

[Cite as *Info4um.com v. Cincinnati*, 2018-Ohio-1553.]

INFO4UM.COM	Case No. 2017-00878PQ
Requester	Special Master Jeffery W. Clark
v.	<u>REPORT AND RECOMMENDATION</u>
CITY OF CINCINNATI	
Respondent	

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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 Public Records 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. “[O]ne of the salutary purposes of the Public Records Law is to ensure accountability of government to those being governed.” *State ex rel. Strothers v. Wertheim*, 80 Ohio St.3d 155, 158, 684 N.E.2d 1239 (1997). Therefore, the Public Records Act “is construed liberally in favor of broad access, and any doubt is resolved in favor of disclosure of public records.” *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996). R.C. 149.43(B)(1) requires a public office to make copies of public records available to any person upon request, within a reasonable period of time.

{¶2} On September 14, 2017, Garry Mott as info4um.com (info4um) mailed a public records request to respondent City of Cincinnati (City) for

a. records that are in possession of the City of Cincinnati’s Health Department \* \* \*.

Please allow me to inspect \* \* \*:

b. Records that, individually or collectively, show facts, details, cause, discussions, observations, or conclusions contained in the public records regarding the death of Deborah Watren that occurred in the month of January 2001.

(Compl. at 3.) On October 12, 2017, requester sent a reminder email addressed to the Cincinnati city manager's office. (Compl. at 7.) On October 16, 2017, the City sent an email response that requests for death records "are handled via the purchase of the certificate," signed by Clarice Edmondson of the Office of Vital Records. (Compl. at 8.)

{¶3} On October 27, 2017, info4um filed a complaint under R.C. 2743.75 alleging denial of timely access to public records in violation of R.C. 149.43(B). The case proceeded to mediation, and on January 25, 2018, the court was notified that the case was not resolved. On February 5, 2018, info4um submitted a motion that the court subsequently accepted as a submission of additional argument and evidence (Motion). On February 6, 2018, the City filed its motion to dismiss (Response).

{¶4} R.C. 2743.75(F)(1) states that determination of public records claims shall be based on "the ordinary application of statutory law and case law." Case law regarding the alternative public records remedy under R.C. 149.43(C)(1)(b) provides that a relator must establish by "clear and convincing evidence" that it is entitled to relief. *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, ¶ 14. Therefore, the merits of this claim shall be determined under the standard of clear and convincing evidence, i.e., "that measure or degree of proof which is more than a mere 'preponderance of the evidence,' but not to the extent of such certainty as is required 'beyond a reasonable doubt' in criminal cases, and which will produce in the mind of the trier of facts a firm belief or conviction as to the facts sought to be established." *Cross v. Ledford*, 161 Ohio St. 469, 120 N.E.2d 118 (1954), paragraph three of the syllabus. *Accord Hurt v. Liberty Twp.*, 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30.

**Motion to Dismiss**

{¶5} The City moves to dismiss the complaint on the grounds that, subsequent to the filing of the complaint, it has provided requester with the only responsive record in its possession – the certificate of death of Deborah L. Watren (Watren certificate). (Response; Stackpole Aff., ¶ 4-9.) In construing a motion to dismiss pursuant to Civ.R. 12(B)(6), the court must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 192, 532 N.E.2d 753 (1988). Then, before the court may dismiss the complaint, it must appear beyond doubt that plaintiff can prove no set of facts entitling him to recovery. *O'Brien v. Univ. Community Tenants Union, Inc.*, 42 Ohio St.2d 242, 245, 327 N.E.2d 753 (1975). In this case, the complaint and attachments contain factual allegations that, if given all reasonable inferences, could state a claim for relief. I therefore recommend that the court OVERRULE the motion to dismiss, and determine requester's claims on the merits.

