

[Cite as *Graham v. Cleveland*, 2019-Ohio-5485.]

CHRISTOPHER GRAHAM

Requester

v.

CITY OF CLEVELAND

Respondent

Case No. 2019-00869PQ

Special Master Jeff Clark

REPORT AND RECOMMENDATION

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{¶1} Ohio’s Public Records Act, R.C. 149.43, provides a remedy for production of records under R.C. 2743.75 if the court of claims determines that a public office has denied access to public records in violation of R.C. 149.43(B). The policy underlying the Act is that “open government serves the public interest and our democratic system.” *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. The Act is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13.

### **Background and Facts**

{¶2} From June 1, 2018 to July 1, 2019, requester Christopher Graham made 473 public records requests to the City of Cleveland (City). (Response, Andrews Aff. at ¶ 4; see e.g., Complaint at 5-9, 11-208.) The requests included daily duty reports of named City police officers for one-month periods. The City satisfied these requests through June 9, 2019. (Complaint at 5-7.) However, from June 24, 2019 forward, the City denied Graham’s requests for daily duty reports<sup>1</sup> as not identifying the records sought with reasonable clarity. (Complaint at 4; Response, Puin Aff. at ¶ 2-3, attached email.) The City invited Graham to provide the dates within the month that an officer

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<sup>1</sup> Graham also attaches the copy of a request made on June 24, 2019 for a master list of Internal Affairs investigations for 2009. (Complaint at 102, Request No. PO08243-062419.) However, this request is not included in his list of denied requests (*Id.* at 8-9), or on respondent’s list of “open” requests received prior to the complaint (Andrews Aff. at ¶ 5, attachments), and will therefore not be considered as a claimed violation.

worked in order to properly identify daily duty reports by the method of retrieval used by the City. (*Id.*) There is no evidence that Graham subsequently revised or clarified his requests.

{¶3} On August 6, 2019, Graham filed a complaint pursuant to R.C. 2743.75 alleging that the City denied him access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, the City filed a response and motion to dismiss (Response) on October 15, 2019.

### **Motion to Dismiss**

{¶4} In order to dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that 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} The City moves to dismiss the complaint on the ground that Graham's requests are ambiguous, overly broad, unduly burdensome, and therefore unenforceable. Under the abbreviated pleading procedure in this action (see R.C. 2743.75(D)(1) and (E)(2)) the City's defense has been filed as a combined response and motion to dismiss. On consideration of the motion to dismiss, I find the defense that the requests are improper is not conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed I find that the arguments to dismiss are subsumed in the arguments to deny the claim on the merits. I therefore

recommend that that the motion to dismiss be denied, and the matter determined on the merits.

### **Past Production Does Not Waive Future Assertion of Available Defenses**

{¶6} As a threshold matter, Graham asserts that the reasons given by the City for denial of his requests are not valid because in the past the City has provided him with records in response to identically worded requests for the same category of records. However, the voluntary production of records in the past does not estop a public office from withholding the same type of records on the basis of a valid defense. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 38 (the mere fact that agencies had released employee home addresses to public records requests in the past did not preclude later withholding them as “non-records”); *State ex rel. Plain Dealer Pub. Co. v. Cleveland*, 106 Ohio St.3d 70, 2005-Ohio-3807, 831 N.E.2d 987, ¶ 59-62 (past disclosures did not waive the right to assert exemptions). I find that the City has not waived any defense as to the claims before the court.

### **Burdens of Proof**

{¶7} In any action to enforce the Public Records Act (PRA), the burden is on the requester to prove an alleged violation. In mandamus actions,

[a]lthough the PRA is accorded liberal construction in favor of access to public records, “the relator must still establish entitlement to the requested extraordinary relief by clear and convincing evidence.”

*State ex rel. Caster v. Columbus*, 151 Ohio St.3d 425, 428, 2016-Ohio-8394, 89 N.E.3d 598, ¶ 15. Entitlement to relief in an action filed under R.C. 2743.75 must likewise be established by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.).

{¶8} If a public office asserts an exception to the Public Records Act, the burden of proving the exception rests on the public office. *State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner’s Office*, 153 Ohio St.3d 63, 2017-Ohio-8988, 101 N.E.3d 396, ¶ 15.

An exception is a state or federal law prohibiting or excusing disclosure of items that otherwise meet the definition of “public record.” However, the defense that a request was improper in the first instance does not assert an exception. Where the defense of ambiguity or overbreadth is raised, the burden of proof remains with the requester to show that he has reasonably identified the record sought:

“[I]t 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, 1993 WL 173743, \*4 (Apr. 28, 1993), *aff’d*, 68 Ohio St.3d 117, 623 N.E.2d 1202 (1993).

If a requester fails to show that a properly specific request has been made, his complaint is subject to dismissal for failure to state a claim. *State ex rel. Lanham v. Ohio Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 687 N.E.2d 283 (1997); *Ziegler v. Ohio Dept. of Pub. Safety*, 11th Dist. Lake No. 2014-L-064, 2015-Ohio-139 (“[T]he obligations of R.C. 149.43(B) are only invoked and a writ of mandamus can only issue where a proper request has been made, i.e., one that describes the records sought with reasonable clarity”). See also *State ex rel. O’Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 23 (if a document’s status as a “record” is denied, burden remains on requester to show that it is); *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 (if office asserts that a requested record does not exist, requester must show that it does).

