

1 CIVIL DISTRICT COURT
2 PARISH OF ORLEANS
3 STATE OF LOUISIANA
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6 THE COUNCIL OF THE CITY OF
7 NEW ORLEANS, JACKIE CLARKSON,
8 ARNIE FIELKOW, CYNTHIA HEDGE-MORRELL,
9 CYNTHIA WILLARD-LEWIS, STACY HEAD,
10 SHELLY MIDURA, JAMES CARTER

NO. 09-4050

9 VS

DIVISION "E"

10 PENYA MOSES-FIELDS
11
12

13 Reasons for Judgment taken in the
14 above-entitled cause, before the HONORABLE MADELEINE
15 LANDRIEU, JUDGE PRESIDING, on the 6th day of May,
16 2009.
17

18 APPEARANCES:

19 STEVEN J. LANE, ESQ.
20 LEONARD A. DAVIS, ESQ.
21 Representing the Plaintiffs
22

23 FRANZ ZIBILICH, ESQ.
24 MS. EVELYN F. PUGH, ESQ.
25 EDWARD R. WASHINGTON, ESQ.
26 Representing the Defendant
27

28 REPORTED BY:
29 BARBARA A. BURGER
30 CERTIFIED COURT REPORTER
31
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P R O C E E D I N G S

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2
3 THE COURT:

4 The matter before the Court is The Council
5 of the City of New Orleans versus Penya Moses-Fields
6 which is before the Court on a Petition for a Writ of
7 Injunction. Good morning. Make your appearances,
8 please.

9 MR. LANE:

10 Good morning, Your Honor. May it please the
11 Court, Steven Lane with the law firm of Herman,
12 Herman, Katz & Cotlar. With me is my partner Leonard
13 Davis.

14 MR. ZIBILICH:

15 Good morning, Your Honor. Franz Zibilich on
16 behalf of Penya Moses-Fields, City Attorney for the
17 City of New Orleans, along with Chief Deputy Evelyn
18 Pugh and Deputy Ed Washington.

19 THE COURT:

20 Mr. Lane, this is your petition. A
21 Temporary Restraining Order was issued by Judge Reese
22 sitting as duty judge as I recall. This matter is
23 before the Court now on the merits of the petition.
24 Why is it that you believe this injunction should
25 issue?

26 MR. LANE:

27 Judge, if I can start first by -- I guess
28 the easiest way to do this is to start with the
29 exhibits I filed with the Court on Friday and which I
30 would like to go through individually and introduce
31 into evidence and then make my oral argument if
32 that's acceptable with the Court.

1 THE COURT:

2 You presented to the Court it's 14 exhibits
3 identified as P-1 through P-14 which are specifically
4 delineated on this exhibit list, correct?

5 MR. LANE:

6 Correct.

7 THE COURT:

8 And all of which are contained in the black
9 binding which were produced?

10 MR. LANE:

11 Correct.

12 THE COURT:

13 Mr. Zibilich, you've had an opportunity to
14 review these?

15 MR. ZIBILICH:

16 Yes, ma'am. We have no objection to the
17 introduction of any of the exhibits.

18 THE COURT:

19 Mr. Lane, it's your prerogative of course to
20 read your exhibits on to the transcript if you like.
21 That's a personal preference.

22 MR. LANE:

23 No. What I will do, Your Honor, is we filed
24 an index with our bench book and we have the exhibit
25 list and I'm going to offer, introduce and file into
26 evidence Exhibits 1 through 14 set out on the index
27 and on the list of exhibits that you have.

28 THE COURT:

29 Let it be admitted.

30 MR. ZIBILICH:

31 Your Honor, the only problem I have --

32 MR. LANE:

1 I understand. I missed one thing and I
2 apologize. On Exhibit No. 14 are the affidavits of
3 the New Orleans City Councilmembers that were filed
4 in the Tracie Washington case. My inadvertence,
5 there were two affidavits that I filed which were not
6 signed. I have the signed affidavits. Of course
7 they were filed in the Washington case -- my
8 mistake -- and those were by Councilwoman
9 Hedge-Morrell and Councilwoman Willard-Lewis, and
10 what I would like to do with the Court's indulgence
11 and if opposing counsel would be agreeable is to file
12 those affidavits. I know they'd be untimely but I
13 would like to file those affidavits in their signed
14 state. They're already in the public record in the
15 Washington case. There'd be no prejudice.

