[Cite as *Chernin v. Geauga Park Dist.*, 2018-Ohio-1579.]

SHELLEY K. CHERNIN Requester v. GEAUGA PARK DISTRICT Respondent	Case No. 2017-00922PQ Special Master Jeffery W. Clark REPORT AND RECOMMENDATION

{¶1} On August 14, 2017, requester Shelley Chernin made a public records request to respondent Geauga Park District for a copy of

> The letter sent to the Geauga Park District and/or any of its commissioners referenced by Andrej Lah at the August 8, 2017 Park Board meeting which was alleged to have said that the writer is afraid to visit the parks because of Protect Geauga Parks.

(Complaint at 3.) On August 28, 2017, Park District Executive Director John Oros responded that "the letter is not considered to be a public record." (*Id*. at 5.) On November 17, 2017, Chernin filed a complaint under R.C. 2743.75 alleging denial of timely access to public records in violation of R.C. 149.43(B). Chernin attached the request correspondence and a partial video recording of the August 8, 2017 meeting (Meeting Video). The case proceeded to mediation, and on February 6, 2018, the court was notified that the case was not resolved. On February 16, 2018, the Park District filed a motion to dismiss (Response). On February 28, 2018, the Park District filed an unredacted copy of the requested letters, under seal.

{¶2} 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). R.C. 149.43(B)(1) requires a public office to make copies of public records available to any person upon request. 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. "[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 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).

{¶3} 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 they are 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. *See Hurt v. Liberty Twp*., 5th Dist. Delaware No. 17CAI050031, 2017-Ohio-7820, ¶ 27-30.

Motion to Dismiss

{¶4} The Park District moves to dismiss Chernin's complaint on the grounds that the requested document (the Lah Letters) does not qualify as a public record under the definition in R.C. 149.011(G). 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). The unsupported conclusions of a complaint are, however, not admitted and are insufficient to withstand a motion to dismiss. *Mitchell* at 193.

{¶5} The complaint alleges that the content of the Lah Letters was presented and discussed by Geauga Parks District Board Commissioner Andrej Lah at a board meeting, and that it impacted policy decisions of the board. These allegations are subject to rebuttal by respondent, but the complaint as supported by the attached video states a claim that the document is a public record. I recommend that the motion to dismiss be DENIED, and the matter be determined on the merits.

Contents of the Letters

{¶6} The Lah Letters consist of two one-page documents given to Commissioner Lah: an opinion letter, and a cover letter. The opinion letter contains the writer's personal experiences with a Geauga Park District park, her opinions regarding park utilization, and her recommendations for action by the leadership of the Park District. The wording of the letters clearly anticipates that the opinion letter will be read in the presence of both the leadership of the Park District, and persons with opinions contrary to hers.

The Letters were not "Anonymous"

{¶7} Neither letter supports the Park District's assertion that "the writer of the Letter requested that she not be identified as expressing such an opinion," or that "[t]he letter writer asked that I not use her name when discussing the contents of the letter." (Response at 2; Lah Aff. at ¶ 3.) On the contrary, the writer informed Lah that she had addressed her concern about contact from others by signing both letters with just her first name. (*See* Lah Letters, filed under seal.) The writer typed her first name at the end of both letters, included her email address, and gave Lah the option to contact her

further. The writer could have sent a genuinely anonymous communication without her name, or shared her opinions with Lah verbally and not created a written record, but chose instead to write and sign two letters.

Definition of "Records" Subject to the Public Records Act

{¶8} R.C. 149.011(G) provides a three-part definition of "records" as used in Revised Code Chapter 149:

> "Records" includes 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 Ohio Supreme Court applies the definition of records broadly and inclusively, in favor of disclosure:

> The [Public Records] Act represents a legislative policy in favor of the open conduct of government and free public access to government records. As we noted in [*Dayton Newspapers, Inc.*, 45 Ohio St.2d 107, 109]:
>
> "'The rule in Ohio is that public records are the people's records, and that the officials in whose custody they happen to be are merely trustees for the people; therefore anyone may inspect such records at any time * * *.'"
>
> * * *
>
> In R.C. 149.011(G), the General Assembly prefaces its definition of "records" with the term "includes," a term of expansion, not one of limitation or restriction. * * *

State ex rel. Post v. Schweikert, 38 Ohio St.3d 170, 172-173, 527 N.E.2d 1230 (1988). "The R.C. 149.011(G) definition of 'records' has been construed to encompass 'anything a governmental unit utilizes to carry out its duties and responsibilities.'" (Citations omitted.) *State ex rel. Beacon Journal Publishing Co. v. Whitmore*, 83 Ohio St.3d 61, 63, 697 N.E.2d 640 (1998).

