

583 So. 2d 119 (La. App. 4 Cir. 1991)10

STATUTES

La. R.S. 29:7299
La. R.S. 40:1307.18
La. R.S. 44:15
La. R.S. 44:3 passim
La. R.S. 44:3.12, 4
La. R.S. 44:315
La. R.S. 44:335
La. R.S. 44:3412

OTHER AUTHORITIES

Homeland Security City of

Mr. Arnold waived that objection by failing to assert it below. If their disclosure is too burdensome, he likewise waived that objection.

This is a public-records case regarding the locations of publicly funded, conspicuously visible cameras that the City of New Orleans uses to surveil people

R. at 38.

Mr. Arnold

disclosure because they are records regarding investigative technical equipment and physical security information created in the prevention of terrorist-related activity.

R. at 41. Mr. Arnold cited two statutes containing the referenced exemptions: La. R.S. 44:3 and 44:3.1. R. at 43–44. The trial court ordered the records produced, reasoning that the exemptions do not apply. R. at 69–72. This suspensive appeal by Mr. Arnold followed.

On appeal, Mr. Arnold contends that the records are exempt from disclosure, relying exclusively on La. R.S. 44:3.¹ He contends that NOHSEP is an intelligence agency entitled to the protection of La. R.S. 44:3(A); moreover, he claims the maps

9–13.

He also asserts disclosure of the maps is unduly burdensome and overly broad, and that disclosure would hinder criminal investigations. . 13–16. As of

this time he has not produced the requested documents.

II. ISSUES PRESENTED FOR REVIEW

- A. Whether the trial court properly found that Mr. Arnold did not meet his burden to establish that NOHSEP

¹ Mr. Arnold apparently has abandoned on appeal his argument that the exception contained in La. R.S. 44:3.1 also applies to the requested records.

may invoke the exemption in La. R.S. 44:3(A) to withhold the public records requested by Ms. Bixby.

B. Whether Mr. Arnold should be barred on appeal from introducing evidence not presented at trial and making arguments previously waived.

C.

Id. These findings cannot be disrupted absent manifest error. *Beasley*,
2018-0520, p. 3; 259 So. at 636.

V. LAW AND ARGUMENT

A. The trial court correctly found that NOHSEP is not an

and Administration of Criminal Justice, or publicly owned water districts of the

Offices of emergency preparedness, like NOHSEP, are not enumerated in this list. Instead,

itself to be a

Sewerage and Water Board of New Orleans would be an intelligence agency. So would the Department of Code Enforcement, which gathers information on blighted properties information that may be used by the NOPD when it decides where to patrol in a neighborhood.

cannot, the mere act of gathering
s essential nature into

In the federal government, seventeen agencies are considered part of the intelligence community, including the Central Intelligence Agency, the Federal Bureau of Investigation, and the National Security Agency.³ These agencies are typically associated with espionage, code-cracking, and the collection of *secret* the collection and analysis of information in support of political and military objectives, including national security and/or foreign policy, though it may also support law enforcement. NOHSEP resembles none of these, as it

³ The other agencies include the Office of the Director of National Intelligence, the Defense Intelligence Agency, the State Department Bureau of Intelligence and

ysis, the

Geospatial-Intelligence Agency, the National Reconnaissance Office; Air Force Intelligence, Surveillance and Reconnaissance; Army Military Intelligence; Office of Naval Intelligence; Marine Corps Intelligence; and Coast Guard Intelligence. Nina Agrawal, *More Than the CIA and FBI: The 17 Agencies That Make Up the Intelligence Community*, L.A. TIMES (Jan. 17, 2017), <https://www.latimes.com/nation/la-na-17-intelligence-agencies-20170112-story.html>.

⁴ It is neither an investigative agency nor a law enforcement agency.

Even the federal Department of Homeland Security, of which Mr. Arnold of sorts R. at 47, is not itself an intelligence agency it contains the Office of Intelligence and Analysis, which is one. NOHSEP contains various components, none of which is focused on intelligence-gathering: the Emergency Preparedness Branch, the Public Engagement Branch, the Hazard Mitigation Office, and the Public Safety Support Services Branch.⁵

Throughout his brief, Mr. Arnold erroneously conflates NOHSEP with the Real- See, e.g., . 11

). But even if RTCC were itself an intelligence agency, that would not transform NOHSEP into one. By that logic, any government department that contains a subsidiary intelligence agency would itself be considered an intelligence agency. This cannot be the case under La. R.S. 44:3(A) because the subsection already provides express exemptions to agencies that happen to have subsidiary intelligence branches. The Louisiana Department of Public Safety and Corrections, for example, to which La. R.S. 44:3(A) expressly provides a separate exemption, has an Organized Crime Intelligence Division. See La. R.S. 40:1307.1. The existence of this subsidiary intelligence division

records statute requires more than a judicial acceptance of an assertion of privilege

Cormier v. Di Giulio, 553 So. 2d 806, 807 (La. 1989). The trial court did not manifestly err in determining tm16 52.3e6

Fussell v. Reed, 664 So. 2d 1214, 1216 (La.

App. 1 Cir. 11/9/95)

standpoint, especially if he obtains information which might lead to his finding the

Id.

In response to records request, Mr. Arnold did not certify in writing that the maps were not in his custody or control. Nor did he assert that they

See R. at

24. -existence before the trial court is all

the more glaring because he explicitly denied the existence of a different, additional record that Ms. Bixby had requested in the same public records request.⁸ R. at 25

failure to provide written certification that the maps were not in his custody or control entitled Ms. Bixby to a presumption of their existence. *See Kyle v. Perrilloux*, 2002-1816, p. 8 (La. App. 1 Cir. 11/7/03); 868 So. 2d 27, 31 (

mechanism for validating the location of public records and settled procedural doctrine requiring all defenses be made with appropriate notice and with appropriate factual testing, Mr. Arnold is estopped from making an about-face argument for the first time on appeal that the records sought do not exist.

2. The effect of disclosure is irrelevant.

Mr. Arnold continues, on appeal, to make arguments that presuppose the

Br. 13 15. If the maps truly did not exist, such arguments would be neither logical nor necessary. Regardless, Mr. Ar speculation about policy to release them an argument that Ms. Bixby explicitly rejects that would not excuse Mr. Arnold from his obligation to release them. He

Moreover, speculation is unconvincing. He reasons that they plan their attacks and aid in their escape. Br. 16. Mr. Arnold ignores the fact that the locations are already public information, and a potential terrorist can already determine whether a camera is present at a given location in the City. Mr. Arnold also assumes that a potential terrorist would choose a target that is covered by a camera, and that the camera would provide information that would be useful in preventing an attack. Obviously, a camera cannot prevent a spontaneous attack, and it is unclear how it could prevent a planned attack. Regardless, Mr. Arnold speculation is not a legitimate exception to the Public Records Law.

D. The award of attorney's fees is mandated in this case.

Finally, Mr. Arnold argues that fees is not warranted because Ms. Bixby should not have prevailed. Yet, Ms. Bixby did prevail, and for

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the above and foregoing pleading has been served on all parties of counsel by depositing a copy of same in the U.S. mail, postage prepaid, and via electronic mail on this 29th day of July, 2019.

A handwritten signature in blue ink, appearing to read "Conor S. Gaffney", is written over a blue rectangular stamp or background.

CONOR GAFFNEY