[Cite as *State ex rel. Dissell v. Cleveland*, 2021-Ohio-2937.]

COURT OF APPEALS OF OHIO

EIGHTH APPELLATE DISTRICT
COUNTY OF CUYAHOGA

STATE EX REL., RACHEL DISSELL, :

Relator, :

No. 110425

v. :

THE CITY OF CLEVELAND, :

Respondent. :

JOURNAL ENTRY AND OPINION

JUDGMENT: WRIT DENIED
RELEASED AND JOURNALIZED: August 25, 2021

Writ of Mandamus
Motion No. 547393
Order No. 548281

Appearances:

Milton A. Kramer Law Clinic Center, Case Western Reserve University School of Law, Andrew Geronimo, and Arcola A. Whatley, *for relator*.

Barbara A. Langhenry, Cleveland Director of Law, and Jerome A. Payne, Jr., Assistant Director of Law, *for respondent*.

MICHELLE J. SHEEHAN, J.:

{¶ 1} Relator, Rachel Dissell ("Dissell"), seeks a writ of mandamus directing the city of Cleveland ("the city") to produce records responsive to her

November 5, 2020 records request that sought all communications sent to the Mayor's Action Center ("MAC") in 2018, 2019, and the first ten months of 2020. For the reasons that follow, we deny the requested relief because the request is overly broad, constituting a complete duplication of voluminous files.

I. Factual and Procedural History

{¶ 2} Dissell initiated the instant action on April 13, 2021. Her complaint alleges that she sent the following records request to the city on November 5, 2020:

> Please provide for the years 2018, 2019 and 2020 through Nov. 1 the following information. Any and all emails to the Mayor's Action Center, with an email address of mayorsactioncenter@city.cleveland.oh.us. Please include all information including the name and email address of the sender, time the message was sent and body of the message. In addition, please include any message sent during the same timeframe through the form for the Mayor's Action Center on the City of Cleveland website * * * including the following fields on the form: Title First Name Middle Initial Last name Email Address Street Address City State Zip Code Telephone Ward Comment, question or complaint. Please provide any log of calls to the Mayor's Action Line number – listed as 216-664-2900 for the same time period. Including name and number of caller and reason for calling and any other information logged. Please provide the responsive records as they become available.

{¶ 3} The city responded to the request on November 10, 2020, stating, "Based on *State ex rel. Glasgow v. Jones*, 119 Ohio St.3d. 391, [2008-Ohio-4788, 894 N.E.2d 686,] we are responding that this request is overly broad for your request for emails. As far as the request for a [call] log, the city has no responsive records. Please re-submit your request by narrowing your search for emails."

{¶ 4} After some further contacts, on November 30, 2020, Dissell sent a letter contesting the denial as overly broad. After some back and forth, on

December 4, 2020, the city produced a spreadsheet with information responsive to the request for communications sent through the online form on the city's website, consisting of over 5,600 communications spanning 1,682 pages. The city continued to deny the request for a call log, claiming that such a log was not kept. It also maintained that the request for emails was overly broad and asked that the request be narrowed by subject. During negotiations between the parties, Dissell sought the release of one month of emails received by the designated email address for the MAC. She chose October 2019. The city reviewed, redacted, and released some 8,800 pages of documents responsive to this agreed request. Further negotiations were not successful, and Dissell commenced suit.

{¶ 5} After unsuccessful mediation, the city filed an answer. The parties filed cross-motions for summary judgment on June 21, 2021. Briefs in opposition were filed on July 6, 2021. As part of a status update, Dissell also submitted the records that she had received from the city.

