[Cite as *Ryan v. Ashtabula*, 2022-Ohio-4009.]

IN THE COURT OF CLAIMS OF OHIO

JAMES RYAN Requester v. CITY OF ASHTABULA Respondent	Case No. 2022-00533PQ Special Master Jeff Clark REVISED 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 June 7, 2022, requester James Ryan filed a complaint pursuant to R.C. 2743.75 alleging denial of access to public records by respondent City of Ashtabula ("the City") in violation of R.C. 149.43(B). Following mediation, the City filed an answer and motion to dismiss (Response) on August 22, 2022. On August 23, 2022, Ryan filed an amended complaint (Am. Compl.) adding a prayer for relief for "$1,000.00 for each of the 5 public record request enumerated" (Am. Compl. at 1), and three affidavits. On September 14, 2022, the City filed a supplemental response (Supp. Resp.) in compliance with an August 29, 2022 court order. On October 14, 2022, Ryan filed an Affidavit in Response to Defendants Filings (Reply).[1]

[1] On September 27, 2022, the Special Master inadvertently filed a report and recommendation, which by order of the same date was then held in abeyance to permit Ryan's filing of a reply as anticipated in the court's order of August 29, 2022.

{¶3} Ryan claims that the City has failed to produce all public records responsive to requests relating to three criminal cases. The City asserts it has provided Ryan with a complete and unredacted copy of all three prosecution files, that other requested records do not exist, and that some of his questions are not proper, actionable requests for public records. Ryan's claims for relief under the Public Records Act are presented in the Amended Complaint at p. 1 and 10-11,[2] based on the following inquiries:

> Request No. 1: On May 25, 2022, Ryan inquired of the City Solicitor's Office:
>
> > In the last hearing when the 3 criminal charges were dropped with prejudice and no court fees … the prosecutor (Lamer) said she had some evidence that I was not responsive until the court case was filed and state this was the reason to assess court fees to me.
> >
> > Please provide any and all notes / evidence to me that were used as the basis for such a statement to be made about me not being responsive.

(Ellipsis *sic*.) (Am. Compl. at 13.) On May 26, 2022, the City Solicitor denied this request, citing the attorney work product exception and stating that "if the notes exist, they were created by an attorney in anticipation of trial. * * * I haven't even confirmed they exist" and later "I said I would neither confirm nor deny" whether they existed. (*Id*. at 5-7; Aff. 2, Exh. 1.) The City has now submitted the testimony of the assistant solicitor that no "notes" were created for or used at the hearing at which the charges were dismissed. (Supp. Resp., Exh. B – Lamer Aff. at ¶ 4-6.)

> Request No. 2: On June 5, 2022, Ryan expanded the May 25, 2022 request to:
>
> > I request the full file for all 3 cases against me that were dismissed with prejudice and with no court fees, including any and all trial prep notes.

(Am. Compl. at 16.) On June 6, 2022, the City sent a response with 4 PDF attachments that the City Solicitor affirmed on June 13, 2022 as "a copy of the Solicitor's file." (*Id*. at 7, 9.) The City asserts it has produced "the complete casefile for the prosecutions the Respondent speaks of and is 210 pages." (Supp. Resp. at 1, 3, Exh. A.)

> Request No. 3: On June 6, 2022, Ryan made a request:

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[2] The complaint and Ryan's correspondence contain immaterial and duplicative matter, peppered with accusations of misfeasance and bad faith on the part of the City. Recitation of a requester's reasons for seeking records is usually unnecessary and cannot be required. R.C. 149.43(B)(4). Nor has this court any authority to provide relief for allegations of misconduct other than violation of duties enumerated in R.C. 149.43(B). In any future pleading, Ryan is admonished to make concise averments based only on statutory and case law elements of the claim, and refrain from scurrilous accusations.

> for any and all charges or warning or citations or any document of testimony or recording or anything whatsoever which suggests that 1. Mike Miller was in my house illicitly 2. Mike miller was cited for trespass or breaking and entry or any charge at all pertaining to 1639 w 8th st when the alleged condition arose 3. The dates and times of such occurrences 4. The names of person(s) alleging such things.

