[Cite as *Patton v. Univ. of Akron*, 2018-Ohio-1555.]

DAVID V. PATTON Requester v. UNIVERSITY OF AKRON Respondent	Case No. 2017-00820PQ Special Master Jeffery W. 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 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 May 7, 2017, requester David Patton made a request of respondent University of Akron (UA) for

> a. complete copies of all emails to, from, and/or among University of Akron faculty members Dr. Alise Bartley, Dr. Rebecca Boyle, Dr. Karin Jordan, Dr. Heather Katafiasz, Dr. Rikki Patton, and/or Dr. David Teftteller from October 1, 2015 to February 29, 2016, inclusive.

(Compl., Exh. A.) On May 12, 2017, Scott Campbell, Associate General Counsel and Records Compliance Officer for UA, responded that the request was not valid under Ohio public records law. (*Id*., Exh. B.) Campbell explained that the request was overly broad, lacked the specificity needed to identify and locate only responsive records, and sought complete duplication of voluminous files. Campbell provided legal authority relating to the denial. Campbell invited Patton to submit a revised request specifically describing the public records sought, and provided a web link to UA's records retention manual to assist him. On May 12, 2017, Patton sent Campbell an email that split the original request into two requests for each named faculty member, e.g.,

> b. (i)Emails that University of Akron faculty member Dr. Alise Bartley sent from her University of Akron email account from October 1, 2015 to February 29, 2016, inclusive.
>
> c. (ii)Emails that University of Akron faculty member Dr. Alise Bartley received to her University of Akron email account from October 1, 2015 to February 29, 2016, inclusive.

(*Id*., Exh. C.) On May 17, 2017, Campbell responded that this request was still not valid, and provided additional explanation of the specificity needed to locate responsive records. Campbell repeated the legal authority and online resources provided in his previous response, and added, "If you feel that a discussion would be helpful to narrow your request I would be happy to have a phone conference with you." (*Id*., Exh. D.)

{¶3} In a subsequent telephone conversation, Patton advised Campbell that he was interested in documents, particularly emails, relating to one of his clients, a former UA student. (*Id*. at ¶ 5; Campbell Aff., ¶ 10.) Campbell requested, and Patton provided, a release from the former student. On May 31, 2017, Ronald L. Bowman, Jr., Assistant VP for Student Success and University Registrar, provided Patton with a compact disc containing 512 pages of UA documents relating to the student. (Compl. at ¶ 5-7; Campbell Aff., ¶ 11; Disc filed January 17, 2018.) Mr. Bowman stated in his cover letter:

> d. The Office of General Counsel has prepared the enclosed documentation from Tonya Merlitti's student file pursuant to your

> request and the authorization completed by Ms. Merlitti. While you had requested communication between faculty members related to Ms. Merlitti's academic dismissal, those communications are part of Ms. Merlitti's student file. To provide a complete context to requested communications between faculty members related to Ms. Merlitti's academic dismissal, a copy of her file from the department is enclosed.

(Compl., Exh. E.)

{¶4} On October 9, 2017, Patton filed a complaint under R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). The complaint seeks "to obtain the emails requested in my (i) May 7, 2017 public records request, and (ii) May 12, 2017 rephrased public records request." (*Id*. at ¶ 8.) The matter was referred to mediation, and on November 30, 2017, the court was notified that the parties had not resolved the matter. On December 5, 2017, UA filed its response and motion to dismiss (Response) with the attached affidavit of Scott M. Campbell. On December 11, 2017, the court ordered Patton to file a copy of the compact disc he had received from UA containing records related to his client's academic dismissal by December 22, 2017. The court did not receive the requested filing from Patton, and issued an order to UA to file a copy of the disc as sent to Patton. UA filed a compact disc on January 17, 2018.

{¶5} 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 he 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.

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 public records must first determine what records were requested, and then whether any responsive records were provided.

{¶7} UA states that the claim for records of faculty email, as relating to Tonya Merlitti, has been rendered moot by its production of May 31, 2017. Patton disputes this assertion, stating that "Despite Mr. Bowman's statement to the contrary, the compact disk did not contain any of the emails that I requested in my original or rephrased public records requests." (Compl. at ¶ 7.) On review of the compact disc filed by UA, I find that approximately 100 of the 512 pages contain email messages and attachments responsive to Patton's original and rephrased public records requests.[1] These emails are to, from, and among all the faculty named in the request, except Dr. Bartley.

{¶8} I therefore recommend that the claim for production of records be DENIED AS MOOT to the extent of the responsive email records disclosed in UA's production of May 31, 2017.

Overly Broad Requests

{¶9} R.C. 149.43(B)(2) addresses ambiguous and overly broad requests:

> e. 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

[1] For reviewers' convenience, see p. 99-458 of the disc filed by respondent. The greatest concentrations of responsive email are found at p. 99-189, and 300-314.

> 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.

In making a request, "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 for an entire category or type of records is improper:

> f. A general request, which asks for everything, is not only vague and meaningless, but essentially asks for nothing. At the very least, such a request is unenforceable because of its overbreadth. At the very best, such a request is not sufficiently understandable so that its merit can be properly considered.

