[Cite as *Bollinger v. River Valley Local School Dist.*, 2020-Ohio-6637.]

MARK A. BOLLINGER Requester v. RIVER VALLEY LOCAL SCHOOL DISTRICT Respondent	Case No. 2020-00368PQ Special Master Jeff Clark REPORT AND RECOMMENDATION

{¶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 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.

{¶2} On or about August 15, 2017, requester Mark Bollinger made a public records request to respondent River Valley Local School District for a variety of communications, including

> All communications (including ALL text message transcripts) collected by Douglas Duckett and/or any employee or representative of the River Valley Local School District from [two students] during the investigation that lead to the termination of Mark Bollinger's contract and the issues reported to the Ohio Department of Education.

(Complaint at 5.) By letter of August 23, 2017, the School District provided records responsive to the requests, but noted that "records which do not document organization, function, policies, decision, procedures, operations or other activities of a public office are not public records" and "records which are attorney-client privileged" are not public records. (*Id*. at 6.) On or about April 4, 2018, Bollinger submitted a functionally identical

request for communications involving only one of the students (*Id*. at 7). Although Bollinger represents that he received no response to this second request (*Id*. at 2), the School District has submitted a June 9, 2018 email and attachments from School District legal counsel to Bollinger that reasserted the School District's explanation for withholding, and provided him a second copy of the previously disclosed records. (Response, Exh. B filed under seal.) On October 1, 2019, Bollinger made a final, revised request for

> ALL text or transcripts of text messages, collected by Douglas Duckett and/or any employee or representative of the River Valley Local School District, from [one student] during the investigation of Mark Bollinger in 2015.

(*Id*. at 8.) On or about October 2, 2019, the School District reiterated that Bollinger was "only entitled to a copy of those text messages or transcripts which are public records" and that it was not providing any items "that did not document the organization, functions, policies, decisions, procedures, operations, or other activities of" the School District. The response asserted that "any records that are attorney-client privileged are not public records." (*Id*. at 9.)

{¶3} On June 11, 2020, Bollinger filed a complaint pursuant to R.C. 2743.75 alleging that the School District denied him access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, the School District filed a motion to dismiss (Response) on September 8, 2020. On October 2, 2020, Bollinger filed a reply.

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.

{¶5} The School District moves to dismiss the complaint on the grounds that, 1) Bollinger's requests are moot because it has previously provided all public records responsive to the requests, properly declining to retrieve or produce those documents in the hands of its outside investigator that do not meet the definition of "records." R.C. 149.011(G), and 2) all information received by the School District's attorney-investigator as part of his investigation and used to compile the final report would be protected from disclosure by the attorney-client privilege. On consideration of the motion, I find that the nature and status of the withheld documents as "records" or attorney-client privileged communications is not conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed I find that these arguments 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.

Burdens of Proof

{¶6} A requester must establish entitlement to relief in an action filed under R.C. 2743.75 by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.). If a public office asserts an exception to the Public Records Act as the basis for withholding records, the burden shifts to the public office to establish its applicability. *State ex rel. Cincinnati Enquirer v. Jones-Kelley*, 118 Ohio St.3d 81, 2008-Ohio-1770, 886 N.E.2d 206, ¶ 10. *See 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 a "record" of the office, including those enumerated in R.C. 149.43(A)(1). However, the defense that an item is not a "record" of the office does not assert an exception, and the burden of proof remains with the requester to establish that status. *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; *Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 19.

Past Production Does Not Waive Assertion of Available Defenses

{¶7} Bollinger states that the printouts previously disclosed by the School District include texts that were extraneous to the investigation. In other words, some of those texts were non-record for the same reasons asserted for the withheld texts, but were voluntarily disclosed. (Reply at ¶ 10-11.) However, voluntary production of records in the past does not estop a public office from later 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 School District has not waived any defense to the claims before the court.

Non-Records are not Subject to the Public Records Act

"Records" are defined in R.C. 149.011(G) as including:

> any document, device, or item, regardless of physical form or characteristic, * * *, created or received by or coming under the jurisdiction of any public office of the state or its political subdivisions, which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office.

The definition of "record" does not include every piece of paper on which a public officer writes something, or every document received by a public office. *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 13. R.C. 149.011(G) requires more than mere receipt and possession of an item for it to be a record for purposes of R.C. 149.43. *State ex rel. Beacon Journal Publ'g Co. v. Whitmore*, 83 Ohio St.3d 61, 64, 697 N.E.2d 640 (1998). *See State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188, 610 N.E.2d 997 (1993). Information that a public office

happens to be storing, but which does not serve to document any aspect of the office's activities, does not meet the statutory definition of a "record." *State ex rel. McCleary v. Roberts*, 88 Ohio St. 3d 365, 367-368, 725 N.E.2d 1144 (2000).

