[Cite as *Barack v. Thalman*, 2022-Ohio-1355.]

ROGER A. BARACK Requester v. MAYOR KATHRYN THALMAN, CITY OF ST. CLAIRSVILLE Respondent	Case No. 2021-00228PQ Special Master Jeff Clark REPORT AND RECOMMENDATION

{¶1} The Public Records Act requires a public office to make copies of requested public records available at cost and within a reasonable period of time. R.C. 149.43(B)(1). The Act is construed liberally in favor of broad access, with any doubt resolved in favor of disclosure. *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. R.C. 2743.75 provides an expeditious and economical procedure to resolve public records disputes in the Court of Claims.

{¶2} On July 13, 2020, requester Roger Barack made a public records request to respondent Mayor Kathryn Thalman, City of St. Clairsville, stating, in pertinent part:

> Request No. 1
>
> I am requesting copies of all correspondence, including without limitation memoranda, notes, electronic mails, and text messages, by, between, or among the following offices:
>
> a. The Mayor and staff;
> b. The Director of Public Service/Safety and staff;
> c. The Belmont County Water and Sewer District Director and staff;
> d. Department Superintendents and respective staffs; and/or
> e. Any and all City employees;
>
> where the subject matter of such correspondence relates to:
>
> a. Roger A. Barack, a resident of St. Clairsville;
> b. Heinlein Properties Inc.; and/or
> c. The below-described property:

> 0 National Road
> St. Clairsville, Ohio 43950
> Parcel Number 32-00429.000
> Property Owner: Heinlein Properties Inc.
>
> from January 1, 2016, through January 1 2020.
>
> Request No. 2
>
> I am requesting copies of all invoices provided to the City or any City department from any and all lawyers or law firms, from January 1, 2016, through January 1, 2020.

(Complaint at 4.) On August 20, 2020, Barack's counsel Cory Barack ("Counsel") emailed St. Clairsville Administrative Assistant Jennifer McMillen requesting an update on any response to the request. (*Id*. at 6.) From August 24, 2020 through February 26, 2021, first McMillen and then Director of Public Service/Safety Jeremy Greenwood advised Counsel that city staff were working on the request, including legal review. (*Id*. at 6-9.) On March 8, 2021, Counsel sent a litigation hold to the Mayor. (*Id*. at 2; Supp. Reply at 3-8.) Counsel avers that he "visited [City Law Director Elizabeth] Glick in person at her office on or about April 9, 2021. She showed me the box of records and stated that she would have them reviewed by approximately April 13, 2021." (Complaint at 2.) On April 15, 2021, Counsel sent an email to Glick stating, "Elizabeth, I really need those records that my client requested from the city. This is long past due. Please provide an update as soon as possible." (*Id*. at 10.) He received no response. (*Id*. at 2.)

{¶3} On April 27, 2021, Barack filed a complaint alleging denial of access to public records in violation of R.C. 149.43(B). On September 23, 2021 the Mayor filed a response and motion to dismiss (Response), including notice that the office had produced responsive, non-privileged, and non-exempt documents on June 11, 2021 (Response at 2, Mertz Aff. at ¶ 6, Greenwood Aff. at ¶ 5) and delivered additional records on July 21, 2021. (Response at 2.) On October 28, 2021, Barack filed a reply. On October 29, 2021, the Mayor filed a supplemental response with a privilege log, affidavit, and a purported city records retention schedule, and filed unredacted copies of the law firm invoices under

seal. On November 19, 2021, the Mayor filed a second supplemental response with a different set of documents purported to be the city's retention schedule. On December 30, 2021, Barack filed additional information. (Supp. Reply.) On February 7, 2022, the Mayor filed a third supplemental response with documents allegedly used in lieu of a proper retention schedule, various excuses for the absence of an approved retention schedule, and affidavits denying the existence of any responsive communications on the personal devices of two former employees.

Motion to Dismiss

{¶4} 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.

