

NOT DESIGNATED FOR PUBLICATION

SANDRA WHEELER-HESTER * **NO. 2002-CA-0506**
VERSUS * **COURT OF APPEAL**
THE ORLEANS PARISH * **FOURTH CIRCUIT**
SCHOOL BOARD, WYATT V. *
DEJOIE AND CYNTHIA * **STATE OF LOUISIANA**
WILLIAMS

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APPEAL FROM
CIVIL DISTRICT COURT, ORLEANS PARISH
NO. 2001-5954, DIVISION "N-8"
Honorable Ethel Simms Julien, Judge

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JUDGE MAX N. TOBIAS, JR.

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(Court composed of Judge Charles R. Jones, Judge Michael E. Kirby, Judge
Max N. Tobias, Jr.)

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REVERSED.

The defendants, the Orleans Parish School Board (“the Board”) and Colonel Alphonse Davis, former Board CEO, appeal from the judgment of the trial court awarding the plaintiff, Sandra Wheeler-Hester (“Ms. Wheeler-Hester”), civil sanctions for an alleged failure to comply with the provisions of Louisiana’s Public Records Act, La. R. S. 44:1 *et seq.* For the following reasons, we reverse the judgment entered against the appellants. In all other respects, the judgment is affirmed.

The plaintiff submitted a public records request to the Board on 25 September 2000. Wyatt Dejoie, the Board secretary and custodian of records, responded to the request by forwarding several audit reports to Ms. Wheeler-Hester. Ms. Wheeler-Hester voiced her dissatisfaction with the responsiveness of the material sent. By letters dated 29 and 30 November 2000, the plaintiff clarified her 25 September 2000 request and made several requests for additional documents. By Ms. Wheeler-Hester’s own admission, the documents sought by her were quite voluminous.

On 6 December 2000, a letter was sent to the plaintiff by Tracie Washington, General Counsel for the Board, stating that the requests lacked specificity, were extensive and burdensome, and could involve some areas of

privilege. The letter further suggested that the plaintiff might have to pay for staff overtime and copying costs. Ms. Dejoie was relieved of her duties as custodian of records on 6 December 2000. At trial, Ms. Washington stated that in February 2001, Colonel Davis assigned her the responsibility of responding to various public record requests, including those of the plaintiff.

On 2 February 2001, Cynthia Williams became the Board secretary and its custodian of records. In early March 2001, Ms. Wheeler-Hester notified Ms. Williams that her public records request had not yet been honored. Ms. Williams testified that she spoke to Ms. Washington, who told Ms. Williams that the request was being compiled. On 23 April 2001, a letter was sent to Ms. Wheeler-Hester stating that the documents were available for review; a second letter was sent on 16 May 2001, conveying the same information.

Ms. Wheeler-Hester filed a petition for declaratory judgment, writ of mandamus, and injunctive relief for violation of the Louisiana Public Records Act on 4 April 2001 against the Board, Wyatt Dejoie, and Cynthia Williams. After several continuances, Ms. Wheeler-Hester filed an amended

petition on 14 May 2001, wherein she added Colonel Davis and Ms.

Washington as defendants and alleged that they had conspired with the other defendants to deprive her of the right to examine the public records.

The matter was heard on 13 June 2001, during which testimony was given by Messes. Wheeler-Hester, Dejoie, and Williams, Colonel Davis, and Carolyn Green-Ford, then the Board's president. Because the issue of production was moot, the trial court heard the remaining question of the plaintiff's entitlement to damages or civil penalties, based on the Board's alleged arbitrary and capricious refusal to produce the requested documents. The court took the matter under submission. However, before judgment was rendered, Ms. Wheeler-Hester moved to reopen the case and Ms. Washington testified on 21 September 2001.

The trial court rendered judgment on 16 November 2001, in favor of the plaintiff and cast all five defendants as liable *in solido* for civil penalties in the amount of \$100.00 per day for the period from 6 December 2000 through 20 February 2001. Damages and attorney's fees were not awarded.

