

IN THE COURT OF CLAIMS OF OHIO

KELLY MARIE McCURLEY

Requester

v.

WEST CHESTER TOWNSHIP

Respondent

Case No. 2025-00470PQ

Special Master Todd Marti

REPORT AND RECOMMENDATION

{¶1} This case is before me for a R.C. 2743.75(F) report and recommendation. I recommend that the court: (1) order respondent to produce copies of all attachments referenced in the previously produced emails that have not already been produced; (2) order respondent to take that action within 30 days of the entry of a judgment adopting this report and recommendation; (3) order respondent to file an affirmation that it has taken that action within 40 days of the entry of a judgment adopting this report and recommendation; (4) order respondent to pay requester's filing fee, costs, and the other the costs of this case; and (5) deny all other relief.

I. Background.

{¶2} Requester Kelly McCurley is an employee of respondent West Chester Township ("West Chester"). The parties had a dispute about issues related to Ms. McCurley's use of leave time, and Ms. McCurley made three requests to West Chester for public records related to those matters. West Chester produced some records in response to those requests before this case was filed. *Complaint*, filed May 9, 2025, pp. 1-2; *Notice of Filing Respondent's Evidence*, filed August 15, 2025, ("*Respondent's Evidence*"), p. 5, ¶ 11.¹

¹ All references to specific pages of filings in this case are to the pages of the PDF copies posted on the court's docket.

{¶3} Ms. McCurley filed this case to compel the production of additional records. Mediation did not resolve the case, so a schedule was set for the parties to file evidence and memoranda supporting their positions. That schedule has run its course, making this case ripe for decision. *Complaint*; *Order Terminating Mediation*, entered August 1, 2025; *Notice of Extension of Time*, entered September 4, 2025.

II. Analysis.

A. Respondent's procedural motions should be denied in part.

{¶4} West Chester has filed two motions: an August 26, 2025, motion to dismiss this case pursuant to Civ. R. 12(B)(6) and an August 29, 2025, motion to strike Ms. McClurley's August 25, 2025 filing.

{¶5} The motion to dismiss should be DENIED because it relies on materials beyond the complaint. *State ex rel. Hanson v. Guernsey Cty. Bd. of Commrs.*, 65 Ohio St.3d 545, 548 (1992).

{¶6} The motion to strike should be GRANTED in part and DENIED in part. West Chester's motion argues that the court should not consider evidence filed after the deadline for evidentiary submissions and asks the court to strike the August 25th filing in its entirety. West Chester is correct in arguing that the court should not consider such evidence, *Schaffer v. Ohio State Univ.*, 2024-Ohio-2185, ¶ 12, adopted, 2024-Ohio-2625 (Ct. of Cl.), but incorrect in arguing that the entire filing should be stricken. A close reading of that filing reveals that, although it does contain tardily filed evidence, it also contains arguments which I construe as Ms. McCurley's response to West Chester's Response to the Complaint. Those arguments were filed within the deadline set in the *Order Terminating Mediation*, and hence are properly before the court. I therefore recommend that the court strike the portions of the filing that contain tardily filed evidence, but consider the balance of the August 25th filing.

B. Requester's production claim is moot as to all records except the attachments referenced in the emails respondent produced.

{¶7} “In general, the provision of requested records to a [requester] in a public-records . . . case renders the . . . claim moot.” *State ex rel. Cincinnati Enquirer v. Dupuis*, 2002-Ohio-7041, ¶ 8. A public records case can be mooted by the respondent producing the responsive records during the course of the litigation. *State ex rel. Striker v. Smith*, 2011-Ohio-2878, ¶¶ 17-18, 22.

{¶8} West Chester filed and served 298 pages of records it asserts are responsive to Ms. McCurley's records requests. It's unsworn response to her complaint asserts that it has produced all records responsive to those requests. Although West Chester has submitted affidavit testimony that it has produced records responsive to those requests, that testimony does not state that it has produced *all* responsive records. *Notice of Production of Responsive Records*, filed August 15, 2025; *Respondent's Motion to Dismiss*, filed August 26, 2025, pp. 6, 8, 10, 11; *Respondent's Evidence*, pp. 4-7, 32-33.

