[Cite as *Langshaw v. N. Royalton*, 2021-Ohio-3394.]

DANIEL R. LANGSHAW Requester v. CITY OF NORTH ROYALTON Respondent	Case No. 2021-00070PQ Special Master Jeff Clark REPORT AND RECOMMENDATION

{¶1} Ohio's Public Records Act provides that upon request a public office "shall make copies of the requested public record available to the requester at cost and within a reasonable period of time." R.C. 149.43(B)(1). Ohio courts construe the Public Records Act liberally in favor of broad access, with any doubt resolved in favor of disclosure of public records. *State ex rel. Hogan Lovells U.S., L.L.P. v. Dept. of Rehab. & Corr.*, 156 Ohio St.3d 56, 2018-Ohio-5133, 123 N.E.3d 928, ¶ 12. This action is brought under R.C. 2743.75, which provides an expeditious and economical procedure in the Court of Claims to resolve public records disputes.

{¶2} On July 18, 2020, requester Daniel Langshaw made a written request through legal counsel to respondent City of North Royalton

> for a copy of any and all communications, including but not limited to correspondence, emails, text messages, letters, and phone records, involving any one of the following people: the Mayor, Law Director, Ms. Anton, or any member of City Council (except Councilman Langshaw) from June 19, 2020 through today. The requested records should specifically include any discussion of Councilman Langshaw's phone call to Ms. Anton, his status as a council member, and any disciplinary action that may be taken against him.

(Complaint at 2, Exh. D.) On August 5, 2020, Langshaw received a response from the city with documents attached, including two explanatory responses from City officials. (Complaint at 2, Exhs. E, F, G.)

{¶3} On February 8, 2021, Langshaw filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records in violation of R.C. 149.43(B). Following unsuccessful mediation, the City filed a combined response to complaint, motion to strike and motion to dismiss (Response) on April 15, 2021. Langshaw filed a combined brief in opposition to respondent's motion to strike and motion to dismiss (Reply), and a separate motion to compel, on May 7, 2021. On May 21, 2021, the City filed a brief in opposition to the motion to compel.

Pending Motions

Motion to Strike

Civ.R. 12(F) provides:

> Upon motion made by a party before responding to a pleading or, if no responsive pleading is permitted by these rules, upon motion made by a party within twenty-eight days after the service of the pleading upon him or upon the court's own initiative at any time, the court may order stricken from any pleading an insufficient claim or defense or any redundant, immaterial, impertinent or scandalous matter.

The City asserts that paragraph 1 of the complaint contains statements that are immaterial to Langshaw's public records claim, and that exhibits referenced in that paragraph are likewise immaterial. (Response/Motion to Strike at 4-5.) Langshaw contends that the paragraph and exhibits "[go] to the motive for the Respondent to not comply with the Public Records act or even destroy public records." (Reply at 4.)

{¶4} The complaint asserts denial of access to public records. The City's sole defense is that all existing requested records have been disclosed. Langshaw cites no legal authority for the proposition that the referenced text and documents are material to proving his claim or countering the City's proof of the defense. On review, the special master finds that Exhibits A-C and the greater part of paragraph 1 are immaterial to this action. The clerk is directed to strike all of the first paragraph of the complaint following the date "July 4, 2020" and strike Requester's Exhibits A-C in their entirety. On the

court's own initiative and on the same basis, the special master further directs the clerk to strike the first four full sentences on page 4 of Langshaw's reply.

{¶5} Langshaw claims the City failed to file the motion to strike within the time set forth in Civ.R. 12(F). However, "to the extent that they would by their nature be clearly inapplicable," the Rules of Civil Procedure do not apply to procedure in special statutory proceedings. Civ.R. 1(C)(6). R.C. 2743.75 is a special statutory proceeding providing at division (E)(2) that other than the complaint and response, "[n]o further motions or pleadings shall be accepted by the clerk of the court of claims or by the special master * * * unless the special master directs in writing that a further motion or pleading be filed." Further, the special master's February 17, 2021 notice of referral to mediation stayed all filing deadlines in this case until further order of the court. The special master finds that the time limits of Civ.R. 12(F) either do not apply or have been complied with by excluding the time during which pleading was stayed. The City filed the motion to strike 13 days after mediation was terminated which, added to the 6 days between service of the complaint and referral, totals 19 days.

