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NATCHITOCHES PARISH, LOUISIANA

**WILLIAM ALAN PESNELL
AND DOUGLAS WADE PESNELL**

DOCKET NO.: 94689-B

VERSUS

10TH JUDICIAL DISTRICT COURT

**RONNIE WILLIAMS, JR. AND
STACY MCQUERY**

NATCHITOCHE PARISH, LOUISIANA

WRITTEN REASONS FOR JUDGMENT

Findings of Fact.

On Friday, March 8, 2024, Co-Plaintiff W. Alan Pesnell authored and hand-delivered to Natchitoches City Attorney Alex Washington a letter requesting particular public records relative to grants applied for and received or denied during Mayor Williams' term of office. Exh P-1. The request consisted of three items:

- 1. Any and all grants applied for by the City of Natchitoches, Louisiana and any office, department, agency, person or other designee which is an extension of the City of Natchitoches, Louisiana or connected to Natchitoches, Louisiana in any way, where such grants were applied for on or after the date Mayor Williams took office.*
- 2. Any grants received by the City of Natchitoches and any office, department, agency, person or other designee which is an extension of the City of Natchitoches, Louisiana or connected to Natchitoches, Louisiana in any way, where such grants were approved and received on or after the date Mayor Williams took office.*
- 3. All records of monies received from grants by the City of Natchitoches and any office, department, agency, person or other designee which is an extension of the City of Natchitoches, Louisiana or connected to Natchitoches, Louisiana in any way, where such grants were approved and received on or after the date Mayor Williams took office, listed by the grant to which the funds were tied.*

On Thursday, March 14, 2024, attorney Morgan Briggs, of the Gold Weems law firm engaged to represent the Defendants, authored a letter informing Petitioners that it needed 30 days (or to April 14) "to collect, reexamine, review,

analyze, segregate and/or redact the potentially responsive documents and materials you have requested.” (*See* Exh.2, Pet’n.)

After 32 days had passed since the written request with no documents having been received from Defendants or an invitation from them for Plaintiffs to personally inspect the requested documents, the Pesnells filed the instant suit on Tuesday, April 9, 2024, at 12:58 p.m., claiming “neither the Mayor nor the Clerk have complied with the request” and thus sought an order compelling Defendants to produce copies of the records at issue or immediately allow for inspection of those records. Two days later, on Thursday, April 11, 2024, Defendants’ counsel authored a letter to Plaintiffs that included a thumb drive of “documents responsive to your request.” In Defendants’ answer, this is alleged to be in the “thousands.” (*See* Exh. 1, Def. Answer)

At trial called on Monday, April 15, 2024, the court recessed at the request of the parties in order for defense counsel to visit the City’s offices to determine if there were additional records that had not been produced. Defense counsel subsequently advised plaintiffs’ counsel and this court that there were in fact additional records, and it was agreed that all records would be provided by the close of business on Wednesday, April 17, 2023. The trial on the Motion to Compel was thus continued until Tuesday, April 23, 2024, at 9:00 a.m.

At trial on April 23, 2024, it was uncontested that Defendants did produce all remaining records by the April 17, 2024 deadline as promised.

LAW AND DISCUSSION

In addition to general mandamus provisions of Articles 3861, *et seq.*, of the Louisiana Code of Civil Procedure, the Public Records Law also specifically

provides for mandamus relief to a person whose public records request has gone unheeded. Louisiana Revised Statutes 44:35 provides:

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.

B. In any suit filed under Subsection A above, the court has jurisdiction to enjoin the custodian from withholding records or to issue a writ of mandamus ordering the production of any records improperly withheld from the person seeking disclosure. The court shall determine the matter de novo and the burden is on the custodian to sustain his action. The court may view the documents in controversy in camera before reaching a decision. Any noncompliance with the order of the court may be punished as contempt of court.

This provision also allows the award of attorney fees against the custodian, as well as actual damages should the court determine that the custodian arbitrarily and capriciously withheld the requested records, the payment of which the custodian is personally liable. La.R.S. 44:35(E)(2).

An informed citizenry provides a bulwark against official corruption and holds officials accountable, two elements essential to democratic government. *N.L.R.B. v. Robbins Tire & Rubber Co.*, 437 U.S. 214, 98 S.Ct. 2311 (1978). The Constitution of the State of Louisiana enshrines its citizens' right to access public records: "No person shall be denied the right to observe the deliberations of public bodies and examine public documents, except in cases provided by law." La.Const.

art. 12, § 3. Our state legislature has enacted statutes that facilitate free access to public records. Louisiana Revised Statutes 44:1(A)(2)(a) provides:

All books, records, writings, accounts, letters and letter books, maps, drawings, photographs, cards, tapes, recordings, memoranda, and papers, and all copies, duplicates, photographs, including microfilm, or other reproductions thereof, or any other documentary materials, regardless of physical form or characteristics, including information contained in electronic data processing equipment, having been used, being in use, or prepared, possessed, or retained for use in the conduct, transaction, or performance of any business, transaction, work, duty, or function which was conducted, transacted, or performed by or under the authority of the constitution or laws of this state, or by or under the authority of any ordinance, regulation, mandate, or order of any public body or concerning the receipt or payment of any money received or paid by or under the authority of the constitution or the laws of this state, are "public records", except as otherwise provided in this Chapter or the Constitution of Louisiana.

The Public Records Law requires that the custodian of a record prove that a record is not subject to inspection, copying, or reproduction. La.R.S. 44:31(B)(3). The "burden is on the custodian to sustain his action." La.R.S. 44:35(B); *Title Research Corporation v. Rausch*, 937-38 (La.1984), 450 So.2d 933. The Public Records Law is to be liberally construed "in favor of free and unrestricted access to public documents." *Shane v. Par. of Jefferson*, 14-2225, p. 9 (La. 12/8/15), 209 So.3d 726, 735. However, the custodian is only required to produce documents in his custody and is not required "to create new documents in the format requested." *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.

Mooted Mandamus

This court foregoes the analysis whether a suit for mandamus to compel performance of the Defendants in their official capacities as Mayor and City Clerk, as it is uncontested that the production of the requested documents was complete when tendered on Wednesday, April 17, 2024, eight days after filing the instant suit.

Tempus Fugit

Defendants timely informed Plaintiffs that they needed time to produce the requested request. Although a requested public record generally must be made available immediately, the law recognizes that some reasonable delay may be necessary to compile, review, and, when necessary, redact or withhold certain records that are not subject to production. *Krielow v. La. State Univ. Bd. of Sup'rs.*, 2019-0176 (La.App. 1 Cir. 11/15/19), 290 So.3d 1194; *Stevens v. St. Tammany Par. Govt.*, 2017-0959 (La.App. 1 Cir. 7/18/18), 264 So.3d 456, *rehearing denied, writ denied*, 2018-2062, (La. 2/18/19), 265 So.3d 773. Here, in Defendants' letter of March 14, 2024, the Defendants informed Plaintiffs that

...it is estimated it will take the City up to thirty (30) days to collect, reexamine, review, analyze, segregate and/or redact the potentially responsive documents and materials you have requested. The City hopes to provide a more detailed response to your request(s) sooner than the estimate thirty (30) days... (Exh.2, Pet'n.)

As stated in their filed Opposition to Exception of No Cause of Action and Prematurity, Plaintiffs objected arguing that Ms. McQueary and Mr. Williams

... did not need 30 days and that amount of time was unreasonable per se, given the election claims of the Mayor, and the timing of the run-off election. This is a public issue which had to be timely responded to in

order to make a difference. Furthermore, the 30 days ran, and no response was received until after filing suit. (Def. Opp'n to Exp'ns, p.2, ¶1.)

Pursuant to La.R.S. 44:35(A), any person who has been denied timely access to a requested record by a determination in writing by the custodian giving “an estimate of the time reasonably necessary for collection, segregation, redaction, examination, or review of a records request,” may not institute proceedings under the public records law. The key word is *reasonably*. Here, Defendants timely responded that such a request would take 30 days “*to collect, reexamine, review, analyze, segregate and/or redact the potentially responsive documents and materials*” the Pesnells requested. However, the City failed to meet not only their own 30-day time limit to produce the records, but they doubly failed in establishing the delay was reasonable *or necessary*. At trial, Defendants presented no evidence or testimony that such time was needed “*to collect, reexamine, review, analyze, segregate and/or redact the potentially responsive documents and materials...*” No testimony was presented either by the named Defendants (who were absent) or by any person charged with such collection, reexamination, reviewing, analyzing, segregation and/or redaction of the subject records. This absence of evidence allegedly necessitating the 30-day delay supports Plaintiffs’ allegation that such a lengthy delay was neither reasonable nor necessary because the same documents requested are the same documents from which the City of Natchitoches previously concluded and publicly announced in the preceding weeks that it received approximately 40 million dollars in grant funding.

Moreover, defense counsel stated on the record on April 15, 2024, as part of their stipulation to continue the trial for the City to comply with the request, that

they appreciated Plaintiffs' help to "narrow" and "specify" the documents requested to three groups of documents: (1) grant applications, (2) grant award letters, and (3) documents showing the flow of funds awarded to the City. To the degree that this may serve as an explanation for the City's delay in producing the requested documents, it does not. The subject public records request was already sufficiently "narrow" and "specif[ic]" as it requested (1) "*Any and all grants applied for by the City of Natchitoches...*" (2) "*Any grants received by the City of Natchitoches...*" and (3) "*All records of monies received from grants by the City of Natchitoches...*" As this court stated on the record, no such narrowing and/or specification was required in order for the City to perform as required under the Louisiana Public Records Law. Further, pursuant to La.R.S. 44:32(A)(2), the burden is on the *custodian* to make "reasonable attempts to narrow or specify the request with the requestor."

Attorney Fees and Costs

Counsel for Defendants argue that their letter to Plaintiffs dated March 14, 2024, wherein Plaintiffs were advised that it may take up to 30 days to produce the documents requested, or by April 14, 2024, and that the 30 days should begin to run from the date of the letter. This court demurs. First, the subject letter makes no such distinction. Second, there is no such default start date under the subject statute. Matter of fact, all time delays covered by the subject statute start with the date of the demand. *See* La.R.S. 44:32(D); 44:33(B)(1); 44:35(A)(1). Here, Mr. Alan Pesnell hand-delivered the written request to the Natchitoches City attorney March 8, 2024. After 30 days had passed without any documents being produced

or provided for inspection, Plaintiffs filed suit. It was only after the filing of this suit was a partial production provided on April 12, 2024, and a complete production provided on April 17, 2024. (*See* Tr. Exh. P-7)

It is noted that Defendants offered an exhibit showing that the March 8 written request was received by the City of Natchitoches on March 11, 2023. This court finds that for the purposes of the Louisiana Public Records Law, a written demand upon the City of Natchitoches was properly and statutorily made on March 8, 2024, when Mr. Pesnell personally hand-delivered the written request to Mr. Alex Washington, the Natchitoches City Attorney. Assuming *arguendo* that the City did in fact receive the Pesnell written request on March 11, 2024, and the 30-day delay thus ended on April 10, 2024, the same evidence adduced at trial establishes Defendants failed to produce the documents timely as the partial and then complete production occurred 2 and 7 days later, respectively.

For the purposes of the Louisiana Public Records Law, specifically, La. R.S. 44:35(D), the production of record after a plaintiff has filed suit is sufficient to establish that he “prevail[ed] in such suit.” *Aswell v. Div. of Admin.*, 2015-1851 (La.App. 1 Cir. 6/3/16), 196 So.3d 90, 94, *writ denied sub nom. Aswell v. Div. 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. 3 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. Therefore, any claim by Defendants of *no harm-no foul-no attorney fees* because Plaintiffs were given the requested documents prior to the April 23, 2024 hearing fail; the requested records were produced only after the Pesnells were forced to file suit. For purposes of La.R.S. 44:35(D), the

production of the records *after* the Pesnells filed suit is sufficient to establish that he “prevail[ed] in such suit.” To find 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.

Aswell, supra, at 94-95, citing La. Const. art. 12, § 3 and *Heath v. City of Alexandria*, 2009–28 (La.App. 3 Cir. 5/6/09), 11 So.3d 569, 572.

Therefore, finding that Plaintiffs have prevailed in this suit, the award of attorney fees and costs are appropriate.

Attorneys Fees to Mr. William Alan Pesnell Are Unavailable.

Because attorney's fees are awarded to a successful litigant so that his recovery might not be diminished by the expense of legal representation, to allow an attorney filing suit in proper person to recover attorney's fees when he has not actually incurred their expense gives him a monetary advantage unavailable to anyone hiring counsel. *See Abels v. Ungarino & Eckert, LLC*, 2006-0366 (La.App. 1 Cir. 12/28/06), 951 So.2d 318, 323, *writ denied*, 2007-0192 (La. 3/23/07), 951 So.2d 1106. *See also Lamz v. Wells*, 2005–1497 (La.App. 1st Cir.6/9/06), 938 So.2d 792, 798; *Cf. Hornot v. Cardenas*, 2010-1569 (La. App. 1 Cir. 3/25/11), 2011 WL 1103151 (unreported).

However, in this case, Mr. William Alan Pesnell, besides representing himself, also represented, along with Mr. Ronald R. Corkern, Mr. Douglas Wade Pesnell, who is not an attorney. Therefore, under these facts and given the

jurisprudence, this court finds it equitable that fifty percent (50%) of the attorney fees attributable to the representation of Douglas Wade Pesnell be awarded.

Civil Penalties Triggered.

Louisiana Revised Statute 44:35(E)(1) provides:

If 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 R.S. 44:32, it may award the requestor any actual damages proven by him to have resulted from the actions of the custodian except as hereinafter provided. In addition, if the court finds that the custodian unreasonably or arbitrarily failed to respond to the request as required by R.S. 44:32, it may award the requestor civil penalties not to exceed one hundred dollars per day, exclusive of Saturdays, Sundays, and legal public holidays for each such day of such failure to give notification.

A trial court may award the requestor actual damages if the court finds: (1) the custodian arbitrarily or capriciously withheld the requested record, or (2) arbitrarily or unreasonably failed to respond to the records request as required by La. R.S. 44:32. *Roper v. City of BR/Parish of EBR*, 16-1025 (La.App. 1 Cir. 3/15/18), 244 So.3d 450, 460. For purposes of determining whether the withholding of public records is arbitrary or capricious, the terms “arbitrary” and “capricious” mean willful and unreasoning action. *Id.*, *Carter v. City of Shreveport*, 51,589 (La.App. 2 Cir. 9/27/17), 244 So.3d 659; *Aswell*, 196 So.3d at 94. However, when there is room for two opinions, an action is not arbitrary or capricious when exercised honestly and upon due consideration, even though it may be believed an erroneous conclusion has been reached. *Roper*, 244 So.3d at 642; *Toups v. City of Shreveport*, 2010–1559 (La. 3/15/11), 60 So.3d 1215, 1217.

Here, Messrs. Pesnell assert that they are entitled to civil penalties arising from Defendants' deliberate delay to timely produce the subject records because of the pending run-off election. Specifically, the subject records should have been produced by April 8, 2024, the last day of Defendants' promise to perform. A partial response was tendered on April 12, 2024, and a full response was not made until April 17, 2024, 4 and 9 days after filing the instant suit, respectively. For the following reasons, this court finds such a delay was statutorily arbitrary and capricious.

First, at trial, the City did not provide evidence for either the initial 30-day delay or for the 10-day delay after suit was filed and declined to provide such argument in a post-trial memorandum of law. In fact, the requested documents were provided in a mere two days—April 16 and 17, 2024, after the case was called to trial on April 15, 2024. Additionally, the City, in their letter of March 14, 2024, seem to raise issues of fact whether the requested documents can be timely produced:

Further, your request(s), as written and at least in part, may infringe upon the constitutionally protected privacy interests of third parties. Your request(s), as written and at least in part, may concern certain information the City has a duty to segregate under Louisiana Law. Additionally, Louisiana law provides that "all existing records or records hereafter accumulated by the various services of the state or its subdivision which participate in federal programs or received federal grants may be destroyed after three years from the date of which the records were made..." Insofar as you seek record from more than three (3) years in the past, Louisiana law does not require the retention of such records.

Accordingly, as it relates to your request(s), it is estimated that it will take the City up to thirty (30) days to collect, examine, review, analyze, segregate, and/or redact the potentially responsive documents and materials you have requested. The City hopes to

provide a more detailed response to your request(s) sooner than the estimated thirty (30) days...

[Exh.2, Pet'n. (citations omitted)]

Yet, again, the City neither presented evidence nor argued at trial or in post-trial memorandum that any part of the delay was due to such reasons as containing non-public information, segregation, or records purged under an applicable records retention schedule. This court understands and concurs with Defendants' argument that given the alleged voluminous request, Defendants had an obligation to inform Plaintiffs all or some of these issues may come into play necessitating more time to produce the requested documents, as well as preserving any objections should a mandamus suit be filed. However, that proviso only supports Defendants' claim *as of March 14, 2024*, that there exists the *possibility* of a 30-day delay, but it does not explain the *35 day delay realized* thereafter to produce them. When queried by this court, Defendants' counsel stated that, to his knowledge, no records were segregated, redacted, or destroyed. Defendants presented no testimony or evidence that the records were in fact reviewed for segregation, redaction, or non-public information substantiating the delay or that the alleged volume of the requested records prevented timely production. Argument by counsel "is not evidence and cannot be considered as proof of fact." *Ortega v. Cantu Servs., Inc.*, 2017-1123 (La.App. 3 Cir. 5/2/18), 246 So.3d 827, 830, quoting *Taiae v. City of Baton Rouge*, 00-915, p. 4 (La.App. 1 Cir. 6/22/01), 808 So.2d 677, 680, n.3; *see also Maxie v. McCormick*, 95-1105 (La.App. 1 Cir. 2/23/96), 669 So.2d 562, *Harrison v. La. State Univ. Med. Ctr.*, 623 So.2d 707 (La.App. 4 Cir. 1993).

As Defendants had the burden of proof to show timely production or the alleged applicable exceptions thereto, their defenses fail on showing made.

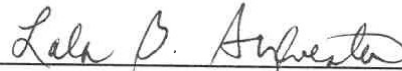
Therefore, considering that Defendants (1) presented no evidence or testimony explaining neither the initial 30-day delay nor the additional 10 days to produce the requested records, (2) produced all requested records nine days after the instant suit was filed, and (3) the request as written required no further clarification or specification nor was any further clarification or specification requested by Defendants, this court finds that Defendants arbitrarily and capriciously withheld the requested documents and thus Plaintiffs are awarded civil penalties of one hundred dollars per day, exclusive of Saturdays, Sundays, and legal public holidays, beginning April 8, 2024, the first day after the subject 30-day delay expired, and April 17, 2024, the day Defendants completed production of the requested documents.

CONCLUSION

Once a record requester prevails in a suit under the Louisiana Public Records Law, La.R.S. 44:35 mandates an award of reasonable attorney's fees and other costs of litigation. The statute further states that if the records requester is partially successful in its suit the court has discretion in awarding reasonable attorney's fees. La.R.S. 44:35(D). As to the Pesnell's public records request, Defendants violated the Public Records Law by unreasonably withholding records that were in its possession for more than 30 days. Because the Pesnells prevailed in their suit, *i.e.*, the subject records were produced after a cause of action ripened and was instituted under the Louisiana Public Records Law, this court awards Plaintiffs attorney fees and costs, including all court costs.

Pursuant to La.R.S. 44:35(E)(1), a trial court may award the requester civil penalties not to exceed one hundred dollars per day, exclusive of Saturdays,

Sundays, and legal public holidays for each such day of such failure to give notification pursuant to La.R.S. 44:32(D). As Defendants presented no evidence, testimony, or written legal argument in defense of their considerable delay in producing the requested document, civil penalties are proper. As it is within the court's discretion not only to award such civil penalties, but also in what amount up to one hundred dollars per day, this court finds the maximum is proper given this is the second time within one year the same Defendants have been found to have violated the subject statute. *See Paniotti v. City of Natchitoches*, 10th Judicial District Court of Louisiana, #94105-A, 9/5/23.



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