II. Law and Analysis

A. Applicable Standards

{¶ 6} Ohio's Public Records Act, R.C. 149.43, embodies a strong public policy for open access to records maintained by Ohio's public institutions. Where a requester of records feels that a governmental agency or employee has failed to live up to the duties imposed by the Act, a writ of mandamus is one of the appropriate avenues for relief. R.C. 149.43(C)(1)(b); *State ex rel. Mun. Constr. Equip. Operators' Labor Council v. Cleveland*, 162 Ohio St.3d 195, 2020-Ohio-3197, 165

N.E.3d 214, ¶ 7, citing *State ex rel. Rogers v. Dept. of Rehab. & Corr.*, 155 Ohio St.3d 545, 2018-Ohio-5111, 122 N.E.3d 1208, ¶ 5. "To be entitled to the writ, the relator must establish a clear legal right to the requested relief and a corresponding clear legal duty on the part of the respondent to provide that relief." *Id.*, citing *Rogers* at ¶ 5. Broad access to public records is the goal, so "'any doubt is resolved in favor of disclosure of public records.'" *State ex rel. Summers v. Fox*, 163 Ohio St.3d 217, 2020-Ohio-5585, 169 N.E.3d 625, ¶ 27, citing *State ex rel. Cincinnati Enquirer v. Hamilton Cty.*, 75 Ohio St.3d 374, 376, 662 N.E.2d 334 (1996).

{¶ 7} Where a records custodian denies a records request based on exceptions to the Public Records Act, the custodian "bears the burden of proof with respect to those exceptions." *Id.* at ¶ 28, citing *State ex rel. Besser v. Ohio State Univ.*, 89 Ohio St.3d 396, 398, 732 N.E.2d 373 (2000). "To meet this burden, a custodian must prove that the requested records fall squarely within the exception." *Id.*, citing *State ex rel. Miller v. Ohio State Hwy. Patrol*, 136 Ohio St.3d 350, 2013-Ohio-3720, 995 N.E.2d 1175, ¶ 23.

{¶ 8} The case is before the court on cross-motions for summary judgment. Pursuant to Civ.R. 56(C), judgment may be granted when all the properly submitted pleadings and evidence "show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." When reviewing all of the evidence and pleadings allowed under this rule, summary judgment is appropriate where "reasonable minds can come to but one conclusion and that conclusion is adverse to the party against whom the motion for summary

judgment is made, that party being entitled to have the evidence or stipulation construed most strongly in the party's favor." Civ.R. 56(C). *See also State ex rel. Parker v. Russo*, 158 Ohio St.3d 123, 2019-Ohio-4420, 140 N.E.3d 602, ¶ 5-10.

{¶ 9} In her motion for summary judgment, filed June 21, 2021, Dissell sets forth the records that are still at issue in this case: "(1) unproduced MAC emails from 2018, 2019, and through November 2020 (except for October 2019), and (2) any records that document telephone calls to the MAC number." This constitutes an acknowledgement that the request for records received by the MAC through the online form has been satisfied. The request for online submittals was satisfied prior to the institution of this action. Therefore, this opinion will be limited to the two types of records identified above.

B. Emails and Overbreadth

{¶ 10} A records custodian has a duty, under R.C. 149.43(B)(1) to prepare and make available all public records responsive to a request. *State ex rel. Shaughnessy v. Cleveland*, 149 Ohio St.3d 612, 2016-Ohio-8447, 76 N.E.3d 1171, ¶ 8. However, a records request that is so vague or broad that a records custodian cannot properly provide records in response does not trigger this duty. Pursuant to R.C. 149.43(B)(2), the custodian may deny the request for these reasons, but "shall provide the requester with an opportunity to revise the request by informing the requester of the manner in which records are maintained by the public office and accessed in the ordinary course of the public office's or person's duties." It is up to the requester to identify with sufficient clarity the requested records, and the failure

to do so impacts a relator's ability to demonstrate entitlement to relief in mandamus. *State ex rel. Zidonis v. Columbus State Community College*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, ¶ 21.

