

22ND JUDICIAL DISTRICT COURT FOR THE PARISH OF ST. TAMMANY

STATE OF LOUISIANA

EXEMPT

DOCKET # 2024-11070

DIVISION "I"

JEFF LYONS SR. AND ANDREW ELLENDER

VERSUS

CITY OF MANDEVILLE AND KATHLEEN SIDES AS CUSTODIAN OF RECORDS FOR
CITY OF MANDEVILLE DEPARTMENT OF FINANCE

FILED: _____

DEPUTY CLERK

**MEMORANDUM IN SUPPORT OF EXCEPTIONS OF NO CAUSE OF ACTION AND
NO RIGHT OF ACTION ON BEHALF OF CITY OF MANDEVILLE**

MAY IT PLEASE THE COURT:

Defendants City of Mandeville and Finance Director Kathleen Sides, appearing as custodian of records, except to the Petition for Writ of Mandamus brought by Lyons and Ellender on multiple grounds. Petitioners have no cause of action under *LA-R.S. 44:35* as they admit in their own filing that the City advised that documents in the requested form do not exist, and that the City responded to their requests with the available documents to make any calculations they desire. Similarly, Petitioners have no right of action as they have not been denied the right to inspect or copy a record; in fact, they received multiple responses outlining the location of the publicly available records that would help their inquiry. As such, there is no need for or right to a mandamus hearing.

Exception of No Cause of Action

The peremptory exception of no cause of action “test[s] the legal sufficiency of the petition by determining whether the law affords a remedy on the facts alleged in the pleading.” *Hayes v. University Health Shreveport, LLC*, 2021-01601 (La. 1/7/22), 332 So.3d 1163, 1168. Before bringing an action under the Public Records Law seeking a writ of mandamus pursuant to *LA-R.S. 44:35(A)*, there are six (6) requirements for invoking the mandamus remedy. As noted recently in *Labranche v. Landry*, 2022-0461 (La. App. 1 Cir. 12/15/22), 357 So.3d 395, 404, the requirements are: (1) a request must be made; (2) the requestor 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.

Petitioners herein made requests to a custodian, are individually (but not collectively) persons, and the reports, which they request are in the nature of a public record. However, Petitioners' effort fails, and they have no cause to bring such action because the requested "complete and final end-of-year financial report, including fund balances" does not currently exist. Moreover, the custodian and city attorney responded to their (individual) requests, provided records for their inspection, and directed them to documents, which could be used to calculate the information that each requestor sought until that time at which an audited year- end financial statement would exist.

As set forth in the Petition, Ellender made a February 9, 2024 public records request and sought copies of a report that would include "general fund balances." [Petition, para. 10]. Ellender acknowledges that he received a timely response on February 16¹ from the city attorney on behalf of the custodian providing "receipts and expenditures" [Petition, para. 10] and an explanation that there were at least three reports that contained updated information as the City's expenditures and income were reconciled and balanced, all of which could be used to calculate the general fund balance. Similarly, Lyons made a request on February 7, 2024 for "FINAL year end finance report including the final general fund balance ending fiscal year 2023." [Petition, para. 14]. Lyons admits that he received a response *the following day* alerting him to the website location of the available financial records which he admits "included the annual financial reports." [Petition, para. 15].

No Responsive Document Exists in The Form Requested

In their Petition, Lyons and Ellender assert that the City Charter of Mandeville "mandates that the City provide a complete and final end-of-year financial report, including fund balances within 45 days after the end of the fiscal year." [Petition, para. 9]. While that supplemented wording would seem to benefit Petitioners efforts herein, the actual wording of the Charter provides otherwise. The Charter², at Section 3-05 and relevant to the matter at hand, provides the following concerning budgetary and financial matters:

¹ The City of Mandeville was closed on February 12 and 13, 2024 for Mardi Gras.

² This Court may take judicial notice of the Charter for the City of Mandeville pursuant to LA-R.S. 13:3712(B) (All courts of record in the state shall take judicial cognizance of the municipal ordinances and parochial ordinances which may be enacted by governing authority of any town, city, municipality, or parish within their respective jurisdictions whenever certified copies of such ordinances have been filed with the clerk of said court). The City has filed a certified copy with the clerk. *See also, Tull v. City of Baton Rouge*, 385 So.2d 343, 345 (La. App. 1 Cir. 1980).

(5) Prepare a monthly financial statement comparing the operating budget with income and expenditures for the month and for the fiscal year to date. The report shall be submitted to the council no later than fifteen (15) days after the end of the month.

(6) Submit to the council and make available to the public, within forty-five (45) days after the end of the fiscal year, a complete report on the finances and administrative activities of the City as of the end of each fiscal year.

Charter, City of Mandeville, at Sec. 3-05 (emphasis added).

The distinct language of the Charter, which Petitioners ignore, misrepresent and supplement, is important. As the City advised Petitioners several times, the financial information they sought was available if they tallied the values previously reported and circulated by the Financial Director. The City explained that the document, *in the form that Petitioners unilaterally insert in to the Charter provision*, was not available, as it was neither a type of report that the City created or utilized, and that such a report that contained the audited general fund balance would be available once the annual audit was complete.

