9} However, the Special Master has not ordered the submission of additional evidence and briefing on the existence of responsive records because the City has asserted an independently sufficient ground to deny the request in its entirety and the requested records fall by definition within the asserted exemption.

### **Exemption Claimed**

{¶10} “[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).

#### Public Utility Usage Records

R.C. 149.43(A)(1) and (A)(1)(aa) provide that;

“Public record” does not mean any of the following: \* \* \*

(aa) Usage information including names and addresses of specific residential and commercial customers of a municipally owned or operated public utility;

Under this language, the City *may* withhold public utility usage information. The exemption is discretionary, not mandatory. 2000 Ohio Atty.Gen.Ops. No. 021 (“R.C. 149.43 does not expressly prohibit the disclosure of items that are excluded from the definition of public records, but merely provides that their disclosure is not mandated.”).

{¶11} The court may take notice that the common meaning of “usage” includes the use of something, the way in which it is used, and how much it has been used.<sup>2</sup> Usage of a public utility service thus spans the commencement of the service, period of active access to the service, and any gap in or termination of service. The inclusion of the “names and addresses of specific residential and commercial customers” means that the mere fact of a person’s status as a utility customer is “usage information.” The Special Master concludes that any “shut-off lists for the City of Galion Utilities” or their functional equivalent by another name would fall squarely under the exemption for “[u]sage information \* \* \* of a municipally owned or operated public utility.” Although Wade later sought to modify her request to one for “financial information” (Reply at 2; Memorandum in Support at 2.), it is axiomatic that financial information in a utility shut-off list would also

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<sup>2</sup> See <https://dictionary.cambridge.org/us/dictionary/english/usage> (Accessed Nov. 10, 2022.)

relate to usage. There is thus no need for the court to further explore the City's ability to provide the information in list format.

{¶12} Wade relates her purpose in making her request, submits court documents and personal accusations unrelated to any legal basis for the request, and opines that the Mayor "should not be allowed to shield this shutoff information from public view." (Response at 2-3, Exh. 3.) However, this court rules on public records disputes based on the ordinary application of statutory law and case law as they existed at the time of the filing of the complaint. R.C. 2743.75(F)(1). Public policy considerations for statutory exemptions have already been weighed and balanced by the General Assembly:

It is the role of the General Assembly to balance the competing concerns of the public's right to know and individual citizens' right to keep private certain information that becomes part of the records of public offices. The General Assembly has done so, as shown by numerous statutory exceptions to R.C. 149.43(B), found in both the statute itself and in other parts of the Revised Code

*State ex rel. Toledo Blade Co. v. Univ. of Toledo Found.*, 65 Ohio St.3d 258, 266, 602 N.E.2d 1159 (1992). Accord *State ex rel. WBNS TV, Inc. v. Dues*, 101 Ohio St.3d 406, 2004-Ohio-1497, 805 N.E.2d 1116, ¶ 36-37. The court may not ignore the clearly applicable exemption cited by the City.

### **Conclusion**

{¶13} Upon consideration of the pleadings and attachments the Special Master recommends the court DENY requester's claim for production of records. It is recommended that costs be assessed to requester.

{¶14} *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

**Filed November 18, 2022**  
**Sent to S.C. Reporter 12/15/22**