In its original reasons for judgment, the court found that Ms. Dejoie served as the Board's custodian from 25 September 2000 until 6 December

2000, and that Ms. Williams had served as the Board's custodian beginning on 20 February 2001, but that neither of them had acted arbitrarily in responding to the plaintiff's requests under the act. Thus, the trial court stated that neither Ms. Dejoie nor Ms. Williams could be personally liable to the plaintiff. The court stated that Tracie Washington became custodian of records on 6 December 2000 and retained that title until 20 February 2001, and that her actions in responding to the plaintiff's requests for records had been arbitrary and capricious. The court did not assign any basis for rendering judgment against the Board and Colonel Davis.

On 26 November 2001, the trial court issued its amended judgment, which eliminated Ms. Dejoie and Ms. Williams as parties cast in judgment and excluded legal holidays from the penalties period. In its amended reasons, the trial court stated:

This court finds not only against Tracie Washington but also against Alphonse Davis and the Orleans Parish School Board based on the evidence that Alphonse Davis, CEO of the Orleans Parish School Board, specifically told Tracie Washington to stonewall the request made by Sandra Hester. For that reason the Orleans Parish School Board, Alphonse Davis, and Tracie Washington are liable in solido.

The Board and Colonel Davis appeal from that judgment, arguing that the trial court erred by imposing civil penalties on them, or alternatively that the penalties period is too long.

Before addressing the defendants' arguments, we briefly review the Louisiana Public Records Act's requirements.

Pursuant to La. R. S. 44:32:

A. The custodian shall present any public record to any person of the age of majority who so requests. The custodian shall make no inquiry of any person who applies for a public record, except an inquiry as to the age and identification of the person and may require the person to sign a register and shall not review, examine or scrutinize any copy, photograph, or memoranda in the possession of any such person; and shall extend to the person all reasonable comfort and facility for the full exercise of the right granted by this Chapter; provided that nothing herein contained shall prevent the custodian from maintaining such vigilance as is required to prevent alteration of any record while it is being examined; and provided further, that examinations of records under the authority of this Section must be conducted during regular office or working hours, unless the custodian shall authorize examination of records in other than regular office or working hours. In this event the persons designated to represent the custodian during such examination shall be entitled to reasonable compensation to be paid to them by the public body having custody of such record, out of funds provided in advance by the person examining such record in other than regular office or working hours.

B. If any record contains material which is not a public record, the custodian may separate the

nonpublic record and make the public record available for examination.

C. (1)(a) For all public records, except public records of state agencies, it shall be the duty of the custodian of such public records to provide copies to persons so requesting. The custodian may establish and collect reasonable fees for making copies of public records. Copies of records may be furnished without charge or at a reduced charge to indigent citizens of this state.

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(2) For all public records of state agencies, it shall be the duty of the custodian of such records to provide copies to persons so requesting. Fees for such copies shall be charged according to the uniform fee schedule adopted by the commissioner of administration, as provided by R.S. 39:241.

Copies shall be provided at fees according to the schedule, except for copies of public records the fees for the reproduction of which are otherwise fixed by law. Copies or records may be furnished without charge or at a reduced charge to indigent citizens of this state or the persons whose use of such copies, as determined by the custodian, will be limited to a public purpose, including but not limited to use in a hearing before any governmental regulatory commission.

(3) No fee shall be charged to any person to examine or review any public records, except as provided in this Section, and no fee shall be charged for examination or review to determine if a record is subject to disclosure, except as may be determined by a court of competent jurisdiction.

D. In any case in which a record is requested and a question is raised by the custodian of the record as to whether it is a public record, such custodian shall within three days, exclusive of Saturdays, Sundays, and legal public holidays, of the receipt of the request, in writing for such

record, notify in writing the person making such request of his determination and the reasons therefor. Such written notification shall contain a reference to the basis under law which the custodian has determined exempts a record, or any part thereof, from inspection, copying or reproduction.

Section 35 provides for enforcement of the Act, and provides in pertinent part:

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.