Motion to Compel

{¶6} Langshaw filed a motion to compel the City to produce all withheld records and allow inspection of City officials' mobile devices "pursuant to Rules 26, 37, and 45 of the Ohio Rules of Civil Procedure and R.C. 2743.75, R.C. 149.43, and R.C. 149.43(B)." Langshaw states that he is seeking "further discovery * * * of the suspicious contradictory statements made by" the officials. (Motion to Compel at 3.) Again, to the extent that they would by their nature be clearly inapplicable the Rules of Civil Procedure do not apply to procedure in this special statutory proceeding. Civ.R. 1(C)(6). R.C. 2743.75(E)(3)(a) provides that "The special master shall not permit any discovery." Langshaw's request for discovery under the Civil Rules is therefore prohibited.

{¶7} Langshaw's separate citation to R.C. 2743.75 and R.C. 149.43 is duplicative of the complaint to the extent it seeks production of records. However, the motion

further seeks an order to "produce and permit inspection of mobile devices and copying of any designated documents named in Requester's complaint or electronically stored information that are in the possession, custody, or control of" two named officials. (Motion to Compel at 1, 4-5.) First, Langshaw sought only copies, not inspection, in his request of July 2, 2020 and may not enforce a claim in this action that is not based on a previously denied request. *State ex rel. Bardwell v. Ohio Atty. Gen.*, 181 Ohio App.3d 661, 2009-Ohio-1265, 910 N.E.2d 504, ¶ 5 (10th Dist.). Second, if the motion is for Langshaw to inspect storage devices as a matter of discovery, he cites no statutory or case law permitting a public records requester to conduct such an inspection or any other discovery. Finally, the special master is not persuaded that it is necessary to order the devices submitted for *in camera* inspection by the court.

{¶8} A public office has a duty to retrieve its public records from wherever they are kept, including electronic records stored only in an employee's personal device. *See Sinclair Media III v. Cincinnati*, Ct. of Cl. No. 2018-1357PQ, 2019-Ohio-2624, ¶ 5-12 and cases cited therein. Moreover, if a requester provides *prima facie* evidence that an office has improperly deleted emails that are public records, the office may be ordered to recover those records by reasonable means. *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, ¶ 26-41. However, the response to a public records request for an official's correspondence may often rely appropriately, even necessarily, on identification and retrieval of responsive records by the official himself. *Viola v. Ohio Attorney General's Office - Pub. Records Unit*, Ct. of Cl. No. 2020-00507PQ, 2021-Ohio-749, ¶ 14. Here, copies of the only texts shown to be deleted were provided from the storage device of the other corresponding official.

{¶9} In the absence of evidence to the contrary, the City may be presumed to have performed its duties including public records identification and retrieval regularly and in a lawful manner. *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth.,*

121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 29. While an office has no duty under R.C. 149.43 to detail for a requester the steps actually taken to identify and retrieve requested records, *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office,* 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26, the City here produced explanations of how they retrieved responsive text messages, and resolution of a problem they encountered. Langshaw has not offered persuasive evidence that this process was irregular or unlawful, and his suspicions are insufficient to prove the existence of additional public records on the City officials' personal devices. On the facts and evidence before the court, the special master finds that Langshaw has not shown that the manner in which the City processed his requests violated R.C. 149.43(B). To the extent the motion seeks direct inspection of City officials' mobile devices, the request is not supported by the facts or existing law and is denied.