(Am. Compl. at 18.) On July 7, 2022 at 9:21 AM, the City advised that "[y]ou have received everything you are entitled to from the Solicitor's file. You will receive nothing else." (*Id*. at 24.) The City has now submitted testimony that "[a]ny evidence concerning Mr. Miller's tenancy that was contained a [*sic*] file in the Solicitor's Office was in Mr. Ryan's criminal file." (Supp. Resp. at 2-3, Cooper Aff. at ¶ 4-6.)

Request No. 4: On June 7, 2022 at 10:33 AM, Ryan made a fourth request:

> I have also noted potential technology glitches.
>
> 1. The first attachment does not have an affiant
> 2. The second attachment has adobe pdf symbols which likely means the pdfs are embedded inside a word document which itself was printed to pdf. I would like a copy of the embedded pdfs.

(Am. Compl. at 20.) Paragraph 1. Is not a request for records and requires no further analysis. With regard to Paragraph 2, the City later

> printed out and numbered each of the over two hundred pages that were our digital response to his request for documents and hand delivered them to [Ryan]. This included the photographs he said he could not open electronically. See attached Exhibit A.

(Response at 4, Exh. A.)

Request No. 5: On June 6, 2022, Ryan made what will be referenced, despite the chronology, as his fifth request. Ryan seeks enforcement of only one item therein: "I hereby make the request for an updated records management policy which complies with Ohio State laws."[3] (Am. Compl. at 22.) Ryan admits that the City previously disclosed its existing records retention schedule. (*Id*. at 5, paragraph no. 6; and 8; Aff. 2, Exh. 2.) The

[3] The document Ryan refers to here as the City's "records management policy" is actually the policy "for responding to public records requests" required by R.C. 149.43(E)(2). (Am. Compl., Aff. 1, Exh. 2.) Public office records are "managed," i.e., created, maintained, and disposed of, under R.C. Sections 149.351 through 149.42 and commission-approved records retention schedules per, e.g., R.C. 149.39. (Am. Compl., Aff. 2, Exh. 2.)

City asserts without contradiction that no other records management policy or retention schedule exists. (Response at 2, paragraphs no. 8-10; and 4-5, Exh. B.)

Request No. 6: On June 6, 2022, Ryan made what will be referenced as his sixth request. Ryan verbally demands "to know if [the city solicitor] is putting her oath and bond on all of his public records so that accountability for completeness is clear." (Am. Compl. at 8.) On June 10, 2022, "James reminds the thread that * * * 2) the oath and bond of the person declaring and verifying records delivery to be complete be asserted by the City." (*Id*.) The City advised Ryan that "This email does not request a public record," apparently in response to this request. (*Id*. at 9.)

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).

{¶6} The City moves to dismiss the complaint on the grounds that, 1) Request No. 1 was for personal notes that would not qualify as "records" of the office, 2) Requests Nos. 2, 3, 4 and 5 have been satisfied by production of all responsive records and are

therefore moot, and 3) Requests Nos. 5 and 6 improperly ask the City to, respectively, create new city records, and "assert" the existence of bond and oath qualifications.

