

IN THE COURT OF CLAIMS OF OHIO

LYNN A. CLARK

Requester

v.

CITY OF TWINSBURG

Respondent

Case No. 2022-00493PQ

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} Requester Lynn Clark made multiple public records and information requests to respondent City of Twinsburg between April 29, 2022 and June 14, 2022 regarding a commercial development known as Project Gumbo. (Complaint at 2-8; Reply at 2-5, Exhs. 1 and 8; Response at 3.) The City provided a set of responsive records and answers to questions on May 2, 2022. (Reply Exhs. 2-4.) On July 29, 2022, following the filing of this action, the City reminded Clark of the over 2,500 files of responsive records it had previously provided in response to related requests, and stated that all records responsive to the current requests have been produced. (Response, Exh. A.)

{¶3} On June 22, 2022, Clark filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records by the City in violation of R.C. 149.43(B).¹ On August 9, 2022, the City filed a motion to dismiss (Response). On September 9, 2022, Clark filed a reply.²

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.” *Welsh-Huggins v. Jefferson Cty. Prosecutor’s Office*, 163 Ohio St.3d 337, 2020-Ohio-5371, 170 N.E.3d 768, ¶ 33.

Motion to Dismiss

{¶5} To dismiss a complaint for failure to state a claim upon which relief can be granted, it must appear beyond doubt 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).

¹ The June 22, 2022 complaint alleges: “No documents have been provided nor has any reason been given as to why they have not been provided.” The allegation is unsupported in light of Clark’s admitted receipt of documents provided on May 2, 2022. (Response at 5, 18; Reply at 2, 8-17 – May 2, 2022 City email and partial attachments.) See Civ.R. 11 (“The signature of an attorney or *pro se* party constitutes a certificate by the attorney or party that the attorney or party has read the document; that to the best of the attorney’s or party’s knowledge, information, and belief there is good ground to support it.”) This also constitutes failure to “attach to the complaint copies of * * * any written responses or other communications relating to the request from the public office” as required by R.C. 2743.75(D)(1).

² The reply was not accompanied by a completed proof of service, in the absence of which “[d]ocuments filed with the court shall not be considered.” Civ.R. 5(B)(4). However, in the interest of justice the Special Master reviewed the reply and will reference certain portions below.

{¶6} The City moves to dismiss the complaint on the grounds that, 1) the requests that seek only answers to questions without reasonably identifying specific existing records do not create a duty for the City to respond, 2) certain requested records do not exist, and 3) the City has provided all records responsive to Clark's proper requests.

{¶7} The Special Master finds that the failure of some, but not all, of the inquiries to request *records* is apparent on the face of the complaint and attachments. The Special Master finds that the non-existence of certain records and the City's satisfaction of the one valid request are not conclusively established in the complaint and attachments. For concision and because these matters have now been fully briefed, the Special Master recommends the court deny the motion to dismiss and proceed on the merits.

{¶8} The Special Master will first analyze what portions of the five referenced request dates contain valid public records requests.

No Duty to Answer Questions or to Assemble Dispersed Information

{¶9} The burden is on Clark to prove facts showing that each request sought an identifiable public record. *Welsh-Huggins*, at ¶ 33. In response to questions or requests for information that do not reasonably identify "records," a public office has no

clear legal duty to seek out and retrieve those records which would contain the information of interest to the requester. Cf. *State ex rel. Cartmell v. Dorrian* (1984), 11 Ohio St.3d 177, 179, 464 N.E.2d 556. Rather, it is the responsibility of the person who wishes to inspect and/or copy records to identify with reasonable clarity the records at issue.

State ex rel. Fant v. Tober, 8th Dist. Cuyahoga No. 63737, 1993 Ohio App. LEXIS 2591, *3-4 (April 28, 1993), *aff'd*, 68 Ohio St.3d 117, 623 N.E.2d 1201 (1993). Accord *State ex rel. Lanham v. State Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 687 N.E.2d 283 (1997) (request for "qualifications of APA members"). This includes requests for records supporting an agency decision. *State ex rel. Morabito v. Cleveland*, 8th Dist. Cuyahoga No. 98820, 2012-Ohio-6012, ¶ 14 (for information, including "why, how, when, and by whom" a video was destroyed); *Kovach v. Geauga Cty. Auditor's Office*, Ct. of Cl. No. 2019-00917PQ, 2019-Ohio-5455, ¶ 9-10 (seeking explanations or reasons for the execution of public functions, and to admit or deny factual representations).