State ex rel. Zauderer v. Joseph, 62 Ohio App.3d 752, 756, 577 N.E.2d 444 (10th Dist.1989) (all traffic accident reports). For example, a request for "all e-mails sent or received by" a public official for a six-month period is overly broad and therefore improper. *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 4-5, 16-19. *See Zidonis* at ¶ 4, 13, 28-32 ("all email" sent between two employees denied as overly broad); *but see State ex rel. Carr v. London Corr. Inst.,* 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 25-29 (communication between one person and a specific department for two months found not overly broad). Determination of whether a request is proper or improper is based on the facts and circumstances of each case. *Zidonis* at ¶ 26.

{¶10} The request in this case is very similar to that in *Glasgow,* and more egregious because Patton's request is for all email from not one but six faculty members' email accounts. The request is for a substantial period of time, October 1, 2015 to February 29, 2016, and is not limited to a specific subject. *See Zidonis* at ¶ 26. I

find that both the original and "rephrased" requests are overly broad and therefore improper.

{¶11} A sufficiently specific request contained within an otherwise overly broad request may be enforceable. In *Glasgow*, the request for *all* of a state representative's email for six months was overly broad, but the language "including, but not limited to [a particular house bill]" was sufficiently narrow to be a proper request. *Glasgow* at ¶ 1, 17-24. The facts of this case parallel *Glasgow* in that Patton also made a more specific request – for email and other documents relating to a former UA student. As in *Glasgow*, UA willingly and promptly provided records it identified using the additional information.

{¶12} Such mutually negotiated narrowing, clarification, or otherwise reasonable identification of desired records can help avoid litigation while fully accomplishing the purposes of the Public Records Act. To that end, the Act requires parties to cooperate in clarifying ambiguous and overly broad requests, with the goal of identifying the specific records sought while minimizing the burden on the public office. When an improper request is denied, R.C. 149.43(B)(2) requires the public office to

> g. 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.

The statute does not require the office to rewrite the request for the requester, but the office should convey relevant information to support revision of the request. Options include, but are not limited to: offering to discuss revision with the requester, *Zidonis* at ¶ 4-5, 40; *State ex rel. Morgan v. Strickland,* 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 14-20, providing the requester with a copy of the office's records retention schedule, *Zidonis* at ¶ 36, or other explanation of how records are maintained and accessed. *Id*. at ¶ 35. A requester's demonstrated ability to craft other, proper requests can show that the requester already possesses information necessary to

revise and narrow his request. *Id*. A public office's voluntary effort to provide some responsive records, notwithstanding denial of the request, is considered favorably in evaluating its response. *Id*. at ¶ 39; *Morgan* at ¶ 6, 14.

{¶13} In this case, Associate General Counsel Campbell accompanied each denial with an invitation for Patton to revise the request, citing exemplary legal authority and providing a link to UA's records retention manual to assist in revision. (Compl., Exhs. B and D.) In his letter of May 17, 2017, Campbell asked Patton to name items or topics such as a contract, academic program, employee matter, or other subject, to facilitate identification of records sought. (*Id*., Exh. D.) Campbell also offered: "If you feel that a discussion would be helpful to narrow your request I would be happy to have a phone conference with you." *Id*. Patton accepted this offer, and in the resulting discussion clarified that he "was interested in documents, particularly emails, relating to" a former student who was now his client. (Compl. at ¶ 5-7.) UA accordingly provided Patton with 512 pages of the student's academic file. The file included many pages of emails, at least 100 of which matched the correspondents and time frame given in the requests. (*Id*.; Exh. E; Campbell Aff., ¶ 11; Disc filed January 17, 2018.) Although still ambiguous (due to the phrase "relating to"), Patton's topically narrowed request provided enough specificity for UA to identify a large set of desired records. Based on the reasonable efforts evidenced, I find that UA met its statutory obligation to provide Patton with the opportunity and relevant information to revise his request.

{¶14} The parties retain the ability to continue negotiating their respective interests in obtaining and providing any further records that Patton seeks. The parties have already demonstrated that discussion can result in productive revision of an otherwise overly broad request. Such discussions are favored by the courts. *See Morgan* at ¶ 15-20. The parties are encouraged to cooperate in any future request to achieve a mutually acceptable resolution of their interests.

Conclusion

{¶15} Upon consideration of the pleadings and attachments, I recommend that the court find that Patton has failed to establish by clear and convincing evidence that UA violated R.C. 149.43(B) when it denied Patton's requests for all emails to, from, and among six UA faculty members for a period of five months. I recommend that the court find that the request was overly broad, and thereby an improper request that was properly denied by UA. Accordingly, I recommend that the court issue an order DENYING Patton's claim for relief.

{¶16} *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).*

JEFFERY W. CLARK
Special Master

cc:

David V. Patton
33595 Bainbridge Road
Suite 200A
Solon, Ohio 44139-2981

Anthony J. Farris
20 West Federal Street, 3rd Floor
Youngstown, Ohio 44503

Anna M. Seidensticker
30 East Broad Street, 16th Floor
Columbus, Ohio 43215

Filed February 6, 2018
Sent to S.C. Reporter 4/20/18