{¶5} The Mayor asserts 1) the claim for production of law firm invoices is moot, and 2) the Mayor has no duty to provide records kept on personal mobile phones of city employees. On consideration, the special master finds these defenses not conclusively shown on the face of the complaint. Moreover, as the matter is now fully briefed these grounds are subsumed in the defense of the merits. It is therefore recommended the motion to dismiss be denied.

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. The Mayor asserts that all requests have been rendered moot by

production of records after the complaint was filed. (Response at 2-3.) She has submitted testimony that every record "that exists *and is in the possession of the City of St. Clairsville* has been provided by the City to Mr. Barack." (Emphasis added.) (Greenwood Aff. at ¶ 5, Mertz Aff. at ¶ 6.) Barack agrees the Mayor has provided all records described in Request No. 2. (Reply at 1-3.) However, "Requester states that Respondent has not fully complied with its obligation to produce certain communications, as set forth in Requester's written 'Request No. 1,' dated July 13, 2020." (*Id*. at 3.) Specifically, Barack asserts the Mayor has failed to produce responsive texts, voicemail, and other communications from personal devices of city employees. (*Id*. at 3-6.)

{¶7} Based on the parties' agreement, the special master finds the claim for production of records in Request No. 2 is moot. The special master further finds that to the extent any communications described in Request No. 1 have been provided to requester, that claim is also moot. However, both Ohio law and the Public Records Policy of St. Clairsville (Oct. 29, 2021 Supp. Response, Privilege Log, Exh. B, Sections 4, 4.1, and 4.2) provide that electronic office records in private accounts must be filed, maintained, and produced in accordance with the Public Records Act. If the Mayor has not sought to retrieve all such records and does not deny they may exist, the claim for their production is not moot.

{¶8} Independent of the claim for production, requester's claim that the delay between his request and production of any records was unreasonable is not moot. "[A] separate claim based on the untimeliness of the response persists unless copies of all required records were made available 'within a reasonable period of time.' R.C. 149.43(B)(1)." *State ex rel. Kesterson v. Kent State Univ*., 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 19. *Accord State ex rel. Consumer News Servs. v. Worthington City Bd. of Educ*., 97 Ohio St.3d 58, 2002-Ohio-5311, 776 N.E.2d 82, ¶ 31.

Burden of Proof

{¶9} The overall burden of persuasion in a public records case is on the requester to prove his right to relief by the requisite quantum of evidence. *Welsh-Huggins v. Jefferson Cty. Prosecutor's Office,* 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d, ¶ 34. First, the requester must prove he sought an identifiable public record and the public office did not make the record available. *Id.* at ¶ 33. The Mayor does not dispute that Roger Barack reasonably identified the records he sought.

{¶10} If a public office asserts that it has searched for and provided *all* existing records, the requester then has the burden to overcome that denial with clear and convincing evidence that additional responsive records do exist. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 5-10. A requester's mere belief in the existence of more records does not constitute the clear and convincing evidence necessary to establish that responsive documents exist. *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; *State ex rel. Morabito v. Cleveland*, 8th Dist. Cuyahoga No. 98829, 2012-Ohio-6012, ¶ 13.

The Existence of Additional Records Has Not Been Denied

{¶11} Barack asserts that during the timeline in his request city employees were observed using personal cell phones in the course of their duties. (Reply at 2, ¶ 5; Cody Barack Aff. at ¶ 4-9.) The affiant does not attest he heard the content of the cellphone use, or that the content of any call was recorded. However, this and the city's policy anticipating that city records may be made and stored on employee's personal communications devices is some evidence that responsive records may exist there. The special master finds that Barack plausibly infers but does not prove by clear and convincing evidence the existence of additional records on personal devices.

