

VILAR & GREEN

ATTORNEYS AT LAW

A Limited Liability Company

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Alexandria, Louisiana 71315

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Alexandria Office
1450 Dorchester
Alexandria, LA 71301

Lafayette Office
1819 W. Pinhook Road
Lafayette, LA 70508

*Of Counsel

RECIPIENT	FAX NUMBER
Natchitoches Parish Clerk of Court Attention: Civil Department	357-2284

From: Aaron L. Green

Re: Dmitry Paniotto vs. City of Natchitoches, et al
Civil Suit No. A
File No. 17-23-008

9/4/23

Date: July 11, 2023

Pages: 22, including cover sheet

Message: Clerk,

Please fax file the attached Petition and supply our office with confirmation of filing with amount due for your services.

Thanks,



THE ATTACHED INFORMATION IS CONFIDENTIAL AND SHOULD BE DELIVERED ONLY TO THE ADDRESSEE. IF YOU HAVE RECEIVED THIS INFORMATION IN ERROR, PLEASE DESTROY IT AND CONTACT THE SENDER AT ONCE.

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* Of Counsel

July 11, 2023

**VIA FAX: 318-357-2284
and U.S. MAIL**

Natchitoches Parish Clerk of Court
200 Church Street, Room 104
Natchitoches, LA 71458

Re: Dmitry Paniotto vs. City of Natchitoches, et al
Civil Suit No. _____
File No. 17-23-008

Dear Clerk,

Enclosed is an original and one copy of a Petition for Mandamus, Statutory Penalties and Attorney's Fees in the above captioned matter, which we are fax filing on behalf of Dmitry Paniotto. Please date and time stamp the copy and return it to us.

Please supply our office with confirmation of service.

If you need anything further to process these requests, please notify our office immediately.

Sincerely,

VILAR & GREEN, LLC

By: *Aaron L. Green*
Aaron L. Green

ALG/bdr

Enclosure

cc: Alex J. Washington - via email only

FAC
RECEIVED AND FILED
DAVID STAMEY
CLERK OF COURT

2023 JUL 11 P 3:15
CIVIL SUIT NO. 94105
DIVISION "H"
BY: DMITRY PANIOTTO
NATCHITOCHES PARISH, LA

DMITRY PANIOTTO

10TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF NATCHITOCHE

CITY OF NATCHITOCHE, ET AL

STATE OF LOUISIANA

**PETITION FOR MANDAMUS,
STATUTORY PENALTIES AND ATTORNEY'S FEES**

NOW INTO COURT, through undersigned counsel, comes Plaintiff, Dmitry Paniotto ("Plaintiff"), a natural person over the age of majority, who respectfully represents as follows:

1.

Made defendants herein are:

CITY OF NATCHITOCHE, ("City") a municipal corporation existing under and by virtue of the constitution and laws of the State of Louisiana who may be served through its agent and chief executive officer, Mayor Ronnie Williams, Jr., or in his absence, by any employee of suitable age and discretion at 700 Second Street, Natchitoches, Louisiana 71457.

STACY MCQUEARY, as City Clerk for the City of Natchitoches, who may be served at 700 Second Street, Natchitoches, Louisiana 71457.

(collectively referred to as Defendants).

2.

On May 4, 2023, Plaintiff, through his attorney, sent a request for public records under the provisions of LSA-R.S. 44:1, et seq. to the Defendants. (Exhibit "A").

3.

Plaintiff's public records request consisted of 6 items seeking various public records. All documents sought fall within the definition of "public records" under Louisiana Revised Statutes 44:1. None of the public records sought by Plaintiff fall within any exception recognized under Louisiana Public Records Law.

4.

Defendants received the records request via facsimile on May 4, 2023 and by U.S. Mail. (Exhibit "A").

5.

Defendants have failed to timely and adequately respond to Plaintiff's public records request within the time limitations and within the manner required by applicable law.

1

6.

Since more than two weeks passed with the Defendants responding to, or even acknowledging, Plaintiff's public records request, Plaintiff sent a letter to City's attorney on May 19, 2023 via email and US mail requesting information regarding the status of Defendants' response to Plaintiff's May 4th public records request. (Exhibit "B").

7.

Finally on May 25, 2023, the City acknowledged Plaintiff's public records request when the City requested an extension, until June 5, 2023 to respond to the request. Plaintiff granted this request for an extension. (Exhibit "C").

8.

On June 23, 2023, Defendants still had not responded to Plaintiff's public records request. Therefore, Plaintiff was forced to advise the City's attorney that a Petition for Writ of Mandamus would be filed if Defendant's responses were not received by June 30, 2023. (Exhibit "D").

9.

On July 1, 2023, Defendants submitted a partial response to a public record request that had been outstanding since May 4, 2023. Defendants responded to Items #1 through #5 of the Request, by alleging there were either no documents responsive or that the documents had already been provided. (Exhibit "E").

10.

Defendants refused to respond to Item #6 of the Request alleging that this portion of the request needed clarification. (Exhibit "E").

11.

Item #6 of Plaintiff's public records request seeks the following:

Any and all contracts, agreements, invoices, payments to, requests for payment, or other documents pertaining to any contractors, third parties or other persons who were contracted, hired, or paid by the City to perform any work on the City's Water System, including but not limited to:

- (A) any inspections of the water lines, meters, valves and/or disconnections at locations where the City's water lines connect to customers homes, businesses or property;
- (B) disconnecting customers from the City's Water System; and
- (C) "turning off" a customer's water."

(Exhibit "A"). Item #6 of Plaintiff's request details with specificity which documents are being requested and no clarification is necessary.

12.

Furthermore, assuming clarification were warranted, which is denied, Defendants are in bad faith in waiting until July 1, 2023 to, for the first time, seek clarification of a public records request that Defendants received on May 4, 2023. Respectfully, Defendants' dilatory request for "clarification" was solely an effort to either not respond to this portion of Plaintiff's request or further delay said response.

13.

