[Cite as *Sinclair Media III, Inc. v. Cincinnati,* 2019-Ohio-2623.]

SINCLAIR MEDIA III, INC. D/B/A WKRC-TV Requester v. CITY OF CINCINNATI Respondent	Case No. 2018-01357PQ Judge Patrick M. McGrath DECISION

{¶1} Respondent City of Cincinnati (City) filed objections to the report and recommendation of the special master, issued on April 15, 2019. Requester Sinclair Media II, Inc. d/b/a WKRC-TV (Sinclair) filed a response to the City's objections. For the reasons set forth below, the court adopts, in part, and modifies, in part, the special master's report and recommendation.

Factual Background and Procedural History

{¶2} On May 6, 2018, reporter Angenette Levy submitted the following public records request on behalf of Sinclair to the City's Solicitor, Paula Boggs-Meuthing:

> This is an open records request for all text messages from Cincinnati city council members, Mayor John Cranley and Harry Black in which Black's employment status is discussed. I request these records pursuant to ORC – 149.43 the Ohio Public Records Act.
>
> We are also requesting any messages in which votes on Black's employment are discussed and attempts to sway other members of council. I am also requesting any text messages involving the so-called "Gang of 5" in which Harry Black's employment is discussed- including any text messages in which race is discussed.
>
> The text messages we are requesting are between March 1 and April 12, 2018.

(Complaint, Ex. A.) Harry Black is the former City Manager for the City of Cincinnati. (Supplemental Pleading at 1.) Levy re-submitted the request to the City Solicitor's Chief Counsel, Roshani Hardin, on May 25, 2018. (Complaint, Ex. A.) Hardin confirmed receipt of the request, and told Levy, "We will get that item assigned and provide you with the responsive documents." (Complaint, Ex. A.) Levy sent a follow-up message on July 17, 2018. (Complaint, Ex. A.) The City neither denied the request nor provided any further response. (Complaint, Ex. A; Motion to Dismiss at 2.)

{¶3} On October 11, 2018, Sinclair filed this action pursuant to R.C. 2743.75, alleging a denial of access to public records. The court appointed an attorney to serve as special master in this case. Following unsuccessful mediation, the City filed a combined motion to dismiss and response to Sinclair's complaint. The City moved to dismiss the complaint on the grounds that Sinclair's request was ambiguous and overly broad and that the records requested were not public records. Pursuant to an order issued by the special master, the City filed a supplemental response and submitted records under seal. Sinclair filed a reply to the City's combined pleadings.

{¶4} The special master issued a report and recommendation recommending the court deny the City's motion to dismiss and order the City to provide Sinclair the records filed under seal. (Report and Recommendation at 8, 14). The special master found the request sufficiently clear and specific because it was limited to text messages sent by specific City officials, discussing the specific topic of Black's employment, within a six-week period. (Report and Recommendation at 9-10.) With respect to the City's claim that the requested records were not "public records," the special master determined that text messages written by City council members and officials concerning the employment status of a City official (Black) were records created, received, by, or under the jurisdiction of the City. (Report and Recommendation at 3-6.) The special master further determined that those records were "kept by" the City through its officials, regardless of

whether the text messages were kept on publicly-issued or personal devices. (Report and Recommendation at 8.)

R.C. 2743.75(F)(2) provides:

> Either party may object to the report and recommendation within seven business days after receiving the report and recommendation by filing a written objection with the clerk and sending a copy to the other party by certified mail, return receipt requested. Any objection to the report and recommendation shall be specific and state with particularity all grounds for the objection.* * *If either party timely objects, the other party may file with the clerk a response within seven business days after receiving the objection and send a copy of the response to the objecting party by certified mail, return receipt requested. The court, within seven business days after the response to the objection is filed, shall issue a final order that adopts, modifies, or rejects the report and recommendation.

The City raises two objections to the special master's report and recommendation.

Requester's First Objection

{¶5} The City first objects to the special master's finding that Sinclair's request was not ambiguous or overly broad. The special master concluded:

> [Sinclair's] request is limited to a reasonably short period of six weeks. The subject matter is limited to Black's employment status. The request seeks only text messages rather than all communications, and is limited to texts from city council members, the mayor, and Black. The middle paragraph of the request appears only to emphasize the requester's interest in any subset of responsive messages that discuss votes and race. It thus does not expand the overall request, and is mere surplusage. Further, even if the middle paragraph were found to be a separate request that is ambiguous or overly broad on its specific terms, it would be severable from the remaining, properly framed request presented by the first and third paragraphs.

