

[Cite as *Ebersole v. Powell*, 2018-Ohio-5011.]

BRIAN EBERSOLE

Requester

v.

CITY OF POWELL

Respondent

Case No. 2018-00478PQ

Judge Patrick M. McGrath

DECISION

{¶1} On October 18, 2018, requester Brian Ebersole filed objections to a special master’s report and recommendation of October 9, 2018. On the same date, respondent city of Powell also filed objections. The matter is now before the court for decision.

I. Background and Procedural History

{¶2} On March 16, 2018, pursuant to R.C. 2743.75(D), Ebersole filed a complaint against the city of Powell (City) wherein he alleged a denial of access to public records. The court appointed a special master in the cause and the case was referred to mediation. After mediation failed to successfully resolve all disputed issues between the parties, the court returned the case to the docket of the special master.

{¶3} On June 20, 2018, the City, through counsel, submitted a combined response and motion to dismiss. The special master permitted the parties to submit additional filings and requested additional information from the parties. On October 9, 2018, the special master issued a report and recommendation, wherein he recommended the court deny requester’s claim for production of records and found that respondent failed to respond to requester’s overly broad request with the opportunity and information required by R.C. 149.43(B)(2). It was recommended that costs be shared equally by the parties. (Report and Recommendation, 22.)

{¶4} On October 18, 2018, Ebersole and the City filed separate written objections to the special master's report and recommendation. On October 29, 2018, Ebersole filed a response to the City's objections.

II. Law and Analysis

{¶5} R.C. 2743.75(F)(2) governs objections to a report and recommendation issued by a special master of this court relative to a public records dispute. Pursuant to R.C. 2743.75(F)(2),

[e]ither party may object to the report and recommendation within seven business days after receiving the report and recommendation by filing a written objection with the clerk and sending a copy to the other party by certified mail, return receipt requested. Any objection to the report and recommendation shall be specific and state with particularity all grounds for the objection. If neither party timely objects, the court of claims shall promptly issue a final order adopting the report and recommendation, unless it determines that there is an error of law or other defect evident on the face of the report and recommendation. If either party timely objects, the other party may file with the clerk a response within seven business days after receiving the objection and send a copy of the response to the objecting party by certified mail, return receipt requested. The court, within seven business days after the response to the objection is filed, shall issue a final order that adopts, modifies, or rejects the report and recommendation.

A. Ebersole's objections are not well-taken.

{¶6} Ebersole presents the court with seven objections, several of which have subparts. When the seven objections and subparts are taken together, Ebersole submits at least thirty-six objections. Based on the court's review, none of Ebersole's objections have merit. And the court further determines that the special master's recommended denial of Ebersole's request for production of records should be adopted.

B. City of Powell's objections are well-taken.

{¶7} The City objects to the special master's determination that the City committed a per se violation of R.C. 149.43(B)(2) (duty of a public office or person responsible for a requested public record to provide information and invite revision of a request for records). According to the City, the affirmative defense that Ebersole's

“request for ‘any and all’ correspondence was overly broad was first raised during the course of briefing in this litigation, simply to point out that [Ebersole] was seeking to enforce a request that was unenforceable.” (Objections, 1.)

{¶8} At issue in the City’s objections is an interpretation and application of R.C. 149.43(B)(2), which provides:

* * * If a requester makes an ambiguous or overly broad request or has difficulty in making a request for copies or inspection of public records under this section such that the public office or the person responsible for the requested public record cannot reasonably identify what public records are being requested, the public office or the person responsible for the requested public record *may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office’s or person’s duties.*

(Emphasis added.) Here, according to the special master, the City “provided Ebersole with hundreds of responsive records.” (Report and Recommendation, 21.) And, according to the special master, “the request in Prayer for Relief A2 is ambiguous and overly broad in several respects.” (Report and Recommendation, 13.) Nonetheless, despite finding that the City provided “hundreds of responsive records” to Ebersole and that Ebersole’s request in Prayer for Relief #A2 was ambiguous and overly broad, the special master determined that the City committed a *per se* violation of R.C. 149.43(B)(2) in responding to Ebersole’s Prayer for Relief #A2. The special master states: “In responding to the request in Prayer for Relief #A2 prior to this action, Powell neither denied the request nor provided significant information as to the manner in which records are maintained and accessed by the office. Powell has now denied the request, and the failure to provide information and invite revision constitutes a *per se* violation of R.C. 149.43(B)(2). *State ex rel. ESPN v. Ohio State Univ.*, 132 Ohio St.3d 212, 2012-Ohio-2690, 970 N.E.2d 939, ¶ 10-11.” (Report and Recommendation, 21.)

{¶9} In *ESPN* at ¶ 10-11, the Ohio Supreme Court found a *per se* violation of R.C. 149.43(B)(2), stating:

ESPN first claims that Ohio State committed per se violations of R.C. 149.43(B)(2) and (3) in its responses to ESPN's requests for pass lists and documents regarding past and current NCAA violations and NCAA investigations. *Ohio State initially denied the requests for pass lists and the documents regarding violations because they were "overly broad" and the documents regarding the current investigation because it would "not release anything on the pending investigation."*

We agree with ESPN's contentions that Ohio State violated R.C. 149.43(B)(2) and (3). For its denials based on overbreadth of the requests, Ohio State did not provide ESPN, in accordance with R.C. 149.43(B)(2), "with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties." * * *.

