

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

FILED
2017 MAY 12 A 8:50
CIVIL
DISTRICT COURT

EMILY WASHINGTON,

Plaintiff

vs.

Civil Action No.

LEON CANNIZZARO,

Defendant.

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

Now into Court comes petitioner Emily Washington, who requests, pursuant to Article XII, Section 3 of the Louisiana Constitution of 1974, La. R.S. 44:35(A), 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 Plaintiff with public records in his possession. In addition, Plaintiff seeks penalties for violation of the State public records law. Although Plaintiff is entitled to an expedited hearing pursuant to La. R.S. 44:35(C) and Louisiana Code of Civil Procedure art. 2591, 2595, Plaintiff instead seeks to be able to conduct discovery prior to a hearing.

In support of this Petition, Plaintiff states the following:

1.

Plaintiff Emily Washington is an attorney with the Roderick and Solange MacArthur Justice Center in New Orleans.

2.

Defendant Cannizzaro is the District Attorney for the Parish of Orleans.

3.

Article 66 of the Louisiana Code of Criminal Procedure enables offices of district attorneys to obtain subpoenas for documents or people from a court *ex parte*. That provision states:

Upon written motion of the attorney general or district attorney setting forth reasonable grounds therefor, the court may order the clerk to issue subpoenas directed to the persons named in the motion, ordering them to appear at a time and place designated in the order for questioning by the attorney general or district attorney respectively, concerning any offense under investigation by him. The court may also order the issuance of a subpoena duces tecum. Service of a subpoena or subpoena duces tecum issued pursuant to this Article upon motion of

the attorney general may be made by any commissioned investigator from the attorney general's office, or in conformity with Article 734 of this Code.

La. Code Crim. Proc. Ann. art. 66. This provision of state law entrusts individual district attorneys with sweeping authority to subpoena people and documents with no opportunity for affected individuals to be heard in opposition.

4.

Article 66 is facially unconstitutional insofar as it purports to authorize the seizure of personal property via subpoena duces tecum upon *ex parte* showing of “reasonable grounds” by the district attorney, rather than probable cause. Because the Article purports to authorize the issuance of a seizure warrant without a showing of probable cause, it is a violation of the Fourth Amendment.

5.

In May of 2015 attorneys with the Roderick & Solange MacArthur Justice Center (“MJC”) in New Orleans became concerned that the Office of the District Attorney for Orleans Parish was abusing its authority pursuant to Article 66.

6.

Specifically, MJC attorneys were concerned as to whether the Office of the District Attorney was unilaterally subpoenaing documents, including individual phone records, even where no criminal prosecution was intended or subsequently occurred.

7.

In an attempt to ascertain the frequency with which the Article 66 power was utilized and to evaluate the constitutionality of the actions of the Office of the District Attorney, Plaintiff Washington sent a public records request to the Office of the District Attorney.

8.

That records request, dated May 7, 2015, and attached hereto as Exhibit A, requested:

From January 2013 to the present, all records of any subpoenas and subpoenas duces tecum sought by the Orleans Parish District Attorney pursuant to the power granted by Article 66 of the Louisiana Code of Criminal Procedure. This request includes but is not limited to:

1. any motion or request for subpoenas or subpoenas duces tecum sought pursuant to Art. 66 and/or presented to any section of the Orleans Parish municipal court, magistrate court, or criminal district court;
2. any subpoenas or subpoenas duces tecum issued pursuant to Art. 66 by the clerk of any section of the Orleans Parish municipal court, magistrate court, or criminal district court or issued by the Office of the Clerk of Court for Orleans Parish municipal court, magistrate court, or criminal district court;

3. any records of service of subpoenas or subpoenas duces tecum issued pursuant to Art. 66 and served by representatives/commissioned investigators of the Orleans Parish District Attorney, by representative/commissioned investigators of the Louisiana Office of Attorney General, or by the Orleans Parish Sheriff's Office;
4. any records of the return of subpoenas or subpoenas duces tecum issued pursuant to Art. 66;
5. any records of the Orleans Parish District Attorney moving for contempt of court for failure or refusal to comply with a subpoena or subpoena duces tecum issued and served pursuant to Art. 66.