The defendants first contend that the Louisiana Public Records Act does not authorize the imposition of civil penalties on public bodies, such as the Board. The Act imposes civil penalties on custodians in certain cases:

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 requester 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 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.

La. R. S. 44:35(E)(1).

In La. R. S. 44:1, the Act defines both the phrase “public body” and the word “custodian,” as follows:

A. (1) As used in this Chapter, the phrase “public body” means any branch, department, office, agency, board, commission, district, governing authority, political subdivision, or any committee, subcommittee, advisory board, or task force thereof, or any other instrumentality of state, parish, or municipal government, including a public or quasi-public nonprofit corporation designated as an entity to perform a governmental or proprietary function.

* * * * *

(3) As used in this Chapter, the word "custodian" means the public official or head of any public body having custody or control of a public record, or a representative specifically authorized by him to respond to requests to inspect any such public records.

Therefore, the Act distinguishes between the public body and its custodian of records. Because the Act authorizes the imposition of civil penalties *only* on the custodian of records, the trial court erred by imposing

civil penalties on the Board. Consequently, that portion of the judgment is reversed.

We next address the defendants' argument that the trial court erred by imposing civil penalties on Colonel Davis, then CEO of the Board. The court did not find that Colonel Davis was, at any relevant time, the custodian of the records sought by Ms. Wheeler-Hester. Instead, the court held that Colonel Davis "specifically told Tracie Washington to stonewall the request made by Sandra Hester." However, a review of the evidence fails to support this finding.

Ms. Washington's testimony reveals that she filed a complaint in federal court against Colonel Davis and the Board on 18 June 2001 for damages. Read into the record at the hearing was Paragraph 11 from that complaint:

Defendant, Alphonse G. Davis, also prohibited plaintiff from faithfully and timely responding to records requests made pursuant to the *Louisiana Public Records Act*, a task that he assigned to the Office of General Counsel on February 2, 2001. [Emphasis in original.]

Ms. Washington admitted on the stand that she verified the complaint as true and correct to the best of her knowledge. However, she declined to answer, or was prevented from answering, specific questions regarding her conversations with Colonel Davis based on the attorney-client relationship

with the Board and/or Colonel Davis personally.

After reviewing the testimony, we find that the allegation in the federal court complaint is insufficient to support the trial court's statement that Colonel Davis "specifically told Tracie Washington to stonewall the requests made by Sandra Hester." First, it is elementary that an allegation contained in a complaint is not a proven fact; it merely alleges "facts" that must later be proven through the proper introduction of evidence. In addition, even assuming that the allegation is true, it does not specifically reference Ms. Wheeler-Hester's records request and Ms. Washington was not asked if it did so. Therefore, the allegation is not proof of any misconduct by Colonel Davis.

The only indication in the record supporting the trial court's finding is an *incomplete* newspaper article dated 20 June 2001, that was attached to Ms. Wheeler-Hester's motion to reopen the hearing. The article reflects an interview with Ms. Washington concerning her federal lawsuit. The second to last paragraph of the article states:

She [Ms. Washington] said Davis also instructed her to stonewall an extensive request by board critic Sandra Wheeler-Hester, who sued to get the records. A judge is expected to rule in that case soon.

Times-Picayune at p. A-8 (June 20, 2001).

This incomplete newspaper article, while a part of the record, was never properly authenticated and introduced into evidence at the hearing. In fact, the article was never even referenced by the plaintiff when she questioned Ms. Washington during the hearing. Therefore, the trial court erred by relying on the statements made in the article in making its decision.

We agree with the defendants that the record is devoid of any evidence proving culpability on the part of Colonel Davis. Therefore, the trial court erred in holding him liable for civil penalties. Further, as a matter of law the Board cannot be held liable for civil penalties, which may only be assessed against the actual custodian, *i.e.*, an individual.

Based on the forgoing, we reverse the judgment entered against the New Orleans School Board and Colonel Alphonse Davis. In all other respects, the judgment is affirmed. Each party is to bear its own costs.

REVERSED.