{¶ 11} Further, "'the Public Records Act "does not contemplate that any individual has the right to a complete duplication of voluminous files kept by government agencies."'" *State ex rel. Kesterson v. Kent State Univ.*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, ¶ 22, quoting *Glasgow*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 17, quoting *State ex rel. Warren Newspapers, Inc. v. Hutson*, 70 Ohio St.3d 619, 624, 640 N.E.2d 174 (1994). *See also Gupta v. Cleveland*, Ct. of Cl. No. 2017-00840PQ, 2018-Ohio-3475, ¶ 26, citing *State ex rel. Dehler v. Spatny*, 11th Dist. Trumbull No. 2009-T-0075, 2010-Ohio-3052, ¶ 4, 18 ("A public records request is * * * unenforceable if it is too voluminous, vague or indefinite to be properly acted on by the records holder.").

{¶ 12} Here, Dissell has requested essentially all records of non-emergency communications sent to the MAC by anyone by phone, web form, or email for a 34-month period. We must determine whether the city has demonstrated this constitutes an overly broad request that amounts to a complete duplication of voluminous files maintained by the government.

{¶ 13} Dissell argues that the request is temporally limited as well as limited by subject-matter and, therefore, does not constitute a complete duplication of voluminous records. Dissell asserts that her records request was not overly broad under the standard announced in *Kesterson*. She claims that the *Kesterson* court

clarified that "even expansive requests are not objectionable as overbroad unless they 'fail[] * * * to identify the records * * * with sufficient clarity.'" Relator's brief in opposition to summary judgment, filed July 6, 2021, page 3, quoting *Kesterson* at ¶ 24-25.

{¶ 14} This case did not announce a new standard, and Dissell's argument that pre-*Kesterson* cases cited by the city no longer constitute a valid source of legal authority is without merit. The *Kesterson* court continued to recognize that a requestor is not entitled to ""complete duplication of voluminous files kept by government agencies."" *Kesterson*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, at ¶ 22, quoting *Glasgow*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 17, quoting *Warren Newspapers*, 70 Ohio St.3d at 624, 640 N.E.2d 174 (1994). In granting relief in mandamus, the court recognized that the requestor "cast a wide net," but limited her requests temporally and by subject-matter, and except for one request, by specific employees concerned. *Id*. at ¶ 25. It determined that "Kesterson did not request the 'complete duplication' of anyone's files, nor does any individual request approach the type of vague and impermissibly broad request that we refused to enforce in *Glasgow*, [*State ex rel. Dillery v. Icsman*, 92 Ohio St.3d 312, 750 N.E.2d 156 (2001)], or *Zidonis*[, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861]." *Id*. at ¶ 25.

{¶ 15} When determining whether a writ should be granted, the *Kesterson* court cited approvingly *State ex rel. Morgan v. Strickland*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, for the proposition that "a request for emails

sent or received by a specific individual regarding a specific topic during a reasonably short time period is not" an impermissible request. *Kesterson* at ¶ 26, citing *Morgan* at ¶ 30, 33-35. The request in *Morgan* was temporally limited and limited to the subject of school funding. *Morgan* at ¶ 4.

{¶ 16} In *Morgan* and *Kesterson*, valid requests were limited by subject. Contrary to Dissell's argument, her request is not so limited. This finding is borne out by a review of the records that were provided to Dissell and submitted to this court.

{¶ 17} The emails produced for the month of October 2019 range in subject from requests for assistance involving domestic violence, including attached medical records, and assistance with utility services regarding Cleveland Public Power and the Cleveland Division of Water, with attached billing statements containing usage data; complaints about trash collection, tall grass, trees, potholes, and new construction in the Little Italy neighborhood of Cleveland; and praise for "DJ Kishka on the Polka Train."[1] Further, there are certain prolific citizen-emailers who regularly forward news articles and press releases to the MAC email address without any accompanying request or message.

[1] The city has averred that certain information must be redacted from the emails because this information is prohibited from release and/or does not constitute a public record. For instances, in reviewing the October 2019 records released to Dissell, the city averred that it had to redact social security numbers (R.C. 149.43(A)(1)(dd)), medical records (R.C. 149.43(A)(1)(a)), and usage information for customers of municipally owned public utilities (R.C. 149.43(A)(1)(aa)).