{¶10} Requests that seek only narrative answers to questions, or to ask for a gathering of explanatory information, are not requests for records *that are subject to*

objection as “ambiguous” or “overly broad” per R.C. 149.43(B)(2). They are not requests for records *at all* and therefore cannot invoke any duty found in R.C. 149.43(B). Almost all of Clark’s inquiries seek narrative answers to questions or ask for information supporting a position and are therefore not actionable under the Public Records Act.

April 29, 2022 Request:

{¶11} The first paragraph of this email asks whether the City’s Engineering Department has approved a project site and, if so, to “please provide the details about the nature of the review relative to surface and groundwater quality and quantity.” (Complaint at 3.) The yes/no question as to project site approval is not a request for records. The Special Master further finds that the City had no duty under the Public Records Act to create the narrative explanation sought by a request for “details about the nature of the review.”

{¶12} The second sentence: “Please send me copies of all review notes, calculations, field observations, laboratory tests, correspondence or any other pertinent information and data used in your department’s review,” is partly framed as a proper request for reasonably identified records. However, the last clause, “or any other pertinent information and data used in your department’s review,” is an ambiguous catch-all that cannot be enforced. *State ex rel. Chasteen v. Ohio Dept. of Rehab. & Corr.*, 10th Dist. Franklin No. 13-AP-779, 2014-Ohio-1848, ¶ 23-27; *Kovach v. Geauga Cty. Auditor’s Office*, Ct. of Cl. No. 2019-00917PQ, 2019-Ohio-5455, ¶ 9-10.

May 10, 2022 Request:

{¶13} Although Clark attached no evidence of this request to his complaint, the City agrees that Clark attended a council meeting on May 10, 2022 where he verbally inquired as to the status of his previous request. (Response at 3.) Clark later clarified that he is referring to requests he made at the meeting for:

- A. Meetings to discuss alternative proposals for the development, to which he received no response either during the meeting or since.
- B. The City Engineer’s review notes, especially as they pertained to hydrogeology and surface hydrology, to which he received no response during the meeting. It has only been during the sessions associated with the Court of Claims that the Requester was told by Law Director that the City Engineer does not have any review notes relative to this request.

(Reply at 4.) Inquiry A. is a request for more meetings, not for public records. Inquiry B. is merely a follow-up to the April 29, 2022 request and not a new or separate records request.

May 27, 2022 Request:

{¶14} This email states: “I am requesting the documentation to support Mr. Cohen’s statements in both of the May Planning Commission meetings where he stated that the Summit Commerce #2Gumbo project application met all of the permitting requirements at a Federal, State and City level.” (Complaint at 4.) Asking for “documents to support” the statement of a position is argumentative rather than identifying. It is a request to research and compile explanatory information, rather than a request for reasonably identified records. The Special Master finds that this question triggers no duty to respond under the Public Records Act.

June 1, 2022 Request:

{¶15} Clark’s June 1, 2022 request letter first asks: “Please advise what, if any, additional information was used to form the position that this application was compliant with all applicable Federal State, and local ordinances, regulations and guidelines.” (*Id.* at 6-8.) This merely expands the May 27, 2022 request assemble information and explain a position, rather than reasonably identifying specific public records.

{¶16} The second request, “Please convey, your and your staffs’ relative level of expertise in hydrogeology,” is a request for information supporting public officials’ “qualifications” rather than for reasonably identified records. *Lanham v. State Adult Parole Auth.*, 80 Ohio St.3d 425, 427, 687 N.E.2d 283 (1997).

{¶17} Neither of the requests in this letter triggers any duty to respond under the Public Records Act. The remainder of the letter consists of Clark’s opinions, recommendations, and offers to assist the City.

June 14, 2022 Request:

{¶18} Clark did not attach any evidence of this request to his complaint. Clark later identified a verbal request made on this date at a city council meeting and describes it as a follow-up to earlier written and verbal requests: “The Requester renewed his request to provide details behind the assertions that the proposed development met all applicable Federal, State, and local laws, regulations, and ordinances.” (Reply at 5, 49.) This follow-

up appears duplicative of the requests made on May 27, 2022 and June 1, 2022 and the Special Master finds this renewed request is not a proper, actionable request for public records for the same reasons discussed above.