Request for Prosecutor's Notes

> Notes may not constitute "records" subject to the Public Records Act if they are (1) kept as personal papers, not official records; (2) kept for the employee's own convenience; and (3) other employees did not use or have access to the notes. *State ex. rel. Cranford v. Cleveland*, 103 Ohio St.3d 196, 2004-Ohio-4884, 814 N.E.2d 1218, ¶ 18. Notes taken by public officials for their convenience as interviewers, evaluators, or assessors, and subsequently used in deliberative processes that result in written summaries or decisions, generally do not constitute "records" of the public office. *Cranford* at ¶ 14-22 (predisciplinary conference notes); *Barnes v. Columbus*, 10th Dist. Franklin No. 10AP-637, 2011-Ohio-2808, ¶ 9-27 (civil service commission assessors' notes); *State ex rel. Murray v. Netting*, 5th Dist. Guernsey No. 97-CA-24, 1998 Ohio App. LEXIS 4719 (police chief interviewers' notes). While such notes are often destroyed when of no further use to the drafter, retaining them in public office files does not automatically make them "records." *Cranford* at ¶ 21; *Silberstein v. Montgomery Cty. Cmty. College Dist*., 2nd Dist. Montgomery No. 23439, 2009-Ohio-6138, ¶ 54, 67. Nor do personal notes lose their non-record status merely because they contain information that is not transferred to an official report. *State ex rel. Summers v. Fox*, 163 Ohio St.3d 217, 2020-Ohio-5585, 169 N.E.3d 625, ¶ 65-66.

Paramount Advantage v. Ohio Dept. of Medicaid, Ct. of Cl. No. 2021-00262PQ, 2021-Ohio-4180, ¶ 13. This principle was recently applied to 92 pages of a prosecutor's handwritten notes made during interviews with the accuser and witnesses in a criminal case. *Summers* at ¶ 14, 62-66. The Supreme Court affirmed that when notes are taken by an official for their own personal convenience and are not required to be maintained they are not records of the office, regardless of the substance of the information contained in the record. *Id*. at ¶ 66.

{¶7} Ryan's Request No. 1 describes alleged notes of an assistant city solicitor in the context of a status hearing where she "said she had some evidence that [Ryan] was not responsive until the court case was filed and stated this was the reason to assess court fees on [him]." (Am. Compl. at 13.) Ryan offers no evidence that he actually saw any notes, or that if notes had been used by the assistant solicitor they were for anything other than personal convenience, or that they were required to be maintained.

{¶8} The assistant solicitor attests that she did not prepare any notes for use at the status hearing, or for trial (Supp. Resp., Exh. B – Lamer Aff. at ¶ 5, 7). She states that at the hearing she "did look in the case file to determine the date that the initial compliance order had been issued in the argument regarding the payment of court costs." (*Id*. at ¶ 6; Am. Compl., Aff. 3 at p. 2) Ryan thus describes a typical use of non-record notes - to transmit information between an existing record and another recipient. The City correctly observes that if such notes existed, they would not fall under the definition of "records" and would thus not be subject to public records request. *Summers*, *supra*. The City promptly proffered its denial for this reason, based on Ryan's description.

{¶9} While Ryan's own description contradicts his argument that any presumed notes were "records," the factual allegations of the complaint are presumed true and all reasonable inferences are made in claimant's favor when considering a motion to dismiss. Because the defenses of non-existence and non-records are not conclusively established on the face of the complaint, the Special Master recommends the Court deny the motion to dismiss and consider, first, the defense of non-existence, and then, if necessary, whether any existing notes are "records," on the merits.

Suggestion of Mootness

{¶10} 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 Ryan in response to Request No. 2 prior to the filing of the complaint:

> June 6, 2022 – four PDF attachments in response to Request No. 2 that the City advised Ryan constituted "a copy of the Solicitor's file." (Am. Compl. at 7, 9; Response at 1 ¶ 3-4.)
>
> June 6, 2022 – a copy of the "City's Record Management Policy and Public Works Retention Schedules," eff. 2009. (Am. Compl. at 8; Response at 2, ¶ 8-9, Exh. B.)

However, Ryan asserts that the City's response to Request No. 2 is incomplete (Am. Compl. At 8, 10), and the provision of all records is thus not conclusively established on the face of the complaint. The Special Master recommends the Court deny the motion to dismiss this claim as moot.

{¶11} The pleadings show no other records specifically provided in response to Requests 3 or 4 prior to filing of the complaint, nor is it plain on the face of the complaint that no other records responsive to these requests existed at the time of the requests. The Special Master recommends the court deny the motion to dismiss this claim and determine any further evidence of mootness on the merits.