{¶ 18} The emails also include a large number of unsolicited business messages and advertisements. For instance, one sales inquiry offers a new method for fixing potholes. Another sales inquiry seems to indicate that the sender has a preexisting business relationship with the city and would like to "review your payments processing account," but further reading of the email indicates that it is likely from a company that does not have an existing relationship with the city. It is not immediately apparent whether these messages constitute public records that must be disclosed based on a past or present business relationships without further research by the city.[2]

{¶ 19} The diversity of emails sent to the MAC show that there is, in fact, no subject-matter limitation.

{¶ 20} A small percentage of the emails produced to Dissell are not responsive to the records request because they are emails that were sent from the MAC email address rather than received by it. However, that does not change the voluminous nature of records responsive to Dissell's request. Generally, "'[n]o pleading of too much expense, or too much time involved, or too much interference with normal duties, can be used by the respondent to evade the public's right to inspect and obtain a copy of the public records within a reasonable time.'" *State ex rel. Toledo Blade Co. v. Seneca Cty. Bd. of Commrs.*, 120 Ohio St.3d 372, 2008-

[2] A "record" for purposes of the Public Records Act is defined in R.C. 149.011(G) as document, in whatever form "created or received by or coming under the jurisdiction of any public office of the state * * * which serves to document the organization, functions, policies, decisions, procedures, operations, or other activities of the office." Unsolicited advertisements likely do not fall within this definition.

Ohio-6253, 899 N.E.2d 961, ¶ 36, quoting *State ex rel. Beacon Journal Publishing Co. v. Andrews*, 48 Ohio St.2d 283, 289, 358 N.E.2d 565 (1976). However, the request here constitutes the complete duplication of voluminous records — a right not bestowed by the Public Records Act, and does not constitute a request that a records custodian must fulfill. *Graham v. Cleveland*, Ct. of Cl. No. 2019-00869PQ, 2019-Ohio-5485, ¶ 11, citing *Glasgow*, 119 Ohio St.3d 391, 2008-Ohio-4788, 894 N.E.2d 686, at ¶ 17.

{¶ 21} Dissell claims this case is unlike any other case because her request is for emails sent to a dedicated means of contact for the city. This, she argues, is fundamentally different from requests for emails sent or received by a specific employee. For instance, where a records requester sought all email messages, text messages, and correspondence of a state employee for a six-month period, that request was denied as overly broad. *Glasgow*. Even if we accept this argument, Dissell's request is similar to a request for all of a single category or type of record for a 34-month period. Where a requestor sought all traffic accident reports without temporal or subject-matter limitations, that request was denied as constituting a complete duplication of voluminous records. *State ex rel. Zauderer v. Joseph*, 62 Ohio App.3d 752, 577 N.E.2d 444 (10th Dist.1989).

{¶ 22} Broad requests similar to the one made in *Zauderer*, even with temporal and subject-matter limitations, also resulted in a finding that the request was improper. *State ex rel. Dehler v. Spatny*, 127 Ohio St.3d 312, 2010-Ohio-5711, 939 N.E.2d 831 (request for all orders and receipts for certain items for a seven-year

period deemed overly broad); *Zidonis*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861 (request for complaint and litigation files for a six-year period was found to be overly broad); *Gupta*, Ct. of Cl. No. 2017-00840PQ, 2018-Ohio-3475, at ¶ 25 (request for all "emails and other correspondence" between named individuals for a two-year period was found to be overly broad).

{¶ 23} However, where a person requested "all internal investigation [files] from 1988 to 1993" and "all incident reports or traffic tickets written in 1992," the Supreme Court of Ohio did not deny the request as overly broad. *Warren Newspapers*, 70 Ohio St.3d at 619, 624, 640 N.E.2d 174 (1994). In that case, the respondent argued the broadly worded request would involve reviewing and redacting "over 32,000 pages of documents per year for five to six years." *Id.* at 624. The court rejected the argument in part because there was no evidence in the record to support that statement. *Id.* at 624-625.