On July 2, 2023, Plaintiff yet again afforded Defendants additional time to fully respond to the public records request. (Exhibit "F"). This time Plaintiff afforded Defendants an additional eight days (until July 10, 2023) to fully respond to the public records request or this Petition would be filed on July 10, 2023. (Exhibit "F").

14.

Defendants have yet to respond to Plaintiff's July 2, 2023 correspondence.

15.

There is ongoing litigation between Plaintiff and City pending at the Tenth Judicial District Court bearing suit caption: *Cane River Parkland, LLC v. City of Natchitoches, et al*, Docket Number 93,864, Division "B".

16.

The existence of pending litigation between the parties does not excuse Defendants from their obligations under Louisiana Public Records Law. *Heath v. City of Alexandria*, 09-28 (La. App. 3 Cir. 5/6/09); 11 So.3d 569; *Baker v. City of Leesville*, 13-480 (La. App. 3 Cir. 11/20/13); 127 So.3d 107.

17.

Defendants have failed to comply with Louisiana Public Records Law. Plaintiff requests an order from this Court compelling Defendants to fully respond to public records request. Additionally, Plaintiff desires and is entitled to receive from Defendants an award of reasonable attorney's fees and penalties in the amount of One Hundred and No/100 (\$100.00) Dollars per day from the date its response was due until complete and proper responses are received, as is provided in LSA-R.S. 44:35.

18.

Plaintiff desires and is entitled to under the provisions of LSA-R.S. 44:35(C) to have this matter tried by preference and in a summary manner.

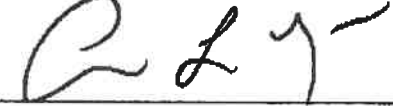
3

WHEREFORE, PLAINTIFF PRAYS that Defendants, **CITY OF NATCHITOCHE**s and **STACY MCQUEARY**, as City Clerk for the City of Natchitoches, be served with a copy of this petition and after all legal delays have elapsed and due proceedings had, there be judgment rendered herein in favor of Plaintiff, **DMITRY PANIOTTO**, and against Defendants, **CITY OF NATCHITOCHE**s and **STACY MCQUEARY**, as City Clerk for the City of Natchitoches, ordering Defendants to fully respond to Plaintiff's public records request and awarding Plaintiff all attorney's fees incurred in connection with this matter, plus penalties of One Hundred and No/100 (\$100.00) Dollars per day from the date responses were due, all costs of these proceedings, and all other relief to which Plaintiff is entitled.

PLAINTIFF FURTHER PRAYS that this Honorable Court order the Defendants to appear and show cause, if any they have or can, on a date and time set by this Court, why the relief requested herein and all full, general and equitable relief should not be granted.

Respectfully submitted,

VILAR & GREEN, L.L.C.

By: 

Mark F. Vilar, #25918
Aaron L. Green, #30530
Jonathan A. Cobb, #38163
 1450 Dorchester Drive
 Post Office Box 12730
 Alexandria, Louisiana 71315-2370
 Telephone: (318) 442-9533
 Facsimile: (318) 442-9532

ATTORNEYS FOR PLAINTIFF

CIVIL SUIT NO. _____
DIVISION " _____ "

DMITRY PANIOTTO

10TH JUDICIAL DISTRICT COURT

VERSUS

PARISH OF NATCHITOCHE

CITY OF NATCHITOCHE, ET AL

STATE OF LOUISIANA

ORDER

IT IS ORDERED that Defendants, **CITY OF NATCHITOCHE** and **STACY MCQUEARY**, as City Clerk for the City of Natchitoches, to appear and show cause on the ____ day of _____, 2023 at ____ o'clock ____ m., why there should not be judgment rendered herein in favor of Plaintiff, **DMITRY PANIOTTO**, and against Defendants, **CITY OF NATCHITOCHE** and **STACY MCQUEARY**, as City Clerk for the City of Natchitoches, ordering Defendants to fully respond to Plaintiff's public records request and awarding Plaintiff all attorney's fees incurred in connection with this matter, plus penalties of One Hundred and No/100 (\$100.00) Dollars per day from the date responses were due, all costs of these proceedings, and all other relief to which Plaintiff is entitled.

THUS DONE AND SIGNED this ____ day of _____, 2023 at Natchitoches Parish, Louisiana.

JUDGE, 10TH JUDICIAL DISTRICT COURT

PLEASE SERVE:

CITY OF NATCHITOCHE
through its Mayor
Ronnie Williams, Jr.
700 Second Street,
Natchitoches, Louisiana 71457

and

STACY MCQUEARY
as City Clerk for the City of Natchitoches
700 Second Street
Natchitoches, Louisiana 71457

RECEIVED AND FILED
DAVID STANLEY
CLERK OF COURT
2023 JUL 11 P 3:50
D.K. CLEMK
NATCHITOCHE PARISH, LA

POSTED
JH

RECEIVED AND FILED
DAVID STRALEY
CLERK OF COURT

2023 SEP 5 P 1:28

Katn/jm
BY CLERK
NATCHITOCHES PARISH, LOUISIANA

DMITRY PANIOTTO

DOCKET NO.: 94105-A

VERSUS

10TH JUDICIAL DISTRICT COURT

**CITY OF NATCHITOCHEs AND
STACY MCQUERY**

NATCHITOCHEs PARISH, LOUISIANA

WRITTEN REASONS FOR JUDGMENT

THIS CAUSE COMES BEFORE THIS HONORABLE COURT on a Petition for [Writ of] Mandamus, Statutory Penalties, and Attorney's Fees filed July 11, 2023, by Plaintiff herein, Dmitry Paniotto. Trial was held on August 1, 2023, at which the following persons appeared: Aaron L. Green, Esq., representing Plaintiff, Dmitry Paniotto (hereinafter "Plaintiff" or "Mr. Paniotto"); and Alex J. Washington, Esq., representing the City of Natchitoches ("the City") and Stacy McQuery. After closing arguments, the matter was submitted to the court for discernment and judgment. Immediately thereafter, defense counsel requested to submit a post-trial memorandum. The court extended the invitation to Plaintiff's counsel, and the matter was taken under advisement on the morning of Monday, August 7, 2023.