{¶12} However, the Special Master finds the claim to enforce Request No. 5 is moot to the extent it sought the office's current "records management policy." Ryan does not dispute receipt of the existing public records policy and records retention schedule. The separate demand in Request No. 5 for an "updated" policy will be addressed under *Non-Existent Records*, below.

Request to Create Records

{¶13} A requester is entitled only to the existing records of a public office. The City provided Ryan with a copy of its *current* public records policy and records retention schedules prior to his making Request No. 5 "for an *updated* records management policy which complies with Ohio State laws." (Am. Compl. at 22.) The City has no duty to create new records, by "updating" or otherwise.

> A relator's belief that a document exists (or should exist) is not sufficient to create a genuine issue of material fact as to whether the document exists. *See, e.g., State ex rel. McCaffrey v. Mahoning Cty. Prosecutor's Office*, 133 Ohio St. 3d 139, 2012-Ohio-4246, 976 N.E.2d 877, ¶ 26 (relator's claimed "reasonable and good faith belief" that documents "do, in fact, exist" "did not constitute sufficient evidence to establish that the documents do exist" for purpose of mandamus claim under Ohio Public Records Act);

(Add'l citations omitted.) *Crenshaw v. Cleveland Law Dept*., 8th Dist. Cuyahoga No. 108519, 2020-Ohio-921, ¶ 42 (requester believed respondent *should have* gathered additional documents as part of an investigation). Because Ryan's wording clearly demands that an "updated" record be created, the Special Master finds the claim based on Request No. 5 should be dismissed as an improper demand to create new records.

Request to Find Records Containing Information of Interest to Requester

Request No. 3 for

> any and all charges or warning or citations or any document of testimony or recording or anything whatsoever which suggests that 1. Mike Miller was in my house illicitly 2. Mike miller was cited for trespass or breaking and entry or any charge at all pertaining to 1639 w 8th st when the alleged condition

> arose 3. The dates and times of such occurrences 4. The names of person(s) alleging such things.

(*Id*. at 18.) is not a proper public records request but rather an improper demand that the City conduct a search for information within the office's records.

> Relator has not cited any authority under which this court could--pursuant to R.C. 149.43--compel a governmental unit to do research or to identify records containing selected information. That is, relator has not established that a governmental unit has the 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. Font v. Tober, 8th Dist. Cuyahoga App. No. 63737, 1993 Ohio App. LEXIS 2591, *3-4 (Apr. 28, 1993), affirmed in *State ex rel. Fant v. Tober*, 68 Ohio St.3d 117, 623 N.E.2d 1201 (1993). See *Ebersole v. Powell*, Ct. of Cl. No. 2018-00478PQ, 2018-Ohio-4597, ¶ 31-33 ("provide me with any and all documents that the City relied upon * * * in making [a particular] determination"). The Special Master concludes that the City had no duty to search for records containing selected information in response to Request No. 3 and recommends the Court grant the motion to dismiss this claim.

{¶14} Request No. 6 likewise demands a search for information to answer a question. Ryan asks "*to know* if [the city solicitor] is putting her oath and bond on all of his public records so that accountability for completeness is clear." (Emphasis added.) (Am. Compl. at 8.) Ryan later "reminds the thread [sic] that * * * 2) the oath and bond of the person declaring and verifying records delivery to be complete *be asserted by the City*." (Emphasis added.) (*Id*.) The "reminder" that the City should *assert* the existence of an oath and bond is not an unambiguous request to produce a record. The Special Master recommends the court grant the motion to dismiss this claim as based on an improper request.

{¶15} Analysis now turns to the merits of the remaining claims:

Non-Existent Records

{¶16} "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.

{¶17} When a public office asserts that it has no additional records in its possession, the burden is on the requester to prove by clear and convincing evidence that the records it requests do exist and are maintained by that office. *State ex rel. Cordell v. Paden*, 156 Ohio St.3d 394 2019-Ohio-1216, 128 N.E.3d 179, ¶ 5-10. 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. *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.