{¶ 24} Here, the city produced emails for a single month selected by Dissell in an effort to provide her with information that could be used to narrow her request. As a result, the record contains information about the nature of the records that are responsive to Dissell's request and the vastness of her request for any communication that anyone sent to the MAC for a 34-month period. In a June 11, 2021 status update submitted in this case, Jerome A. Payne, Jr., an assistant law director for the city, averred that Dissell's request for emails constitutes a request for approximately 57,000 emails, and the emails produced for a single month consist of approximately 8,800 pages. The record establishes that one out of 34

months of requested emails required review and redaction of these approximately 8,800 pages. Assuming some variation between months, this may well constitute the duplication, review, and redaction of over 250,000 pages. In other words, a complete duplication of voluminous files maintained by the city.[3]

{¶ 25} When faced with vague or overly broad records requests, a records custodian is under an obligation to alert requestors that their request is vague or overly broad, inform them about the methods of records storage to assist requesters in narrowing requests, and to provide them with an opportunity to refine their request. R.C. 149.43(B)(2); *Zidonis*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, at ¶ 33. The city complied with this obligation during communications and prelitigation negotiations as evidenced by exhibits attached to the complaint. Therefore, Dissell is not entitled to a writ of mandamus to force the city to comply with the Public Records Act by releasing emails sent to the MAC for a 34-month period.

C. Call Logs

{¶ 26} Dissell's request for a log of calls to the phone number for the MAC was denied shortly after it was made. The city denied that it maintained a log of calls to the MAC. Jacqueline Sutton, a manager for the MAC, averred in her June 18,

---

[3] Dissell, in prelitigation negotiations, did offer to narrow her request to a one-year period, but she never amended her request. An offer to amend is not an amendment of a public records request. *Zidonis*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, at ¶ 25. Dissell's complaint and motion for summary judgment seek records for a 34-month period.

2021 affidavit attached to the city's motion for summary judgment that the city does not keep a log of calls to the MAC.

{¶ 27} In response, Dissell argues that the city's prelitigation responses to questions do establish that, in fact, the city logs the calls to the MAC. She argues the city has records responsive to this request and has failed to produce them.

{¶ 28} During prelitigation negotiations, an attorney for the city, Stephanie Melnyk, responded to a list of questions posed by Dissell's attorney. The responses were attached to Dissell's complaint as Exhibit 8. There, Melnyk stated,

> First, I have confirmed again that the Mayor's Action Center ("MAC") does not have a phone log. I understand from our conversions that Council members may have referred to a phone log. The document that they referenced may be a City Council generated form and, if you or your client have not done so already, perhaps reach out directly to Council for clarification. Second, regarding how calls are handled and logged, I believe I may have previously provided some of this information during one of our phone calls. In short, when a phone call is received about a City matter, the matter is usually entered into one of the City['s] three systems. The three systems are the Mayor's Action Center system (used for the most departments), ACR/311 system (used primarily for complaints for the Departments of Building & Housing and Public Works - e.g. parks, recreation and waste collection matters); and City Works System (used primarily for Department of Public Works - e.g. streets, traffic engineering, vacant property matters). Depending upon the complaint, an email may be sent in addition to or in lieu of entry into one of these systems.

Dissell argues this answer actually shows that the city does log phone calls to the MAC whether or not the city calls it a phone log.

{¶ 29} The statement indicates that when any call is received by the city about a city matter, not just for calls to the MAC, the communication may prompt a number of actions: An email to a department or person that may address an issue

or entering information into any of three computer systems. The response to Dissell's question does not indicate that the city maintains a call log for calls received through the MAC phone number. The city is not required to produce a record it does not have or create a record that does not exist to satisfy a public records request. *State ex rel. Gooden v. Kagel*, 138 Ohio St.3d 343, 2014-Ohio-869, 6 N.E.3d 471.