Petitioners' motive behind their omission of the actual text of the Charter is revealed in their efforts to alter and add to the language from the Charter. While the Charter requires "a complete report on the finances and administrative activities of the City as of the end of each fiscal year," Lyons and Ellender argue to this Court that the same Charter provision instead requires "a complete and final end-of-year financial report, *including fund balances*." The phrase "including fund balances" does not appear in the Charter or anywhere in the Code of Ordinances for the City of Mandeville, nor is the word "final" included in the Charter's description of the City's financial reporting obligations. Instead, the Charter provides direct instructions of what is required, and the City has not only met those requirements, but made this information available to the Petitioners.

As admitted by Lyons and Ellender, they received from the city a timely response with a link to the financial records of the City of Mandeville.³ [*Petition*, para. 10, 12, 15]. At that site, Lyons and Ellender both had access to not only a report entitled "Financial Report 202308" and revisions to that document, but also the monthly financial reports from September 2022 through January 2024 provided in compliance with Sec. 3-05(5) of the Charter. On the same website, Lyons and Ellender had access to FY20-FY22 Annual Financial Statements. As shown on an

³ The City's response to each alerted them that the information is available on the City's webpage: <https://www.cityofmandeville.com/finance/page/monthly-financial-statements-0>."

annual financial statement, the audited documents include the independent auditor reports as well as Government-Wide Financial Statements as of the end of the City's fiscal year. The Charter's requirement of "a complete report on the finances and administrative activities of the City as of the end of each fiscal year" is satisfied by the Financial Report 202308, and has never been construed to require the Annual Fiscal Year audited report. In fact, pursuant to *LA-R.S. 24:513(A)(5)(a)(i)*, when a licensed certified public accountant is approved to perform the audit on the City by the legislative auditor, "such audits shall be completed within six months of the close of the entity's fiscal year." By statute, the FY23 Annual Financial Statement was not due to be completed until the end of February 2024, after their respective public records requests.

By inserting an imaginary obligation into the Charter provision - "including fund balances" - and then issuing a public record request specifically seeking a report exhibiting the "general fund balances" timestamped December 4, 2023 (Ellender) and "year-end finance report including the final general fund balance" (Lyons), Petitioners show their hand. Petitioners know, and have been told, that a document in the form they seek does not exist; nevertheless, in an effort to assist the Petitioners locate the information they seek, the City directed them to the reports that contain the values of expenses and income, which they can use to calculate the information that they seek until the City finalizes year-end statements through its annual audit practice. The Petitioners simply are not satisfied with this response because they have reimagined what reports are required by the Charter.

As set forth in the controlling decision in *Labranche*, the fifth requirement for bringing a writ of mandamus is that the document requested must exist. In *Labranche*, the Attorney General's office provided some documents and information in an attempt to appease Mr. Labranche, but as noted by the Court, "the alleged facts and documents attached to the petition show that the requested documents do not exist." *Id.*, at 404. Herein, as shown in the Petition, Ellender admits that he was told that there was no document that reported the information "including fund balances" but that he could make such calculations from the information contained in the records that the City did provide for his inspection. [*Petition*, para. 12]. Ellender cannot admit that he was provided responsive records and simultaneously complain that the City did not satisfy its obligations under the Public Records Law. By seeking final fund balances, Petitioner acknowledges that he seeks information that is only available after the City completes its annual

audit process; however, this very acknowledgement is fatal to his claim that the City refused to provide responsive records; rather, it is evidence of Ellender's inherent admission that such request for this financial statement is premature. Indeed, his complaint about the records that were produced by the City is further evidence that the City attempted to satisfy his request for records, which contain unaudited expenses and income, that were available and regularly generated by the City. Ellender's misrepresentation of the Charter's language, and his admission that (1) he received explanation that a report containing general fund balances did not yet exist, and (2) his refusal to utilize the available information provided to him by the City defeat his request for mandamus. In other words, he does not have a cause of action simply because he thinks that the City should create a report to satisfy his incorrect interpretation of the Charter.

The law is very clear that a 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." *Zillow, Inc. v. Gardner*, 2021-1172 (La. App. 1 Cir. 4/8/22), 341 So.3d 765, 770, citing *Nungesser v. Brown*, 95-3055 (La. 2/16/96), 667 So.2d 1036, 1037. The law is also clear that there is no obligation on a custodian to compile data and create a record in the format requested. *Zillow, Inc. v. Blanchard*, 2021-1167 (La. App. 1 Cir. 5/17/22), 342 So.3d 892, 895 (It [Zillow] maintains that, by "holding that the Assessor would have to create a new document, the trial court assumed a fact completely unsupported by evidence." Contrary to this assertion, we conclude that the evidence sufficiently established that a data file must be created to satisfy Zillow's request, and Zillow failed to introduce evidence to rebut this showing.)