16 MR. ZIBILICH:

17 I have no reason to believe or disbelieve
18 him unfortunately. I have never seen those two
19 signed affidavits. I have reviewed an affidavit by
20 Councilmember Hedge-Morrell and the ones I have
21 reviewed is unsigned.

22 THE COURT:

23 I understand.

24 MR. ZIBILICH:

25 I don't even understand exactly what weight
26 those particular affidavits would have in this
27 particular matter. I mean, if he has got signed ones
28 on him and --

29 THE COURT:

30 Mr. Zibilich, I think I can handle this. To
31 the extent that there are signed affidavits in
32 substantially the same format as those that appear in

1 Exhibit 14 that have already been filed in the public
2 record in another case, they will be introduced and
3 admitted here. If there are not signed affidavits in
4 the other case, then these two will be stricken.

5 MR. LANE:

6 Sure.

7 MR. ZIBILICH:

8 That's assuming they were in fact filed in
9 that other case.

10 THE COURT:

11 Correct. If they are filed and exist within
12 the other case signed and they are the same affidavit
13 as I have read unsigned, I'm going to allow them to
14 be substituted for these unsigned affidavits.

15 MR. LANE:

16 No problem.

17 MR. ZIBILICH:

18 Obviously if they were not made a part of
19 the record in the other case, they're not part of the
20 record in this case?

21 THE COURT:

22 I didn't know I had to say both the
23 affirmative and the negative, but if it makes you
24 feel good, then yes, sir.

25 MR. ZIBILICH:

26 I'm just insecure.

27 THE COURT:

28 I'm not going to respond to that. Mr. Lane,
29 you may proceed.

30 MR. LANE:

31 Good afternoon, Your Honor. May it please
32 the Court, I think the best way for me to start I'm

1 going to go backwards. I'm going to start with the
2 relief that the City Council seeks and then give you
3 the background information upon which to base the
4 judgment to that effect.

5 What the City Council is seeking here are
6 essentially four things. Number one is the granting
7 of injunctive relief to prevent the dissemination of
8 City Council e-mails and other documents that may be
9 privileged, not allowing them to be disseminated
10 until the City Council has a reasonable opportunity
11 to look at those e-mails and documents.

12 Number two, a finding as we've pled in our
13 petition that the City Council is the custodian of
14 those e-mails and similar e-mails and documents that
15 are at issue in this case and which may become at
16 issue in future cases.

17 Number three, that because they are the
18 custodian of these documents and because of the
19 privileges and protections that relate to these
20 particular documents, that only the City Council can
21 assert or waive the privileges or protections
22 relative to those documents.

23 And, number four, it's hope that the Court
24 will fashion some type of procedure for public
25 records request in this particular case that can be
26 used as a guide such that from this point forward
27 neither the City of New Orleans or the City
28 Attorney's office will be involved in the production
29 of City Council documents which will insulate the
30 City Attorney's office from any future liability and
31 it will become the responsibility of the City Council
32 to produce those records and we won't have to have

1 these types of proceedings that we're having today.
2 That's the type of relief that the Council is looking
3 for.

4 Now, the bases upon which we filed our
5 petition are set out in the exhibits that we filed.
6 First of all, if you take a look at Exhibit No. 1,
7 this all started on or about March 5th, 2009. If you
8 recall it was at or about that time that it became
9 known to the City Council that certain Council
10 e-mails and other documents had been produced to
11 Tracie Washington by the Department of Sanitation
12 without the Council having any opportunity to review
13 those documents.

14 What I did at that point in time when we
15 found out about that problem was Exhibit 1, I sent a
16 letter to the City Attorney's office to Mrs. Fields
17 and to the Chief Technology Officer, Mr. Harrison
18 Boyd, saying that: "From this point forward, I'd
19 appreciate if any information request is received by
20 the City Attorney's office or any other department of
21 the City for information that in any way involves
22 production of documents by the City Council, legal
23 matters involving the City Council or any other
24 documents which might involve a privilege to members
25 of the City Council, please immediately date-stamp
26 the information request, send it to me, send it to
27 the President of the City Council and to Ron Pursell,
28 who is the Chief of Staff, so that the City Council
29 can determine how it wants the documents produced and
30 what privileges the Council wishes to assert as it
31 relates to any such document request."