AFTER CAREFUL CONSIDERATION OF THE LAW, EVIDENCE, TESTIMONY, AND THE ORAL AND WRITTEN LEGAL ARGUMENTS OF DISTINGUISHED COUNSEL, IT IS ORDERED, ADJUDGED, AND DECREED that this court finds in favor of Plaintiff and against Defendant, the City of Natchitoches, for the reasons that follow.

LAW AND DISCUSSION

Findings of Fact.

On Thursday, May 4, 2023, Plaintiff, via counsel, authored a public records request that was faxed to and received by Stacy McQuery, City Clerk of and for the City of Natchitoches. The original signed letter followed by U.S. Postal Service and received on Monday, May 8, 2023.¹ Plaintiff's request consisted of six items seeking various public records regarding the City's water system:

1. *Please produce any and all policies, policy manuals, standards, codes, procedures, safety procedures, inspection procedures, and any and all other documents that were in effect during the calendar years 2022 and 2023 that in any way memorialize any of the following:*
 - A. *The City's process, methods, and/or practices for disconnecting the water supply from the City's Water System to properties;*
 - B. *Any notices you provide when you disconnect water supply;*
 - C. *Any inspections/ [sic] or safety checks you perform of the City's Water System, including the pipes and valves at, near[,] or that connect to the Subject Property; and*
 - D. *Any inspections and/or safety checks you perform after the water supply has been disconnected to confirm there is no water flow into a citizen or customer[']s property.*
2. *Please produce a copy of any and all safety rules and regulations related to disconnecting water supply from the City's Water System.*
3. *Please produce any and all work orders, invoices, logs, time sheets[,] or other documents related to all work, maintenance, inspections performed by or on behalf of the City at or near the 400 Rapides Drive, Natchitoches, Louisiana[,] from the present date, to as far back as the City has records of such activity.*
4. *Please produce a copy of any and all documents pertaining to notifications, reports, or complaints from January 1, 2020[,] through the present date regarding the City's failure or delay in disconnecting the supply of water from the City's Water System after a citizen requests disconnection.*

¹ This letter is dated (Thursday) May 4, 2023, and reads "Via fax: (318) 357-3829 and U.S. MAIL." McQuery testified that the letter was received via facsimile on (Sunday) May 7, 2023; however, no evidence was offered substantiating receipt on either date. The City stamped the hardcopy letter as being received on Monday, May 8, 2023. For all purposes of this litigation, this court finds the request was received by the City of Natchitoches on Monday, May 8, 2023.

5. *Please produce any and all documents and/or records reflecting or memorializing any and all work orders, customer service calls, incident reports, logs, or the like in any way related to the disconnecting of water supply at 400 Rapides Drive, Natchitoches, Louisiana[,] from January 1, 2022[,] through January 26, 2023.*
6. *Any and all contracts, agreements, invoices, payments to, requests for payment, or other documents pertaining to any contractors, third parties[,] or other persons who were contracted, hired, or paid by the City to perform any work on the City's Water System, including but not limited to:*
 - A. *Any inspections of the water lines, meters, valves[,] and/or disconnections at locations where the City's water lines connect to customers['] homes, businesses[,] or property;*
 - B. *Disconnecting customers from the City's Water System; and*
 - C. *"turning off" a customer's water.*

By May 19, 2023, Plaintiff received no response from Ms. McQueary or anyone from the City of Natchitoches prompting him to send an email that date, with hardcopy to follow via the U.S. Postal Service, requesting information regarding the status of Plaintiff's public records request. On May 25, 2023, the City's attorney, Alex Washington, acknowledged the request via email and requested an extension to June 5, 2023, to respond to the public records request. Plaintiff conceded to the extension via email sent on May 27, 2023.

June 5, 2023, came and went, and on June 23, 2023, Plaintiff sent a firm email to Mr. Washington stating that no response to the public records request has been received, and informed the City that if no responses were received by June 30, 2023, a Petition for Writ of Mandamus seeking penalties and attorney's fees would be filed to compel the City to respond.

At 3:50 p.m. on the afternoon July 1, 2023, the City submitted a response via email responding to items 1-5 but not item #6 requesting Plaintiff to "[p]lease clarify this request."

The following day, Plaintiff's counsel responded via email:

Good morning Alex:

I received your correspondence yesterday (July 1) responding to my client's May 4th public records request. Respectfully, Item 6 of the Request is clear as written. Additionally, my client takes exception with the City waiting until July 1st to seek "clarification" regarding a request you received on May 4. On July 10 we will move forward with a mandamus suit to obtain guidance from the Court.

The instant mandamus suit was filed Tuesday, July 11, 2023.

On July 17, 2023, Plaintiff responded further to the clarification request stating in part:

...my client is unable to limit item #6 of his request to a specific time frame. In short, he wants and is entitled to everything the City has that is responsive to Item #6. The City's response should indicate if the City's records only go back to a certain date. The only questions are whether said documents are available in electronic format, such that there won't be any charge under applicable law. And if the documents are not available in electronic format, whether my client will inspect the records or whether he will obtain copies. As requested in the original May 4, 2023 request, please notify our office if any of the requested records are not available in electronic format and the cost for obtaining copies of such records. Additionally, please inform us as to the number of pages not available in electronic format, so we can confirm the proposed cost.

On July 20, 2023, via email from Alex Washington, the City responded to Plaintiff stating:

In response to PRR#6, the City does not have any documents in respect to #6. Please consider this as an addendum to our July 1st response. Thanks.

At trial, only one witness was called, the records custodian for the City of Natchitoches, Ms. Stacy McQuery, who testified to the following:

1. She was unsure whether she and the City had fully responded to the May 4, 2023 Public Records Request;

2. Upon receipt of the public records request, she immediately forwarded it to the city attorney, Alex Washington, to handle as it involved pending litigation against the city in a companion case;
3. She had little or no further involvement in responding to the public records request;
4. To her knowledge, the City has only produced two documents in response to the request: a one-page service order dated November 28, 2022, and produced to Plaintiff on July 1, 2023, and the City's policy manual which was produced to Plaintiff on July 28, 2023.
5. That both of these documents were "immediately available" at the time the City received the subject request on May 8, 2023.
6. That she, as custodian, failed to ensure compliance with the deadlines mandated by the Louisiana Public Records Law instead deferring to the City Attorney to handle the matter as it was related to pending litigation in another matter.