Under the same reasoning, Lyons' effort must fail. Lyons seeks a "finance report including the final general fund balance," but the Charter makes no such requirement and, as he admits, the information can be calculated from the documents already readily available and pointed out to Lyons. [*Petition*, para. 15]. As such, he seeks a document in the format of *his* preference that he (incorrectly) claims is required by the Charter. However, his interpretation of the Charter is not supported by the plain language of the very provisions upon which he cites to seek this mandamus. Consequently, the City does not have a practice of creating a report in the format that he incorrectly assumes is required; and therefore, the City does not have a record to produce. As noted in *Lewis v. Morrell*, 2016-1055 (La. App. 4 Cir. 4/5/17), 215 So.3d 737, 745, a custodian's statutory duty

is “to provide immediate access to records *that are available*.” *Id.* (*emphasis original*). Long ago the Louisiana Supreme Court noted that in such a circumstance where a record is not available, “[u]nder these circumstances, a mandamus would not serve a useful purpose and should not be issued. *Reynolds v. Louisiana Highway Comm’n*, 111 So. 622, 624 (La. 1927), as cited in *Lewis, supra*.

The City Responded to the Public Record Requests

The final criteria for pursuing mandamus pursuant to *LA-R.S. 44:35* is that there must be a failure by the custodian to respond to the request. Here, Petitioners outline in their filing that they received multiple responses, advising where the information could be obtained and how the information could be viewed. Plaintiffs also admit that the City informed that they could obtain copies of the freely available materials if they chose to do so. [*Petition*, para. 10, 12, 15]. The issue here is that neither Lyons nor Ellender is satisfied with the response, *not* that the City failed to provide a response at all.

“To trigger the right to a mandamus remedy, there must be a failure of a custodian to respond.” *Lewis, Id.*, at 746. Additionally, Courts instruct that the right to a mandamus is limited, advising: “Should the custodian refuse to allow access to the public records, the custodian must defend his action in a contradictory hearing.” *Lewis, Id.* at 744. However, “the statute provides no cause of action for a requestor to seek ordinary relief for damages, costs, or attorney fees in situations where a public entity complies, even if untimely, with a public records request prior to the filing of any legal proceedings.” *Carolina Biological Supply Co. v. East Baton Rouge Parish School Bd.*, 2015-1080 (La. App. 1 Cir. 8/31/16), 202 So.3d 1121, 1126 (1st Circuit sustained the peremptory exception and dismissed the claims raised under the public records law). Petitioners admit in their filing that the City timely responded, provided multiple communications about the response, and provided reference to the documents that will allow the calculations sought by Petitioners.

Taking their allegations from the Petition, Petitioners have failed to meet the criteria for establishing a cause of action under *LA-R.S. 44:35*. Thus, their effort to pursue mandamus is statutorily precluded.

Exception of No Right of Action

Petitioners have no right of action for mandamus. As noted above, neither Ellender nor Lyons have established the fifth or sixth criteria for a mandamus under *LA-R.S. 44:35*. They each admit in their Petition that the City provided a response, which defeats the sixth criteria, and they further document that the City has explained to them that the record they seek *in the format they request* does not exist, which defeats the fifth criteria. Therefore, this Court has no obligation to perpetuate the needless waste of resources by holding a mandamus hearing when the Petitioners' own filing spells out their failures. Under the law, Petitioners have no right to a hearing and "such a contradictory hearing is unnecessary when the requirements for invoking the mandamus remedy under *LA. R.S. 44:35 A* are not met." *Lewis*, Id. at 745.

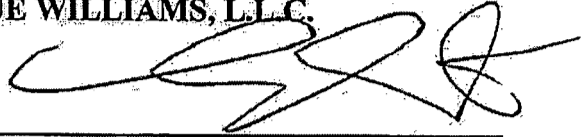
Conclusion

Petitioners filed a public records request for a document which does not currently exist, is not required by the Charter, and assumes a ministerial duty that is not supported by the actual Charter language. In needlessly filing this Petition for Mandamus, Petitioners ignore the following facts: (1) the City timely responded, (2) the City advised that it had reports that contained the necessary information to generate the requested calculations, and (3) the City has no statutory obligation to generate monthly or year-end reports that contain unaudited fund balances. As such, Petitioners fail to satisfy the perquisites for seeking a mandamus as they admit they have been told no document responsive to their designed criteria exists, and they admit that the City did provide other documents from which they can make calculations that are directly responsive to their inquiry. They have no cause of action for mandamus. Further, as they cannot establish the same prerequisites based on their own pleadings and the Charter language, they have no right to pursue mandamus.

Either peremptory exception is defeating to this effort to bring mandamus, and the Court should deny any further proceedings in this matter, finding the rule to show cause moot by their failure to satisfy the requirements of *LA-R.S. 44:35*. Defendants, therefore, request that this Honorable Court dismiss the mandamus with prejudice at Petitioners' cost.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY by my signature hereinabove, I have on this 5th day of March 2024 served a copy of the foregoing pleading on Pro Se Petitioners by electronic mail to:

Andrew Ellender Andrew.Ellender@gmail.com

Jeff Lyons, Sr. lyonshoover@bellsouth.net