{¶9} A requester has the burden of proving that additional responsive records exist if the respondent asserts that it has produced all responsive records. A requester need only provide “some evidence” of the existence of additional records if the respondent does not support its assertion with sworn evidence. *Sell v. Trumbull Cty. Juvenile Div.*, 2024-Ohio-6139, ¶ 6 (Ct. of Cl.).

{¶10} West Chester has asserted that it has produced all records responsive to Ms. McCurley's requests, but has not provided sworn evidence supporting that assertion. Ms. McCurley was therefore only required to produce some evidence that additional responsive records exist.

{¶11} She has met that burden, in part. Some evidence exists if other records refer to or otherwise suggest the existence of the additional records. *Mattis v. Toledo Police Dept.*, 2023-Ohio-4878, at ¶¶ 17, 24 (Ct. of Cl.). As Ms. McCurley correctly notes, several of the emails West Chester produced as responsive to her requests indicate that they had attachments, and those attachments were not included in its production. The attachments were part of responsive emails and hence are themselves responsive. The emails' references to those attachments are some evidence that those additional responsive

records exist, so Ms. McCurley has met her burden of proving that some additional responsive records exist: the attachments

{¶12} The same cannot be said of Ms. McCurley's other arguments about why additional records exist (problems with Dropbox, the existence of other responsive records supposedly being proven by her having copies of those other records). Those assertions are made in unsworn submissions and hence do not constitute evidence. *Meadows v. Freedom Banc, Inc.*, 2005-Ohio-1446, ¶ 20 (10th Dist.).

{¶13} I therefore recommend that the court (1) find Ms. McCurley's claims for production of records are moot except as to the unproduced attachments referenced in the emails that West Chester produced, and (2) order West Chester to produce those emails.

C. No other claims are properly before the court.

{¶14} Ms. McCurley's August 25 filing arguably asserts several claims in addition to the claim for production of records set forth in her complaint: that West Chester has altered records, that it unreasonably delayed the production of records, and that its personnel have not received required public records training. Those claims should not be considered because they were not pled and West Chester cannot be said to have impliedly consented to their adjudication because it had no opportunity to respond to them on the merits. See *Hanson v. Etna Twp.*, 2025-Ohio-2880, ¶¶ 5,6 adopted, August 12, 2025 (Ct. of Cl. Case No. 2025-00243PQ).

{¶15} Ms. McCurley also asserts that one West Chester official involved in responding to her requests had a conflict of interest. That was referenced in her complaint, but this court lacks subject matter jurisdiction over the claim. To the extent that such a claim exists in this case, it is based on something other than R.C. 149.43 and hence is beyond the jurisdiction granted by R.C. 2743.75, the exclusive basis for this case. *Trader v. Ontario Local School Dist.*, 2025-Ohio-2374, ¶ 5, adopted, 2025-Ohio-2879 (Ct. of Cl.) ("R.C. 2743.75(A) grants this court jurisdiction to resolve disputes alleging a denial of access to public records in violation of division (B) of section 149.43 of the Revised Code, but does not otherwise give it jurisdiction over political subdivisions.").

D. Requester is entitled to recover her filing fee and costs; respondent should bear the balance of the costs.

{¶16} R.C. 2743.75(F)(3)(b) provides that the “aggrieved person shall be entitled to recover from the public office . . . the amount of the filing fee . . . and any other costs associated with the action[.]” Ms. McCurley was aggrieved by West Chester failing to produce the attachments referenced in the responsive emails. I therefore recommend that she recover her filing fee and the costs she incurred in this case. I also recommend that West Chester bear the balance of the costs of this case.

III. Conclusion.

{¶17} In light of the foregoing, I recommend that the court:

- A. Order respondent to produce copies of all attachments referenced in the previously produced emails that have not already been produced;
- B. Order respondent to take that action within 30 days of the entry of a judgment adopting this report and recommendation;
- C. Order respondent to file an affirmation that it has taken that action within 40 days of the entry of a judgment adopting thus report and recommendation;
- D. Order respondent to pay requester’s filing fee, costs, and the other the costs of this case; and
- E. Deny all other relief.

{¶18} *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).*

TODD MARTI
Special Master