Motion to Dismiss

{¶10} In order 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. The unsupported conclusions of a complaint are, however, not admitted and are insufficient to withstand a motion to dismiss. *Mitchell v. Lawson Milk Co.*, 40 Ohio St.3d 190, 193, 532 N.E.2d 753 (1988).

{¶11} The City argues the complaint fails to state a claim because it does not establish by clear and convincing evidence that the City maintains and can access additional responsive records. However, the factual allegation of records existence is presumed to be true for purposes of a Civ.R. 12(B)(6) motion. The City conflates

Langshaw's ultimate burden of persuasion in the case with his initial burden of production, which is merely to show that he sought identifiable public records. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office*, Slip Opinion No. 2020-Ohio-5371, ¶ 33. Langshaw's factual allegation of improper deletion of records supports a claim for denial of access to those records. Only upon the City pleading that no other responsive records exist was Langshaw required meet his ultimate burden to prove the allegation of additional records by clear and convincing evidence. It is therefore recommended that that the motion to dismiss be denied and this issue proceed to determination on the merits.

Burden of Proof

{¶12} The requester in a case brought under R.C. 2743.75 must establish any public records violation by clear and convincing evidence. *Hurt v. Liberty Twp.*, 2017-Ohio-7820, 97 N.E.3d 1153, ¶ 27-30 (5th Dist.). An implicit element of this burden is to show that the items sought meet the statutory definition of "records," actually exist, and have not been provided.

Records and Non-Records

"Records" are defined in R.C. 149.011(G) as including:

> 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.

A putative record must satisfy all three elements of the definition. The parties do not dispute that email and text communications meet the first element as "any document" and "an electronic record." However, the City argues that Langshaw fails to prove that every text on the devices of the named officials meets the third element of serving "to

document the organization, functions, policies, decisions, procedures, operations, or other activities of the office."

{¶13} The definition of "record" does not include every piece of paper on which a public officer writes something. *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 13. Even for email within a public office's account, a requester must show that the email actually served to document "an official duty or activity of the office" to qualify as a record of the office. *State ex rel. Wilson-Simmons v. Lake Cty. Sheriff's Dept.*, 82 Ohio St.3d 37, 41, 693 N.E.2d 789 (1998) (e-mail consisting of racist slurs against a co-worker, although reprehensible, was not used to conduct sheriff's department business). *Accord State ex rel. Beacon Journal Publ. Co. v. Whitmore*, 83 Ohio St.3d 61, 63-64, 697 N.E.2d 640 (1998). The test is not whether Langshaw feels that any and all text messages would be of interest to him, but rather which text messages were used by the City to document its official duties and activities.

Non-Existent Records

{¶14} A public office has no duty to provide records that do not exist, or that it does not possess. *State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 471, ¶ 5, 8-9. An office may establish by affidavit that all existing records have been provided. *State ex rel. Fant v. Flaherty*, 62 Ohio St.3d 426, 427, 583 N.E.2d 1313 (1992); *State ex rel. Toledo Blade Co. v. Toledo-Lucas Cty. Port Auth*., 121 Ohio St.3d 537, 2009-Ohio-1767, 905 N.E.2d 1221, ¶ 15. Although the office's affidavit may be rebutted by evidence showing a genuine issue of fact, a requester's mere belief based on inference and speculation does not constitute the evidence necessary to establish that a document exists as a record. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 22-26.

{¶15} Records previously kept as public records but properly disposed of pursuant to the office records retention schedule prior to the request are no longer

subject to public records request. *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, ¶ 23; *State ex rel. Glasgow v. Jones,* 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686*,* ¶ 24, fn. 1. In the absence of evidence to the contrary, a public office will be presumed to have properly performed its duties, including those regarding records disposition. *Toledo Blade* at ¶ 29.