The Requested Letters are Records of the Park District

{¶9} The Lah Letters readily meet the first two elements of the definition, as written *documents* that were *received by* Lah in his capacity as a Park District Board Commissioner. Respondent argues that the Lah Letters did not meet the third element as items utilized to carry out the office's public duties and responsibilities, because they were unsolicited and did not become records merely because they *might* be used by the office, citing *Whitmore, supra*.

{¶10} In *Whitmore*, 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, which actually "constitute[d] improper ex parte communication," did not serve to document the judge's sentencing decision in that case "or any other activity of her office." *Id*. at 63. In contrast, the evidence here shows that constituent letters and email are publicly solicited by the Park District board. (GPD August 8, 2017 Minutes (Minutes), Commissioner's Time, second paragraph.)[1] The Park District web site has a Contact page that invites viewers to "reach out to us directly" through calls, letters, and email.[2]

{¶11} The fact that constituent correspondence is solicited by the Park District is not sufficient, alone, to make the Lah Letters records for purposes of R.C. 149.43. In *State ex rel. Cincinnati Enquirer v. Ronan,* 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, at ¶ 15-16, the Supreme Court clarified the transition point between non-record and record status for the invited correspondence in that case:

> Therefore, until the school district retrieved the documents from its post office box *and reviewed them or otherwise used or relied on them*, they were not records subject to disclosure under R.C. 149.43 * * *. When the school district opened the post office box and used the documents, the documents became records subject to disclosure under R.C. 149.43, and the school district promptly made them available for inspection and copying at that time.

---

1 https://reservations.geaugaparkdistrict.org/documents/2017/8.8.17-Board-Meeting-Minutes.pdf#search (Accessed March 18, 2018.)

2 https://www.geaugaparkdistrict.org/contact/ (Accessed March 22, 2018.)

(Emphasis added.) Here, Lah did not just passively receive and possess the documents. He accepted constituent letters from a woman he knew "who wanted to convey her opinions regarding the use of the Geauga parks." (Lah Aff. at ¶ 2.) The writer expected that Lah would convey those opinions by "discussing the contents of the letter," i.e., with the board. (*Id*. at ¶ 3.) Lah complied by discussing and utilizing her opinions at the August 8, 2017 board meeting.

{¶12} In the meeting video from 03:51 through 10:35, Lah engages in a discussion with Executive Director Oros and audience members about problems, goals, and policies regarding public input to the board. After noting the misperception of a Susan Festa that public comment is not permitted, and asking that her letter be introduced into the record, Lah notes that public comment at board meetings has been restricted "because of some of the antics of the past." He advocates creating a method for public comments to be presented, including through letters, but "managed in such a way that it doesn't cause disruption at these types of meetings." Oros describes written and other recent public contact related to park development projects, and Lah then discusses the Lah Letters:

> I received a letter this past Sunday [patting a document in front of him], and I can't read it because [patting] there's two pages to it and the first page is a request for anonymity because she's very critical of, not the board, but the fact that there isn't enough done at the parks and she feels unsafe when she comes to the parks because there's nobody ever around. And I will ask this when I see her this Sunday for permission to read it into the record and also her name.[3]
>
> She didn't want her name to be used because she's afraid of being harassed by a certain group, what is that? "Preserve," "Protect," or whatever that's called. She doesn't want to be harassed by them and she's in fear of that harassment. So there's also a perception that there is a particular group of people that if you have an opinion that may be a little

[3] Neither letter directs Lah not to read it, or her first name, to the board. The wording instead anticipates that the opinion letter will be read in public, with the caveat that Lah should feel free to not read any parts that he felt were not appropriate.

> bit different that you will be subjected to ridicule. So it really is an unfortunate reality, and I wonder sometimes if that's why we don't get a lot of contravening opinions or opinions on the other side of the spectrum with regard to how our parks are managed and how they're used.
>
> And you know it brings to mind that you know, being involved in this commission and this board and having your own credibility or your own purpose implied to have an implication to something nefarious as to why you involve yourself in something like this. It's amazing to me that when your goal is simply to provide some assistance – you have some knowledge in the management of land and how things are done and so forth, and you, and especially in the cemetery operations, and all of a sudden because you decide to volunteer for something, there's a certain group that immediately assumes that there must be something nefarious, "What's really, what's your real agenda?" And you can't assume that we're here to do something good for the community.
>
> And I wish I could read this letter [patting the document] so that this group could truly understand how some people – many people – in the community perceive you [nodding toward part of the audience].

(Meeting video at 06:58 to 09:28; *see also* Minutes, *supra*.)