Has a Mandamus Suit Been Confecked?

The City of Natchitoches argues that Plaintiff's mandamus suit must be denied because it responded timely and that Plaintiff "has everything." In *Lewis v. Morrell*, 2016-1055 (La. App. 4 Cir. 4/5/17), 215 So.3d 737, the Louisiana Fourth Circuit Court of Appeal set forth the six requirements for invoking the mandamus remedy under the Public Records Act:

- (1) a request must be made;
- (2) the requester must be a "person;"
- (3) the request must be made to a "custodian;"
- (4) the document requested must be a "public record;"
- (5) the document requested must exist; and
- (6) there must be a failure by the custodian to respond to the request.

Id. 742-44.

In this case, the plaintiff filed a writ of mandamus seeking the enforcement of his public records request to the City of Natchitoches custodian of records, City Clerk Stacy McQueary. The record further reveals that Ms. McQueary minimally, if at all, assisted in preparing the responses to the plaintiff's public record request by choosing to follow apparently established protocol by forwarding all public

records requests to the City's attorney, especially those relating to pending litigation. Ms. McQueary's testimony and the exhibits confirm that she received Mr. Paniotto's written public records request on May 8, 2023, a search was conducted on all documents related to what Mr. Paniotto requested and no documents existed but for two, a one-page service order dated November 28, 2022, and the City's policy manual. It is uncontested that the requested documents are in fact public records. Therefore, Defendants confirmed that the first, second, third, fourth, and fifth requirements of the public records request were satisfied.

However, in order for a mandamus judgment to be issued in this case, the sixth *Lewis* requirement necessitates that there be a failure by the custodian to respond to the request. *Id.* at 743. Here, for the reasons that follow, this court finds that that Defendants failed to respond to the request in the manner prescribed by La.R.S. 44:1 *et seq.* Therefore, all of the six requirements identified in *Lewis* for invoking the mandamus remedy under the Public Records Act were met.

Plaintiff asserts that the City violated the Public Records Act when it failed to timely and appropriately respond to his public records request, as required by La.R.S. 44:35(A). This court concurs.

A custodian of public records has a statutory duty to provide immediate access to public records if they are available. If the records cannot be produced immediately, the custodian must certify in writing that they are unavailable and arrange for access to the records within three business days. La.R.S. 44:33 B(1). If there is a question as to whether a requested record is public, the custodian must make a determination and notify the person requesting the record of its determination and the reasons therefor within three business days. R.S. 44:32(D).

Louisiana Revised Statutes 44:35(A) provides that:

A. Any person who has been denied the right to inspect, copy, reproduce, or obtain a copy or reproduction of a record under the provisions of this Chapter, either by a determination of the custodian or by the passage of five days, exclusive of Saturdays, Sundays, and legal public holidays, from the date of his in-person, written, or electronic request without receiving a determination in writing by the custodian or an estimate of the time reasonably necessary for collection, segregation, redaction, examination, or review of a records request, may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief, together with attorney fees, costs and damages as provided for by this Section, in the district court for the parish in which the office of the custodian is located.

Neither McQueary nor the City's attorney (1) allowed plaintiff access to the requested records within five days of his request, exclusive of Saturdays, Sundays, and legal public holidays, or (2) provided plaintiff with a written determination or estimation of time for inspection within those same five days. The facts show that the City failed to respond in any manner whatsoever until May 25, 2023, acknowledging for the first time Plaintiff's request, a period of 14 days exclusive of Saturdays, Sundays, and legal public holidays. In the City's initial tardy response, it requested an extension to June 5, 2023, by which it would have the information. On June 23, 2003, still awaiting that response, Plaintiff sent to the City an email firmly demanding response to the public records request no later than June 30, 2023. Again, the City remained silent. On Saturday, July 1, 2023, the City responded to the subject item #6 with nothing more than "please clarify this request."

This court concurs with Plaintiff's assessment that Item #6 is clear as written and that it is unreasonable that the City took nearly two months, to determine that the request required clarification. A written request for clarification was required no later than five days after the initial public records request was made. La.R.S.

44:35(A). Further, the City's claim for a delay seeking a "time frame" is weak given Item #3's rather similar document request for "all work orders, invoices, logs, time sheets[,] or other documents related to all work, maintenance, inspections performed by or on behalf of the City at or near the [sic] 400 Rapides Drive, Natchitoches, Louisiana[,] *from the present date, to as far back as the City has records of such activity.*" [Emphasis added] Defendants have offered no explanation why any clarification it required on July 1, 2023, was not also required and *acknowledged* on or before May 12, 2023, the 44:35(A) five-day deadline. Notwithstanding a cursory reading of Item #6 to reasonably discern that it requires no clarification, the vague response of "[p]lease clarify this request" failed to even obliquely hint at what vagaries puzzled the City in its attempt to honor the request thus delaying Plaintiff's attempt. The July 17, 2023 email from the City to Plaintiff (Plaintiff Exh. G), reveals that the City "would like to respond to #6 provided we have some type of time frame" providing not only a clue as to the clarification the City claims is needed, but that *the responsive information exists*. However, again, that reveal should have *and could have* been made within the statutory window after receipt of the Plaintiff's request.

Inspection of Public Records

In its pre-trial opposition memorandum of law, the City defended its actions claiming it required a "time frame" determination to honor the request:

The Natchitoches water system began in the 1990s. The water plant was built in the 1950s. For practical purposes, records were not kept prior to that time. The water system's record keeping was computerized in the 1990s. All paper records prior to that time have since been destroyed since it is beyond the retention policy. All of the Water Department's records are kept in one database organized by

each residence. All of the disconnect notices or work order are not kept together, but rather with each residence.