Text Messages

{¶16} Text messages are often personal and/or transient in nature, substituting at a distance for informal verbal conversation. If they do not meet the definition of a record, they need not be provided in response to a request for "all texts" between office employees. *Bollinger v. River Valley Local Sch. Dist*., Ct. of Cl. No. 2020-00368PQ, 2020-Ohio-6637, ¶ 7-15. The City's records retention schedule acknowledges the transient nature of texts, grouping text messages in its CO-13 Correspondence/Mail category for Transitory messages "which serve to convey information of temporary importance in lieu of oral communication." (Response Exh. 4 p. 2.) The retention period for such correspondence is "[u]ntil no longer administratively needed." (*Id*.) On review, the text messages that the City provided to Langshaw are chatty and/or transient, and a few are entirely personal. (Response, Exh. 3.)

Records Provided and Evidence Submitted

{¶17} On or about August 5, 2020, the City provided Langshaw with 156 pages, including cover pages, of email and text communications responsive to the request. (Response at 2-3, 6-8, Exh. 3.) Although Langshaw claims that "Respondent still has failed to provide all records required by law to Requester" (Reply at 3), he does not specify particular records he believes have not been provided, other than messages from the personal Facebook account of the mayor. (Reply at 6, Langshaw Aff. at ¶ 11-19.) At most, Langshaw refers to letters from two city officials admitting they deleted some text messages with other members of city council within the time period and on

the subject at issue. (Complaint at 2, Exh. F, G.) Langshaw alleges he "knew them both to routinely secretly text message each other regarding city business." (*Id*.)

{¶18} The City maintains that any deleted text messages were either disposed of in accordance with the City's records retention schedule or were inadvertently deleted but recovered and produced to Langshaw. (Response at 7-8.) The City provides two affidavits in support. One city official attests that his statement regarding deletion of texts (Complaint Exh. G) referred to deletion of text messages that were either not public records in the first instance or were deleted in conformity with the city council records retention schedule. (Response, Exh. 1 – Wos Aff. at ¶ 4-7.) The second official attests that he inadvertently deleted some text messages while attempting to print them for the response to Langshaw's public records request but is reliably informed that all of the messages, which were between himself and Councilman Wos, were provided by Wos. (Response, Exh. 2 – Dietrich Aff. at ¶ 4-8.) This testimony is some evidence in support of the defense of full production, and the non-existence of additional responsive records. Other than suspicion and speculation, Langshaw offers no evidence that he did not receive all responsive records between the two officials through this process.

{¶19} Langshaw seeks communications from a preexisting "personal social media account" of the now-mayor of the City. (Reply, Langshaw Aff. at ¶ 11-15.) There is no evidence that the mayor's personal Facebook account is maintained by the City or that it is used to keep records documenting the official activities of the City. Langshaw filed what is presumably his most compelling example of a "public record" on the account (Reply, Langshaw Aff. at ¶ 18, Exhs. A6-A7) but the exemplar is no more than a message of agreement and support from a Facebook friend, to which there was no reply by the mayor in his official capacity or otherwise. The special master finds that Langshaw fails to establish by clear and convincing evidence that any messages on the mayor's personal Facebook account meet the definition of a record under R.C. 149.011(G), or of a public record under R.C. 149.43(A)(1).

{¶20} Langshaw states he believes there are additional communications between the two City officials. However, a requester's mere disbelief in a public office's assertion of non-existence does not constitute the clear and convincing evidence necessary to establish that responsive documents do exist. *State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St.3d 139, 2012-Ohio-4246, ¶ 22-26, 976 N.E.2d 877; *State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 471, ¶ 8. The special master finds that Langshaw has not met his burden to prove by clear and convincing evidence that any additional records documenting the official activities of the City exist in the relevant officials' mobile devices or elsewhere.

Conclusion

{¶21} Based on the pleadings, affidavits, and documents submitted in this action, the special master recommends the court find that requester has not shown that respondent violated R.C. 149.43(B). It is recommended that costs be assessed to requester.

{¶22} *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

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