{¶8} A requester seeking items withheld as non-records must establish that they "create a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of the [public office]." *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 22. Disclosure of information about private citizens is not required when such information reveals little or nothing about an agency's own conduct and would do nothing to further the purposes of the Act. *State ex rel. Beacon Journal Publ'g Co. v. Bond*, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 9-13; *Dispatch* at ¶ 27. *See State ex rel. Wilson-Simmons v. Lake County Sheriff's Dep't*, 82 Ohio St.3d 37, 41, 693 N.E.2d 789 (1998) (personal emails, not used to conduct business of the office); *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 25 (texts not shown to document work-related matters).

{¶9} Even where a document is received, reviewed, and integrated into a topical office file, but is not used to document the office's activities, it may not rise to the definition of a "record." In *State ex rel. Beacon Journal Publ'g Co. v. Whitmore,* 83 Ohio St.3d 61, 697 N.E.2d 640 (1998), a judge received, read, and filed letters relating to an upcoming sentencing hearing, but testified that she did not rely on them in reaching her decision. The Supreme Court found that the unsolicited letters did not serve to document her sentencing decision in that case, or any other activity of her office. *Id.* at 63-65. "By so holding, we reject relators' contention that a document is a 'record' under R.C. 149.011(G) if the public office 'could use' the document to carry out its duties and responsibilities." *Id*. at 63. *Compare Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 23.

{¶10} Electronic storage devices obtained in the course of criminal or administrative investigations may include voluminous content that is personal or

otherwise unrelated to the investigation. If such items were automatically considered "records," the public office would be obliged to respond fully to public records requests for them. Fortunately, no such result is required by the language of R.C. 149.011(G). *See generally Narciso v. Powell Police Dept.*, Ct. of Cl. No. 2018-01195PQ, 2018-Ohio-4590, ¶ 45-51. Items gathered during an investigation, but never used to document any aspect of the investigation, do not qualify as "records." *Narciso* at ¶ 48; *Andes v. Ohio AG's Office*, Ct. of Cl. No. 2017-00144-PQ, 2017-Ohio-4251, ¶ 13-14 (contents of storage devices were either not relevant to the investigation, or were not used in the criminal prosecution).

{¶11} The investigation that lead to the termination of Mark Bollinger's contract was conducted by two attorneys. The School District summarizes the acquisition and use of text messages from two students as follows:

> As part of the investigation of Mr. Bollinger, Respondent's attorneys received hundreds of pages of text messages between V.A. and A.G. Only a portion of those messages mention Mr. Bollinger or anything related to Respondent, and those are the messages that Respondent previously provided to Mr. Bollinger. The other text messages were not received by Respondent, were not used by Respondent to perform any sort of public function, and were not relied upon by Respondent when making any decision regarding Mr. Bollinger.

(Response at 3; Pollock Aff. *passim*; Keller Aff. at ¶ 3-4.) The School District has twice provided copies to Bollinger of all text messages relied upon in the attorneys' investigation report. (Response at 2; Keller Aff. at ¶ 6-7.)

{¶12} The School District submitted all text messages that its investigators received in connection with the investigation, under seal. ("sealed records"). The School District provided a list of the printout pages containing the texts used in and attached to the investigation report:

> One file of text messages consisted of 123 pages. Pages 105-108 and 114-119 from that file were printed and attached as Appendix A to the investigative report provided to Respondent. The remaining pages were not provided to Respondent and were maintained by Ms. Pollock. All 123

> pages have been filed separately under seal and labeled Exhibit C. The second file consisted of 127 pages of text messages. Pages 3-8, 10-15, 17-19, 24, 27, 29, 33-36, 38-39, 45-48, 56-61, 65-66, 68, 73-76, 80, 84, 87-92, 99, 107, and 110 from that file were printed and attached as Appendix B to the investigative report provided to Respondent. The remaining pages were not provided to Respondent and were maintained by Ms. Pollock. All 127 pages have been filed separately under seal and labeled Exhibit D. All of the pages of text messages that were appended to the investigative report have been provided to Mr. Bollinger in response to his public records requests. The remaining pages of text messages that were retained by Respondent's counsel and were not part of the investigative report have not been provided to Mr. Bollinger.

