

[Cite as *Hicks v. Union Twp., Clermont Cty. Trustees*, 2022-Ohio-3142.]

CHRISTOPHER RICHARD HICKS	Case No. 2022-00408PQ
Requester	Special Master Jeff Clark
v.	<u>REPORT AND RECOMMENDATION</u>
UNION TOWNSHIP, CLERMONT COUNTY, TRUSTEES	
Respondent	

{¶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} In a letter dated January 12, 2022, requester Christopher Hicks made a public records request to respondent Union Township, Clermont County, Trustees (hereinafter “Township”) as follows:

This is a record request for mailing lists used for the township newsletter. I am requesting two formats:

- EMAIL LIST – the full email list used for township newsletters.
- MAIL LIST – the full mail list used for township newsletters.

(Complaint at 3.) The Township responded on January 18, 2022 (Response, Exh. B) and January 26, 2022 (Complaint at 4) that the newsletter mailing list was a non-record because it does not “document the activities or function of the Township.”

{¶3} On May 11, 2022, Hicks filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records by the Township in violation of R.C. 149.43(B).

Following unsuccessful mediation, the Township filed its response to the complaint on July 22, 2022. On August 5, 2022, Hicks filed a reply.

Burden of Proof

{¶4} The requester in an action under R.C. 2743.75 bears an overall burden to 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.). The requester bears an initial burden of production “to plead and prove facts showing that the requester sought an identifiable *public record* pursuant to R.C. 149.43(B)(1) and that the public office or records custodian did not make the record available.” (Emphasis added.) *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 33. Thus, the burden is on Hicks to show that the requested lists meet the definition of “record” contained in R.C. 149.011(G).

Non-Records Need not be Provided

{¶5} “Records” are defined in R.C. 149.011(G) as including:

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.*

(Emphasis added.) The definition of “record” does not include every piece of paper on which a public officer writes something, or every document received by a public office. *State ex rel. Cincinnati Enquirer v. Ronan*, 127 Ohio St.3d 236, 2010-Ohio-5680, 938 N.E.2d 347, ¶ 13. R.C. 149.011(G) requires more than mere receipt and possession of an item for it to be a record for purposes of R.C. 149.43. *State ex rel. Beacon Journal Publ’g Co. v. Whitmore*, 83 Ohio St.3d 61, 64, 697 N.E.2d 640 (1998). For example, “[t]o the extent that any item contained in a personnel file is not a ‘record,’ *i.e.*, does not serve to document the organization, etc., of the public office, it is not a public record and need not be disclosed.” *State ex rel. Fant v. Enright*, 66 Ohio St.3d 186, 188, 610 N.E.2d 997 (1993). Information that a public office happens to be storing, but which does not serve

to document any aspect of the office's activities, will not meet the statutory definition of a "record." *State ex rel. McCleary v. Roberts*, 88 Ohio St.3d 365, 367-368, 725 N.E.2d 1144 (2000) (children's personal information within files of summer pool program did nothing to document any aspect of the Recreation and Parks Department).

{¶6} If a public office withholds personal information about its employees or customers as non-record, a requester must establish that the withheld data "create a written record of the structure, duties, general management principles, agency determinations, specific methods, processes, or other acts of the [public office]." *State ex rel. Dispatch Printing Co. v. Johnson*, 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274, ¶ 22. The test is not whether the information is of interest to the requester, but whether it is used by the office to document its official duties and activities. This is fully consistent with the purposes of the Public Records Act:

As we noted in *McCleary*, disclosure of information about private citizens is not required when such information "reveals little or nothing about an agency's own conduct" and "would do nothing to further the purposes of the Act." 88 Ohio St.3d at 368 and 369, 725 N.E.2d 1144, quoting *United States Dept. of Justice v. Reporters Commt. for Freedom of the Press* (1989), 489 U.S. 749, 780, 109 S.Ct. 1468, 103 L.Ed.2d 774.

State ex rel. Beacon Journal Publ'g Co. v. Bond, 98 Ohio St.3d 146, 2002-Ohio-7117, 781 N.E.2d 180, ¶ 9-13. *Accord Dispatch* at ¶ 27. See also Ohio Atty.Gen.Op. 2014-039.