{¶19} After rejecting the questions and requests for information that do not constitute actionable public records requests and consolidating the duplicate or follow-up requests, only one public records request remains before the court for determination:

“Please send me copies of all review notes, calculations, field observations, laboratory tests, correspondence or any other pertinent information and data used in your department’s review [relative to surface and groundwater quality and quantity].”

(Complaint at 3.) The City asserts that it has provided all existing records responsive to this request, rendering the claim for production of additional records moot.

Mootness

{¶20} 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 the claim for production moot. *State ex rel. Striker v. Smith*, 129 Ohio St.3d 168, 2011-Ohio-2878, 950 N.E.2d 952, ¶ 22. The record shows the City provided the following records to Clark prior to the filing of the complaint:

- On May 2, 2022:
 - Project Gumbo review comments_4-28-22.pdf (Summit SWCD Review of Storm Water Pollution Prevention Plan, Reply, Exh. 3)
 - 521_OH_CPS_Pond_Sealing_or_Lining-Geomembrane_or_Geostnthetic_Clay_Liner.pdf (government conservation practice standards document, not filed with this court)
 - 520_OH_CPS_Pond_Sealing_or_Lining-Compacted_Soil_Treatment_2017.pdf (government conservation practice standards document, not filed with this court)
 - Summit Commerce #2 IOM_4-21-21.pdf (Ohio EPA interoffice memorandum and attachments, Reply, Exh. 4)
 - 2021-398 SWM Report 01C.pdf (Storm water calculations, not filed with this court)

(Response at 18; Reply at 8-17)

- Between January 1, 2022 and June 27, 2022:

“[O]ver 2,500 files in response to [previous] public records requests concerning the Project Gumbo Site and other development in the City.”

(Response at 3, 12 - Muter Aff. at ¶ 2-3, and 13 through 16 – July 29, 2022 response letter)

Clark does not dispute the delivery, number, or responsive nature of the above- described records. The Special Master finds that to the extent files earlier provided to Clark are responsive to the requests at bar, and in particular to the one proper request for the engineering department’s review of Project Gumbo relative to surface and groundwater quality and quantity, they constitute satisfaction of those requests. A requester is not entitled to multiple responses from the same public office to duplicate requests for identical records. *State ex rel. Laborers Int’l Union, Local Union No. 500 v. Summerville*, 122 Ohio St.3d 1234, 2009-Ohio-4090, 913 N.E.2d 452, ¶ 6.

Non-Existent Records

{¶21} “Public records” means records *kept by* a public office. R.C. 149.43(A)(1). 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. The public office must clearly deny the existence of the specifically requested records. *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 56-57.

{¶22} The City asserts that between the 2,500 files provided in response to Clark’s earlier public records requests, and the additional records provided on May 2, 2022, “Requester has been provided all responsive documents to his requests.” (Response at 3; see Mohr Aff. at ¶ 2-3, Muter Aff. at ¶ 2-3, Respondent’s Exh. A.) When a public office states that all existing responsive records have been provided, the burden is on the requester to prove by clear and convincing evidence that additional requested records do exist and are public records maintained by the office. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394 2019-Ohio-1216, 128 N.E.3d 179, ¶ 8. The office’s assertion may be rebutted by evidence showing a genuine issue of fact, but 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. *Id.* at ¶ 5-6, 9-10; *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. In the course of arguing existence or non-existence, “there is no duty under R.C. 149.43 for respondents to detail the steps taken to search for records responsive to the requests.” (Citations omitted.) *McCaffrey* at ¶ 26.

{¶23} With specific regard to Clark’s April 29, 2022 Request and May 1, 2022 follow-up for “review notes * * * used in your department’s review,” the Twinsburg City Engineer attests:

4. Mr. Lynn Clark has requested from me what Mr. Lynn Clark has referred to as my engineer’s review notes or engineering review notes (or the like) concerning Project Gumbo.
5. I do not have any public records in my possession that are responsive to a request for engineer’s review notes or engineering review notes (or the like) concerning Project Gumbo.

(Response at 11 – Mohr Aff. at ¶ 3-4.) The City’s attestation is unequivocal and unrebutted by any evidence or argument from Clark. Clark’s reply contains no evidence or argument supporting the existence of withheld engineer’s notes.