To comply with Plaintiff's request, an employee would have to access the file for each of the approximately 20,000 residences and businesses to compile the disconnect notice and work order for each since the system was computerized. The City estimates that, if the subject records did exist, it would take an employee at least a year to do nothing else but to access these records and compile the data that plaintiff is requesting for the city that literally is the oldest permanent settlement in the entire Louisiana Purchase.

Act 770 of the 2022 Regular Session amended La.R.S. 44:32 to provide that the custodian shall be permitted to make an inquiry regarding the specificity of the records sought by the applicant, if, after review of the initial request, the custodian is unable to ascertain what records are being requested. Accordingly, the City claims, it provided a "sensible response" to Mr. Paniotto's request when it asked for clarification on July 1, 2023. However, this explanation given in the City's pre-trial memorandum of law, one that this court finds relevant *and* responsive, was not relayed to Plaintiff in a written response, thus rendering the "[p]lease clarify this request" response quite non-responsive for the following reasons.

The Subject Records Exist with the City.

The enforcement provisions of La.R.S. 44:35 presuppose the existence of the records in the office of the custodian. *Nix v. Daniel*, 95-1393 (La.App. 1st Cir.2/23/96), 669 So.2d 573, *writ denied*, 96-0878 (La.10/25/96), 681 So.2d 360; *Revere v. Taylor*, 613 So.2d 738 (La.App. 4th Cir.1993), *writ denied* 615 So.2d 332 (La.1993). Moreover, whether civil penalties or damages may be awarded under La.R.S. 44:35(E)(1) is based on whether the custodian arbitrarily or capriciously withheld the requested records or arbitrarily or unreasonably failed to respond to the request as required by La.R.S. 44:32. The provisions in La.R.S.

44:32 address the duty of the custodian *to permit examination of public records* and its duty should it question whether a record is a public record. Thus, this statute, like the enforcement provisions under La. R.S. 44:35, presupposes the existence of the records in the office of the custodian.

Any unreasonably burdensome segregation of a public record in the custody or control of the person to whom a public records request is directed is addressed by La.R.S. 44:33(A)(2):

If, however, segregating the record would be unreasonably burdensome or expensive, or if the record requested is maintained in a fashion that makes it readily identifiable and renders further segregation unnecessary, the official shall so state in writing and shall state the location of the requested record.

Here, this court finds that the City failed to provide the notice ordered by La.R.S. 44:33 as to the myriad relevant reasons why the records could not be immediately produced. As the City stated in its opposition, the paper records were destroyed and the requested *collective* information lay within the record of each *individual* municipal address. It follows, *a fortiori*, that the requested information is in the possession of the City, but not in a form readily available. “[T]he request for production of information cannot be so burdensome as to interfere with the operation of the custodian's constitutional and legal duties.” *Zillow, Inc. v. Taylor*, 2021-739 (La.App. 3 Cir. 3/30/22), 350 So.3d 550, 555, citing *Williams Law Firm v. Bd. of Sup'rs of Louisiana State Univ.*, 03-79, p. 6 (La.App. 1 Cir. 4/2/04), 878 So.2d 557, 563. “The custodian need only produce or make available for copying, reproduction, or inspection the existing records containing the requested information, and is not required to create new documents in the format requested.” *Id.* at 563. Here, the City would have to gather data from the water system’s

database to build the record Plaintiff seeks, something outside the scope of what the public records law requires a custodian to do. However, the evidence adduced at trial shows that the City never once informed Plaintiff of these details nor provided a 44:33 written notice. It's empty "please clarify this request" response of July 1, 2023, and its misleading "the city does not have any documents in respect to number #6" of July 20, 2023, fail to give the details commanded by La.R.S. 44:33(A)(2), thus these responses lacked what a requester needed to facilitate the exercise of his rights granted under the Public Records Law.²

In further complication, the City, in its post-trial memorandum of law, offered Plaintiff personal access to the system to collect the data himself:

As plaintiff's counsel knows, the City of Natchitoches is not a metropolis with an enormous number of employees or resources. The limited City staff was asked regarding plaintiff's vast requests and it was reported that no such compilation of disconnect record exists. In any event, the City has agreed to allow plaintiff or his representative to come to a designated city office for access to a computer and instructions to attempt to locate the requested information. [Emphasis in the original]

Defendants' post-trial memo, p.3, ¶1.

However, no evidence of Defendant's offer to Plaintiff permitting him to view the documents was presented. Although this court finds that the City's July 1 & 20, 2023 responses lacking under Louisiana Public Records Law for this reason, La.R.S. 44:35(E)(1) does not authorize an award of civil penalties or damages for a violation of this notice provision.

Overstaying One's Extension.

² It is noted that the City was forewarned by Plaintiff with his advise stated in his July 27, 2023 email wherein he informed the City that "[t]he only questions are whether said documents are available in electronic format ..."

The City's mitigation claims include that the July 1, 2023 response was timely because it stipulated to two successive extensions with Plaintiff: one to June 5, 2023 and the other to June 30, 2023.³ This court would otherwise agree with Defendants' assessment *had the City responded within either extension*. It chose to remain silent. In this court's mind, the City's failure to respond *at all* within either of those extensions (and then to do so only at the foot-stomping insistence of the Plaintiff) suggests that the City had no good-faith intention of responding thus no extension existed.⁴ Defendants have made no showing explaining their failure to respond to either the June 5 or June 30 deadline.

The City claims a third extension when it stated that “[a]nother extension was provided by plaintiff on July 2, 2023 which extended the deadline to respond by July 10, 2023.” This court respectfully but steadfastly demurs. The July 2, 2023 communicate referenced by the City states in its entirety:

I received your correspondence yesterday (July 1) responding to my client's May 4th public records request. Respectfully, Item 6 of the Request is clear as written. Additionally, my client takes exception with the City waiting until July 1st to seek “clarification” regarding a request you received on May 4. On July 10 we will move forward with a mandamus suit to obtain guidance from the Court.