**Suggestion of Mootness**

{¶6} In an action to enforce R.C. 149.43(B), a public office may produce the requested records prior to the court's decision, and thereby render the claim for production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 18-22. A court considering a claim of mootness for a public records request must first determine what records were requested, and then whether any responsive records were provided. The City offers affidavit testimony that it searched for responsive records within the City health department, as requested, as well as those of the police department and the City's lead program coordinator. (Stackpole Aff. at ¶ 4-6.) The City attached to its response a copy of the Watren certificate and states that it was provided to info4um. (Stackpole Aff., Exhibit H.) Info4um notes receipt of a Watren certificate, apparently identical to that submitted by the City other than a diagonal watermark, but alleges that it was obtained from another agency. (Motion at 8; Exh. H.) I

find that no later than requester's receipt of the City's response and its attached Watren certificate, the City provided requester with a copy of this responsive document.

{¶7} The City avers that it has no other records concerning Deborah Watren. (Stackpole Aff. at ¶ 9.) Requester claims to the contrary that

- c. Cincinnati has more records than just the death certificate and in forms other than paper or image records. The State of Ohio informs that pertaining to the records sought: "The statistical file will contain all of the information from the death certificate and more." See "Exhibit G" attached here which Requester obtained from the State of Ohio.

(Motion at ¶ 4.) Requester's Exhibit G is labeled "Email from Ohio Health Department" and appears to be a printout of email from Karen.Sorrell@odh.ohio.gov in response to a public records request from info4um, stating in full:

- d. I wanted to let you know that I spoke with my staff this morning about your request. We do not have an electronic copy of this death certificate since it's from 2001; however, we do have the data on a statistical file. John Paulson will create a statistical file in Excel and since it's so small he will e-mail it directly to you. The statistical file will contain all of the information from the death certificate and more. Thank you.

This email states that the staff of the Ohio Department of Health (ODH) "do not have an electronic copy of this death certificate," and advises instead that it will "create a statistical file in Excel" and email it to info4um. Requester's Exhibit H is plainly not a "statistical [spreadsheet] file in Excel." Further, the sentence: "The statistical file will contain all of the information from the death certificate and more" plainly relates to records possessed by ODH ("we do have the data on a statistical file"), and not the City.<sup>1</sup>

{¶8} I find that requester's arguments are inconsistent with its own exhibits, and that it fails to show by clear and convincing evidence that the City possesses additional responsive records. I find that the City's testimony that it has no other records

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<sup>1</sup> Neither party addresses procedures in effect in 2001. The current Ohio statutes regarding filing, maintaining, and obtaining death records is found in R.C. Chapter 3705, *Vital Statistics*.

responsive to the request is consistent with the record, and more persuasive. I therefore recommend that the claim for production of records be DISMISSED AS MOOT.

### **Timeliness and Claimed Damages**

{¶9} The City did not provide a copy of the Watren certificate and the explanation that it possessed no other responsive records until at least four months after the September 14, 2017 request. The City provides no explanation for the delay, and the correspondence attached to the response indicates that the search and legal review, once commenced, took only one month. I find that the City failed to comply with its obligation under R.C. 149.43(B)(1) to provide its response “within a reasonable period of time.”

{¶10} Requester states that he is entitled to damages under R.C. 149.43(C)(2) and to unspecified equitable relief. (Motion at 6.) However, R.C. 149.43(C)(2) applies only to actions in mandamus brought under R.C. 149.43(C)(1)(b). This action was brought pursuant to R.C. 149.43(C)(1)(a) and R.C. 2743.75 as a special statutory proceeding, not as an action in equity.

### **Conclusion**

{¶11} Upon consideration of the pleadings and attachments I recommend that the court DENY the City’s motion to dismiss. I further recommend that the court DENY requester’s claim for production of records as MOOT. I further recommend that the court find that the City failed to provide a response to the request within a reasonable period of time and order that requester is entitled to recover from the City its twenty-five-dollar filing fee. R.C. 2743.75(F)(3)(b).

{¶12} *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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JEFFERY W. CLARK  
Special Master

cc:

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