APPENDIX

IN THE COURT OF APPEALS OF OHIO

TENTH APPELLATE DISTRICT

State ex rel., Center for Media and Democracy et al.,	:	
Relators,	:	
v.	:	No. 20AP-554
The Office of Attorney General David Yost,	:	(REGULAR CALENDAR)
Respondent.	:	

MAGISTRATE' S ORDER

{¶ 61} Relator submitted a public records request to respondent Dave Yost seeking the following:

> [A] copy of all records that pertain to the Republican Attorneys General Association (RAGA), Rule of Law Defense Fund [RLDF], and the RAGA Winter Meeting held February 29 through March 2 from the Office of Attorney General Dave Yost. The scope of this request includes the Attorney General and Chief of Staff. The scope of this request should include but is not limited to emails, attachments, both sent and received, all draft records, briefing books, memos, notes, minutes, scheduling records, text messages, other correspondence (internal and external) and all other records.

(Relator's Compl. at 3-4.)

{¶ 62} Respondent's office answered with an email dated March 30, 2020 stating that the requested information was "exempt from disclosure as it is not a record of this office, pursuant to *State ex rel. Dispatch Printing Co. v. Johnson,* 106 Ohio St.3d 160, 2005-Ohio-4384, 833 N.E.2d 274; *State ex rel. Fant v. Enright,* 66 Ohio St.3d 186, 610 N.E.2d 997 (1993)." Relators restated their request, and received further response by email dated July 13, 2020 which appeared to shift the emphasis of respondent's response

to the public records request to assert that the records were non-existent rather than merely exempt:

> The Ohio Attorney General's Office reviewed your request and determined that no such email, text, drafts, memo, minutes, or other correspondence records exist with the Attorney General and his Chief of Staff and while we understand your position regarding your request, please note that any other information does not meet the definition of a record as defined by Ohio's Public Records Act (Ohio Revised Code Section 149.43). See *State ex rel. Dispatch Printing Co. v. Johnson,* 106 Ohio St.3d 160, 2005-Ohio-4384 (public office has no obligation to produce items that do not document the organization, functions, policies, procedures, operations, or other activities of the office.)

{¶ 63} Relators commenced this mandamus action under R.C. 149.43(C)(1)(b) to compel compliance with the Public Records Act. Discovery proceedings ensued. Relators conducted depositions of four members of respondent's staff and served interrogatories and requests for production. Respondent provided his own affidavit and that of several staff members. Relators sought to depose respondent personally as well as Solicitor General Benjamin Flowers.

{¶ 64} Discovery reached an impasse. Counsel and the magistrate held a status conference leading to the present cross-motions for discovery rulings. Respondent has submitted a number of documents under seal for in camera inspection.

{¶ 65} Relator seeks to obtain expanded answers to interrogatories already served and to expand the classes of records made available to the magistrate for in camera inspection.

{¶ 66} Respondent seeks a protective order for himself and Solicitor General Flowers to avoid submitting to depositions.

{¶ 67} The parties differ on the extent to which relators may pursue discovery to establish that the described records exist and should be made available. Original actions seeking a writ of mandamus from this court are governed by the Ohio Rules of Civil Procedure. Civ.R. 26(B) permits the discovery of all non-privileged matter "that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance

of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." The standard used to determine relevancy for purposes of discovery " 'is much broader than the test to be utilized at trial. It is only irrelevant by the discovery test when the information sought will not reasonably lead to the discovery of admissible evidence.' " *Tschantz v. Ferguson*, 97 Ohio App.3d 693, 715 (10th Dist.1995), quoting *Icenhower v. Icenhower*, 10th Dist. No. 75AP-93 (Aug. 14, 1975). With respect to depositions, Civ.R. 30(A) provides that after the filing of any complaint, "any party may take the testimony of any person, including a party, by deposition upon oral examination."

{¶ 68} Addressing first relators' complaints regarding interrogatory answers and requests for production, relators specifically quote and object to respondent's answer to Interrogatory Two:

> Identify each and every person employed by the Office of the Ohio Attorney General who did any of the following in the years 2019-2021:
>
> a. Communicated in any form with representatives, officers, and/or employees of RAGA and/or RLDF.
>
> b. Attended any meeting and/or conference sponsored in whole or part by RAGA and/or RLDF.
>
> c. Requested, received, and/or assisted in processing any reimbursement of expenses by RAGA and/or RLDF.
>
> d. Drafted and/or assisted in drafting documents (including briefs, letters, and/or press releases) that involved other Republican state attorneys general and/or their offices in any way (including by signing, co-authoring, drafting, and/or revising).
>
> e. Received, sent, and/or were copied on requests to and/or from RAGA, RLDF, and/or other Republican state attorneys generals and/or their offices seeking cooperation and/or participation in litigation, amicus curiae filings, lobbying, petition, and/or corresponding with government bodies.
>
> f. Accessed any RAGA and/or RLDF online "briefing room" or other file-sharing system sponsored, hosted, and/or arranged by RAGA and/or RLDF.