(Response at 4-5.) Each of the 250 pages contains multiple separate texts. Like the pages that were disclosed, the withheld pages contain approximately 10 to 20 texts per page. On review in camera, I find that respondent's description of the records produced to Bollinger accurately accounts for the pages that mention or relate to him.

{¶13} Bollinger believes that the withheld texts contain evidence that contradicts the credibility of the students, and of the investigation report. (Complaint at 2; Reply at ¶ 5-9.) Bollinger's specific beliefs regarding behaviors and motivations evidenced in withheld texts (Complaint at 4; Reply at ¶ 17-22) are matters that presumably could have been pursued in his administrative proceeding, through discovery or otherwise. Re-litigation of that proceeding is neither necessary or appropriate in this court.

{¶14} The issue in this public records action is instead whether the requested documents served to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office. Bollinger provides no evidence, or even an express assertion, that the investigators relied on or otherwise used the withheld texts to document the investigation and report. The unauthenticated material attached to his reply (Reply at 10-20) shows at most that all of the students' texts were *reviewed* during the investigation, not that every one was utilized for the investigation. Further, Bollinger does not contest the School District's assertion that it did not receive the withheld texts prior to its decision to terminate his contract. (Pollock Aff. at ¶ 7;

Keller Aff. at ¶ 3-4.) The withheld texts thus did not document either the investigation or the employment decision.

{¶15} I find under the facts and circumstances of this case that disclosure of texts obtained and stored but not actually used to document the investigation, including any that were reviewed but disregarded by the investigator, *Whitmore* at 65, would reveal little or nothing about the School District or its activities. *Dispatch Printing Co. v. Johnson,* 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 27. I find that Bollinger has not met his burden to show by clear and convincing evidence that any withheld document in this matter satisfies the definition of a "record" of the School District. The School District therefore had no obligation to produce additional documents in response to Bollinger's records request.

Attorney-Client Privilege[1]

{¶16} "The attorney-client privilege, which covers records of communications between attorneys and their government clients pertaining to the attorneys' legal advice, is a state law prohibiting release of these records." *State ex rel. Toledo Blade Co. v. Toledo-Lucas County Port Auth.*, 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 22. *Accord State ex rel. Leslie v. Ohio Housing Fin. Agency,* 105 Ohio St.3d 261, 2005-Ohio-1508, 824 N.E.2d 990, ¶ 21-24. The party asserting the attorney-client privilege bears the burden of showing its applicability. *State ex rel. Pietrangelo v. Avon Lake*, 146 Ohio St.3d 292, 2016-Ohio-2974, ¶ 9. The bare assertion that the privilege applies does not meet this burden, and a record is not exempt merely because it is received by counsel. *See generally Cincinnati Enquirer v. Hamilton Cty. Bd. of Commrs*., Ct. of Cl. No. 2019-00789PQ, 2020-Ohio-4856, ¶ 20-28 and cases cited therein.

[1] While an attorney's compiled but unused materials could conceivably be subject to other exemptions or privileges, these have been waived and need not be considered. *Toledo-Lucas County Port Auth*. at ¶ 19.

{¶17} In this case, Bollinger does not expressly contest the School District's assertion of attorney-client privilege. However, the School District must still meet its burden to show applicability. The School District asserts the withheld texts fall under the privilege because they were gathered in the course of an investigation conducted by attorneys, citing *Toledo-Lucas County Port Auth.* However, the respondent in that case submitted affidavits detailing the legal issues on which advice was provided, and how that advice was evidenced in resulting documents. *Id.* at ¶ 29. The School District provides no comparable testimony or documentation supporting attorney-client privilege. Further, respondent in *Toledo-Lucas County Port Auth*. voluntarily disclosed the preexisting documents gathered and reviewed by the attorney-investigator. *Id*. at ¶ 1, 7. The case thus does not stand for the proposition that all factual materials gathered in an attorney-led investigation are covered by the attorney-client privilege. I find that the School District's assertion of attorney-client privilege is based solely on conclusory statements that do not identify and explain the nature of any legal issue for which the withheld texts were utilized. I conclude that the School District has not met its burden to prove that the withheld texts fall squarely under the privilege.

{¶18} Further, the School District's own assertion that the requested documents "were unrelated to Mr. Duckett's report" (Pollock Aff. at ¶ 7) contradicts a necessary element of the attorney-client privilege - that the material pertained to the attorney's provision of legal advice. Under the facts and circumstances of this case the defenses of non-record and attorney-client privilege are mutually exclusive alternatives. If the court finds that the withheld texts were non-records, then the claim of attorney-client privilege is moot.

Conclusion

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

{¶20} *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

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