[Cite as *Anthony v. Columbus City Schools*, 2021-Ohio-3242.]

SUMMER ANTHONY Requester v. COLUMBUS CITY SCHOOLS Respondent	Case No. 2021-00069PQ Special Master Jeff Clark REPORT AND RECOMMENDATION

{¶1} The Ohio Public Records Act (PRA) requires copies of public records to be made available to any person upon request. The state policy underlying the PRA is that open government serves the public interest and our democratic system. *State ex rel. Gannett Satellite Information Network, Inc. v. Petro*, 80 Ohio St.3d 261, 264, 685 N.E.2d 1223 (1997). To that end, the public records statute must be construed liberally in favor of broad access, with any doubt resolved in favor of disclosure of public records. *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 6. This action is filed under R.C. 2743.75, which provides an expeditious and economical procedure to enforce the PRA in the Court of Claims.

Request for Teacher Attendance and Leave Records

{¶2} On December 29, 2020, requester and CCS employee Summer Anthony sent a public records request to respondent Columbus City Schools (CCS) at publicrecordsrequest@columbus.k12.oh.us for, inter alia,

> the records of the last three years (17-18, 18-19, 19-20) of the number of teachers absent in each building each month and the number that had substitute coverage for the absences. I would like this information for ALL Columbus City Elementary Schools, specifically Como ES.

(Complaint at 3.) On January 22, 2021, Anthony sent a follow-up email stating that she had not received the records or any other response. (*Id*.) CCS made no response to either message prior to the filing of this action. On February 8, 2021, Anthony filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in

violation of R.C. 149.43(B). On April 9, 2021, the court-appointed mediator advised that all claims had been resolved other than the above request. On April 23, 2021, CCS filed a motion to dismiss the complaint. (Response). On June 1, 2021, Anthony filed a reply. On July 12, 2021, CCS filed additional information pursuant to court order (Sur-reply).

Motion to Dismiss

{¶3} To dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt that the claimant can prove no set of facts warranting relief after all factual allegations of the complaint are presumed true and all reasonable inferences are made in claimant's favor. *State ex rel. Findlay Publishing Co. v. Schroeder*, 76 Ohio St.3d 580, 581, 669 N.E.2d 835 (1996). As long as there is a set of facts consistent with the complaint that would allow the claimant to recover, dismissal for failure to state a claim is not proper. *State ex rel. V.K.B. v. Smith*, 138 Ohio St.3d 84, 2013-Ohio-5477, 3 N.E.3d 1184, ¶ 10.

{¶4} In an action to enforce R.C. 149.43(B), a public office may produce requested records prior to the court's decision and thereby render a claim for their production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 18-22. During mediation, the parties resolved all claims other than the one listed above under *Request for Teacher Attendance and Leave Records*. (April 9, 2021 Mediator's Entry, Response at 2.) The special master concludes that the other claims for production of records contained in the complaint are thus moot.

{¶5} CCS further argues the complaint fails to state a claim regarding the remaining request, on the grounds that responsive records do not exist. On review, non-existence of the requested teacher absence and substitute data is not conclusively shown on the face of the complaint and attachments. Moreover, as the matter is now fully briefed this argument is subsumed in CCS' defense on the merits. It is therefore recommended that that the motion to dismiss be denied as to the remaining claim for production of records.

Burden of Proof

{¶6} A requester must establish a public records violation by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.). At the outset, the requester bears the burden of production to plead and prove facts showing she sought identifiable public records from a public office pursuant to R.C. 149.43(B)(1) and that the request was denied. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 33. Anthony must first show that the items sought meet the statutory definition of "records," and that the records were kept by CCS.

The Request Seeks CCS "Records"

{¶7} "Public records" means records *kept by* a public office. R.C. 149.43(A)(1). "Records" as defined in R.C. 149.011(G) includes documents, items within them, and reports or files aggregated from separate records. *Kish v. Akron,* 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 20-24; *State ex rel. Data Trace Info. Servs., L.L.C. v. Cuyahoga Cty. Fiscal Officer*, 131 Ohio St.3d 255, 2012-Ohio-753, 963 N.E.2d 1288, ¶ 28-38. Anthony seeks statistical records received or created by CCS to document its personnel operations. CCS does not dispute that complete data regarding teacher absences and substitute coverage for each school, employee, and date are kept in its computerized Substitute Employment Management System (SEMS). (Response at 3-4.) SEMS "is designed for absence entry, substitute selection, job notification, and job assignment for teachers and their substitutes that work throughout the 110 Columbus City School buildings." (*Id*. at 4.) Instead, CCS argues that the requested data report does not exist because "SEMS is not designed to create reports with the exact information requested by Ms. Anthony." (*Id*.) In making this argument, CCS first misstates the standard to which public offices are held when a request is made for records from a public database. CCS argues that the standard is as follows:

> [I]t is well-established that R.C. 143 creates no duty for CCS to search a database and create new responsive records by searching for and compiling information from that database.