{¶7} Examples of cases that found personal identifying information did not serve to document the functions, policies, decisions, procedures, operations, or other activities of the office include: *State ex rel. O'Shea & Assocs. Co., L.P.A. v. Cuyahoga Metro. Hous. Auth.*, 131 Ohio St.3d 149, 2012-Ohio-115, 962 N.E.2d 297, ¶ 23-36 (personal identifying information on lead-poisoning questionnaires and release authorizations); *Dispatch Printing Co. v. Johnson* at ¶ 20-41. (state employee home addresses, generally); *State ex rel. DeGroot v. Tilsley*, 128 Ohio St.3d 311, 2011-Ohio-231, 943 N.E.2d 101, ¶ 6-8 (addresses of retired municipal employees); *McCleary, supra* (identifying information of children in city recreational program). However, personal information shown to document

the activities of an office was found to be a “record” in: *Dispatch Printing Co. v. Johnson* at ¶ 39. (addresses of employees who are required to live in a certain jurisdiction); *State ex rel. Harper v. Muskingum Watershed Conservancy Dist.*, 5th Dist. No. 2013 AP 06 0024, 2014-Ohio-1222, ¶ 4-12 (property lessee names and addresses on agency billings); *Brown v. Cleveland*, Ct. of Cl. 2018-01426PQ, 2019-Ohio-1819, ¶ 8-12 (addresses on sign-in sheet for official meeting limited to residents of a particular neighborhood).

{¶8} The Township attests that the newsletter at issue is mailed automatically to all township addresses through a third-party direct mail vendor, but that any person may subscribe to receive an electronic version through the Township web site. (Response, Exh. A – Twp. Admin. Ayers Affidavit at ¶ 7, 9.) The third-party vendor maintains the list of physical mailing addresses, and the Township maintains the list of names and email addresses that are sent a copy of the electronic version. (*Id.* at ¶ 7–11.)

{¶9} Other than describing the direct mail vendor as a “printer,” Hicks agrees with the above facts. (Reply at 2-3, Exh. 1 – DiMario Aff. at ¶ 8-17.) Hicks also clarifies that the newsletter is a one-way communication from the Township to the public that does not include input from township residents or other subscribers. (Reply at 3, DiMario Aff. at ¶ 8-24.) Hicks asks the court to distinguish these mailing lists from the items found to be non-records in the cases cited above by analogizing them to lists of persons requesting absentee ballots. (Complaint at 2.) However, unlike persons seeking voting forms whose request must be documented as to their eligibility and the office’s compliance with the request, Hicks offers no proof that the Township mailing and email addresses document the eligibility of persons to receive its newsletter. Hicks cites no Township ordinance, resolution, policy or procedure setting any requirements regarding distribution of or access to the newsletter. The identity of mail or email recipients no more documents the activities of the office than would knowing the identity of every person who saw a township billboard or heard a public service announcement disseminating the same information.

Note that as a practical matter online subscribers could input fictitious names and use untraceable mail addresses, and the physical mailing addresses are not correlated with resident or business names. The mail and email lists are kept solely for the administrative purpose of sending out the newsletter (Ayers Aff. at ¶ 13). They constitute contact information used for administrative convenience in cost-effective communication to township residents, businesses, and other interested persons. See *Dispatch Printing v. Johnson*, 106 Ohio St.3d at ¶ 25; *Degroot v. Tilsley* at ¶ 6-8. The Special Master finds that disclosure of the names and/or addresses of persons who automatically receive or have subscribed to the township newsletter would not further the purposes of the Act. They would not help to monitor the conduct of township government and would reveal little or nothing about the agency or its activities.

{¶10} The Special Master concludes that Hicks has not shown by clear and convincing evidence that the requested township newsletter mailing or email lists meet the definition of a “record” of the Township and are not governed by the Public Records Act. To be clear, the Township cites no statutory or constitutional law that would *prevent* it from disclosing these lists, but the Public Records Act does not *require* the Township to produce them.

Conclusion

{¶11} On consideration of the pleadings and attachments, the Special Master recommends the court deny the claim for production of records. It is recommended costs be assessed to requester.

{¶12} *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 16, 2022
Sent to S.C. Reporter 9/8/22