{¶12} In response, the Mayor first asserted that she had now provided all records responsive to the request "in the possession of [the city]" (Response at 2-3, Exh. A at ¶ 6, Exh. B at ¶ 5). However, the Mayor stated that additional responsive emails or texts "may

or may not" exist on the personal devices of former city employees. The Mayor did not consider such records to be "in the possession of" the city because "[i]t is the City's position that it cannot demand access to the personal property of private citizens." (*Id*. at 3.) She thus did not seek any such records in responding to the request.

{¶13} The Mayor later provided the testimony of Jeremy Greenwood that the physical files of former Public Service/Safety Director James Zucal, the physical files of former Mayor Terry Pugh, and all electronically stored records "on the City's computer system" were searched for the requested information. (Feb. 7, 2022 Supp. Response at 48.) The Mayor provided the testimony of Pugh and Zucal that they did not use their personal cell phones to conduct City business by either text or email and do not have "any business information related to the City of St. Clairsville stored on" their personal cell phones. (*Id*. at 49-50.) These affidavits do not address the personal device records of any of the other city employees identified in the request. Further, the description of information not stored on the two personal cell phones is limited to "business information related to the [city]" rather than the full language of Barack's request. (*Id*.)

{¶14} The St. Clairsville public records policy contradicts the Mayor's assertion that she need not review personal devices, requiring instead that emails on employees' private accounts are to be retained and made available like any other record of the office. (Nov. 22, 2021 Supp. Response at 56-57, §§ 4 – 4.2.) The special master finds that the Mayor's refusal to look for responsive records everywhere they may reasonably be kept partially negates her assertion that no additional records exist. See *State ex rel. Kesterson v. Kent State Univ*., 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 25-27.

Duty to Retain Records

{¶15} On October 1, 2021, the special master ordered respondent to file a copy of the City's records retention schedule in effect on the date of the request to establish the format, location, and duration of its retention of electronic communication records from

employee personal devices. Respondent instead filed a copy of the *Local Government Records Manual* published by the Ohio History Connection, attesting that this served as the City's retention schedule. While the Manual advises how to create a records retention schedule, it is not a retention schedule. The special master clarified that respondent was to provide a copy of the St. Clairsville records retention schedule (RC-2) approved by the municipal records commission under R.C. 149.39, as required by law for disposal of records of the office, R.C. 149.351(A), which is further required to be posted at a location readily available to the public in accordance with R.C. 149.43(B)(2) and the St. Clairsville Public Records Policy, Section 1.1. (Oct. 29, 2021 Supp. Response at 54.) The Mayor admitted the city had no approved records retention schedule on the date of Barack's request. (Feb. 7, 2022 Supp. Response at 1-2.) Where there is no records retention schedule that provides for the destruction of a city record, the retention period is indefinitely; "until the records commission takes further action in compliance with R.C. 149.39 to authorize its destruction." *Keller v. Columbus*, 100 Ohio St.3d 192, 2003-Ohio-5599, 797 N.E.2d 964, ¶ 29-37.

{¶16} Separately, the Mayor was required to preserve potentially relevant records when this litigation became reasonably foreseeable. *See Mitchell v. Lemmie*, 2nd Dist. No. 21511, 2007-Ohio-5757; ¶ 86-93 *Yontz v. Gregg Appliances*, Franklin C.P. No. 12-CV-004331, 2013 Ohio Misc. LEXIS 10039, *48-51 (Oct. 25, 2013) and cases cited therein. Finally, the Mayor was served with a litigation hold letter on March 8, 2021. (Supp. Reply, Exh. 1.) The Mayor's overlapping duties to retain and maintain records pursuant to R.C. 149.40, R.C. 149.43(B)(2), the St. Clairsville public records policy, and the litigation hold letter, as well as her obligation to dispose of such records only as provided by law or under the rules adopted by the city records commission (i.e., an approved records retention schedule), R.C. 149.351(A), includes records kept on the personal devices of city employees. *See Sinclair Media III v. Cincinnati*, Ct. of Cl. No. 2018-01357PQ, 2019-Ohio-2624, ¶ 4-12 and cases cited therein.