(*Id*.) To the contrary, Ohio courts expressly require public offices to give the public the benefit of data and computing power that the public has paid for and produce any database record compilation available through existing programming, even if the requested compilation is "new" in the sense that the office has not used the database software to compile that particular set of information in the past.

The Database Rule

{¶8} A public office is only required to produce existing records and has no obligation to create new records, including new compilations of dispersed data. *State ex rel. Lanham v. Smith*, 112 Ohio St.3d 527, 2007-Ohio-609, 861 N.E.2d 530, ¶ 15; *State ex rel. White v. Goldsberry*, 85 Ohio St.3d 153, 154, 707 N.E.2d 496 (1999). However, if an electronic database used by a public office has existing programming that can produce the output sought in a public records request, then that output already "exists" for the purposes of the Public Records Act.

> We hold that the clerk could not be required to create a new "document" by compiling material to facilitate review of the public records. Conversely, if the clerk's computer were already programmed to produce the desired printout, the "document" would already exist for the purpose of an R.C. 149.43 request.

State ex rel. Scanlon v. Deters, 45 Ohio St.3d 376, 379, 544 N.E.2d 680 (1989), overruled on other grounds by *State ex rel. Steckman v. Jackson,* 70 Ohio St.3d 420, 426-427, 639 N.E.2d 83 (1994). *Accord Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 74 ("If a record containing exempt and nonexempt information can, through reasonable computer programming, produce the requested output, the record is deemed to already exist," citing *Scanlon*); *State ex rel. Gambill v. Opperman*, 135 Ohio St.3d 298, 2013-Ohio-761, 986 N.E.2d 931, ¶ 4, 12, 16,

32-35; *Naymik v. N.E. Ohio Areawide Coordinating Agency,* Ct. of Cl. No. 2017-00919PQ, 2018-Ohio-1718, ¶ 31-33.

{¶9} Database access law is grounded in both the public nature of the data, and the enormous value added through database functionality. "The law does not require members of the public to exhaust their energy and ingenuity to gather information which is already compiled and organized in a document created by public officials at public expense." *State ex rel. Cincinnati Post v. Schweikert*, 38 Ohio St.3d 170, 173-174, 527 N.E.2d 1230 (1988). "Similarly, a public agency should not be permitted to require the public to exhaust massive amounts of time and resources in order to replicate the value added to the public records through * * * a data base containing such records." *State ex rel. Margolius v. Cleveland*, 62 Ohio St.3d 456, 460, 584 N.E.2d 665 (1992). As the Fourth District Court of Appeals summarized:

> The basic tenet of *Margolius* is that a person does not come - like a serf - hat in hand, seeking permission of the lord to have access to public records. Access to public records is a matter of right. The question in this case is not so much whether the medium should be hard copy of [sic] diskette. Rather, the question is: Can a government agency, which is obligated by law to supply public records, impede those who oppose its policies by denying the value-added benefit of computerization?

State ex rel. Athens Cty. Property Owners Assn. v. Athens, 85 Ohio App.3d 129, 131, 619 N.E.2d 437 (4th Dist.1992). The public is not required to forfeit value that has been added to teacher absence and substitute records by CCS' manner of storage and organization. *Margolius* at 559-560. *See also Parks v. Webb*, Ct. of Cl. 2017-00995PQ, 2018-Ohio-1578, ¶ 10-17. The database rule mandates public access to the full *functionality* of SEMS, not just to strict duplication of past CCS use.

{¶10} The database rule is not unlimited. Requesters are entitled to output available using existing programming. *State ex rel. Kerner v. State Teachers Retirement Bd*., 82 Ohio St.3d 273, 274-275, 695 N.E.2d 256 (1998) ("In order to create the requested records, the board would have had to reprogram its computer system."). *See*

also Speros v. Secy. of State, Ct. of Cl. No. 2017-00389PQ, 2017-Ohio-8453, ¶ 12-21 (office was not required to produce an aggregate spreadsheet from two separate databases), and cases cited therein. Thus, the question before the court is whether CCS' database was already programmed to produce the desired monthly output specified in Anthony's request.

Respondent's Evidence

{¶11} CCS asserts that:

> 3. CCS cannot produce a report in the manner requested. CCS's vendor, SmartFindExpress (SEMS), would have to create datasets (known as a "Job Inquiry Report") that would then need to be manually manipulated to create a report that shows the number of teacher absences in each building each month and the number that had substitute coverage for absences.
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> 4. SEMS is not able to create datasets (Job Inquiry Report) that only list the number of teachers absent in each building each month and the number that had substitute coverage. To produce the information in the requested format, the report would need to be manually manipulated in an Excel spreadsheet and the creation of pivot tables.
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> 5. CCS has 115 buildings. To satisfy a request for "each building each month" would require Columbus City Schools to run 115 individual reports for each of the 3 years requested. This would equal a total of 345 reports.
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> 6. To obtain the requested information, CCS would have to create a dataset from the database, extract raw data from that dataset, and then manually manipulate the extracted raw data from the dataset.