9.

On May 11, 2017 the Office of the District Attorney responded by letter, stating that the District Attorney does not “maintain a database that would allow it to determine the location of records of any subpoenas and subpoenas duces tecum sought by the Orleans Parish District Attorney pursuant to the power granted by Article 66” And, “the District Attorney’s Office cannot provide the information you seek.”

10.

Plaintiff believed this response to be a violation of the Defendant’s obligation to identify and produce public records under state law. Accordingly, she continued to request the documents from various employees of the Defendant’s office via follow-up telephone calls. She also sent a letter requesting a schedule to review closed files and refused cases. Exhibit B.

11.

On June 24, 2017 the Office of the District Attorney responded that production of the requested records would be unduly burdensome because it would require the review of thousands of closed files, many of which are stored off site. The Defendant imposed a retrieval fee of \$8.10 per file for the “thousands” of files ostensibly required to review files to locate Article 66 subpoenas. Exhibit C. This is a violation of the state Public Records statute, which does not allow charges to be imposed for custodian’s labor involved in retrieving records. La. R.S. 44:32(C)(3).

12.

Citing to La. R.S. 44:33 in denying Plaintiff access to the public records requested, the Office of the District Attorney stated: “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.” That is not what the law provides. La. R.S. 44:33 instead requires that where

segregating a public record from other records held by a custodian would be unreasonably burdensome or expensive, the official “shall state the location of the requested record.”

13.

Here, instead of accommodating Plaintiff’s request to schedule review of the requested records, the Office of the District Attorney directed Plaintiff to the Clerk of Court: “the subpoenas/subpoenas duces tecum issued at the request of the Orleans Parish District Attorney’s Office are part of the criminal court record, and therefore, the Clerk of Court of the Orleans Parish Criminal District Court is the proper custodian of these records.” Exhibit C.

14.

Plaintiff was concerned that if no prosecution resulted from the subpoena, it would not in fact be contained in any court file, because there would be no court file. Therefore, these documents had to be in the possession of the Office of the District Attorney. Despite multiple conversations with representatives from the Office of the District Attorney, Defendant did not provide Plaintiff with access to review the files in the possession of the office to find the subpoenas. Instead, Plaintiff was informed that any subpoena would be located at the courthouse, as a judge would have signed it and the clerk would retain a copy as custodian of criminal court records.

15.

Plaintiff also served public records requests seeking Article 66 subpoenas on every section of Criminal District Court for the Parish of Orleans, as well as upon the Clerk of Court for Criminal District Court, Arthur Morrell.

16.

The Judges at Criminal District Court responded collectively through the Office of the Judicial Administrator, which stated simply “these records are not in our custody.” Exhibit D.

17.

Clerk of Court Arthur Morrell responded essentially that the Clerk’s office had no way to identify subpoenas issued pursuant to Article 66, that there were often dozens of subpoenas in every criminal file, and that 15,000 annual cases that would need to be reviewed. Exhibit E.

18.

Thus, Plaintiff Washington was unable to obtain the documents she sought.

19.

Due to recent reporting by investigative online media outlet The Lens, Plaintiff has now learned that the District Attorney's response directing her to contact the court for records was knowingly false and intentionally misleading.

20.

It has been disclosed that the Office of the District Attorney has or had a practice of completing Article 66 subpoenas and serving them upon witnesses without securing a judge's signature. This deceptive practice was used to secure the presence of witnesses. It is unclear whether the practice was used to obtain documents.

21.

In response to her May 2015 public records request, Plaintiff was directed by the Defendant to seek Article 66 subpoenas—records created by his office—from the Criminal District Court. However, at least some portion of the subpoenas were never presented to a court for signature. Therefore, the Defendant misdirected Plaintiff in suggesting that she could locate these materials at the Criminal District Court. This is a violation of the Public Records Act obligation to identify the whereabouts of sought records. La. R.S. 44:34; 44:33(A)(2).