This court is hard-pressed to interpret, no matter how liberally, that this communicate is remotely suggestive that Plaintiff offered an extension (or tacitly consented to an extension by the City) for it to respond by July 10. Plaintiff's courtesy forewarning of a mandamus suit was by no means translative of another extension as Plaintiff's right to file a petition for writ of mandamus had already

³ The email communicates exchanged between the parties (Exhs. G, H) state that Mr. Washington was 24 hours late in meeting the June 30, 2023 deadline due to a “medical procedure.” However, no evidence or testimony was offered to show establishing this fact or how it caused a delay or why the letter drafted on Friday, June 30, 2023 (a business day) emailed mid-afternoon on Saturday, July 1, 2023 (a non-business day).

⁴ It is noted that good faith is not a consideration in a public record request.

ripened *and vested* on Monday, May 15, 2023, five days, exclusive of Saturdays, Sundays, and legal public holidays, from the date of May 8th request pursuant to La.R.S. 44:35(A). Therefore, the City's advance notice that Plaintiff would be filing a writ of mandamus on July 10, 2023,⁵ provided no putative safe-harbor extension. However, assuming *arguendo* that the City interpreted this as a *de facto* third extension, it nonetheless maintained its *modus operandi* by doing nothing as the City's next and final response to the request did not come until July 20, 2023, twenty days later.

"Immediately Available"

Plaintiff further asserts that Defendants violated the Public Records Law by not immediately providing him with the two records produced in response to the subject request, specifically, the one-page service order (dated November 28, 2022) and the City's policy manual, provided to the Plaintiff on July 1, and July 28, 2023, respectively. Again, this court concurs.

Louisiana Revised Statutes 44:33(B)(1) provides:

If the public record applied for is immediately available, because of its not being in active use at the time of the application, the public record shall be immediately presented to the authorized person applying for it. If the public record applied for is not immediately available, because of its being in active use at the time of the application, the custodian shall promptly certify this in writing to the applicant, and in his certificate shall fix a day and hour within three days, exclusive of Saturdays, Sundays, and legal public holidays, for the exercise of the right granted by this Chapter.

Ms. McQueary testified that she received the subject public records request on May 8, 2023, and that these two documents, the only documents produced responsive to Item #6, were in fact readily available on May 8, 2023, although she

⁵ Plaintiff actually fax-filed his petition for writ of mandamus a day later on July 11, 2023.

did not produce them until July 1 and 28, 2023, respectively; the latter *after* the mandamus suit was filed. Therefore, because these records were immediately available and not in active use at the time of the request, McQueary and the City failed to comply with La.R.S. 44:33(B) and, in turn, failed to comply with the requirements of La. R.S. 44:35(A), which provides that Plaintiff may “institute proceedings,” as he has done in this case.

Actual Damages-Prevailing Winds

Plaintiff demands attorney's fees and penalties as a result of the City's failure to comply with the Public Records Act. This court now thrice concurs.

Louisiana Revised Statutes 44:35 provides that:

A. Any person who has been denied the right to inspect or copy a record under the provisions of this Chapter, either by a final determination of the custodian or by the passage of five days, exclusive of Saturdays, Sundays, and legal public holidays, from the date of his request without receiving a final determination in writing by the custodian, may institute proceedings for the issuance of a writ of mandamus, injunctive or declaratory relief, together with attorney's fees, costs, and damages as provided for by this Section, in the district court for the parish in which the office of the custodian is located.

[....]

D. If a person seeking the right to inspect or to receive a copy of a public record prevails in such suit, he shall be awarded reasonable attorney's fees and other costs of litigation. If such person prevails in part, the court may in its discretion award him reasonable attorney's fees or an appropriate portion thereof.

The record shows that 18 days had passed before The City acknowledged Plaintiff's request⁶ and an additional 38 days for a response relating to the availability of the requested records,⁷ then an additional 27 days to conclude

⁶ May 8, 2023 to May 25, 2023.

⁷ May 25, 2023 to Jul 1, 2023, when the City requested “please clarify the request.”

receipt or response of the last of the requested records.⁸ Moreover, the last of the records requested that were in fact produced came *after* the mandamus suit was filed. The City's response came clearly beyond the statutory period provided for in La.R.S. 44:35(A). Louisiana Revised Statutes 44:35(E)(1) provides for actual damages "[i]f the court finds that the custodian arbitrarily or capriciously withheld the requested record or unreasonably or arbitrarily failed to respond to the request as required by La.R.S. 44:32."

As discussed in detail above, and contrary to the City's argument, neither McQueary nor the City responded within the statutory time delays or the purported extension of time to do so, *to wit*: June 5 and June 30. The City argues it met the June 30 deadline to respond in writing, but it did not - the City responded on July 1, 2023 (Plaintiff's Exh. E) with a letter merely dated June 30.

Further, the later-produced hardcopy document came after Plaintiff filed the instant mandamus suit. Therefore, Plaintiff is entitled to be awarded reasonable attorney fees and other costs of litigation as provided for in La.R.S. 44:35(D) which states:

If a person seeking the right to inspect, copy, or reproduce a record or to receive or obtain a copy or reproduction of a public record prevails in such suit, he shall be awarded reasonable attorney fees and other costs of litigation. If such person prevails in part, the court may in its discretion award him reasonable attorney fees or an appropriate portion thereof. (Emphasis added.)

The City contends that because Plaintiff was given the two hardcopy documents responsive to the request prior to commencement of the hearing, Plaintiff did not "prevail" in his suit and, therefore, was not entitled to attorney

⁸ July 1, 2023 to July 28, 2023, when Plaintiff received the policy manual.

fees. However, one of the requested records, the City's policy manual, was produced only *after* Mr. Paniotto's attorney was compelled to file suit pursuant to La.R.S. 44:35(A). For purposes of La.R.S. 44:35(D), the production of records *after* a plaintiff has filed suit is sufficient to establish that he "prevail[ed] in such suit." *Aswell v. Div. of Admin., State*, 2015-1851 (La.App. 1 Cir. 6/3/16), 196 So.3d 90, 94, writ denied sub nom. *Aswell v. Div. OP Admin.*, 2016-1263 (La. 11/7/16), 209 So.3d 102; *Heath v. City of Alexandria*, 2009-28 (La.App.3 Cir. 5/6/09), 11 So.3d 569, 572; *Johnson v. City of Pineville*, 2008-1234 (La.App. 3d Cir.4/8/09), 9 So.3d 313, 317; *Carolina Biological Supply Co. v. E. Baton Rouge Par. Sch. Bd.*, 2015-1080 (La.App. 1 Cir. 8/31/16), 202 So.3d 1121, 1126.