(Report and Recommendation at 10.) Based on this conclusion, the special master found that the request was not ambiguous or overly broad. (Report and Recommendation at 10.) The City disputes the special master's determination that the

second paragraph of the request simply emphasized a specific subset of records requested in the first paragraph. (Objections at 2.) Instead, the City contends, the second paragraph includes additional requests for records or information distinct from the request in the first paragraph. (Objections at 2.) The City argues that the second paragraph is a vague, ambiguous, and overly broad request for information rather than a request for records. (Objections at 2.) The City acknowledges that the first paragraph is a request for records but argues that the request is improper because it is ambiguous and overly broad. (Objections at 2.)

{¶6} The Public Records Act permits a public office to deny a request that is ambiguous or overly broad. R.C. 149.42(B)(2). The Act provides:

> 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 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.

Id. The requester bears the responsibility "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. (Internal quotations omitted.) "[T]he Public Records Act does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies." *Id*. (Internal quotations omitted.) Requests for information or requests that require a records custodian to create a new record by searching for and compiling select information are impermissible—a requester must seek specific, existing records. *State ex rel. Morgan v. City of New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 30. In determining whether a request is sufficiently specific, the court must consider each request "under the totality of the facts and circumstances." *Zidonis* at ¶ 26; *see also Morgan* at ¶ 33 ("[The] request must be considered in the context of the circumstances surrounding it.").

{¶7} As an initial matter, the court disagrees with the special master that the second paragraph of the request merely emphasizes the first. In the second paragraph, Sinclair, through Levy, stated, "[w]e are *also requesting*" messages discussing votes on Black's employment and "I am *also requesting*" text messages involving the "Gang of 5" in which Black's employment is discussed. (Complaint, Ex. A.) (Emphasis added.) While there may be significant overlap between the text messages referenced in the first and second paragraphs, the plain language of the request indicates that the messages referenced in the second paragraph are additional to those referenced in the first. However, the court agrees with the special master that the content of the second paragraph is severable from that of the first. Thus, the court concludes that Sinclair made three distinct requests: (1) a request for "all text messages from Cincinnati city council members, Mayor John Cranley and Harry Black in which Black's employment status is discussed"; (2) a request for "any messages in which votes on Black's employment are discussed and attempts to sway other members of council"; and (3) a request for "any text messages involving the so-called 'Gang of 5' in which Harry Black's employment is discussed – including any text messages in which race is discussed." All three requests are limited to the period from March 1 to April 12, 2018. The court considers each request separately.

{¶8} Considering the facts and circumstances of this case, the court finds Sinclair's first request sufficiently specific to state a valid public records request. The City argues that the request is an impermissible "discovery-type" request that is "burdensome and voluminous." (Objections at 2-3.) However, the Ohio Supreme Court recently noted that "complex and expansive" requests may still be valid and sufficiently specific if the requester places sufficient limitations on the scope of the request. *State ex rel. Kesterson v. Kent State Univ*., Slip Opinion at 2018-Ohio-5110, ¶ 25, citing *State ex rel. Bott Law Group, LLC v. Ohio Dept. of Natural Resources*, 10th Dist. Franklin No. 12-AP-448, 2013-Ohio-5219, ¶ 40-41. In *Kesterson*, the Court found that numerous

requests for "all records of communications between various individuals regarding certain subjects" were sufficiently specific where the requester limited each request "temporally by subject matter, and in all but one instance, by the specific employees concerned." *Id*. at ¶ 23, 25.

{¶9} Sinclair similarly limited its first request in this case. The request is limited to a specific, six-week period, and Sinclair limited the subject matter of the request to discussions of Harry Black's employment status. The request is also limited to messages sent by Black, Cranley, and the City Council members. This last limitation is not quite as narrow as the limitations in the permissible *Kesterson* requests. The *Kesterson* requester asked for "communications *between* specified Kent State employees." *Kesterson* at ¶ 26. (Emphasis added.) Although Sinclair limited its request based on the identity of the individuals sending the text messages, it did not specify the identities of the recipients. However, in at least two other respects, Sinclair's first request is narrower than the requests found permissible in *Kesterson*. First, Sinclair's request concerns a shorter period of time. Whereas several of the *Kesterson* requests concerned communications over several months, Sinclair restricted its request to a six-week period. *See Kesterson* at ¶ 3. Second, Sinclair more narrowly limited the type of record sought. In *Kesterson*, the requester "cast a wide net for 'communications.'" *Id*. at ¶ 25. Sinclair requests only text messages. Considering the limitations in Sinclair's first request in light of the Ohio Supreme Court's *Kesterson* analysis, the court does not find the request overly broad or ambiguous. Therefore, the first paragraph of Sinclair's request states a valid public records request.