{¶13} Lah's use of the letters to tell a portion of the audience that "this group" is responsible for harassment that deters contravening opinions is the equivalent of Judge Whitmore bringing victim impact letters to the sentencing hearing, verbally summarizing the fear felt by the letter writers, and telling the defendant from the bench "I hope this helps you understand how some people – many people – in the community perceive you." The judge in that event would not be able to credibly claim that paraphrasing the content to the defendant did not constitute use of the letters in a function of the court, and neither can Lah. Lah's public presentation of the letter writer's concerns and his opinion of their import was a substantive step beyond mere receipt and possession, and constituted actual use of the letters to explain and justify policies, procedures and operations of the board regarding public input.

{¶14} The Park District emphasizes that the Lah Letters were not used as the basis for any decision made by the board. (Response at 5-6; Lah Aff. at 7.) However, the definition of public records has far greater breadth:

> Indeed, any record that a government actor uses to document the organization, policies, functions, decisions, procedures, operations, or other activities of a public office can be classified reasonably as a record. So can any material upon which a public office *could* rely in such determinations.

(Emphasis sic.) (Citations omitted.) *Kish v. Akron,* 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20. *See State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 13-15, 21-24 (constituent communications regarding legislation and other "matters of concern to them" were provided without dispute).

{¶15} Lah also emphasizes that he did not physically share the letter with the other commissioners. (Lah Aff. at ¶ 4.) In *State ex rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, 814 N.E.2d 1218, ¶ 18-19, the Court found that notes taken by an official conducting a predisciplinary conference, which he used to refresh his memory of the conference at a subsequent civil service commission hearing, were not "records" because they were personal notes kept for his own convenience to recall events and were not kept as part of the city's or the planning commission's official records. The court found it significant that no information had been lost because the requester had also been present at the predisciplinary conference and could have taken his own notes or obtained a transcription. Further, most of the notes were actually read into the transcribed civil service commission hearing. The court noted as a sixth factor that there was no evidence other city officials had access to or used the notes.

{¶16} The facts here are almost entirely the opposite of *Cranford.* The Lah Letters were not the personal notes of Lah, were not used just to refresh his own memory, were not notes from an event where Chernin was present, were not read into the Park District meeting minutes, and were received as constituent input by Lah in his capacity as a board commissioner. The facts are further distinguished in that Lah was

allegedly conveying the thoughts of another person, rather than his own. Aside from cases like *Cranford* involving personal notes or calendars made for an official's own convenience, the court is aware of no cases finding significance in the fact that an official did not physically distribute copies of a record to other officials. Instead, notes of a council meeting have been found to have particular significance when the notes "are not identical to the official typed meeting minutes." *State ex rel. Verhovec v. Marietta*, 4th Dist. Washington No. 12CA32, 2013-Ohio-5415, ¶ 30, *appeal not accepted*, 138 Ohio St.3d 1470, 2014-Ohio-1674, 6 N.E.3d 1206. The public is entitled to review the letters Lah characterized and relied on at the meeting to determine whether his representations match their content.

{¶17} Beyond its status as a public office, the Geauga Park District Board of Commissioners is also a public body. R.C. 121.22(B). The duties of a public body include taking official action, conducting deliberations, and discussion of the public business in open meetings. R.C. 121.22(A), (B)(2). The board's discussion of how, when, where or whether to receive its public input is a part of the functions, policies, procedures, and other activities of a public body. In addition, Lah relayed the letter writer's opinion on park management to the board "that there isn't enough done at the parks and she feels unsafe when she comes to the parks because there's nobody ever around." Lah thus utilized the letters to carry out both the board meeting's function as a forum for public input regarding both park management, and to discuss meeting policies and procedures. The Supreme Court affirms that "public scrutiny is necessary to enable the ordinary citizen to evaluate the workings of his or her government and hold government accountable." *White v. Clinton Cty. Bd. of Commrs.*, 76 Ohio St.3d 416, 420-424, 667 N.E.2d 1223 (1996) (meeting minutes must be full and accurate). *See Starks v. Wheeling Twp. Trustees*, 5th Dist. Guernsey Nos. 2008CA000037 and 2009CA000003, 2009-Ohio-4827, ¶ 27. If constituent letters summarized and relied on by a board member can be withheld from public access, then officials can bring stacks

of paper to public meetings, declare that they are all letters supporting their position, but refuse to allow the public to examine them for confirmation. This is the very antithesis of public scrutiny.

{¶18} Although I conclude that the letters clearly meet the definition of records, the result would be the same even if the question were close. Doubt as to whether documents fall within the definition of public records is resolved in favor of disclosure:

> Further, the law's public purpose requires a broad construction of the provisions defining public records. Because the law is intended to benefit the public through access to records, this court has resolved doubts in favor of disclosure.