{¶18} As noted above in *Request for Prosecutor's Notes*, the assistant solicitor attested that she did not use any notes at the May 28, 2022 status hearing and did not create any "trial notes."[4] (Supp. Resp., Exh. B – Lamer Aff. at ¶ 4-7.) Ryan claims no visual or other direct knowledge of any alleged notes. His ambiguous assertion that Lamer used "notes / evidence" (Am. Compl. at 13) as the basis for a status hearing statement suggests he merely infers the existence of one or the other. The Special Master finds that Ryan has not shown by clear and convincing evidence that any records exist responsive to the request for "notes" in Request No. 1.[5]

Ryan further complains that the folder of criminal case records provided to him

[4] The City did not clearly deny Request No. 1 on this basis in its initial correspondence. However, the initial explanation provided to a requester "shall not preclude the public office or the person responsible for the requested public record from relying upon additional reasons or legal authority in defending an action commenced under division (C) of this section." R.C. 149.43(B)(3).

[5] The defense of non-existence is dispositive, and preemptive of defenses that require a court to examine withheld records *in camera*. In likely recognition of this conundrum, the City did not brief and has thus waived application of the attorney work product and trial preparation exceptions to the putative notes.

> has no tabs, no markers, and no references at all to the original public records requests. As such it is unintelligible and unable by any person to determine which public records requests (if any) were fulfilled.

(Am. Compl., Affidavit 1 at 3.) Ryan offers no evidence of what, if any, tabs or markers were used for City case files, or show how such items would satisfy the definition of "records." R.C. 149.011(G). Ryan has identified no duty under the Public Records Act for the City to further explain or provide "tabbing" where complete files of prosecution records have been provided.

{¶19} On review of the criminal file records sent to Ryan (Supp. Resp., Exh. A) the Special Master finds the records are from three criminal matters and self-identify as: tickets; incident reports with supplements; court pleadings including reports, notices, entries, orders, and other filings; telephone messages; texts; and email messages. It is clear that all records in Exhibit A are responsive to Request No. 2, and that records among them are responsive to Requests No. 3 (Mike Miller tenancy), and 4 (PDF images that Ryan was unable to view). Ryan claims that the files sent to him must be incomplete because of minor inconsistencies in the four files sent to him and offers his personal opinion that additional types of records should have been prepared. He provides no direct evidence that the totality of the records provided to him does not include every existing record in the three criminal files, as attested by the City.

{¶20} In response to Request No. 5 for an updated records management policy, the City asserts that the 2009 schedule it provided was the only schedule then in effect. (Response at 4-5, Exh. B.) Ryan provides no evidence to the contrary. Even were terms in the City's public records policy or records retention schedule inconsistent with a current public records exemption, as Ryan asserts, the Public Records Act entitles him only to the policy and schedule in existence. It does not empower him to demand that a record be updated. Ryan fails to provide clear and convincing evidence to counter the City's denial of the existence of any additional records responsive to Request No. 5.

Evidence of Mootness

{¶21} The City filed a letter of July 26, 2022 covering its mailing of "a complete copy of the 210 pages of records, constituting the prosecutor's file, that were sent to you by email on June 6, 2022" (Response at 8) and later filed copies of the records. (Supp.

Resp., Exh. A.)[6] City Solicitor Cooper attests that she has repeatedly provided Ryan with complete copies of the three criminal prosecution matters, as requested. (*Id*. at 1-3, Exh. A.) "Not a single piece of paper has been removed from the file." (*Id*., Cooper Aff. at ¶ 3-5.) She further attests that "there are no files, reports or Prosecutor Office records relating to Mike Miller, other than what is contained in Exhibit A." (*Id*. at 2.) "Any evidence concerning Mr. Miller's tenancy that was contained a [*sic*] file in the Solicitor's Office was in Mr. Ryan's criminal file." (*Id*., Cooper Aff. at ¶ 6; Response at 2, ¶ 7.)