32 And then on the second page of the letter I

1 ask to please advise as to whether this request is
2 acceptable to your office.

3 On or about March 6th I received a response
4 from Sarah Garrett of the City Attorney's office
5 saying to me under Exhibit No. 2: "Please see below
6 the response from Penya Moses-Fields regarding your
7 letter of March 5th, 2009," and then on the next page
8 under Exhibit No. 2 you see where Mrs. Fields said
9 "fine." And from that point forward the documents
10 would be sent to me for review by the City Council to
11 try and make sure that we avoid the problem that had
12 occurred with Ms. Washington which documents were
13 produced and the Council didn't have the opportunity
14 to review.

15 Then if you take a look at Exhibit No. 3, at
16 about the same time, March 4th, 2009, you have a
17 series of letters to the City Attorney from various
18 individuals and entities. You can see it's from news
19 stations, from the Times-Picayune, from certain
20 individuals, from the Associated Press, all seeking
21 City Council e-mails and other documents over which
22 privileges might apply which the Council would
23 certainly want to have the opportunity to review
24 before those documents were produced.

25 Then under Exhibit No. 4 you can see a
26 series of letters from Mrs. Fields to those
27 individuals and entities in which Mrs. Fields says:
28 "We are in receipt of your public records request.
29 Your request has been forwarded to the Mayor's Office
30 of Technology for their research and response. We
31 have also forwarded your request to the City
32 Council's attorneys for their response directly to

1 you on the Council's behalf. The documents
2 responsive to your request may involve various
3 exemptions and privileged communications. Before the
4 City and the City Council can provide you with these
5 records, they must be reviewed for any privilege and
6 responsiveness."

7 And then you see a series of these letters
8 to the various people that requested records all
9 basically saying the same thing: The documents have
10 been forwarded to me for review and the response
11 would be made directly to them on the Council's
12 behalf.

13 And this is on the theory that the City
14 Council is the custodian of these types of documents,
15 e-mails or other records that are generated by the
16 Council and this is confirmed in Exhibit No. 5 which
17 is a partial transcript in the case involving Ms.
18 Washington that was heard before Judge Medley on
19 March 12th after -- I had made my oral argument first
20 and after I made my oral argument, Mr. Washington
21 stood up, and the first question out of the box from
22 Judge Medley to Mr. Washington was: "Who is the
23 custodian of these records?" And Mr. Washington's
24 answer was, and he's correct in this, "the custodian
25 of these records are the City Council. They have the
26 custody and control of these records. It is their
27 records. In the end the custodian is the person who
28 makes the records and whose private, personal,
29 legislative information is contained in those
30 records, and that custodian did not authorize and did
31 not release these records," and he goes on and says:
32 "I can tell you from my own experience and experience

1 of our attorneys in our office that these records
2 often include very detailed description of medical
3 information," so from my perspective and from the
4 Council's perspective, certainly as of March 12th,
5 2009, there's an agreement or understanding between
6 the Council and the City Attorney that the City
7 Council will produce -- whatever records need to be
8 produced that they'll have an opportunity to review
9 and it's been acknowledged by the City Attorney's
10 office that the City Council is the custodian and
11 they're the only custodian and the only person who
12 can produce and determine whether there are any
13 privileges or protections as to documents request.

14 And everything was peaceful and quiet for
15 about a month, and then on April 17th I get a letter
16 Friday afternoon from Mrs. Fields saying -- it's
17 Exhibit 6 -- "the City of New Orleans shall produce
18 the e-mails of the City Council to persons and
19 entities that have made requests for these e-mails
20 pursuant to Louisiana Public Records Act by close of
21 business Tuesday, April 21, 2009.

22 By 9:00 a.m. Monday, April 20, 2009, the
23 Mayor's Office of Technology will make available to
24 each Councilmember access to each of their respective
25 e-mail files on a secured shared folder on the
26 'cityofno' server."

