

[Cite as *Beem v. Bur. of Criminal Investigation*, 2016-Ohio-8605.]

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| KIMBERLY R. BEEM | Case No. 2016-00758-PQ |
| Requester | Special Master Robert Van Schoyck |
| v. | <u>REPORT AND RECOMMENDATION</u> |
| BUREAU OF CRIMINAL INVESTIGATION | |
| Respondent | |

{¶1} On September 28, 2016, requester, Kimberly R. Beem (Beem), filed a complaint under R.C. 2743.75 in the Licking County Common Pleas Court alleging a denial of access to public records in violation of R.C. 149.43(B). Pursuant to R.C. 2743.75(D)(1), the clerk of the common pleas court forwarded the complaint to this court, where it was received on October 13, 2016.

{¶2} On November 10, 2016, mediation was conducted with Beem and a representative of respondent, Bureau of Criminal Investigation (BCI), pursuant to R.C. 2743.75(E)(1). On November 14, 2016, the court was notified that the case was not resolved and that mediation was terminated.

{¶3} On November 23, 2016, BCI filed what is construed as a combined response and motion to dismiss pursuant to R.C. 2743.75(E)(2).

{¶4} It is undisputed that Beem, who had previously been the subject of a criminal investigation by BCI, submitted a request to BCI on August 30, 2016, for “all recordings by Agent Jenkins and/or Swope in their investigation of me * * *.” There is no dispute that Beem renewed this request in later correspondence with BCI. The parties are in agreement that BCI subsequently provided Beem with a copy of the recording of her interview with the agents, and, at the same time, informed Beem in an

accompanying letter dated September 23, 2016, that “[t]his is the only material we have that corresponds to your request.”

{¶5} Beem brings this action claiming that recordings of interviews with other persons do exist and that BCI has wrongfully denied her access to such records in violation of R.C. 149.43(B). BCI argues that the complaint should be dismissed as moot because the only existing record responsive to Beem’s request was already produced. BCI’s motion is made under Civ.R. 12(B)(6), asserting that Beem has failed to state a claim upon which relief can be granted. Beem has alleged, though, that BCI has other records—beyond the one that was produced—which are responsive to her request, and, moreover, that she was denied access to such records in violation of R.C. 149.43(B). If proven, such allegations may entitle a person to relief under R.C. 2743.75. Therefore, I recommend that BCI’s motion to dismiss be DENIED and that the claim be determined on its merits.

{¶6} As amended by 2015 Sub.S.B. No. 321, R.C.149.43(C) provides that a person allegedly aggrieved by a violation of division (B) of that section may either commence a mandamus action (a remedy that predates the amendment) or file a complaint under R.C. 2743.75 (a remedy created by the amendment). In mandamus actions alleging violations of R.C. 149.43(B), case law provides that relators must establish by “clear and convincing evidence” that they are entitled to relief. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 14. As for actions under R.C. 2743.75 alleging violations of R.C. 149.43(B), neither party has suggested that another standard should apply, nor is another standard prescribed by statute. R.C. 2743.75(F)(1) states that such claims are to be determined through “the ordinary application of statutory law and case law * * *.” Accordingly, this claim shall be determined under a standard of clear and convincing evidence.

{¶7} The complaint sets forth very few details in support of Beem’s contention that BCI has recordings of other interviews. The complaint provides, in part: “JENKINS

REPORT SHOWS HE RECORDED THE INTERVIEWS * * *. [BCI] REFUSES TO TURN THEM OVER AND PLAYS CHILDISH GAMES BY SENDING ONLY THE INTERVIEW WITH ME.” The complaint does not provide any other information concerning the vague allegation about an unidentified report by Special Agent Jenkins, and although Beem attached to her complaint copies of correspondence between the parties relative to the records request, the correspondence provides no other meaningful detail on the subject, nor did Beem furnish an affidavit or other support for her claim.

{¶8} Pursuant to R.C. 2743.75(E)(3)(b), BCI attached to its response the affidavits of Jonathan Jenkins, Special Agent in the Investigations Section of BCI, and Greg Trout, Legal Counsel in the Administration Section of BCI. Jenkins’ affidavit testimony provides, in part, that Beem was not the only person whom he interviewed in the course of his investigation, but that the only interview he recorded was that of Beem. Jenkins also avers that the only interview in which Special Agent Swope participated was that of Beem. According to Jenkins, there are no other recordings of interviews conducted in the course of the investigation. Trout, who avers that he oversees public records requests at BCI, authenticates copies of correspondence between Beem and BCI relative to Beem’s request, and, according to Trout, “no other recordings were made of persons interviewed in the course of this investigation.”

{¶9} Upon consideration of the pleadings and attachments, I find that Beem has failed to establish by clear and convincing evidence that there are additional records in existence which are responsive to her request, beyond the record that BCI already produced. The affidavit testimony submitted by BCI demonstrates that no such records exist, and Beem presented no evidence that would support a finding to the contrary. *See State ex rel. McCaffrey v. Mahoning Cty. Prosecutor’s Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 26. BCI cannot be ordered to produce records that are shown not to exist. *See State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, ¶ 15;

State ex rel. Garnack v. Newark, 5th Dist. Licking No. 11CA0104, 2012-Ohio-4146, ¶ 10.

{¶10} Accordingly, I find that BCI has not denied access to public records under R.C. 149.43 and that Beem's claim should be DENIED.

{¶11} *Pursuant to R.C. 2743.75(F)(2), within seven business days after receiving this report and recommendation, either party may file a written objection with the clerk of the Court of Claims of Ohio. Any objection to the report and recommendation shall be specific and state with particularity all grounds for the objection.*

ROBERT VAN SCHOYCK
Special Master

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