{¶ 30} Even if Melnyk's answer established some disputed question of fact about a log of calls, "'[r]equests for information and requests that require the records custodian to create a new record by searching for selected information are improper requests under R.C. 149.43.'" *Morgan*, 121 Ohio St.3d 600, 2009-Ohio-1901, 906 N.E.2d 1105, at ¶ 14, quoting *State ex rel. Morgan v. New Lexington*, 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 30. *Kesterson* also recognized that a records request that required improper research is invalid. *Kesterson*, 156 Ohio St.3d 22, 2018-Ohio-5110, 123 N.E.3d 895, at ¶ 26. The *Kesterson* Court defined improper research as requests that "'require the government agency to either search through voluminous documents for those that contain certain information or to create a new document by searching for and compiling information from existing records.'" *Id.* quoting *State ex rel. Carr v. London Corr. Inst.*, 144 Ohio St.3d 211, 2015-Ohio-2363, 41 N.E.3d 1203, ¶ 22, citing *Morgan* at ¶ 30-31, 35.

{¶ 31} The *Kesterson* Court determined that searching through emails to find records did not constitute improper research when the request was limited temporally, by subject, and between specific employees. *Id.* at ¶ 26. The city has averred that it does not maintain a separate call log for the MAC, so Dissell's request

for a log of all calls to the MAC requires a records custodian to search for information that could be responsive to the request across multiple locations for a 34-month period and without any limitation as to subject-matter. Assuming that responsive records for all calls to the MAC are contained within these sources, the request for all calls received by the city through the MAC phone number suffers from the same overbreadth problem detailed above regarding her request for emails. Therefore, the city has demonstrated that Dissell's request was improper and the city has not breached a duty imposed by R.C. 149.43(B)(1) of the Public Records Act.

{¶ 32} The city did not initially deny Dissell's request as overly broad or vague, but Melnyk's answer to Dissell's question directs Dissell to what actions a call to the city may prompt and points to the manner in which those records are generated, stored, and maintained. In other words, the answer provides information to Dissell that would allow her to amend her request to properly access the information sought. The city asserts in its motion for summary judgment that this request is overly broad, and the city has demonstrated, through Melnyk's communications attached to the complaint, that even though it denied the request because of a lack of records, it did comply with its duty under R.C. 149.43(B)(2) to inform Dissell in what form potential records are maintained so that she could make a more targeted request. *See Zidonis*, 133 Ohio St.3d 122, 2012-Ohio-4228, 976 N.E.2d 861, at ¶ 33-40.

{¶ 33} This court declines to issue a writ of mandamus for this request. The city should endeavor to cooperate with Dissell in tailoring her request to attain

records so that her request does not constitute a complete duplication of voluminous files. After all, public records are the people's records. They are "one portal through which the people observe their government, ensuring its accountability, integrity, and equity while minimizing sovereign mischief and malfeasance." *Kish v. Akron*, 109 Ohio St.3d 162, 2006-Ohio-1244, 846 N.E.2d 811, ¶ 16. The city's prelitigation communications with Dissell indicate an attitude of cooperation that is envisioned by Ohio's Public Records Act. The city should endeavor to maintain that level of cooperation to achieve a mutually acceptable resolution.

D. Statutory Damages and Costs

{¶ 34} Dissell has requested an award of statutory damages and costs. This court resolves the action in the city's favor. Therefore, an award of statutory damages and costs is not appropriate.

{¶ 35} Dissell's public records request for all calls and emails sent to the MAC for a 34-month period is overly broad and constitutes a complete duplication of voluminous files.

{¶ 36} The city's motion for summary judgment is granted; Dissell's motion for summary judgment is denied. The request for writ of mandamus is denied. Costs to Dissell. The clerk of courts is directed to serve notice of this judgment upon all parties as provided in Civ.R. 58(B).

_____
MICHELLE J. SHEEHAN, JUDGE

LARRY A. JONES, SR., P.J., and
EILEEN A. GALLAGHER, J., CONCUR