Duty to Locate Records

{¶17} The Mayor's failure to inquire as to records kept on personal devices for any but two employees precludes a fully informed determination of Barack's claim for production. However, under these circumstances the court may order the public office to finally conduct a diligent review for responsive records in all locations where they may be kept by the listed employees. *See State ex rel. DiFranco v. S. Euclid*, 144 Ohio St. 3d 565, 2015-Ohio-4914, 45 N.E.3d 981, ¶ 27; *State ex rel. Hill v. Campbell*, 10th Dist. Franklin No. 20AP-510, 2022-Ohio-354, ¶ 14-17.

Failure to Timely Produce Records

{¶18} "The primary duty of a public office when it has received a public-records request is to promptly provide any responsive records within a reasonable amount of time and when a records request is denied, to inform the requester of that denial and provide the reasons for that denial. R.C. 149.43(B)(1) and (3)." *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394, 2019-Ohio-1216, 128 N.E.3d 179, ¶ 11. Whether a public office has provided records within a reasonable period of time depends upon all the pertinent facts and circumstances of the case. *Id.* at ¶ 11-12. The requester bears the burden of demonstrating that the public office's response was unreasonably delayed. *Id.* at 12.

{¶19} Barack asserts without contradiction that the Mayor failed to provide any records in the nine months between the request and the filing of his complaint, and for an additional two months after the filing. (Complaint at 2; Reply at 3.) Unless a public office can show that extraordinary circumstances interfered with its duty to "organize and maintain public records in a manner that they can be made available" to requesters, R.C. 149.43(B)(2), eleven months is a manifestly unreasonable period of time to produce even a single document. *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, ¶ 36; *State ex rel. Beacon Journal Pub. Co. v. Andrews*, 48 Ohio St.2d 283, 289, 2 Ohio Op.3d 434, 358 N.E.2d 565 (1976). The Mayor states that the delay

> was due in part to lack of staffing, turnover in administration, and the complications of Covid. There was a change in administration as of January 1, 2020, and the voluminous records being requested were from the prior administration's staff.

(Response at 2.) The Mayor offers no evidence or arguments that materially distinguish the circumstances of St. Clairsville from other Ohio municipalities that continued to comply with their obligations under the Public Records Act during this time period.

{¶20} The statutory requirement of efficacious records organization implies capable office management of receipt, logging, processing, and response for public records requests. The Supreme Court routinely rejects excuses for delay such as scarce resources, expense, time involved, or interference with other duties. *State ex rel. Wadd v. Cleveland*, 81 Ohio St.3d 50, 53-54, 689 N.E.2d 25 (1998); *Toledo Blade v. Seneca Cty. Bd. of Commrs.* at ¶ 36*; Beacon Journal v. Andrews* at 289; *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, ¶ 31-33, 43-45. Based on the minimal time necessary to copy and transmit any single invoice or other requested document, and in the absence of any evidence that processing this request required particularly time-consuming actions, the special master finds that the Mayor' delay of eleven months before producing a single requested record was unreasonable. *See generally Snyder-Hill v. Ohio State Univ.*, Ct. of Cl. No. 2020-00308PQ, 2020-Ohio-4957, ¶ 7-16.

{¶21} Finally, interminable failure to produce requested records eventually constitutes the denial of the request. Upon any 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). In addition to her failure to produce responsive records prior to the complaint, the Mayor failed to comply with her obligation to provide an explanation for denial of the request.

Conclusion

{¶22} The special master recommends the court issue an order for respondent to locate and produce all responsive records kept in the private devices or accounts of any former or current city employee listed in the request. The special master further recommends the court find that respondent failed to produce any responsive record within a reasonable period of time and to provide an explanation for denial. It is further recommended that requester is entitled to recover from respondent the amount of the filing fee of twenty-five dollars and any other costs associated with the action that he has incurred. It is recommended costs be assessed to respondent.

{¶23} *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 March 9, 2022
Sent to S.C. Reporter 4/25/22