As the *Aswell* court reasoned, to hold otherwise,

...public records custodians would be allowed to deny access to public records until suit has been filed and after the requestor has incurred the costs of instituting proceedings, thereby unilaterally precluding the requestor any possibility of "prevailing" on his suit. This would hinder the fundamental right of the public to have access to public records, which is guaranteed by the constitution. (citations omitted)

Pending Litigation

The City further defends its actions arguing that there is pending litigation with the Plaintiff and the City was responding to discovery requests in that case that overlap with the subject public records request. Albeit an explanation, it does not doubly serve as a justification. The jurisprudence indicates that even in the instance of pending litigation, disclosure is still favored. In *Heath v. City of Alexandria, supra*, the Louisiana Third Circuit Court of Appeal found that the public records "pending claim" exemption codified in La.R.S. 44: 4(15) is not triggered by mere "placing the originals or copies thereof in the active litigation files of a city attorney." *Id.*, at 574. The *Heath* court reasoned:

Louisiana Revised Statutes 44:4(15) is designed to protect attorney work product and other materials created specifically for a particular claim. Had [Defendant] been concerned about the possible release of nonpublic documents contained in Johnson's files, La.R.S. 44:32(B) provides that "the custodian may separate the nonpublic record and make the public record available for examination."

Thus, the burden remains high to allow disclosure in the event of pending litigation.

In the matter *sub judice*, the issue was not whether the requested records were in active use by the City in its pending litigation with Plaintiff, but whether the rules of the Louisiana Public Records Law defer to the discovery rules of Louisiana Code of Civil Procedure in the event of pending litigation. Here, Plaintiff's public records request under La.R.S. 44:1 *et seq.* were the same or principally overlapped those he requested in discovery in the pending litigation. Given the great constitutional, legislative, and jurisprudential weight of public records disclosure, a defendant municipality must instantly and abruptly up its game when in the mist of pre-trial discovery tedium comes an envelope wrapped in a public records request. As noted by the *Heath* court, citing *Bauer v. Maestri*, 96-112 (La.App. 5 Cir. 6/7/96), 676 So.2d 1096, the Louisiana Fifth Circuit Court of Appeal opined that "[t]he rules of discovery do not appear to have any bearing on a member of the public's right of access under the Public Records Law." *Heath v. City of Alexandria*, 11 So. 3d 569, n.1. In *Bauer*, a parish employee who had pending litigation with Jefferson Parish, sought to compel production of various parish government documents. On appeal, Jefferson Parish argued that, because Bauer had originally sought the documents through discovery in connection with his ongoing lawsuit with the parish, the documents were exempt from disclosure

under the Public Records Law. The fifth circuit declined to accept such reasoning stating, “such a denial of discovery would not be dispositive of Bauer's right to access under the Public Records Law.” *Bauer v. Maestri*, 676 So.2d. at 1100.

Here, the City of Natchitoches erred by blurring and deferring the rules of the Public Records Law with and to the Code of Civil Procedure when attempting to respond to Plaintiff's request. It is for this reason that the City's argument and reliance on *Baker v. City of Leesville*, 2013-480 (La.App. 3 Cir. 11/20/13), 127 So.3d 107 fails claiming it initially responded to the public records request on May 12, 2023, not May 25, 2023. On May 12, 2023, the City's attorney authored an email to Plaintiff's counsel stating:

Per our 10.1 conference call this morning, we have granted an extension until May 26, 2023 for the City to answer the discovery from Cane River Parkland.

The City takes refuge in this May 12 - 26, 2023 discovery deadline claiming its May 25, 2023 public records response was timely, so it cannot be penalized or “be required to pay attorney fees given that it sought and obtain an extension and that such extension was still in effect when [the City] responded.” Again, neither the discovery rules of the Louisiana Code of Civil Procedure nor the Louisiana Rules for District Courts supplant the well-rooted constitutional rules of the Public Records Law.

Therefore, finding that Mr. Paniotto received readily available documents after the mandamus suit was filed, he is entitled to an award of reasonable attorney's fees and other costs of litigation in accordance with La.R.S. 44:35(D) associated with the mandamus suit.

Per-Day Civil Penalties

The statute provides for additional civil penalties only if the custodian arbitrarily or unreasonably failed to respond. *See Capital City Press, L.L.C. v. Louisiana State University System Bd. of Sup'rs*, 2013–2001 (La.App. 1st Cir.12/30/14), 168 So.3d 727, 743–44, *writ denied*, 2015–0209 (La.4/17/15), 168 So.3d 401. “The trigger for a discretionary award of civil penalties is the failure of the custodian to properly respond to a requester within the three-day statutory period.” *Stevens v. St. Tammany Par. Gov't*, 2017-0959 (La.App. 1 Cir. 7/18/18), 264 So.3d 456, 465, *writ denied*, 2018-2062 (La. 2/18/19), 265 So.3d 773; *Aswell v. Div. of Admin., State*, 2015-1851 (La.App. 1 Cir. 6/3/16), 196 So.3d 90, 95, *writ denied sub nom. Aswell v. Div. OP Admin.*, 2016-1263 (La. 11/7/16), 209 So.3d 102. The civil penalty provision applies “for each such day of such failure to give notification.” La.R.S. 44:35E(1). It does not apply to the time frame for producing the documents. *Capital City Press, L.L.C.*, 168 So.3d at 743. The trial judge must also find that the custodian's failure to respond to the requester was unreasonable or arbitrary. *Id.* at 743–44.