(Emphasis added.) In *ESPN*, The Ohio State University "initially denied" the request for pass lists and other documents as overly broad. But here, according to the special master, in responding to the request in Prayer for Relief #A2 prior to this action, Powell "*neither denied the request nor provided significant information* as to the manner in which records are maintained and accessed by the office." (Emphasis added.) (Report and Recommendation, 21). Unlike *ESPN*, in this case there was no "initial denial" by the public office. And because, according to the special master, the City did not provide *significant* information as to the manner in which records are maintained and accessed by the office, the City apparently provided *some* information (albeit not significant information in the special master's judgment) about the manner in which its records were maintained and accessed. Therefore, unlike *ESPN*, in which the university initially denied ESPN's requests and the university did not inform ESPN of the manner in which records were maintained and accessed, here, the City did not initially deny the request in Prayer for Relief #A2 and the City seemingly provided some information about the manner in which its records were maintained and accessed. The circumstances of this case are thus distinguishable from the circumstances in *ESPN*.

{¶10} Moreover, in defending itself in this litigation, the City was permitted to raise additional reasons—such as overbreadth—in its defense against Ebersole's

complaint. Pursuant to R.C. 149.43(B)(3), if a request is ultimately denied, in part or in whole, the public office or the person responsible for the requested public record “shall provide the requester with an explanation, including legal authority, setting forth why the request was denied. * * * *The explanation shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under [R.C. 149.43(B)(2)].*” (Emphasis added.) Thus, in this instance, under R.C. 149.43(B)(3) the City properly could raise overbreadth and other additional reasons or legal authority as defenses.

{¶11} Furthermore, under R.C. 149.43(B)(2) a *denial* of a request by a public office or person responsible for a public record triggers the obligation to provide a requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office’s or person’s duties. See R.C. 149.43(B)(2) (providing that a public office or the person responsible for the requested public record “*may deny the request but shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office’s or person’s duties*” (emphasis added)). But here, as noted by the special master, the City did not deny Ebersole’s request in Prayer for Relief #A2 prior to this action and the City provided Ebersole with “hundreds of responsive records.” (Report and Recommendation, 21.)

{¶12} In sum, because (1) the City did not initially deny Ebersole’s request for public records; (2) the City proceeded to gather and provide “hundreds of responsive records” to Ebersole; (3) the City did not raise overbreadth until it filed a response and motion to dismiss in this case; (4) the special master found Ebersole’s request in Prayer for Relief #A2 was ambiguous and overly broad; (5) the City has no obligation to provide a response to overbroad and ambiguous public records requests, see *Salemi v. Cleveland Metroparks*, 8th Dist. Cuyahoga No. 100761, 2014-Ohio-3914, ¶ 26

(“R.C. 149.43(B)(2) and Ohio case law require that a public records request be limited to those requests that are not ambiguous, overly broad, or all encompassing”), *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21 (noting that it is the responsibility of a person who wishes to “inspect and/or copy records” to identify with reasonable clarity the records at issue); and (6) the City is permitted to raise defenses, such as overbreadth, in defending against a complaint, the court is therefore hard-pressed under the circumstances of this case to conclude that the City committed a per se violation of R.C. 149.43(B)(2) relative to the request in Prayer for Relief #A2. The court determines that the City’s objections should be sustained and that the court should not adopt the special master’s recommendation that this court find that the City “failed to respond to Ebersole’s overly broad request with the opportunity and information required by R.C. 149.43(B)(2).” (Report and Recommendation, 22.)

III. Conclusion

{¶13} For reasons set forth above, the court holds that Ebersole’s objections to the special master’s report and recommendation of October 9, 2018 should be overruled and that the City’s objections to the special master’s report and recommendation should be sustained. The court further holds that the special master’s report and recommendation, should be adopted in part, rejected in part, and modified in part. The court also holds that the special master’s report and recommendation, as modified, should be adopted.

PATRICK M. MCGRATH
Judge

IN THE COURT OF CLAIMS OF OHIO

BRIAN EBERSOLE

Requester

v.

CITY OF POWELL

Respondent

Case No. 2018-00478PQ

Judge Patrick M. McGrath

JUDGMENT ENTRY

{¶14} For the reasons set forth in the decision filed concurrently herewith, and upon independent review of the objected matters, the court OVERRULES requester's written objections to the special master's report and recommendation of October 9, 2018, and the court SUSTAINS respondent's written objections to the special master's report and recommendation of October 9, 2018.

{¶15} The court adopts in part, rejects in part, and modifies in part the special master's report and recommendation of October 9, 2018. The court adopts, as modified, the special master's report and recommendation of October 9, 2018. Judgment is rendered in favor of respondent. Court costs are assessed against requester. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge