

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

2017 MAY 15 P 12: 58

NO. 17-4661

DIVISION **D**
MARJORIE ESMAN

CIVIL SECTION 12
DISTRICT COURT

VERSUS

LEON A. CANNIZZARO, JR.,

IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY

DALE N. ATKINS
CLERK, CIVIL DISTRICT COURT
402 CIVIL COURTS BUILDING
424 LLOYOLA AVENUE - ROOM 402
NEW ORLEANS, LA 70112
DEPUTY CLERK
504-407-0000

FILED: _____

Receipt Date 5/15/2017 1:05:00 PM

Receipt Number 028897

PETITION FOR WRIT OF MANDAMUS
PURSUANT TO THE LOUISIANA PUBLIC RECORDS LAW

Register CDCCASH1

Case Number 2017 - 04661

NOW INTO COURT, through undersigned counsel, comes petitioner Marjorie Esman, who requests, pursuant to Article XII, Section 3 of the Louisiana Constitution of 1974, La. R.S. 44:31 *et seq.*, and other applicable law cited herein, that this Court issue a Writ of Mandamus directing Leon Cannizzaro, in his official capacity as records custodian for the Office of the District Attorney for Orleans Parish, to provide Petitioner with public records in his possession.

Grand Total \$ 512.00

Amount Received \$ 512.00

Balance Due \$ 0.00

Change Due \$ 0.00

Payment/Transaction List

In addition, Petitioner seeks penalties for violation of the State public records law

Item	Amount	Paid	Bal
Petition for Mandamu	\$444.50	\$444.50	\$0.00

In support of this Petition, Petitioner states the following:

Judicial College \$0.50 \$0.50 \$0.00

Building Fund Fee \$25.00 \$25.00 \$0.00

Indigent Legal Fee \$10.00 \$10.00 \$0.00

Petitioner Marjorie Esman is the Executive Director of the American Civil Liberties

Exhibits (Paper) \$8.00 \$8.00 \$0.00

Union and American Civil Liberties Union Foundation of Louisiana in New Orleans.

2.

Defendant Cannizzaro is the District Attorney for the Parish of Orleans and the records custodian for the Office of the District Attorney for the Parish of Orleans.

3.

On April 26, 2017, Ms. Esman learned through media reports that prosecutors employed by Defendant have engaged in the practice of issuing to witnesses documents titled "subpoena" that were not authorized by a judge or issued by a clerk of court.¹

¹ Maldonado, Charles, "Orleans Parish prosecutors are using fake subpoenas to pressure witnesses to talk to them," THE LENS, April 26, 2017, at <http://thelensnola.org/2017/04/26/orleans-parish-prosecutors-are-using-fake-subpoenas-to-pressure-witnesses-to-talk-to-them/>, last viewed May 12, 2017.

VERIFIED
CEDERICK FAVAROTH

4.

The so-called “fake subpoenas” carried a notice warning that “A FINE AND IMPRISONMENT MAY BE IMPOSED FOR FAILURE TO OBEY THIS NOTICE.”²

5.

Ms. Esman seeks to discover the scope of this practice. Specifically, she wants to determine how widespread the practice has been within the office of Defendant. To that end, she drafted a public records request to the Office of the District Attorney.

6.

In a letter dated May 5, 2017, attached hereto as Exhibit A, Ms. Esman requested:

Records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by your office who have ever authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge, meaning they were not issued by the Clerk of Court and/or signed by a judge.

7.

On May 8, Defendant responded by letter, attached hereto as Exhibit B, stating that the Orleans Parish District Attorney’s Office “does not maintain” the requested records. The response continues to allege that because it “does not maintain separate records of subpoenas, the District Attorney’s Office is not required to compile” the requested names.

8.

Defendant also asserted that he is relieved of the burden to make records available for inspection because doing so “would be unreasonably burdensome or expensive.” The request “involves the review of literally thousands of closed files, a substantial number of which are stored off-site,” Defendant stated, adding that compliance would require his office to “manually review thousands of files stored on premises and off-site, the retrieval fee for which is \$8.10 per file.”

9.

For the above-cited reasons, Defendant denied the request because it “would be unreasonably burdensome.”

10.

The Office of the District Attorney has stated publicly, through First Assistant District Attorney Graymond Martin, that the office has no records maintenance policy with respect to the so-called “fake subpoenas.” Martin told a reporter there “was no formal system of keeping

² *Id.*

record of them. They were issued by individual prosecutors who decided on their own whether to put them in case files.”³

11.

Petitioner submits that Defendant arbitrarily and capriciously denied her request. His response does not address the specific request, which did not seek the subpoenas themselves; instead, Defendant appears to have issued a formulaic denial that does not comply with Louisiana’s public records law.

12.

Louisiana’s public records law provides that “[a]ll persons and public bodies having custody and control of any public record” must preserve the public record “for a period of at least three years from the date on which the public record was made.” La. R.S. 44:36(A). A prosecuting agency’s public records “pertaining to a criminal prosecution that results in a conviction ... shall be retained for a period of three years[.]” La. R.S. 44:36(E)(1).

13.

When a request is made for a record to which the public is entitled, a responsible official such as Defendant “shall have the record segregated from other records under his custody so that the public can reasonably view the record.” La. R.S. 44:33(A)(1). If segregating the record would be “unreasonably burdensome or expensive,” the official shall “so state in writing and shall state the location of the requested record.” La. R.S. 44:33(A)(2).

14.

If a record is not in a public official’s custody or control, the law provides that the official shall “state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person then custody of the record and the manner and method in which, and the exact time at which it was taken from his custody or control. He shall include ... ample and detailed answers to the inquiries of the applicant which may facilitate the exercise” of the public’s right to access those records. La. R.S. 44:34.

15.

Defendant’s response to Petitioner’s request violates Louisiana’s public records law. He does not claim that the requested records do not exist, nor does he claim that they are out of his

³ Sledge, Matt, “New Orleans prosecutors end use of controversial ‘DA subpoenas’ on witnesses,” THE NEW ORLEANS ADVOCATE, April 26, 2017, at http://www.theadvocate.com/new_orleans/news/courts/article_c5b44baa-2ab3-11e7-911d-2b796cd09c6e.html, last visited May 12, 2017.

custody or control. He does not specify their location other than to say they are stored "on premises and off-site." He does not provide ample and detailed answers to Petitioner's request to facilitate the exercise of her right to access the records. He claims that his office does not maintain them, and that obtaining them would be unreasonably burdensome.

16.

A writ of mandamus "may be directed to a public officer to compel the performance of a ministerial duty required by law," La. C.C.P. Art. 3863. This writ is appropriate to compel Defendant to abide by his statutory duty to produce the records requested by Petitioner.

17.

Suits filed under Louisiana's public records law "shall be tried by preference and in a summary manner." La. R.S. 44:35(C).

18.

The burden of proving "that a public record is not subject to inspection, copying, or reproduction shall rest with the custodian." La. R.S. 44:31(B)(3).

19.

The public's right of access to public records is a fundamental right, guaranteed by the constitution. *Title Research Corp. v. Rausch*, 450 So.2d 933, 936 (La. 1984) (citing La. Const. art. 12, § 3, which must be "construed liberally in favor of free and unrestricted access to the records[.]") Access can be denied "only when a law, specifically and unequivocally, provides otherwise." *Id.* "Whenever there is 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 to see." *Id.*

20.

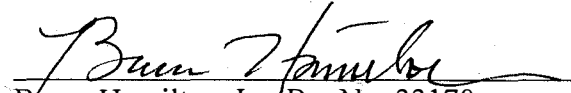
Petitioner submits that Defendant has an obligation to maintain the records sought and to produce them or make them available for inspection. Rather than comply with Petitioner's request or attempt to comply, Defendant has obfuscated the existence and/or location of the records sought.

WHEREFORE, Petitioner prays:

1. That a writ of mandamus be issued directing Defendant to disclose the records requested or show cause why he should not be ordered to do so, and

2. For an award of attorney's fees, damages, sanctions, and costs as provided by law, including specifically penalties for intentional, unreasonable, and arbitrary denial of a valid public records request pursuant to La. R.S. 44:35(E) and 44:37.

Respectfully submitted,



Bruce Hamilton, La. Bar No. 33170
ACLU Foundation of Louisiana
P.O. Box 56157
New Orleans, Louisiana 70156

[REDACTED]
[REDACTED]

Counsel for Marjorie Esman

Sheriff please serve:

Leon A Cannizzaro, Jr.
In His Capacity as District Attorney, Parish of Orleans
619 S. White Street
New Orleans, LA 70119

CIVIL DISTRICT COURT FOR THE PARISH OF ORLEANS

STATE OF LOUISIANA

FILED
2017 MAY 15 P 12:58

NO. _____

DIVISION _____

SECTION:
DISTRICT COURT

MARJORIE ESMAN

VERSUS

LEON A. CANNIZZARO, JR.,

IN HIS OFFICIAL CAPACITY AS ORLEANS PARISH DISTRICT ATTORNEY

FILED: _____

DEPUTY CLERK

ORDER

Considering the foregoing Petition for Writ of Mandamus filed herein by the Petitioner, Marjorie Esman;

IT IS HEREBY ORDERED that the Defendant, Leon A. Cannizzaro, Jr., in his official capacity as Orleans Parish District Attorney, be served with the foregoing Petition and a copy of this Order, and that an alternative writ of mandamus shall issue herewith, directing and compelling Defendant to immediately produce the public records requested, or show cause to the contrary.

IT IS FURTHER ORDERED that a hearing shall be held on the _____ day of _____, 2017, at _____ o'clock ____ .m., and Defendant shall show cause as to:

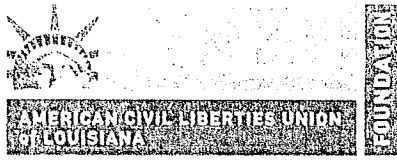
- Why said records should not be produced as requested, and why the alternative writ of mandamus issued by this Order shall not be made peremptory and permanent;
- Why Defendant should not be taxed with costs and attorneys' fees, as well as penalties for an arbitrary and capricious failure to comply with the law, and all other equitable and just relief as may be permitted by law.

New Orleans, Louisiana, this _____ day of _____, 2017.

JUDGE

PLEASE SERVE:

Leon A. Cannizzaro, Jr.
In His Capacity as District Attorney, Parish of Orleans
619 South White Street
New Orleans, Louisiana 70119



FILED

2017 MAY 15 P 12: 59

May 5, 2017
John Rohr, Custodian of Records
Orleans Parish District Attorney
619 S. White Street
New Orleans, LA 70119

CIVIL
DISTRICT COURT

Via postal mail and fax (504) 571-2928

Re: Public Records Request

Dear Mr. Rohr,

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
LOUISIANA
PO BOX 58157
NEW ORLEANS, LA 70156
7704 522 0617
WWW.LAACLU.ORG

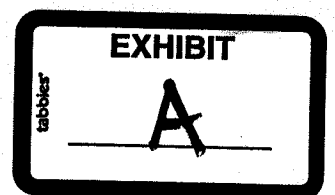
Pursuant to the Public Records Act of Louisiana, R.S. 44:1 et seq., we request copies of the public records described below. For purposes of this request, the term "documents" includes, but is not limited to, any memoranda, letters, electronic mail or "e-mail," handwritten, typed, or electronic notes, recordings of any kind and in any form (video, audio, digital, etc.)

1. Records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by your office who have ever authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge, meaning they were not issued by the Clerk of Court and/or signed by a judge.

Under the provisions of R.S. 44:32, if you raise a question as to whether any of the records requested is a public record, you are required to notify in writing the person making the request of your determination and the reasons, including the legal basis therefor. Notice shall be made within three days of the receipt of the request, exclusive of Saturdays, Sundays and legal public holidays. If you claim exemption for a record or records under the Public Records Act, or any other statute, include for each record the section of law under which exemption is claimed and your reasons for believing the statute is applicable to the record.

Under the provisions of R.S. 44:33, if the public record is not immediately available, you are required to certify this in writing promptly, and in your certificate fix a day and hour within three days, exclusive of Saturdays, Sundays and legal public holidays, for the exercise of the right granted in the Public Records Act.

Under R.S. 44:34, "If any public record applied for by any authorized person is not in the custody or control of the person to whom the application is made, such person shall promptly certify this in writing to the applicant, and shall in the certificate state in detail to the best of his knowledge and belief, the reason for the absence of the record from his custody or control, its location, what person has custody of the record and the manner and method in which, and the exact time at which it was taken from his custody and control. He shall include in the certificate



VERIFIED
CEDERICK FAVAROTH

May 5, 2017

Page 2 of 2

ample and detailed answers to inquiries of the applicant which may facilitate the exercise of the right granted by this Chapter.”


If you are invoking R.S. 44:34 to deny this request, please answer the following questions in detail.

1. Is a copy of the requested public record usually located in your office?
2. Why is your copy of the requested public record absent from your office?
3. Where is your copy of the requested public record?
4. Who has received a copy of the requested public record?
5. How and from whom did the present custodian gain control of your copy of the requested public record?
6. What was the exact time your copy of the public record was taken from your custody and control?
7. When will your copy of the requested public record be returned to your office?
8. Is there any other public official who has a copy of the requested record?
9. What is/are the name(s) of anyone who has a copy of the requested public record?
10. What is/are the location(s) where the public record can be viewed?
11. What are the hours and dates when the requested public record can be viewed?

AMERICAN CIVIL
LIBERTIES UNION
FOUNDATION OF
LOUISIANA
67 BOY 61ST
NEW ORLEANS, LA 70156
TR 04 22 0617
WWW.AACLU.ORG

Please contact us at the number above when the requested materials are ready to be mailed. We request that any and all documents that are available be made available in electronic form. This request includes any documents that are in paper form but that can be scanned to electronic form, as well as digital copies of any recordings. For those documents that cannot be produced in electronic form, if the cost of copies does not exceed \$50.00, proceed without further approval and send us an invoice with the records; otherwise, call to advise and gain approval to proceed. As you are aware, failure to abide by the Public Records Law may result in certain penalties and the award of attorney's fees. We trust that you will comply without the necessity of any further action on our part.

Sincerely,


Marjorie Esman
Executive Director



Leon A. Cannizzaro, Jr.
DISTRICT ATTORNEY

FILED
2017 MAY 15 P 12:59
CIVIL
DISTRICT COURT

May 8, 2017

Marjorie Esman
Executive Director
American Civil Liberties Union
Foundation of Louisiana
P.O. Box 56157
New Orleans, LA 70156

Re: Public Records Request

Dear Ms. Esman:

This correspondence comes in response to your letter directed to John Rohr¹ dated May 8, 2017. In your letter, you request a copy of "records sufficient to show the names and Louisiana Bar Association numbers of any and all lawyers currently employed by your office who have ever authorized or sent documents titled, styled, or identified as subpoenas that were not authorized by a judge, meaning they were not issued by the Clerk of Court and/or signed by a judge."

Pursuant to LSA-R.S. 44:32, you are advised that the Orleans Parish District Attorney's Office does not maintain a copy of documents titled, styled, or identified as subpoenas in a particular file or location, nor does the District Attorney's Office maintain a list of documents titled, styled, or identified as subpoenas. Under the Public Records Law, a records custodian is not required to compile a list in order to respond to a public records request. Rather, the custodian need only make the record available in the particular format in which it is maintained. *See Nungesser v. Brown*, 667 So.2d 1036 (La. 1996), *rehearing denied*, 671 So.2d 929 (La. 1996); *Lewis v. Morrell*, 2017 WL 1247926 (La. App. 4th Cir. April 5, 2017); *Beckett v. Serpas*, 112 So.3d 348, 353 (La. App. 4th Cir. 2013); *Williams Law Firm v. Bd. of Sup'rs of Louisiana State Univ.*, 878 So.2d 557, 563 (La. App. 1st Cir. 2004). *See also* Jack M. Weiss and Mary Ellen Roy, *OPEN GOVERNMENT GUIDE: OPEN RECORDS AND MEETINGS LAWS IN LOUISIANA*, 16 (6th ed. 2011). With respect to your request, since the District Attorney's Office does not maintain separate records of subpoenas, the District Attorney's Office is not required to compile

¹ Your letter is mistakenly directed to John Rohr as custodian of records for the Orleans Parish District Attorney's Office. You are advised that John Rohr is not the legal custodian of records of the Orleans Parish District Attorney's Office. The legal custodian of records of the District Attorney's Office is the Honorable Leon A. Cannizzaro, Jr.



Marjorie Esman
May 8, 2017
Page 2

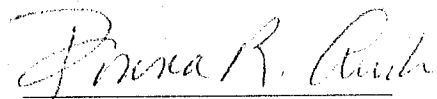
a list of lawyers currently employed by the District Attorney's Office who may have ever authorized or sent subpoenas that were not authorized by a judge.

Under the Public Records Law, a public official is relieved of the obligation to make a public record available for inspection when doing so would be unreasonably burdensome or expensive. See LSA-R.S. 44:33(A)(2). It is well established that the examination of public records or requests for reproduction cannot be so burdensome as to interfere with the operation of the custodian's constitutional and legal duties. *Beckett v. Serpas*, 112 So.3d 348, 353 (La. App. 4th Cir. 2013); *Vandemweghe v. Parish of Jefferson*, 70 So.3d 51, 58 (La. App. 5th Cir. 2011), *writ denied*, 71 So.3d 289 (La. 2011); *Elliott v. Dist. Attorney of Baton Rouge*, 664 So.2d 122 (La. App. 1st Cir. 1995), *writ denied*, 664 So.2d 440 (La. 1995).

In the present case, the request for records of documents titled, styled, or identified as subpoenas, particularly in light of the fact that the request involves a review of literally thousands of closed files, a substantial number of which are stored off-site. Therefore, compliance with your request would require that this Office manually review thousands of files stored on premises and off-site, the retrieval fee for which is \$8.10 per file. Given the potential volume of the records that would have to be reviewed in order to respond to your request, the fact that the records are not readily identifiable and locatable, and the retrieval costs involved, the District Attorney's Office submits that obtaining the records requested by you and preparing them for public review, including redacting and removing privileged information and documentation therefrom and determining whether there is a potential for further criminal litigation, would be unreasonably burdensome.

For the reasons discussed above, your request is denied at this time.

Respectfully submitted,



Donna R. Andrieu
Assistant District Attorney