{¶ 69} The Respondent stated in response:

> Respondent objects to this Interrogatory, including all subparts, as irrelevant, overly broad, unduly burdensome and not proportional to the needs of the case. Although Relators' public records request specifically targeted the records of the Attorney General and his Chief of Staff, this Interrogatory includes "each and every person employed by the Office of the Ohio Attorney General." By including hundreds of employees beyond the Attorney General and Chief of Staff, this Interrogatory is not proportional to the needs of this case, which is limited to whether the Attorney General and Chief of Staff have records that are responsive to Relators' public records request. Moreover, the time period of this Interrogatory encompasses 2019-2021, which is overly broad, unduly burdensome, and not proportional to the needs of the case, which is limited to public records that actually existed at the time of Relator's [sic] request. See, e.g., *State ex rel. Morgan v. City of New Lexington,* 112 Ohio St.3d 33, 2006-Ohio-6365, 857 N.E.2d 1208, ¶ 30, *Sinclair Media III, Inc. v. City of Cincinnati,* Ct. of Cl. 2018-01357PQ, 2019-Ohio-2623, ¶ 6 ("[A] requester must seek specific, existing records."). Relator's [sic] request was dated March 10, 2020, and this Interrogatory seeks information postdating the request by more than a year.
>
> More fundamentally, this Interrogatory seeks the identification of persons, not specific public records, which is not the sole subject of this case. The Public Records Act does not mandate that a public office seek out and provide information of interest to the requester, such as the identification of certain persons. See, e.g., *State ex rel. McElrath v. City of Cleveland,* 8th Dist. Cuyahoga No. 106078, 2018-Ohio-1753, ¶¶ 18-19 (requests seeking information such as the names of officers involved in a police report and information about specific officers were not proper). Because this Interrogatory seeks the identification of certain persons, as opposed to specific and existing records, it is irrelevant, overly broad, unduly burdensome, and not proportional to the needs of this case.
>
> Absent a court order, Respondent will not answer this Interrogatory, including its subparts.

{¶ 70} The magistrate agrees with relators that part of respondent's answer to Interrogatory Two confuses matters by considering the interrogatory as another public records request rather than discovery pursued by relators in order to ascertain the

public/non-public nature of the records sought in the underlying request. While respondent is correct that "the Public Records Act does not mandate that a public office seek out and provide information of interest to the requester, such as the identification of certain persons," discovery proceedings in this mandamus action might require exactly that. Relators are not limited to the described records in the underlying public records request when pursuing information that will help determine whether the requested records are in fact public records, and whether any potentially responsive records have been withheld. Relators are entitled to reasonable discovery to test respondent's claim that his relationship with RAGA and RLDF is a purely personal matter unrelated to the substantive work of his office.

{¶ 71} The magistrate also disagrees with respondent's assertion that Interrogatory Two is overbroad in relation to the core issue in the case. Again, relators are entitled to obtain discovery to challenge the factual basis for respondent's refusal to provide the requested records, and the interrogatory request is proportional to that determination. *See, generally, State ex rel. Morgan v. New Lexington,* 112 Ohio St.3d 33, 2006-Ohio-6365, ¶ 36-37; *State ex rel. Bott Law Group, LLC v. Ohio Dept. of Natural Resources,* 10th Dist. No. 12AP-448, 2013-Ohio-5219, ¶ 18. Identifying staff who, in the course of their agency duties, attend RAGA- and RLDF-related functions is relevant to evaluating respondent's claim that these organizations are unrelated to his official duties. Relators are therefore entitled to an order compelling an appropriate response to Interrogatory Two providing the requested information.

{¶ 72} Similarly, Interrogatory Four asks respondent to identify RAGA and RLDF events attended by respondent or the agency's staff during the period from January 14, 2019 through the present, and Interrogatory Five asks respondent to identify court filings, agency submissions and other interactions with public officials for which RAGA or RLDF provided drafting or other assistance or input. Respondent's answer to both tracks the general objections expressed in his response to Interrogatory Two. Both Interrogatory Four and Interrogatory Five, as with Interrogatory Two, are within the scope of discovery in a public records case and respondent's outright refusal to answer is improper. The magistrate therefore grants the motion to compel as to Interrogatories Four and Five.