Here, as discussed above, the City failed to timely respond to Plaintiff's initial public records request, then were given two consecutive extensions which were ignored. The first response from the City remotely directed at the requested documents in Item #6 came on July 1, 2023, which this court finds considerably lacking. This court finds the 49-day delay (32 days exclusive of Saturdays, Sundays, and legal public holidays) in responding to Plaintiff unreasonable, thus Plaintiff is entitled to per-day civil penalties for this period as authorized by La.R.S. 44:35(E)(1).

“Liable In Solido”

Louisiana Revised Statutes 44:55(E)(2) provides:

The custodian shall be personally liable for the payment of damages (the damages provided for in R.S. 44:35(E)(1)), and shall be liable in solido with the public body for the payment of the requester's attorney's fees and other costs of litigation, except where the custodian has withheld or denied production of the requested record or records on advice of the legal counsel representing the public body in which the office of such custodian is located.... [Emphasis added]

As Ms. McQueary is the City's public records custodian and was following established protocol to blindly turn over all public records requests to the City's attorney for response, this court declares that she is neither personally liable or personally liable *in solido* with the City of Natchitoches. The applicable jurisprudence has held that the statutory scheme of the Public Records Act does not contemplate that a custodian who denies or withholds access to records in the course and scope of his employment or, as in the instant case, in her official capacity, is personally liable for attorney's fees and other costs of litigation. This provision was intended to provide an exception allowing the public body employing the custodian, or the custodian in his official capacity, to escape liability for the payment of attorney's fees and other costs of litigation solely because the custodian who denies or withholds access to records does so on the advice of legal counsel. *See Ferguson v. Stephens*, 92-2113 (La.App. 4 Cir. 8/19/93), 623 So.2d 711.

CONCLUSION

Defendants failed to timely respond to Mr. Paniotto's May 8, 2023 public records request and continued to do so until July 1, 2023, after it ignored two extensions of time to respond. It continued to fail to conclusively respond with a

written determination regarding the requested records until July 28, 2023, 82 days later when the City produced the policy manual and informing Plaintiff that no further records exist. It further failed in its obligation to inform Plaintiff in writing that the data he seeks must be compiled from each municipal address within the City of Natchitoches and to make that data accessible to him by fixing a time and date and manner for him to inspect those records. This 82-day delay is what the Louisiana Public Records Law was designed to prevent; to ensure “[t]he right of the public to have access to the public records [, which] is a fundamental right, and is guaranteed by the constitution.” *Title Research Corp. v. Rausch*, 450 So.2d 933, 936 (La.1984) (citing La.Const. art. 12, § 3). The Louisiana Supreme Court has made clear that “whenever there is any doubt as to whether the public has the right of access to certain records, the doubt must be resolved in favor of the public's right of access.” *Landis v. Moreau*, 00–1157, p. 4 (La.2/21/01), 779 So.2d 691, 694. The supreme court has also recognized the legislature's intent to provide the public with access to the public records in the least restrictive way possible. *Title Research Corp.*, 450 So.2d 933. “To allow otherwise would be an improper and arbitrary restriction on the public's constitutional rights.” *Id.* at 936. Members of the public should not be forced to institute legal proceedings to obtain, at the very least, a final written determination regarding their right of access to the requested records, as provided by the Public Records Law. In this case, it was necessary for Mr. Paniotto to institute a proceeding in accordance with La.R.S. 44:35(A) to assert his rights, and his cause of action for an award under La.R.S. 44:35(D) arose when the statutory time delays lapsed. *Johnson v. City of Pineville*, 08–1234 (La.App. 3 Cir. 4/8/09), 9 So.3d. 313.

Accordingly, Plaintiff is hereby awarded reasonable attorney fees in the amount of \$3,000.00 and all court costs associated with this litigation, pursuant to La.R.S. 44:35(D). Louisiana Revised Statute 44:35(E)(1) provides for actual and additional penalties where the custodian acted arbitrarily or capriciously in failing to respond to the public records request, so this court awards \$1,600.00, or \$50 per day for the collective 32 days, exclusive of Saturdays, Sundays, and legal public holidays, from and including May 13, 2023 to June 30, 2023, for the period Defendants failed to respond in writing to the subject records request.

DECREE

THEREFORE, BASED ON THE ABOVE FINDINGS OF FACT AND CONCLUSIONS OF LAW, IT IS ORDERED, ADJUDGED, AND DECREED THAT:

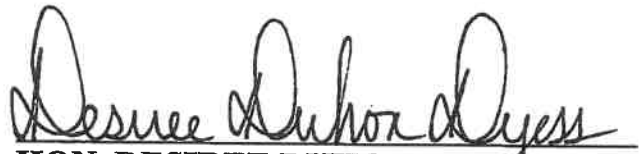
1. Plaintiffs Petition for Writ of Mandamus be and is hereby **GRANTED**, and the City of Natchitoches shall fully respond, in writing, to the May 8, 2023 public records request by fixing a day and hour within three days hereof, exclusive of Saturdays, Sundays, and legal public holidays, for Plaintiff to inspect the records holding the subject Item #6 data kept in the Natchitoches Water Department's computer database;
2. Judgment is rendered in favor of Plaintiff, Dmitry Paniotto, and against Defendant, City of Natchitoches, for reasonable attorney fees in the amount of **THREE THOUSAND DOLLARS AND NO CENTS (\$3,000.00 USD)**, and civil penalties in the amount of **ONE THOUSAND SIX HUNDRED DOLLARS AND NO CENTS (\$1,600.00 USD)** (or \$50 per day for the collective 32 days, exclusive of Saturdays, Sundays, and legal public holidays, from and including May 13, 2023 to June 30, 2023, for a total award of **FOUR**

THOUSAND SIX HUNDRED DOLLARS AND NO CENTS
(\$4,600.00 USD);

3. All court costs are cast to Defendant, the City of Natchitoches; and

IT IS FURTHER ORDERED that the Clerk of Court notify the parties of
the signing of these Written Reasons for Judgment.

THUS DONE AND SIGNED in Chambers, in the City and Parish of
Natchitoches, and State of Louisiana, on this, the 5th day of September, 2023.


HON. DESIREE DUHON DYESS
DISTRICT COURT JUDGE
DIVISION A

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