{¶10} The court cannot say the same of Sinclair's second and third requests. The requests ask generally for *any* text messages between March 1 and April 12, 2018 in which votes on Black's employment are discussed or which involve the "Gang of 5" and discussions of Black's employment. Unlike its first request, Sinclair's second and third requests are not limited in scope by reference to the author or recipient of the requested

text messages. Failure to identify the author of a requested record does not automatically render a public records request improper. *Morgan* at ¶ 37. However, a request is ambiguous or overly broad where it identifies correspondents only by their relationship to offices, titles, or groups of categories, for which research is required to recognize membership. *See State ex rel. Oriana House, Inc. v. Montgomery*, 10th Dist. Franklin No. 04AP-492, 04AP-504, 2005-Ohio-3377, ¶ 9, *rev'd* on other grounds, 107 Ohio St.3d 1694, 2005-N.E.2d 201.

{¶11} This court recently found a request ambiguous and overly broad where the requester asked a municipal government for "all communications, messages, schedules, logs, and documents shared between the City of Cleveland Heights…and employees of the Cleveland Jewish news between March 2013 and April 12, 2013, regarding Garry Kanter." *Kanter v. City of Cleveland Heights*, Ct. of Cl. No. 2018-Ohio-01902PQ, 2018-Ohio-4592, ¶ 1 (*Kanter I*), adopted by *Kanter v. City of Cleveland Heights*, Ct. of Cl. No. 2018-01092PQ, 2018-Ohio-5016 (*Kanter II*). In a decision adopted by this court, the special master found that request overbroad due in part to the fact that the request "require[d] the office to conduct research to find correspondents based on their relationship to organizations, e.g. correspondents within 'the City of Cleveland heights' and 'employees of The Cleveland Jewish News.'" *Kanter I* at ¶ 8. Sinclair's second and third requests in this case are less clear than the request at issue in *Kanter*, as they do not identify correspondents even by affiliation. Thus, in order to fulfill Sinclair's second and third requests, the City would be required to search the cell phones of all City officials, all City employees, and, potentially, other persons responsible for such records. The court finds such requests overly broad.

{¶12} Accordingly, the City's first objection is SUTAINED in part and OVERRULED in part. To the extent Sinclair requests any messages in which votes on Black's employment are discussed and attempts to sway other members of council; and "any text messages involving the so-called 'Gang of 5' in which Harry Black's

employment is discussed – including any text messages in which race is discussed," the court finds the request ambiguous and overly broad. However, Sinclair's request for "all text messages from Cincinnati city council members, Mayor John Cranley and Harry Black in which Black's employment status is discussed" is a proper request.

Requester's Second Objection

{¶13} The City also objects to the special master's finding that text messages on the personal cell phones of City council members are subject to the Public Records Act.[1] (Objections at 3.) The City presents two distinct but closely related arguments in support of this objection. First, it argues that text messages on the "personal, privately-paid for" cell phones of City council members do not fall within the statutory definition of "record" as set forth in R.C. 149.011. (Objections at 3-4.) Second, the City argues that the text messages do not fit within the definition of "public record" under R.C. 149.43 because the records are not "kept by" a public office—i.e. the City. Although the City's arguments invoke different statutes, they are closely related, as both ultimately hinge on the treatment of messages sent from and kept on the personal devices of public employees. Therefore, the court addresses both arguments jointly.

The Public Records Act defines "records" as:

[1] The court notes Sinclair's argument that the City is collaterally estopped from raising this objection because the City failed to object to a similar finding in a separate case previously before this court—*The Cincinnati Enquirer, A Division of Gannett GP Media, Inc. v. City of Cincinnati*, 2018-01139PQ (the *Enquirer* case). Sinclair argues that the *Enquirer* case concerns the same text messages at issue in this case. Collateral estoppel is applicable where the fact or point at issue was: (1) actually and directly litigated in a previous action; (2) passed upon or determined by a court of competent jurisdiction; and (3) when the party against whom issue preclusion is asserted was a party in privity with a party to the prior action. *New Winchester Gardens v. Franklin County Bd. of Revision*, 80 Ohio St.3d 36, 41 (1997), *overruled in part on other grounds*, *Cummins Prop. Servs., L.L.C. v. Franklin County Bd. of Revision*, 117 Ohio St.3d 516, 2008-Ohio-1473. Upon review of the evidence in this case and the decisions of the court and the special master in the *Enquirer* case, the court cannot definitively conclude that the text messages at issue in the two cases are the same. Therefore, the court will consider the City's objection.

> any document, device, or item, regardless of physical form or characteristic, including an electronic record as defined in section 1306.01 of the Revised Code, 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.

R.C. 149.011(G). An "electronic record" is a record "created, generated, sent, communicated, received, or stored by electronic means." R.C. 1306.01(G). The Act defines "Public Record" as "records kept by any public office." R.C. 149.43(A). In its objections, the City does not dispute the special master's conclusion that text messages fall within the definition of "electronic record." (Report and Recommendation at 3.) However, the City contends that the text messages requested by Sinclair are not records because they were sent from and stored on the personal cell phones of individual public officials. Therefore, the City argues, the messages were not created, received by, or under the jurisdiction of the City and do not serve to document the functions, policies, procedures, operations, or other activities of the City. (Objections at 3-4.) Similarly, the City argues the text messages are not public records under R.C. 149.43(A) because they were not "kept by" the City, but rather by individual City officials on personal, privately-paid-for devices.