State ex rel. Cincinnati Post v. Schweikert, 38 Ohio St.3d 170, 173, 527 N.E.2d 1230 (1988). Public records are a "portal through which people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance." *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-Ohio-6253, 899 N.E.2d 961, ¶ 20 (citing *Kish, supra*).

{¶19} Lah holds the records he utilized "as a trustee for the people," *Post, supra*; *White, supra*, who have a right to inspect and compare their content to Lah's representations to the board and the public. All records created or received by a public office must be maintained and disposed of as provided by law, or by the rules of the appropriate records commission (i.e. approved records retention schedules). R.C. 149.351(A). The Geauga County Records Retention Schedule,[4] Schedule Number 2015-026, provides for receipt and retention of General Correspondence, defined as:

> Requests for information pertaining to interpretations and other miscellaneous inquiries; informative – does not attempt to influence policy. Including copies of outgoing correspondence maintained for reference purposes.

The Lah Letters are either general correspondence, or fall under Schedule Number 2015-059:

---

[4] http://co.geauga.oh.us/Portals/0/resources/County%20Documents/archives/grs2015.pdf. (Accessed March 16, 2018.)

> Mail
>
> Communication received from other agencies, commercial entities, and outside institutions or individuals for general information purposes.

(*Id.*) The retention period for general correspondence is two years, and for mail "until no longer of administrative value." (*Id*.) In either case, the Lah Letters had not been properly disposed of at the time of the request, were being kept by Lah, and are therefore subject to disclosure unless otherwise excepted. *Glasgow*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 22-24, fn. 1.

{¶20} I find that the Lah Letters meet the definition of "records" and "public records," subject to any applicable exceptions.

Redaction of Non-Record Information

{¶21} Public offices may redact personal information demonstrably kept only for administrative convenience when releasing a larger record in which that information exists. *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 25-29; *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 369, 725 N.E.2d 1144; *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 610 N.E.2d 997 (1993). Respondent here does not argue that either the letter writer's first name or her email address is such a "non-record" item.

{¶22} In addition to the Park District's waiver of this defense, I find no evidence that the writer provided her first name for administrative convenience. She instead deliberately appended it to a letter she expected to be read to the board. The writer gave her email address as one means for Lah to contact her, but unlike the cases cited above, she was not required to provide this information as an employee or as a condition to participating in a program. I therefore find that none of the content of the letters may be redacted as non-record.

Nondisclosure Agreement

{¶23} The writer did not make any request in the letters for confidentiality of her identity when discussing her opinions, or for non-disclosure of any content other than

her email address. However, even had she so requested, a public entity cannot enter into an enforceable promise of confidentiality with respect to public records. *State ex rel. Findlay Publishing Co. v. Hancock Cty. Bd. of Commrs.*, 80 Ohio St.3d 134, 137, 684 N.E.2d 1222 (1997); *State ex rel. Gannett Satellite Info. Network v. Shirey*, 78 Ohio St.3d 400, 403, 678 N.E.2d 557 (1997). A contractual promise of confidentiality with respect to an otherwise public record is void *ab initio*. *Teodecki v. Litchfield Twp*., 2015-Ohio-2309, 38 N.E.3d 355, ¶ 19-25 (9th Dist). Thus, even had Lah agreed to keep the constituent's identity or email address confidential, such agreement would be of no force or effect in response to a public records request.

No Privacy Right

{¶24} Although not asserted by respondent, I note for completeness that no general privacy right applies to correspondence sent to a public office. *State ex rel. Beacon Journal Publishing Co. v. Kent State Univ*., 68 Ohio St.3d 40, 43, 623 N.E.2d 51 (1993). Even if the court was convinced that fear of harassment and ridicule was both in evidence and justified, this is a public policy consideration which is not for the courts to evaluate or effect. *State ex rel. Thomas v. Ohio State Univ*., 71 Ohio St.3d 245, 249, 643 N.E.2d 126 (1994).

Conclusion

{¶25} Upon consideration of the pleadings, attachments, and responsive records filed under seal, I recommend that the court find that the entirety of the requested constituent letters are records of the Geauga Park District. I accordingly recommend that the court issue an order GRANTING Chernin's claim for production of the requested records. I further recommend that the court order that Chernin is entitled to recover from the Geauga Park District the costs associated with this action, including the twenty-five dollar filing fee. R.C. 2743.75(F)(3)(b).

{¶26} *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:

Shelley K. Chernin
8650 Beechwood Drive
Novelty, Ohio 44072

David M. Ondrey
100 7th Avenue, Suite 150
Chardon, Ohio 44024-1079

Filed March 26, 2018
Sent to S.C. Reporter 4/23/18