{¶ 73} Interrogatory Six asks broadly for information regarding RAGA or RLDF's impact on official positions and actions taken by respondent: "[A]ll official positions and actions taken by Respondent with respect to which the Respondent and/or any of Respondent's employees communicated with any representative and/or employee of RAGA and/or RLDF during any step of the decision-making or implementation processes." (Relators' Ex. 4 at 14.) Respondent again inappositely objects that this interrogatory seeks information that would not itself be subject to a public records request. More effectively, however, respondent characterizes this interrogatory as overbroad on its face. The magistrate agrees. Interrogatory Six requires respondent to identify "official positions and actions," arguably the entirety of his office's work product, and then sort through these to identify any influence attributable to respondent's participation in RAGA or RLDF, an inherently vague or subjective factor. This interrogatory is both overbroad and unduly burdensome in the context of the case, and the magistrate therefore denies relators' motion to compel as to Interrogatory Six.

{¶ 74} Relators served 16 requests for production. Respondent objected to all as irrelevant, overbroad, unduly burdensome, and not proportionate to the needs of the case. Respondent again bases many of these objections on the erroneous premise that no document need be produced in discovery if it would not have been directly responsive to the underlying public records request. While rejecting that premise, the magistrate must balance the broader scope of discovery against the court's past rulings that generally held the position that a requestor may not circumvent the procedures and restrictions of the Public Records Act by obtaining through discovery the very materials he was not entitled to receive in his public records request. In camera submission and examination provide the means to review the appropriateness of redactions and withheld documents in a public records action. *Henneman v. Toledo*, 35 Ohio St.3d 241 (1988); *State ex rel. Natl. Broadcasting Co. v. Cleveland*, 57 Ohio St.3d 77 (1991).

> [Nonetheless,] [a]s the Ohio Supreme Court recognized in *Henneman* * * *, the Ohio Public Records Act does not create an 'absolute privilege' from discovery and 'does not protect records from a proper discovery request in the course of litigation, if such records are otherwise discoverable.' 35 Ohio St.3d 241, 520 N.E.2d 207, 210-11 (Ohio 1988). In fact, the list of documents that are not considered 'public record[s]' for the purpose of the Ohio Public Records Act serves only 'to exempt

> the records described therein from the requirement of availability to the general public on request.' *Id.* at 211; *see also Mattox v. Village of Geneva on Lake*, No. 1:05-CV-2325, 2006 U.S. Dist. LEXIS 91952, 2006 WL 3762096, *1-2 (S.D. Ohio Dec. 20, 2006) (holding that Ohio Rev. Code § 149.43 'does not provide an absolute privilege against discovery requests in civil litigation').

Rose v. State Farm Fire & Casualty Co., S.D. Ohio No. 2:10-CV-874, 2011 U.S. Dist. LEXIS 142750, at *4-5 (Dec. 9, 2011).

{¶ 75} For requests 1-5, 9, 15, and 16, respondent states that despite the above objections, respondent will produce the requested documents for in camera inspection by the magistrate. In furtherance of this commitment, respondent has already submitted a substantial quantity of material under seal. Because other aspects of this order may result in more such submissions, the magistrate cannot determine at this time whether this submission constitutes the entirety of materials sought in these requests. The magistrate therefore concludes that no order compelling discovery can be suitably tailored at this time for the materials sought in requests 1-5, 9, 15, and 16.

{¶ 76} Request for Production 13 sought the record retention schedules of respondent's office. This material has been provided, and no order compelling discovery is necessary.

{¶ 77} Requests for Production 10 and 11 seek the production of emails related to the subject matter of certain targeted search terms including RAGA and RLDF, and certain names. Again, respondent objected to the requests as unduly burdensome and not proportional to the needs of the case. For these interrogatories, relators' motion to compel is granted to a limited extent. Respondent will provide a detailed answer regarding which of the search terms would generate unduly broad results, and, consistent with the deposition testimony of respondent's scheduling assistant, Amy Sexton, conduct searches of personal and public email accounts containing the pertinent information.

{¶ 78} Requests for Production 6, 7, and 8 seek all documents from all staff related to planning, attendance, preparation, and signature of letters, amicus briefs, and events attended or prepared in conjunction with other RAGA members. For the reasons stated

in evaluating relators' Interrogatory 2, the motion to compel is granted for these and respondent will furnish the requested documents.

{¶ 79} Request for Production 12 seeks the timesheets for staff listed in response to Interrogatory 2. The magistrate agrees with respondent that this request is overbroad and unduly burdensome because it will require production of large amounts of material entirely unrelated to relators' inquiry into respondent's claim that his relationship with RAGA and RLDF is a purely personal matter unrelated to the substantive work of his office. Moreover, wholesale production of timesheets will likely require extensive redaction of personal identifiers, litigation materials, and other materials that are exempt or privileged. The magistrate denies the motion to compel as to Request for Production 12. For the same reasons the magistrate denies the motion to compel as to Request for Production 14, which seeks all personnel and telephone rosters for respondent's office. The pertinent staff may be identified through other interrogatories and requests for production discussed above, and the entire roster of the attorney general's office is unnecessary.