{¶22} Ryan complains that the City produced one 205-page "version" of the criminal files (where embedded images could not be opened), and two 210-page sets that differ by some duplicated pages. (Reply, *passim*.) Ryan states that this indicates the full case files were not provided until after the case was opened and that he has "more than a hunch or inference" that additional records still exist. The Special Master notes that the City's count of 210 pages it provided matches Ryan's count of the total number of pages he received, when counting the front and back faces of the documents. (Reply, Exh. 1 – *Front Page Scans of Manila Folder*, Exh. 2 – *Back Page Scans of Manila Folder*.) To the extent Ryan asks the court to further compare the exhibits in search of actionable conduct, "[i]t 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." *State ex rel. McKenney v. Jones*, Slip Opinion No. 2022-Ohio-583, ¶ 26-28 (original action in mandamus). The Special Master finds that Ryan's expressions of suspicion do not meet his burden to show by clear and convincing evidence that the City has withheld additional records responsive to Requests Nos. 2, 3 and 4. The attested production of the complete prosecution files renders the claims based on these requests moot.

{¶23} The technical difficulty in Ryan's ability to open "a copy of the embedded pdfs" from the electronic file sent by the City on June 7, 2022 appears to have been unforeseen. The City asserts that it "sent a complete copy of it's files on June 7, 2022." (Response at 1, ¶ 4.) All of the embedded pdfs were provided in the case records printed out and sent to Ryan no later than July 26, 2022. (*Id*. at 1-2, ¶ 5-6, and 4; Supp. Resp. at

[6] The City also filed an Exhibit F with its supplemental response, characterized as "the documents that have been provided to the Requester." (Supp. Resp. at 3.) On review, Exhibit F contains many records that duplicate those in Exhibit A but appears to include additional photographs and texts.

2, Exh. A.) Ryan makes no argument to the contrary. The Special Master finds that the City made a good faith attempt to provide Ryan with all of the records, and production of additional, printed copies to mitigate the initial technical problem rendered Request No. 4 moot.

{¶24} Although Request No. 6 is an improper request for information rather than a specifically identified record, the City offers the additional defense that it responded to a related request by Ryan for the oaths and bonds of thirty-four city officials and employees by providing the records for those that had either oaths or bonds. (Response at 5.) Ryan makes no argument to the contrary.

Statutory Damages

{¶25} Ryan seeks statutory damages of $1,000.00 per request. (Am. Compl. at 1.) However, R.C. 149.43(C) provides for an award of statutory damages only when a writ of mandamus has been issued, not when a finding of violation is issued in proceedings under R.C. 2743.75. See R.C. 149.43(C)(1)(b).

{¶26} Further, statutory damages are only available "if a court determines that the public office or the person responsible for public records failed to comply with an obligation in accordance with division (B) of this section." R.C. 149.43(C)(2). Because there is no recommendation that the City be ordered to produce records or be found to have violated any obligation under R.C. 149.43(B), the Public Records Act would not authorize statutory damages even if that remedy were available in this court.

Conclusion

{¶27} Upon consideration of the pleadings and attachments, the Special Master recommends the court GRANT the motion to dismiss as to 1) the request for a copy of respondent's current records management policy or records retention schedule, as moot, 2) the claim for records of Mike Miller's tenancy, as an improper request for information, and 3) the claim for an "updated" records management policy, as an improper request to create records, and DENY the remainder of the motion to dismiss. The Special Master further recommends the court find that requester has failed to prove by clear and convincing evidence that any records exist responsive to Request No.1. The Special Master further recommends the court find that requester has failed to prove by clear and convincing evidence that any additional records responsive to Requests Nos. 2, 3, 4, and

5 exist in respondent's keeping beyond those provided to requester. The Special Master further recommends the court find that Request No. 6 did not seek access to existing records and implicated no duty of respondent under R.C. 149.43(B). The Special Master accordingly recommends the court deny the claims for production of records. The Special Master further 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.

{¶28} *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 October 18, 2022
Sent to S.C. Reporter 11/10/22