### **Improperly Ambiguous or Overly Broad Requests**

{¶9} 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. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21. A request that is instead ambiguous or overly broad may be denied. R.C. 149.43(B)(2) 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 \* \* \*.

For example, the Public Records Act does not

compel a governmental unit to do research or to identify records containing selected information. That is, relator has not established that a governmental unit has the 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 1202 (1993). See generally *State ex rel. Essi v. Lakewood*, 2018-Ohio-5027, 126 N.E.3d 254, ¶ 28–37 (8th Dist.). *But see State ex rel. Carr v. London Corr. Inst.*, 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 21-31.

{¶10} Judicial determination of whether an office has properly denied a request as ambiguous or overly broad is based on the facts and circumstances in each case, *Zidonis* at ¶ 26. Here, Graham lists 89 requests he claims were improperly denied. (Complaint at 8-9.)<sup>2</sup> Graham frames each request as seeking “a copy of the duty report for [officer] for the month of [month/year]” (*Id.*) in support of its response to the requests in this format, the City provides the testimony of the public records clerk for the Cleveland PD as to how the requested reports are organized, maintained, and retrieved:

In order to retrieve daily duty reports for an officer for a particular month, I need to first know what days of the month the officer worked; otherwise, I

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<sup>2</sup> The City asserts denial of 96 Graham requests in the same time period. (Andrews Aff. at ¶ 4-5, and attachments.) This disparity in number makes no difference to the disposition of the issues, as they are identical for all the requests.

have to go through all reports of all officers from the same unit for that month. This is because the daily duty assignment sheets (DDA's) and daily duty reports are organized by police district, and then by unit – not by officer name.

(Andrews Aff. at ¶ 8.) The City thus possesses all the reports that Graham seeks, but asserts that these records are not indexed and retrievable solely by officer name. See *State ex rel. McElroy v. Polito*, 8th Dist. Cuyahoga No. 77042, 1999 Ohio App. LEXIS 5683 (Nov. 30, 1999) (no duty to gather all marriage license applications from a specified year, where no collection or index of such records existed). The City accordingly invited Graham “to provide the dates the officer has worked” in order to “properly identify the record you are seeking.” (Complaint at 4.) See *Zidonis* at ¶ 35. I note that as an employee of the City, Graham’s ability to frame sufficiently specific requests is informed by his prior knowledge of how the requested records are labeled, maintained, and accessed. (*Id.* at 2.) See *Zidonis* at ¶ 38. Although Graham has previously obtained daily duty assignment sheets for Cleveland PD units (Complaint at 5-6), which presumably include the dates of service of individual officers therein, he did not obtain and use dates of duty information from assignment sheets to make his current requests in accordance with the method of retrieval used by the City. See *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 755, 577 N.E.2d 444 (10th Dist.1989). Given his manifest awareness of how to frame a properly specific request, I find that the City’s requirement that Graham identify the *days* on which an officer worked, i.e., the manner in which the City organizes and retrieves *daily* duty reports, is a reasonable one. On the facts of this case, I find that Graham made overly broad requests that instead required the City to perform research for the dates of named officer’s reports.

{¶11} Further, parts of the request are arguably so voluminous as to be overly broad for that reason alone. In general,

No pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by the respondent to evade the public’s right to inspect and obtain a copy of public records within a

reasonable time. The respondent 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). See also *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53-54, 689 N.E.2d 25 (1998) (noting that Cleveland's high volume of reports and requests does not exempt it from this principle). However, and apparently separate from proof of interference with the recordkeeping process, the Supreme Court holds that a public office may decline to provide a response that amounts to the complete duplication of voluminous files kept by the office, such as an entire category of records:

In identifying the records at issue, the Public Records Act "does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies." *State ex rel. Warren Newspapers, Inc. v. Hutson* (1994), 70 Ohio St.3d 619, 624, 1994 Ohio 5, 640 N.E.2d 174, citing *State ex rel. Zauderer v. Joseph* (1989), 62 Ohio App.3d 752, 577 N.E.2d 444.

*State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 17 (all of a legislator's email for a six-month period). Graham requests multiple years of daily duty reports for at least three officers. (Complaint at 8-9.) While Graham divides these into requests of one month each, that does not alter the voluminous nature of the combined requests for this category of records. See, e.g., *State ex rel. Bristow v. Baxter*, 6th Dist. Erie Nos. E-17-060, E-17-067, E-17-070, 2018-Ohio-1973, ¶ 12-16.

{¶12} Separately, the City argues that these requests are so unreasonably burdensome as to interfere with the discharge of the duties of the records custodian (Response at 6; *Andrews Aff.* at ¶ 6, 9), and indeed constitute "vexatious conduct" as prescribed by R.C. 2323.52(A)(2). Because the claim is completely resolved on the basis of the above-described overbreadth of the requests, these allegations need not be resolved.

{¶13} I find that the requests were overly broad, did not reasonably identify the records sought, and that the City did not violate the Public Records Act in declining to provide responsive records without identification of the date and officer for each daily duty report. Graham may of course file new public records requests for properly specified reports. The parties are encouraged to make use of the tools provided by the legislature to further narrow ambiguity and overbreadth of such requests, see R.C. 149.43(B)(2) through (B)(7), with the goal of identifying specific records sought while minimizing the burden on the City. Such cooperation is favored by the courts. See *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 15-20.

### **Conclusion**

{¶14} Upon consideration of the pleadings and attachments, I recommend the court DENY requester's claim for production of records. I further recommend that costs be assessed to requester.

*{¶15} 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