27 Well, to say that I almost fell out of my
28 chair would be an understatement because I'm thinking
29 that whatever documents are going to be produced are
30 going to be sent to me. The City Council is going to
31 have an opportunity to review them and the City
32 Council is going to make a decision as the custodian

1 of the records as to what records are privileged,
2 what records can be made public and that's the way it
3 had been and that's the way it had been promised and
4 that's the way it had been represented to the very
5 individuals and entities who the City Attorney's
6 office were about to produce documents to on April
7 21st.

8 The other concern was that according to the
9 letter, the City Council wasn't going to get access
10 to all these e-mails, three years worth of e-mails
11 until Monday 9:00 a.m. and there was no way that the
12 City Council and myself could review all this
13 information in a span of 24 hours. It's not
14 possible.

15 So I sent a letter to Mrs. Fields in
16 response that day -- Exhibit 7 -- saying: "I am
17 making a further and more specific request that the
18 Council and myself be given more adequate time to
19 review whatever documents you intend to produce
20 responsive to various Public Records Act requests."

21 And then on page 2 of the letter, I say: "As
22 stated in our discussion" -- because I had talked to
23 Mrs. Fields and others who were on a conference
24 call -- "as stated in our discussion, I would like to
25 do everything possible to avoid litigation while, at
26 the same time, giving the Council and myself a
27 reasonable period of time within which to review the
28 information that was compiled by the Mayor's Office
29 of Technology over the last month and a half. I
30 would also ask that no action be taken on Tuesday to
31 provide e-mails to anyone other than myself and the
32 City Council, and I would like some type of written

1 confirmation and response to this letter by Monday
2 morning so that I know where we stand regarding your
3 original letter of April 17th."

4 And then in my last paragraph I say:

5 "Finally, as a courtesy, I believe that Rule of
6 Professional Conduct 4.4 should cause the City
7 Attorney's office to refrain from producing any
8 Councilmember e-mails unless and until such time as
9 the Council and myself, as their legal counsel, have
10 had a reasonable opportunity to review the e-mails
11 and to remove any attorney/client privilege or
12 otherwise confidential matters." And the reason I
13 added that paragraph it is my belief that at that
14 point in time when I get a letter from the City
15 Attorney's office telling me that they're going to
16 produce documents in 24 hours and their client -- one
17 of their clients under the Charter of the City
18 Council says don't produce them, that there's a
19 potential conflict of interest there involving the
20 City Attorney's office in representing the City or
21 the administration on one hand and the Council on the
22 other and I felt it was fair to give that paragraph.

23 The response that I got was that the City
24 Attorney's office was not going to wait. They wanted
25 me to send them additional redaction terms so that
26 they could further pare down the number of documents
27 and then they were going to produce them anyway, and
28 my position was, and always has been, unless and
29 until you actually look at the document, it doesn't
30 matter how many redaction terms you need. Something
31 is going to get through, and if a document gets
32 through that's privileged, it's malpractice and I'm

1 not going to put myself in a position of committing
2 malpractice.

3 Now, Exhibit 8 is the affidavit of Mrs.
4 Fields in the Washington case, and the reason that I
5 included this affidavit is if you take a look at
6 paragraph 18 of the affidavit by Mrs. Fields, what it
7 says is: "The production of documents to Ms.
8 Washington in response to the request was not in
9 conformance with the Public Records Act document
10 production policy of the City of New Orleans and the
11 production of documents over which the City Council,
12 its staff and others could assert a privilege was an
13 inadvertent production/waiver."

14 We've got the same type of documents here.
15 E-mails generated by the City Council, received by
16 the City Council, exchanged by the City Council
17 involving financial issues, attorney/client privilege
18 issues, legislative deliberations issues, all privacy
19 issues. The same types of issues for which the
20 Council would be entitled to assert a privilege.

21 Then in the next paragraph 19, Mrs. Fields
22 says: "At no time did any attorney for the City of
23 New Orleans seek or obtain a waiver of privilege from
24 the City Council for production of documents
25 requested by Ms. Washington." And the same thing
26 applies today. At no time has the City Council
27 waived any of its rights, privilege or otherwise,
28 that would attach to any of these three years worth
29 of documents because they haven't had an opportunity
30 to take a look at them.

31 And then in paragraph 28 of Mrs. Fields'
32 affidavit, she says: "The City of New Orleans