{¶14} The City's attempt to exclude messages stored on the personal devices of public officials and employees from the scope of the Public Records Act is inconsistent with Ohio public records case law. The City cites no authority indicating that a court should analyze text messages on personal devices differently than any other item. In fact, Ohio courts routinely treat text messages and emails sent by public officials and employees in the same manner as any other records, regardless of whether messages and emails are on publicly-issued or privately-owned devices. *See e.g. State ex rel. Glasgow v. Jones*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, ¶ 20-28 (analyzing request for text messages and emails sent from a private account to determine whether they were "work-related"); *Kesterson*, Slip Opinion at 2018-Ohio-

5110 at ¶ 23 (requests for text messages and emails analyzed without regard to whether sent from personal or public devices); *State ex rel. Bowman v. Jackson City Sch. Dist.*, 4th Dist. Jackson No. 10CA3, 2011-Ohio-2228, ¶ 15 ("Any email which serves to document the organization, functions, policies, procedures, operations, or other activities of the office constitutes a public record under R.C. 149.011(G)."); *State ex rel. Parisi v. Dayton Bar Assn. Certified Grievance Comm.*, 2017-Ohio-9394, 103 N.E.3d 179, (requests for text messages and emails analyzed without regard to whether sent from personal or public devices); *Cincinnati Enquirer v. City of Cincinnati*, Ct. of Cl. No. 2018-01339PQ, 2019-Ohio-969, ¶ 6-15 (text messages on personal accounts and devices subject to disclosure); *Narciso v. Powell Police Dept.*, Ct. of Cl. No. 2018-01195PQ, 2018-Ohio-4590.

{¶15} This approach is consistent with the overarching purpose of the Public Records Act, which "reflects the state's policy that 'open government serves the public interest and our democratic system.'" *Glasgow* at ¶ 12, citing *State ex rel. Dann v. Taft*, 109 Ohio St.3d 364, 2006-Ohio-1825, 848 N.E.2d 472, ¶ 20. "Consistent with this policy, we construe R.C. 149.43 liberally in favor of broad access and resolve any doubt in favor of disclosure of public records." *Glasgow* at ¶ 12. Thus, the operative question in this case is not whether the text messages at issue were sent from or stored on personal or private devices, but whether they document the functions, policies, procedures, operations, or other activities of the City.

{¶16} The court finds that they do. Sinclair's sole properly-framed request asks only for for the text messages of particular public officials and employees "in which [Harry] Black's employment status is discussed.". Records reflecting the employment decisions of public offices clearly document the operations and activities of that office. Thus, the court finds that any text messages responsive to Sinclair's proper request are public records subject to disclosure. Accordingly, the City's second objection is OVERRULED.

Conclusion

{¶17} Upon review of the record, the special master's report and recommendation, the City's objections, and Sinclair's response, the court modifies, in part, and adopts, in part the specials master's report and recommendation. The court finds that the special master erred in finding that Sinclair submitted a single public records request that was not ambiguous or overly broad. The court finds that Sinclair submitted three related but distinct requests, the second and third of which were ambiguous and overly broad. However, because Sinclair's submitted a properly framed request for "all text messages from Cincinnati city council members, Mayor John Cranley and Harry Black in which Black's employment status is discussed," the City's motion to dismiss is DENIED. Furthermore, upon review of the documents filed by the City under seal, the court finds that all of the documents fall within the definition of public record and are within the scope of Sinclair's properly-framed request. Therefore, the court ORDERS the City to provide Sinclair the documents filed under seal.

PATRICK M. MCGRATH
Judge

IN THE COURT OF CLAIMS OF OHIO

SINCLAIR MEDIA III, INC. D/B/A WKRC-TV Requester v. CITY OF CINCINNATI Respondent	Case No. 2018-01357PQ Judge Patrick M. McGrath JUDGMENT ENTRY

{¶18} For the reasons set forth in the decision filed concurrently herewith, and upon independent review of the objected matters, the court SUSTAINS, in part, and OVERRULES, in part, respondent's first objection. The court OVERRULES respondent's second objection. The court ADOPTS, in part, and MODIFIES, in part the special master's report and recommendation filed on April 15, 2019.

{¶19} The court DENIES respondent's motion to dismiss and ORDERS respondent to provide requester the documents filed with the court under seal on February 14, 2019. Court costs are assessed against respondent City of Cincinnati. The clerk shall serve upon all parties notice of this judgment and its date of entry upon the journal.

PATRICK M. MCGRATH
Judge

Filed May 20, 2019
Sent to S.C. Reporter 6/28/19