{¶ 80} Relator also seeks to expand the scope of in camera review by the magistrate of any documents that relators would deem potentially responsive to the discovery process but respondent considers privileged, exempt, or otherwise subject to dispute. The rulings set forth above essentially yield this result, and the motion to extend the scope of in camera review is granted to the extent necessitated by those rulings.

{¶ 81} Turning to respondent's motion for a protective order, relators seek to depose respondent personally and respondent's Solicitor General Benjamin Flowers.

{¶ 82} The law generally discourages gratuitous depositions of high-ranking public or elected officials because these proceedings present a high risk of pursuit for nuisance value—intrusive discovery and compelled testimony may needlessly disrupt the day-to-day operations of government. *In re Stone,* 986 F.2d 898, 904 (5th Cir.1993). In Ohio, a decision on whether to compel personal deposition testimony by high-ranking officials will be determined based upon "the substantiality of the case in which the deposition is requested; the degree to which the witness has first-hand knowledge or direct involvement; the probable length of the deposition and the effect on government business if the official must attend the deposition; and whether less onerous discovery procedures

provide the information sought." *State ex rel. Summit Cty. Republican Party Executive Commt. v. Brunner,* 117 Ohio St.3d 1210, 2008-Ohio-1035, ¶ 4. In *Brunner,* the Supreme Court of Ohio determined that Jennifer Brunner, then the Secretary of State of Ohio, would sit for deposition because the case presented a matter of great public interest and inquired into the exercise of discretion by the secretary of state herself rather than staff or agency. The court noted that a deposition need not be lengthy under the circumstances and other methods would not yield the pertinent information.

{¶ 83} Respondent first argues that a public records case is inherently not important enough to meet the substantiality factor in *Brunner.* The frequency with which the Supreme Court of Ohio has taken up such cases belies this assertion. *See, e.g., State ex rel. Cincinnati Enquirer v. Pike Cty. Coroner's Off.,* 154 Ohio St.3d 63, 2017-Ohio-8988, ¶ 10 ("This case involves a matter of great public importance: whether autopsy reports in open homicide investigations are public records."). The question of whether the Ohio Attorney General's documents and materials pertaining to his participation in the activities of organizations related to, but not officially part of, his duties is facially important enough to support a deposition in this case if the other factors are met.

{¶ 84} Respondent next argues that neither he nor the solicitor general can provide relevant information through deposition because neither "has first-hand knowledge of the search for responsive records in this case" conducted by subordinate staff. (Respondent's June 18, 2021 Mot. for Protective Order at 12.) Relators persuasively counter that the definition of what constituted responsive documents was necessarily the primary defining factor that underlay the ministerial or clerical process of a search conducted by respondent's staff, and respondent is the only person who can explain the elaboration of that definition.

{¶ 85} Turning to the question of whether there are less burdensome forms of discovery that will produce all the information to which relators are entitled, the state of discovery in this case argues that there are not. The magistrate concludes that respondent is, ultimately, the only person qualified to explain the relation between his RAGA and RLDF activities and the public functions of his office. Respondent has to date only provided an affidavit asserting only that no "records of my office in any of my personal devices or private accounts that would have been responsive to this request." (Yost Aff.

at ¶ 9.) That answer, of course, refuses the question: By stating that no responsive documents exist because any documents that do exist are not records of his office, respondent evades any inquiry by relators or the court into the status of *potentially* responsive documents that do exist. There is no question that respondent, far more than his staff, has the pertinent information regarding the extent to which participation in RAGA and RLDF activities should be considered within the scope of his public duties and activities. There do not appear to be, therefore, less onerous discovery procedures that will provide the information sought.

{¶ 86} Finally, respondent presents no real argument that a reasonably conducted deposition, arranged at his convenience, would disrupt the conduct of his official duties.

{¶ 87} The magistrate therefore concludes that respondent's protective order as to himself must be denied. Relators having made no substantial argument with respect to deposition of Solicitor General Flowers on the above-defined factors, the protective order is granted as to the solicitor general.

{¶ 88} In summary, relators' motion to compel interrogatory answers and expand production of documents for in camera inspection is granted in part and denied in part, and respondent's motion for a protective order is denied as to himself and granted as to Solicitor General Flowers.

/S/ MAGISTRATE
MARTIN L. DAVIS