22.

Due to recent reporting by the New Orleans Advocate, Plaintiff has now additionally learned that Defendant's direction that she physically search closed files for the subpoenas also was knowingly false and intentionally misleading.

23.

The Office of the District Attorney has now publicly stated that there was no records maintenance policy with regard to these subpoenas.

"Martin said he did not know how often the old notices were sent to witnesses because there was no formal system of keeping record of them. They were issued by individual prosecutors who decided on their own whether to put them in case files."¹

This public statement is consistent with what Plaintiff was informally told when she attempted to locate the documents almost exactly two years ago—if no criminal

¹ 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 viewed May 10, 2017.

prosecution resulted from the investigation, how the subpoenas were kept was up to the individual assistant district attorney.

24.

It is now clear that Article 66 subpoenas—fraudulent and real—were not maintained as legally required. No one can locate them. If they cannot be found, they have not been legally preserved. This violates La. R.S. 44:36(A), (E).

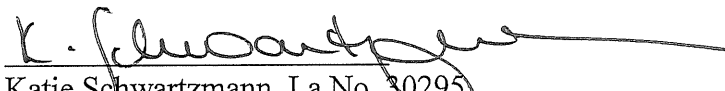
25.

The public interest in this matter is great. Defendant Cannizzaro is a public official. He is entrusted with enormous responsibility by the public. Taxpayers supply his office with millions of dollars annually. He and his staff are accountable to the public and the public has an interest in inspecting his records. It appears that Defendant does not take his obligations under the public records law seriously as seemingly no effort was made to candidly respond to Plaintiff's request. Two years after Plaintiff's request she learned through the media that the records are in fact not located where Defendant asserted they are. Defendant intentionally obfuscated the whereabouts of the requested records by requiring the Plaintiff to seek records—created by his office—from other government actors, knowing that those actors would not actually possess the documents sought. Defendant also knew that even a review of all of the office's closed files would not net the records sought where there in fact was no policy as to where the individual ADA's house or maintain the requested public records.

WHEREFORE, Plaintiff prays:

1. That, in due course after discovery, a writ of mandamus be issued directing the Defendant to disclose the records requested, including all subpoenas issued pursuant to Article 66—both real and fraudulent—or show cause why he should not be ordered to do so;
2. For an award of attorneys' 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. Stat. Ann. § 44:35 and La. Stat. Ann. § 44:37.

Respectfully Submitted,



Katie Schwartzmann, La No. 30295
Roderick & Solange MacArthur Justice Center
4400 S. Carrollton Ave.
New Orleans, La 70119
(504) 620-2259
Katie.schwartzmann@macarthurjustice.org

Counsel for Emily Washington

Sheriff please serve:

Leon Cannizzaro
District Attorney, Parish of Orleans
619 S. White Street
New Orleans, La 70119

CIVIL DISTRICT COURT
PARISH OF ORLEANS
STATE OF LOUISIANA

FILED

2017 MAY 12 A 8:50

EMILY WASHINGTON,

Plaintiff

vs.

Civil Action No.

LEON CANNIZZARO,

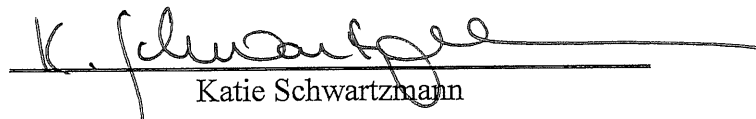
Defendant.

CIVIL
DISTRICT COURT

Before me, the undersigned notary public, personally came and appeared

Katie M. Schwartzmann

who, after being duly sworn, did depose and say that she is counsel for Plaintiff Emily Washington in the above-captioned matter, she has read the foregoing Petition for Writ of Mandamus, and that all of the allegations contained therein are true and correct to the best of her knowledge and belief.


Katie Schwartzmann

Sworn and subscribed before me, the undersigned Notary Public on the 11th day of May, 2017.


Jim Craig
Notary Public