(Sur-reply, Ulas Aff. at ¶ 3-6.) To the extent CCS uses the term "manually manipulate" to mean the selection of data fields in a database's ad hoc report creator, it is not a valid excuse to deny a requester the use of the database functionality. However, CCS attests that information must first be extracted from the database to an Excel spreadsheet and then manipulated with the Excel function of "pivot tables," a data manipulation option apparently not available in SEMS. Although admitting it could do so with what appears to be minimal additional effort, CCS argues that the requested monthly statistics are technically not a record the database was "already programmed to produce."

Requester's Evidence

{¶12} In her reply, Anthony offers no evidence or argument contradicting CCS' representations regarding availability of the requested dataset, making only a bare assertion that the requested output is available. (Reply at 1.) Even a reasonable and good faith belief by a requester, based only on inference and speculation, does not constitute the clear and convincing evidence necessary to establish that a responsive document exists. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 22-26; *State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, ¶ 8. Anthony's opinion, based on inferences from correspondence with CCS regarding an earlier request for different statistics, is outweighed by the affirmative testimony submitted by CCS regarding the capabilities of its database.

{¶13} Because Anthony fails to prove by clear and convincing evidence that the requested output can be produced, she cannot show that CCS had a duty to produce it. *McCaffrey*; *Salemi v. Cleveland Metroparks*, 8th Dist. Cuyahoga No. 100761, 2014-Ohio-3914, ¶ 30. The special master concludes that Antony fails to show that CCS violated R.C. 149.43(B)(1) in denying the particular compilation of records requested. Anthony may of course make future requests to CCS for SEMS output based on the database's existing capabilities.

Failure to Timely Respond to the Request

{¶14} A public office "shall make copies of the requested public record available to the requester * * * within a reasonable period of time." R.C. 149.43(B)(1). Whether a public office has provided records within a reasonable period of time depends upon all the pertinent facts and circumstances of the case. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 11-12. Redaction or withholding of records, including by not responding to the request, constitute denial. Upon denial, an office must "provide the requester with an explanation, including legal authority, setting

forth why the request was denied." R.C. 149.43(B)(3). The requester bears the burden of demonstrating that a public office's response was unreasonably delayed. *Cordell*, *Id*.

{¶15} Anthony claimed that her "email requests have been completed [sic] ignored after multiple requests." (Complaint at 2.) CCS does not deny that in the five weeks between Anthony's request and the filing of the complaint, it neither provided records nor offered the required "explanation including legal authority" for why they were denied. On February 15, 2021, CCS denied the request based on non-existence of the requested SEMS output. (Response, Attachment 3.) Based on the minimal time necessary to evaluate and communicate this conclusion, particularly in light of CCS' responses to previous similar requests, the special master finds that CCS did not respond to the request within a reasonable period of time. *See Snyder-Hill v. Ohio State Univ.*, Ct. of Cl. No. 2020-00308PQ, 2020-Ohio-4957, ¶ 7-15.

{¶16} CCS' eventual denial asserted that Anthony made a form of "overly broad" request by not identifying an existing compilation of records. *See Oriana House, Inc. v. Montgomery* at ¶ 9, 90-93. Failure to make this denial timely had the further consequence of avoiding OCC's duty to provide Anthony the opportunity to revise the request into a proper one and potentially avoid litigation. When a request is denied for overbreadth, a public office is required to

> 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.

R.C. 149.43(B)(2). CCS could have provided Anthony with database maintenance and access information (Sur-reply, Ulas Aff. and Richards Aff.) and/or a copy of the SEMS User Manual (Sur-reply, SmartFindExpress System Administrator User Guide) to allow Anthony to revise her request consistent with the dataset capabilities that CCS *does* possess, e.g., the SEMS standard Reports List and Custom Search Rules.

{¶17} Perfection is not required in a request. *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 37. The General Assembly encourages negotiation to optimize the clarity, scope, speed, format, economy, and delivery of public records. *See* R.C. 149.43(B)(2), (3), (5), (6), (7) and (9). Ohio courts discourage semantic evasion of requests, *Morgan* at ¶ 56-57; *Sutelan v. Ohio State Univ*., Ct. of Cl. No. 2019-00250PQ, 2019-Ohio-3675, ¶ 15-17. Nor may a public office deny record production merely because it is burdensome or inconvenient. *State ex rel. Warren Newspapers v. Hutson*, 70 Ohio St.3d 619, 623, 640 N.E.2d 174 (1994). In practical terms, public offices can reduce the burden of requests by cooperatively negotiating production of even poorly requested records. The parties are encouraged to cooperate fully in any future revision of Anthony's request. *See State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 18-20.

Conclusion

{¶18} The evidence before the court demonstrates that respondent keeps a data management system containing data responsive to the request, but the requested dataset cannot be produced without export for additional manual and electronic data manipulation not available in the database software. Accordingly, the special master recommends the court deny the claim for production of records. The special master further recommends the court find that respondent violated R.C. 149.43(B)(1) by failing to respond to the request within a reasonable period of time. It is recommended the court order court costs be assessed equally between the parties.

{¶19} *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).

JEFF CLARK
Special Master

Filed August 2, 2021
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