{¶24} With regard to any other records of the engineering department’s review relative to surface and groundwater quality and quantity, the Special Master invited Clark to file

a reply pleading, along with any supporting documents or affidavits, identifying in as much detail as possible what specific existing records respondent has failed to produce in response to each separate request. Clark may include in the reply any other desired response to the arguments contained in respondent’s response.

(Aug. 29, 2022 Order.) In the reply, Clark instead states that he will “describe to the extent possible those public records which would be probable under circumstances such as those occurring during the period of the requests subject to this matter before the Court.” (Reply at 1.) Clark then makes the bare assertion the City did not “fully respond” to the request for “all review notes, calculations, field observations, laboratory test, [and] correspondence.” (Reply at 2.) In support of this assertion, Clark relates what he believes the city engineer and city council should and should not have done, notes concerns raised

in the April 27, 2022 letter from the SSWCD, and opines that the city engineer's approval of the project would not have been "appropriate" without additional records "which fully address the SSWCD's, OhioEPA's, and the Requester's concerns." (*Id.* at 2-3.)

{¶25} Clark complains that the City's response of May 2, 2022 states that the SSWCD review comments included "quality calculations" (Reply at 2) but that the city engineer did not "state if these pertained to ground or surface water" and that "[s]uch a calculation, could not be found in the correspondence from the SSWCD" including but not limited to the 2021-398 SWM Report provided with the May 2, 2022 response. (Reply at 2). Neither party has filed a copy of the SWM Report for the court's review, nor is it clear whether the phrase "their review includes quality calculation per OEPA permit" in the first sentence of the May 2, 2022 response refers to the short April 27, 2022 Plan Review letter, or more plausibly to the larger SSWCD review process. The Special Master finds that Clark's vague assertion that he is unable to find additional, unspecified calculations satisfying his expectations for "some aspects of storm water runoff calculations" is not clear and convincing evidence that a record containing additional calculations was kept by the City.

{¶26} Clark describes water drainage paths and other matters not in evidence, arguing that lack of further documentation of these matters "would therefore be contrary to" four sections of the Revised Code, without reference to any specific statutory language. Clark asserts that support for his arguments may be found in copies of meeting minutes and links to videos, without reference to specific lines, language, or time points therein. (Reply at 2-5.) The court is not required to comb through exhibits and online links in search of actionable conduct:

It is not the role of this court to "search the record or formulate arguments on behalf of the parties." *State v. Quarterman*, 140 Ohio St.3d 464, 2014-Ohio-4034, 19 N.E.3d 900, ¶ 19, much less to conduct research to develop evidence the parties did not submit.

State ex rel. McKenney v. Jones, Slip Opinion No. 2022-Ohio-583, ¶ 26-28 (original action in mandamus).

{¶27} The Special Master finds that Clark's beliefs, expectations, opinions, and inferences do not constitute clear and convincing evidence of the existence of withheld engineer review notes, additional quality calculations, or any other record responsive to

the April 29, 2022 request. The mere suggestion that additional records would or should ordinarily be created falls short of proving that they actually were created and exist in the City's keeping. *Cordell v. Paden*, 156 Ohio St.3d 394 2019-Ohio-1216, 128 N.E.3d 179, ¶ 5-6, 8-10. Weighing the evidence before the court, the Special Master finds that Clark has not shown by clear and convincing evidence that any additional engineer review notes, "quality calculations," or other records of the engineering department's review relative to Project Gumbo surface and groundwater quality and quantity existed at the time of the requests.

Further Revision of Requests

{¶28} The conclusions in this report do not restrict Clark from filing new, proper requests for additional records. Under similar circumstances, courts have encouraged parties to persevere to achieve mutually acceptable resolution. See *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, ¶ 14-19. The General Assembly provides statutory tools to optimize the scope, speed, format, economy, and delivery of public records. See R.C. 149.43(B)(2), (3), (5), (6), (7) and (9). The parties are encouraged to cooperate fully in negotiating future requests using these tools.

Conclusion

{¶29} Upon consideration of the pleadings and attachments, the Special Master recommends the court find that all of requester's sufficiently specific requests for public records have been rendered moot and deny the claim for further production of records. The Special Master recommends the court find that no other violation of R.C. 149.43(B) has been shown. It is recommended costs be assessed to requester.

{¶30} *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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